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UNIVERSITY OF WESTERN SYDNEY  
**LAW REVIEW**

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Volume 16

2012

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Alternatively, contributions may be sent to the Editor by post:

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## Editorial Advisory Board

In 2012 the *University of Western Sydney Law Review* (UWSLR) editorial committee decided to establish an Editorial Advisory Board for the UWSLR. The aims of the Advisory Board are to establish links with leading legal academics from other universities in Australia and the world, broaden the reach of the UWSLR to those other institutions in order to encourage submissions from academics at those and other institutions, and broaden the expertise of the UWSLR editorial committee when seeking external referees and advice on particular submissions.

The UWSLR sought members from diverse institutions in Australia and abroad with diverse areas of specialisation. We were fortunate to attract academics who are leaders in their areas of expertise and who are also generous with their knowledge. The UWSLR thanks the members of the Editorial Advisory Board and looks forward to a continuing productive relationship. The members of the Editorial Advisory Board are:

**Professor Michael Adams:** Dean, School of Law, University of Western Sydney, Australia. Professor Michael Adams is an internationally recognised specialist in corporate law, governance, securities markets regulation, and legal education.

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**Professor Ian Ramsay:** Harold Ford Professor of Commercial Law and director of the Centre for Corporate Law and Securities Regulation at the University of Melbourne Law School. Professor Ramsay's current research interests include aspects of corporate law including directors' duties, shareholders' remedies, corporate governance and securities regulation.

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## EDITOR'S NOTE

I am pleased to present Volume 16 of the *University of Western Sydney Law Review*.

This edition presents topics drawn from a wide range of legal concerns which demonstrates the breadth of contemporary legal debate. I am pleased that the *University of Western Sydney Law Review* includes pieces by serving Judges as well as legal academics and legal practitioners that represent many of the concerns and interests of the legal community. This edition includes an inspiring occasional address by the Honourable Justice Ian Coleman on how to take advantage of opportunities granted by education. The topics addressed in this edition are as follows: the civil commitment laws for the mentally ill; the use of the 'day fine' and how it may improve equality before the law in Australia; an examination of the history of the judicial philosophy that guided the High Court in its role in determining the parameters of the dispute resolution function of arbitration tribunals in Australian labour law; and a study of student attitudes about the role culture plays in the lawyering process. The *University of Western Sydney Law Review* also includes a book review and case notes on three recently decided cases.

This edition was made possible through the hard work, co-operation and collegial spirit of the editorial committee and the student editors.

In 2012 the *University of Western Sydney Law Review* was fortunate to be able to attract high quality submissions from academics covering a diverse range of topics. We wish to thank the academics from around Australia and abroad who generously gave of their time to double blind peer review the articles contained herein.

In 2012 the Editorial Committee decided to establish an Editorial Advisory Board for the *University of Western Sydney Law Review*. The aims of the Advisory Board are to establish links with leading legal academics from other universities in Australia and the world, broaden the reach of the *University of Western Sydney Law Review* to those other institutions in order to encourage submissions from academics at those and other institutions and broaden the expertise of the *University of Western Sydney Law Review* editorial committee when seeking external referees and advice on particular submissions.

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I also wish to thank the contributors for their articles, case notes and commentaries, and for helping to make this edition of the *University of Western Sydney Law Review* a publication that continues to contribute to vibrant legal discussion.

Dr Elfriede Sangkuhl

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## Occasional Address

### **THE KEYS TO OPPORTUNITY - EDUCATION, PERSISTENCE AND HARD WORK**

#### **UNIVERSITY OF WESTERN SYDNEY LAW ALUMNI OCCASIONAL ADDRESS**

**2 NOVEMBER 2012, HILTON HOTEL SYDNEY**

THE HONOURABLE JUSTICE IAN ROY COLEMAN\*

Growing up and attending a state high school in outer western Sydney in the 1960s, I barely knew what judges did, much less that I would one day become one. With few exceptions, the parents of children born in the decade following World War II were fiercely determined to secure the best possible start in life for their children, and saw education as the means of doing so. For my parents' generation, university education was rare, essentially for the well off, and, having been diverted into one aspect or other of 'the war effort' for five or six years after leaving school, not something which was then realistically available to them, if it ever had been. Without necessarily understanding why, that generation realised the value of university education, and I do not mean value in a purely financial sense, although that was certainly part of its attraction. I do not recall when I first thought I would like to go to university, or why, which is not surprising, as I really had no idea what a university was. I confess that the prospect of working at Warragamba Dam, or the gravel quarry, or, worse still, in the bank provided powerful motivation to apply myself at school. By the 1960s, universities, of which there were then two in Sydney, were more accessible by children from 'working class families' as ours undoubtedly was, via Commonwealth Scholarships. To university students who have only known HECS, the all expenses paid, no repayment scholarship, for not one, but two undergraduate degrees, must sound too good to be true, but it was. My siblings and I, and thousands of other Australians, only gained a university education because of the availability of Commonwealth Scholarships. Our parents could never have sent us to university otherwise, and even then, could only do so by making personal sacrifices. The scholarships

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\* Justice, Family Court of Australia, Appeal Division.



cannot have been too hard to 'win' - I got one with passes which, even now, I prefer not to reveal!

I would like to say that the prospect of commencing university in 1968 was a daunting experience, but it is hard to be daunted by, or about, something you had no idea about, or expectations of. I can say however that my first year was unfailingly intimidating, and that, within days of commencing, I wondered what I was doing at university, and was certain that I would only be there for one year. The term 'westie' did not emerge until after I had completed my university studies, so I can perhaps suggest that, for the first and only time, I was ahead of my time, in being a westie at Sydney University. Every morning, we westies boarded the train from Penrith and headed east. The journey took one roasting, or freezing hour, depending upon the time of year, packed sardine like in the 'red rattlers'. From Redfern station, we walked to the campus. Each afternoon, we reversed the journey, and did it all the day after, and the day after that. No money, no sophistication, no fancy clothes, we felt, and were, very much 'out of it' in the first year at university. Knowing what our parents were giving up, we stuck at it: train, lectures, Fisher Library, more lectures, train, do it all again tomorrow. It was not unenjoyable, and I did not expect it to be anything more, but, to this day, when I hear people talk about the great times they had at university, I wonder where I must have been going all those years.

To my considerable surprise, and immense relief, I passed all my first year subjects, only just in one or two instances. To my further surprise, so did all my westie friends, whilst many of the 'cool' set did not. I suddenly thought that it might just be possible for me to go the distance! Not that anything changed, except perhaps that some new trains were put onto the western line, and the vending machine under Fisher Library began stocking finger buns with pink icing. The years passed quickly, or so it now seems, and I suddenly found myself entitled to write Bachelor of Arts after my name. The tangible benefits of that acquisition were soon realised - my pay as a casual postie delivering mail around Penrith on a pushbike went up - because I had a university degree. Three years later, I was entitled to write Bachelor of Laws after my name, and did, countless times on sheets of paper I would stare at in amazement. After six years at university, it was time to venture into the real world, and get a job that did not involve milking cows, or pumping petrol, or delivering mail.

To be admitted to the practice of law in the 1970s, two years articles of clerkship needed to be served with a senior solicitor. This could be anything from being paid for two years to learn the trade from barristers and solicitors whose services were in great demand, and priced accordingly, as was my good fortune, to collecting dry cleaning, washing cars and standing in queues for hours at the Stamp Duties Office, as was the fate of many less fortunate articulated clerks. For many well connected graduates, and the honours brigade, to neither of which I belonged, gaining articles was not difficult. For those of us who barely knew what a solicitor was, much less knew any, what can best be described as hand written 'begging letters' were despatched to the best, then the second best, then the....law firms in Sydney. This I did, 110 times. The big firms would invariably grant us also rans interviews. They were generally of short duration, three minutes was my shortest. Once it was realised that you were a state school educated westie, with no likelihood of attracting any but the wrong kind of work to the firm, the prospect of articles dissolved. It was probably after about my 106<sup>th</sup> three minute interview that I began to suspect that I had been 'dudded'- a westie could complete university, but actually gaining admission to the legal profession was something else altogether! My lucky break, letter 110, came when I gained an interview with a small Sydney commercial litigation firm, the partners in which were state school educated, albeit at North Sydney and Sydney Boys High Schools. The time and effort those solicitors put into my apprenticeship, when they could have been earning huge fees for themselves, and the knowledge of law and humanity I gained in my two years articles with them, are things I have never forgotten. Fortunately, and particularly in recent years, I have had the opportunity to help a number of young lawyers from backgrounds similar to my own in a small way.

In early 1974, I became entitled to call myself a solicitor, attorney and proctor of the Supreme Court of New South Wales, a grand way of saying that I had become a lawyer. My pay soared from \$23.50 a week to the stupendous sum of \$150 a week. However, the joys of life as a solicitor were short lived.

The nation's economy was in some difficulty by mid 1975, and Sydney taxi cabs were increasingly being driven by recently qualified solicitors. Faced with the prospect of being 'let go', I did what any lawyer with no money, no contacts, limited ability and virtually no experience does - I went to the Bar. Not having floors of barristers clambering to persuade me to bring my talents to their chambers, or

parents who could stump up \$50,000, I could not hope to buy a room in Selborne or Wentworth Chambers. My applications for a reader's room there were essentially hamstrung for the reasons that my pursuit of articles had proved so problematic. In desperation, I turned to one of the few sets of 'fringe' chambers which then existed in search of a room, or corner of a room as it turned out to be. The chambers were in a run-down building awaiting re-development, in Phillip Street. Though not far in distance from Selborne or Wentworth Chambers, the chambers I entered might as well have been on another planet, so inferior were they to those learned establishments. The members of the chambers could most charitably be described as 'colourful', or unfashionably eccentric. The lifts in the building did not work, the plumbing worked intermittently at best, air-conditioning meant opening the window, if there was one, the succession of clerks, and most members of the chambers had a dearth of work, and powerful liking for strong liquor, but my postage stamp sized desk in the corner of the bordello-like chambers of a criminal barrister who took pity on me was a start. For some members, chambers were a home away from home. For others, they were home. My memories of life in chambers were recently, and with terrifying accuracy, revived, by Cleaver Green in the ABC television 'documentary' Rake.

A 'gritty' existence would accurately describe my early years at the Bar. Not surprisingly, the highly respectable, and even more highly lucrative, commercial and equity work which flooded Wentworth and Selborne barely trickled into our chambers. The flotsam and jetsam of Sydney's litigants however found their way to the chambers with unfailing accuracy. I think State governments of the 20<sup>th</sup> century created the incredibly complicated provisions of the landlord and tenant legislation with the survival of starving barristers in mind. Invariably, the cases were adjourned, over and over and over again, until the tenant died, the landlord paid the tenant to vacate the premises, or the tenant was simply 'persuaded' to vacate. In the meantime, every six weeks or so, a half hour wait in a suburban court for the next adjournment meant a \$30 fee. The cases were never actually heard and decided, or ever going to be, so knowing anything about landlord and tenant law was not required. Another 'earner' for which legal knowledge was scarcely required was entering pleas of guilty for street prostitutes at Central Petty Sessions Court. If represented, the prostitute's case was dealt with early in the list. If unrepresented, the prostitute might have to sit around waiting at court until well after lunch. It made good economic sense for a prostitute to pay a barrister \$15 to say 'usual case of prostitution your worship,

nothing to add', pay the standard \$80 fine, which was fixed by reference to the 'going rate' for services rendered, and be free to get back to business. As a struggling barrister, I pondered more than once the disparity in the fees commanded by the two oldest professions. I did however appear regularly in the High Court, or, more accurately, at the High Court, courtesy of an old friend who worked for the Commonwealth Crown, to receive reserved judgments. The fee was \$15 - good money for about one minute's work, and not even having to open your mouth, and hoping to goodness that you would never have to. Barwick CJ was usually present on those occasions. I would not describe his demeanour as avuncular, but at least his Honour was clearly alive, a conclusion less readily reached in the case of McTiernan J, who was then aged eighty five plus. On one occasion, Barwick CJ looked at me and said 'costs'. From behind me, I heard a whisper - 'make the usual submissions'. 'I make the usual submissions your Honours', I whimpered. My opponent said exactly the same thing, though rather more confidently. The Chief Justice paused. I waited for the ceiling to collapse. 'We make the usual order', his Honour pronounced as he rose to leave the bench. I learnt later that the Commonwealth had won the appeal, and been awarded costs. I also learnt that costs followed the event. Naturally, I did not allow the truth to intrude when recounting my early success in the High Court.

Very occasionally, a brief to appear in the equity court, usually for an impecunious party destined to finish out of the prize money, would escape from Selborne and Wentworth, and seek refuge in our chambers. In all honesty, and with due modesty, I can say that I only ever lost two cases in the equity court. With equal fidelity to honesty, I must disclose that I only ever had two cases in the equity court. Analogies to fishes out of water are apt when I reflect on my equity experience. The judges, without exception, seemed terrifyingly intelligent. So did the barristers who regularly appeared there. Thankfully for me, the judges were unfailingly polite, and suffered fools patiently, if not gladly. Cases proceeded more like games of chess, played quietly and courteously, punctuated by polite sessions in the judge's chambers, with tea served in fine china cups. Raising one's voice during cross-examination was not on, nor was interrupting an opponent. Objections were an unnecessary disruption. Cross-examination which elicited hostile, loud or tearful responses was considered excessively robust. Unless the Bar table was decorated with at least several dozen volumes of law reports, preferably of obscure cases, decided by judges with quaint titles, the case was under prepared.

By comparison, the criminal cases with which I was becoming increasingly familiar, were more like a game of rugby league in which the referee was largely absent, or tended to side with one team, usually the prosecution team. The judges in crime in my early years had generally served in World War II. Of course, there were no women on the bench. In the District Court, it was often 'rough justice', but 'justice', it inevitably was. Perhaps not surprisingly, not much fazed the judges who had seen active service, and were quick to see through the plausible rogue, or spot the rough diamond. The law might not have been the strong suit of some of those judges, but their knowledge of people, and sense of fair play more than made up for anything lacking in the book department. Outwardly, the old school judges were hard. Cruel but fair is a term I have heard used, half accurately, to describe them. Those judges were inevitably fair. A barrister's pedigree counted for nothing in their courts. It was how well you were prepared, and how well and humbly you fearlessly conducted the case, that mattered. Substance mattered a lot, form very little, humbug even less. Judges in those days said things, often in the presence of juries, which would see them carpeted before the Judicial Commission these days, but the inadequacies, or incompetence of counsel, were never visited upon the unfortunate client. The lash of the judge's tongue was never felt by barristers who had prepared to the best of their ability, and tried their hardest for their client. The ill-prepared could expect a torrid time. The reception which awaited the ill-prepared and pompous barrister is too hideous to recount, even thirty years later! The few, and modest, skills I acquired at the Bar were gained more at the hands of the judges of the District Court in the 1970s and 1980s than as a result of subsequent experiences with more learned judges in higher courts, and seriously eloquent senior counsel. I soon came to realise that, provided you hung in there, and did your 90% preparation, 10% presentation to the best of whatever ability you had, where you came from, went to school, what your parents did, had little impact on what you could achieve.

With belated hindsight, being a 'Westie' was an advantage at the Bar, though I most certainly did not see it that way at the outset, or for a long time after. Many of my contemporaries, justifiably, anticipated successful careers at the Bar, and many were obscenely successful. But many who had things 'served up on a plate' for them did not succeed, and struggled to understand why. Having the benefit of humble beginnings, and no contacts, I never expected anything that I did not work for, and only started to think that I might just avoid bankruptcy after five or six years at the Bar. I could not pick and choose what work

I would or would not do at the Bar - every brief could have been my last in those early years, and I valued it accordingly. I can honestly say that no brief, or the fee for it, was too lowly for me for some years after I started at the Bar. By default, much of my work was in the comparatively unfashionable field of criminal law for the better part of my sixteen years at the Bar. Crims weren't greatly interested in where you went to school. Over time, I also gained a practice in the even less fashionable field of family law. Those clients too were more interested in performance than pedigree. My acquisition of a family law practice illustrates how work for barristers can come 'out of the blue'. In 1978 I received two phone calls, from barristers I barely knew, telling me that I would be receiving a few briefs in the Family Court which they no longer required - code for 'I'm being made a judge'. Several boxes of briefs arrived in chambers over the ensuing days. Almost overnight, I thus went from having a rough idea of where the Family Court was, to having a sizeable family law practice.

Not all work that came my way was intended for me. I once received a brief to appear in a criminal case in the District Court at Griffith. I should have been on notice that something was amiss when the solicitor told me that the client, who I had never heard of, had asked him to brief me as I had done such a good job for him on his last malicious wounding case. I arrived in Griffith early on the morning of the case to confer with the client. He blanched, and, with quivering voice, said 'you're not Mr. Coleman'. I did not know much, but was fairly confident that I knew my own name. The penny then dropped - the client thought that the very experienced and capable Michael Coleman, one of the four of us then at the Bar had been retained. The judge smiled benignly when I informed him of my client's difficulty, and offered to adjourn the case. The prospect of paying a return airfare for no fee is not attractive to many barristers, much less to battling barristers. Having rung Michael Coleman in Sydney, the client informed me 'you'll do'. Incredulous, I asked him what Michael had said. He replied, 'that you're the best barrister in Australia'. If my client ever believed that, he could not have for long after the case began, but still seemed happy enough as he was taken into custody to commence his four year sentence. I remarked on his apparent good humour, only to be told that 'the blokes in the pub reckoned I'd get six or seven'.

Although I never kept a tally, by the time I had been at the Bar for a decade, I realised that most of the 109 firms who had discerned my lack of potential in the early 1970s had briefed me, some on a regular

basis. Though re-assured, I made it a rule never to raise where anyone grew up, or went to school, just in case!

Perhaps surprisingly, criminal law and family law have a good deal in common. In both, the best and worst in people are revealed, often painfully, and with life-long repercussions. The personal stakes for the clients are highest. Reliance upon the lawyer is immense. The former High Court judge, Michael Kirby, has long exhorted barristers to embrace the 'unfashionable' litigants and their causes. The wealthy have no difficulty attracting, and retaining, the best counsel money can buy. The less well-off are no less deserving of fearless and competent representation, and generally much less able to recover from the consequences of inferior representation. In criminal and family law, the skills of the advocate are more likely to make a difference than in most other areas of law. Drawing the line between appropriately empathising with the client's plight, but avoiding identifying too closely with it is perhaps more difficult, but more important, in these than in many other areas of practice. I believe that the value of experience of life in the real world in the practice of the law cannot be over-stated, no matter what area of the law is involved. Probably the most valuable thing to be learnt from real life is humility, a virtue which does come naturally or abundantly to most barristers. The humble barrister copes best with opponents with the upper hand, judges with the whip hand, and clients whose hopes have not been fulfilled. Being humble, and being fearless are not mutually inconsistent. The best and most fearsome QCs are generally the most humble. Particularly in crime and family law, the temptation to intimidate, insult or humiliate witnesses who are often frightened, nervous, or unsophisticated, by 'cheap shots' in cross examination, or other advocacy skills, is often considerable. So is the temptation to hold back some of the truth when it seems advantageous to do so. The barrister who does not succumb, and refuses to compromise his or her professional integrity is, in my experience, guaranteed success at the Bar. Judges and opponents have long memories, particularly of sharp or unethical conduct, and it is amazing how quickly 'what goes around comes around'. Ultimately, all a barrister has is a good name, which is slowly earned, quickly forfeited, and then often never regained.

On a Friday afternoon just before Easter in 1991, I received a phone call from someone who said he was Bob Hawke. As I tried to decide which of my friends was impersonating the Prime Minister, I thought I heard the words 'we want to make you a judge' uttered by whoever it was on the other end of the phone. Fortunately, I restrained myself from

abusing my leg puller. After 'take all the time you want to think about, and ring me back on Monday to accept', the caller was gone, but the call was genuine. Given my success at the Bar to that time, I could have rung straight back to accept the offer, before the government came to its senses, or realised that the wrong Coleman had again been telephoned. I played it cool, waiting until 9.05 on the Monday morning to ring the PM to accept. The Attorney-General's Department then contacted me to 'clarify a few' things. These did not include where I grew up, where I went to school, or what my parents did, though the government was very anxious to know that I had paid all my tax. I had.

After more than two decades on the bench, I still marvel at where my journey started, and where it has taken me. My success, if I may call it that without undue immodesty, is no doubt referable to a good deal of hard work, and, quite honestly, being in the right place at the right time, or good luck. In my case, a chance conversation about judicial appointments with a solicitor I did work for whose brother was in the cabinet three weeks before I got 'the call' sounds a bit like luck, or being in the right place at the right time.

But, without education, it could not have happened. Education has enabled me, and my family to have a life which we could never otherwise have had. To suggest that I had to 'overcome' obstacles to success would be a considerable exaggeration. Competing against others who started with a few handy advantages would be closer to the reality. Many years ago, I realised that having grown up in what could fairly be described as a working class family was a great blessing. The work ethic was in our DNA. We never imagined that the world owed us a living. Being humble was easy - we had plenty to be humble about. My siblings and I were left in no doubt, from the time we started school, that education held the key to our futures, and that they were limited only by our own aspirations, and our willingness to work to fulfil them. Everything I have experienced, in the practice of the profession of law, and in life generally, leads me to believe that nothing has changed in this respect. If I can make it to the bench of a superior court, so can any student, or graduate reading this article. Focus on substance, and don't allow yourself to be distracted or intimidated by impressive appearances; the legal profession has no shortage of show ponies, or lions in chambers, lambs in court, if I may push the metaphor perhaps a little too far.



With education, persistence, application, and the great strengths of your origins, you can make a difference and achieve things you may not have thought possible. As a boy chasing a football, or wielding a cricket bat on the clay-pans of western Sydney, I never dreamed of a career which could have so fortunate an ending.

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# DEVELOPING NATIONAL CIVIL COMMITMENT LAWS FOR THE MENTALLY ILL

MICHAEL BARNETT\*

## I INTRODUCTION

This paper argues that Australia should develop national civil commitment laws<sup>1</sup> for the mentally ill, or, as a second preference, develop a model Australian legal approach that could be adopted by individual Australian jurisdictions. The main reasons for that view are as follows: the fundamental importance of such laws to the Australian community both from a human rights perspective and the perspective of community protection; the interrelatedness of the Australian mental health system including its legal, policy and service areas; the importance of international principles and treaties; greater accessibility of the legislation; improved data collection and monitoring; a more cost effective option on a systemic level; reducing cross border issues where two sets of State and/or Territory laws interrelate; and the significant problems with the present State and Territory approaches.

Currently there are no national mental health laws or national standards for such laws. Instead, the states and territories have their own laws, processes and institutions that deal with civil commitment. State and territory jurisdictions provide broadly similar legal approaches to civil commitment.<sup>2</sup> Each has a form of civil commitment on the basis of a mental illness that involves risks to the community and/or to the individual. Each jurisdiction has broadly similar legislation and decision-making systems for mental health and civil

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\*BA LLB, LLM (Hons) (Syd), Lecturer in Law, University of Western Sydney.

<sup>1</sup> For the purposes of this paper, civil commitment means the use of the legal system to detain a person with a mental illness against their will for non-criminal behaviour in a hospital, psychiatric ward or other medical institution.

<sup>2</sup> *Mental Health Act 1986* (Vic); *Mental Health Act 2007* (NSW); *Mental Health Act 2000* (Qld); *Mental Health Act 1996* (WA); *Mental Health Act 1996* (Tas); *Mental Health Act 2009* (SA); *Mental Health (Treatment & Care Act) 1994* (ACT); *Mental Health & Related Services Act 1998* (NT).

commitment including the use of specialist mental health review tribunals. Each contains objectives that attempt to identify and balance the protection of the individual consumer's rights and autonomy with the need for appropriate care and treatment, if necessary on an involuntary basis, and the right to protect the community from risk.

However, as discussed below, there are also significant differences between jurisdictions in the content and process of these laws, significant gaps in service provision, and there is a lack of a coordinated and consistent approach to the civil commitment of the mentally ill across Australia. A properly planned and resourced national set of laws with accompanying policy support would significantly reduce these problems.

The paper then argues that the best way to develop national laws would be through the establishment of a national, public inquiry into Australia's civil commitment laws for the mentally ill. The paper discusses the reasons for the need for such a national, public inquiry which include: the importance of the topic; the controversies that surround it; the number of complex issues and possible reforms involved; the need for broad consultation for major law reform; and the specific defects and concerns with current approaches by state and territory jurisdictions. Thus far, such an inquiry has not occurred and there has never been in Australia a national, State or Territory inquiry that has focused on civil commitment.

The paper then assesses the institution which would best carry out this inquiry. Finally, the paper explores the feasibility of achieving national laws.

## II WHY THERE IS A NEED FOR NATIONAL LAWS

### *A Civil Commitment is of Significant National Importance*

This part of the paper refutes perhaps a general argument against national laws that they are not justified because civil commitment is not important enough to warrant the effort of introducing such laws. Instead this part demonstrates the national importance of the issue.

The mental health of all Australians should be of paramount importance. Large numbers of Australians, apparently at an increasing rate, are directly affected by mental illness. For example, about one in

five Australians experience a mental illness episode during their lives while about one in ten report a long-term mental illness or behavioural issues at any point in time.<sup>3</sup> Estimates from the second National Survey of Psychosis conducted in March 2010 suggest almost 64,000 people have a psychotic illness and are in contact with public specialised mental health services each year.<sup>4</sup> Thus, civil commitment has a direct and dramatic impact on thousands of Australians each year together with their families, carers and friends, and an indirect impact on us all.

In 2006, the Senate Select Committee on Mental Health classified mental illness as the number one health problem in Australia causing years lost to disability and referred to mental illness as the 'disease burden' and 'the significant unmet need' for treatment and action.<sup>5</sup> The National Action Plan on Mental Health 2006-2011 estimated that the annual cost of mental illness in Australia is approximately \$20 billion, including the costs from loss of productivity and participation in the workforce.<sup>6</sup> In addition, mental illness as a political and community issue is gaining greater prominence. Political parties are spending more time and more money on mental health as an issue. The Government introduced a \$2.2 billion mental health reform package in the 2011-12 Budget.<sup>7</sup>

It follows that policy and laws relating to mental health issues should apply fairly and consistently to all Australians regardless of their origins, ethnicity, social class, education or place of residence. It is clearly a national issue involving the fundamental rights of individuals and the protection of the community.

Laws relating to mental illness occupy a very important position. As Unsworth argues, the legal system is a major force in the provision and effectiveness of mental health system: '[I]aw actually constitutes the mental health system, in the sense that it authoritatively constructs,

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<sup>3</sup> Australian Bureau of Statistics, 'National Survey of Mental Health and Wellbeing: Summary of Results' (2007) <<http://www.abs.gov.au>>.

<sup>4</sup> Australian Government, Australian Institute of Health and Welfare, *Mental Health Services in Australia* <<http://mhsa.aihw.gov.au/home/>>.

<sup>5</sup> Parliament of Australia, Senate Select Committee on Mental Health, *A National Approach to Mental Health - From Crisis to Community*, Final Report (April, 2006), rec 2.2.

<sup>6</sup> Council of Australian Governments (COAG), *National Action Plan on Mental Health 2006-2011* (14 July 2006) 1.

<sup>7</sup> Australian Government Department of Health and Ageing <<http://www.health.gov.au>>.

empowers, and regulates the relationship between the agents who perform mental health functions.’<sup>8</sup>

Civil commitment laws can play a vital if not determinative role in addressing the rights of the mentally ill and ensuring that people who need treatment and care may receive it.

Civil commitment is the sharp end of the mental health system. It involves serious and often drastic consequences for individual consumers, their families, carers, friends and the community. It may abrogate, or at least significantly curtail, fundamental human rights such as freedom of movement, control of one’s mind and body, freedom of choice of treatment or no treatment, and rights to dignity and respect. In broad terms of consequences it equates to penal powers with respect to criminal offences and it stands at odds with other types of illness which are categorised as bodily or non-psychiatric, where compulsory detention or treatment is rarely permitted, even if such treatment may be clearly in the interests of the patient from a medical viewpoint. There has perhaps been a tendency to gloss over the exceptional nature of civil commitment for mental illness because it has been used for so long and because it is widespread around the world. In addition, discrimination, stigmatisation and ignorance have led communities to undervalue the human rights of those with a mental illness. Therefore, it is important in any review of civil commitment laws to bear in mind that the powers of the state and its organs in this area are extraordinary and therefore need to be considered with the greatest of care.

Moreover, the mentally ill tend to be one of the most marginalised groups in the community whose rights as to liberty, employment, education and decent housing can be ignored or minimised. A national set of laws would help to ensure that proper attention is paid Australia-wide to issues of their liberty. There are significant general barriers to access to justice for mentally ill people including those who wish to dispute or review civil commitment decisions and processes.<sup>9</sup> There are individual barriers such as lack of awareness of legal rights, being disorganised and exhibiting difficult behaviour and there are also

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<sup>8</sup> Clive Unsworth, *The Politics of Mental Health Legislation* (Clarendon Press, 1987) 5; see also, Bernadette McSherry, ‘Rethinking Mental Health Laws: Developing Model Frameworks’ (Paper presented at Criminal Justice Research Consortium Seminar, Monash Law Chambers, Melbourne, 19 February 2008).

<sup>9</sup> See, eg, NSW Law Foundation, *On the Edge of Justice: the Legal Needs of People with a Mental Illness in NSW* (Sydney, 2006) 96.

systemic barriers such as insufficient availability of affordable legal services, time constraints, being in remote or regional areas, lack of credibility from the perspective of practitioners, stigmatisation and discrimination. It is suggested that these factors also indicate that civil commitment is worthy of national legislation.

There has been a growing realisation that civil commitment involves serious human rights issues. Over the past 30 years an international trend has developed for an increasing interest in protecting the rights of the mentally ill. This trend is clearly observable in many Western countries.<sup>10</sup> For example, human rights jurisprudence particularly concerning involuntary detention, conditions of confinement, civil rights and access to mental health services has been growing in Europe and the Americas.<sup>11</sup> One aspect of that increased interest has been the development of international standards for patients' rights. While overall the jurisprudence of human rights in health care has developed slowly and in piecemeal fashion it is in the area of mental illness that jurisprudential growth has been more marked.<sup>12</sup>

The main objectives of civil commitment laws are clearly of fundamental national importance as they involve the rights of individuals and of the Australian community. These objectives must be carefully considered and balanced.<sup>13</sup> The two basic objectives are usually described as follows. First, commitment may be necessary to protect the community by stopping mentally ill people from harming others. A major concern with this rationale is the problematic nature of predictions of risk or dangerousness.<sup>14</sup>

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<sup>10</sup> Hedy d'Ancona, 'Patients' Rights: Our Common Concern' in World Health Organisation (ed), *Promotion of the Rights of Patients in Europe* (Kluwer Law International, 1995) 2; Bernadette McSherry, 'Human Rights and Mental Illness: The Legal Framework' (1994) 1 *Journal of Law and Medicine* 205.

<sup>11</sup> Laurence Gostin and Lance Gable, 'The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health' (2004) 63 *Modern Law Review* 20, 20-21.

<sup>12</sup> Ian Freckelton and B Loff, 'Health Law and Human Rights' in D Kinley (ed), *Human Rights in Australian Law* (Federation Press, 1998) 267.

<sup>13</sup> Ian Kerridge, Peter Saul and John McPhee 'Moral Frameworks in Health Care: An Introduction to Ethics' in Ian Freckelton and Kerry Petersen (eds), *Controversies in Health Law* (Federation Press, 1999) 276; David Kent Smith, Pamela Miya and Susan Salladay 'Decision -Making in Mental Health Practice' in David Kent Smith, Pamela Miya and Susan Salladay (eds) *Ethics In Mental Health Practice* (Grune & Stratton, 1986) 6; JK Mason and RA McCall Smith, *Law and Medical Ethics* (Butterworths, 4<sup>th</sup> ed, 1994) 6.

<sup>14</sup> See, eg, C Lidz, E Mulvey and W Gardner, 'The Accuracy of Predictions of Violence to Others' (1993) 269 *Journal of the American Medical Association* 1007; JK Mason, 'The Legal

The second major rationale is that mentally ill people may themselves need protection in their own best interests through civil commitment, particularly because of severe mental illness. This justification is often regarded as a *parens patriae* protection. The rationale is controversial because it involves making decisions that infringe upon the autonomy and free choice of the individual and it is difficult to draw a clear line between when paternalism is justified and when it is not.<sup>15</sup>

The importance of achieving national standards for Australian mental health law including civil commitment has been recognised by a variety of experts from different disciplines. The five year project called *Rethinking Mental Health Laws: An Integrated Approach* was funded by the Australian Research Council and conducted by a number of academics, some other experts and some consumer representatives. The aim was to develop recommendations for developing model frameworks for mental health laws in both the civil and criminal law fields.

It is therefore crucial on the basis of the frequency of mental illness and its significant consequences, both for the basic rights and interests of individuals and the community, that an optimal approach to involuntary commitment is adopted across Australia. National laws after an appropriate national inquiry offer the best chance of these important issues being addressed and settled.

### *B National Laws are the Best Response to International Principles and Obligations*

Modern mental health jurisprudence has a substantial foundation in international principles and treaties. In particular, the international principles and guidelines arising from the *United Nations Principles for the Protection of Persons with Mental Illness* (1991),<sup>16</sup> and the *Convention*

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Aspects and Implications of Risk Assessment' (2000) *Medical Law Review* 69; DE McNeil, RL Binder and TK Greenfield, 'Predictor of Violence in Civilly Committed Acute Psychiatric Patients' (1988) 145 *American Journal of Psychiatry* 965.

<sup>15</sup> See, eg, David Price, 'Civil Commitment of the Mentally Ill: Compelling Arguments for Reform' (1994) 2 *Medical Law Review* 321.

<sup>16</sup> C Gendreau, 'The Rights of Psychiatric Patients in the Light of the Principles Announced by the UN' (1997) 20 *International Journal of Law and Psychiatry* 259; Neil Rees, 'Compliance with United Nations Principles for the Protection of Persons with a Mental Illness and for the Improvement of Mental Health Care' (2003) 10(1) *Psychiatry, Psychology and Law* 33.

on the *Rights of Persons with Disabilities* (2006)<sup>17</sup> have played a significant role in Australian law and commentary. Leaving the implementation of such international principles and obligations to the states and territories means the implementation is clearly subject to the vagaries of different legislatures which will often have divergent priorities and approaches. This can be seen by the fact that Victoria and the ACT have enacted human rights charters that have an impact on mental health issues whereas the other Australian jurisdictions have not done so.<sup>18</sup> The optimal approach that will guarantee consistency of approach and consistency of protection of human rights for all Australians is for national implementation of civil commitment laws including implementation of international principles and obligations. Moreover, it is preferable in terms of status and publicity of the principles and laws that it is the sovereign state which signed the treaties which legislates to make them part of domestic law. A national response will also make it far easier to monitor the administration and enforcement of such international obligations.

Moreover, in the course of formulating the national civil commitment laws consideration could be given to related national initiatives such as:

- the development of a national Mental Health Charter, as for example in the Netherlands, covering such matters as the rights of patients and the rights and responsibilities of medical practitioners and State institutions;<sup>19</sup>
- the development of human rights protections for the mentally ill under a general Australian Bill of Rights (on the basis that such a Bill is feasible in Australia);
- the roles of the Australian Human Rights Commission (AHRC),<sup>20</sup> the *Disability Discrimination Act 1992* (Cth), State and Territory anti-discrimination bodies, and ombudsman offices

Another significant benefit of Australia developing national, model civil commitment laws is that they could be adopted in other countries.

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<sup>17</sup> Operative in Australia from 17 July 2008.

<sup>18</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT).

<sup>19</sup> World Health Organization, *Promotion of the Rights of Patients in Europe* (Kluwer Law International, 1995) Chs 12-13.

<sup>20</sup> The AHRC has power to inquire into certain alleged breaches of the ICCPR: see *Australian Human Rights Commission Act 1986* (Cth).



Australia could become a major leader and innovator on mental health law, thus helping to improve the quality of mental health law not just for Australians but for others.

*C National Laws will be more Effective in Responding to the Interactive Nature of the Mental Health System Including Policy and Service Delivery*

Another major reason for a national laws is that civil commitment laws need to be considered as a part of a system or number of systems or subsystems, for example, the health system, mental health system, and a subsystem of mental health law. The breadth of the topic and its context requires a national, broad based response. Mental health is an area where law, medicine, public policy and culture are inextricably linked. National policies, planning and service delivery will be better served by national laws than by a series of different State and Territory laws. This argument is borne out by a consideration of national mental health issues and the growing realisation that national policy and planning are vital.

There is already a considerable degree of consensus for adopting a national approach to mental health. There is a fourth national health plan which has set an agenda for collaborative government action in mental health for 2009-2014.<sup>21</sup> There is also an Australian Health Ministers Conference (AHMC) that meets regularly and a Mental Health Standing Committee that reports to the AHMC.<sup>22</sup> In addition, there has been a Council of Australian Governments (COAG) national action plan on mental health 2006-2011.<sup>23</sup> Moreover, Commonwealth, State and Territory governments are committed to implementing human rights principles as part of the National Mental Health Strategy.<sup>24</sup> As discussed below, there is now a national Mental Health Commission. A set of national laws for civil commitment fits in well with this developing national mental health strategy.

### *1 General Concerns about Current Lack of Cohesion and Planning*

The current array of civil commitment laws reflects the fragmented framework for Australian health care. Under Australia's federal

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<sup>21</sup> See Department of Health and Ageing <<http://www.health.gov.au>>.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Terry Carney et al, *Australian Mental Health Tribunals: Space for Fairness, Freedom and Treatment?* (Themis Press, 2011) 38.

political and legal system there is no one government with sole responsibility for health care. Instead, the Commonwealth and state governments have the capacity to have different and sometimes shared or conflicting responsibilities and powers. The Commonwealth has no power under the Australian Constitution in relation to health care generally. However, it can use various other powers to legislate in relation to health matters.

The states have residual powers, that is, those powers not exclusively those of the Commonwealth. Therefore it is the states who have direct power in relation to the delivery of health care, public health and the regulation of health professionals. The states have responsibility for hospitals and mental health law including civil commitment. This means that each state and territory jurisdiction has somewhat different legislative and policy approaches to civil commitment, although broadly speaking their legislation is similar. The Australian health care system is intrinsically differentiated because the Commonwealth provides funding for the health care system but the delivery and regulation of that system is essentially the responsibility of the states.<sup>25</sup>

Thus responsibility between the Commonwealth and the states is to some extent shared and this can present difficulties in developing one coherent and integrated mental health system for Australia. Moreover, on occasions the Commonwealth and states, and states with respect to each other, may differ over policy and funding priorities and this may make it even more difficult to develop a coherent, national policy. A further potential problem is that gaps develop in health care which may disadvantage certain groups within the community and there may also be cross border issues about patients who move between jurisdictions with differences in civil commitment laws.

There are general reservations about the lack of resourcing, planning, co-ordination, supervision, accountability, and access to services with respect to Australia's mental health system as demonstrated in the Burdekin report<sup>26</sup> and other reports from the Human Rights and Equal

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<sup>25</sup> Peter JM MacFarlane, *Health Law in Australia & New Zealand Commentary and Materials* (Federation Press, 3<sup>rd</sup> ed, 2000) 29-31.

<sup>26</sup> Human Rights and Equal Opportunities Commission, Report of the National Inquiry into the Human Rights of People with Mental Illness ("the Burdekin Report") (1993), Select Committee on Mental Health, Parliament of Australia, A National Approach to Mental Health: From Crisis to Community, First Report, Canberra, 2006.

Opportunity Commission<sup>27</sup> and the Senate Select Committee on Mental Health.<sup>28</sup>

These difficulties together with a lack of consumer awareness mean that people ‘muddle through’ in terms of service delivery and their legal status which is often not based upon any rational pathway or patient choice.<sup>29</sup> For example, there is overlap and confusion about the roles of civil commitment, the criminal justice system and adult guardianship with the result that placement in the system may be haphazard and unprincipled.<sup>30</sup> This might require a clear and formal enunciation of principles and protocols that can be used for all service providers and decision makers.

While the focus must be on the legal responses to civil commitment, that topic needs to be put in its proper context. In reality, designing an ultimate model legal response to civil commitment would involve at least contemplating a best practice mental health legal system because of the interdependence of the components of that system. Civil commitment is but one component of the mental health legal system which consists of numerous parts including voluntary treatment and care and delivery of mental health services, inpatient civil commitment and mandated outpatient treatment. Each of these parts is closely interconnected. Civil commitment will be affected by, and in turn affect, the other components. For example, a move towards tougher, more legalistic rules may mean that more mentally ill people will be in the community with a consequent increased demand for community services and for involuntary community treatment, commonly known throughout Australia as Community Treatment Orders (CTOs). A trend towards looser rules that make it easier to use involuntary commitment is likely to result in the need for more in-house psychiatric hospital resources and beds.

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<sup>27</sup> See, eg, Sev Ozdowski ‘The Human Rights of Mentally Ill People: the HREOC Inquiry and After’ (Mental Health, Criminal Justice and Corrections Conference, Marrickville, 19 October 2001); Mental Health Council of Australia, *Not for Service, Experience of Injustice and Despair in Mental Health Care in Australia*, 2005.

<sup>28</sup> Select Committee on Mental Health, Parliament of Australia, *A National Approach to Mental Health: From Crisis to Community*, First Report, Canberra, 2006.

<sup>29</sup> Carney et al, above n 24, 7.

<sup>30</sup> John Dawson, ‘Choosing Among Options for Compulsory Care’ in Kate Diesfeld and Ian Freckelton (eds), *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (Ashgate, 2003) 133-134, 152-153.

High quality mental health services, particularly community ones including preventive and crisis intervention services, are likely to reduce the level of involuntary commitment. In contrast, inadequate services with gaps in delivery and effectiveness will likely lead to more civil commitment and moreover, likely lead to people who could have successfully used voluntary services deteriorating to the point where civil commitment appears to be the only option for them or instead they receive only very superficial assistance within the community.

## *2 The Litigation System*

For litigation to be an effective tool for achieving objectives there needs to be effective access to justice for mentally ill people. Legal aid which is essentially funded and oversighted by the Commonwealth must be available as part of a wide range of advocacy services with respect to civil commitment. There should be a properly resourced legal system for dealing with civil commitment including: fostering partnerships and co-ordination between legal service providers such as legal aid commissions, community agencies and courts and tribunals to improve client access and the referral network; and providing an effective litigation system including legal assistance and representation allowing individuals to effectively pursue their rights and options to seek review and make complaints. These are broad national issues of planning and funding which can best be implemented and assessed when the same laws are used across jurisdictions.

## *3 Adequate Resourcing for the Operation of the Laws and the Relevant Institutions*

A chronic and longstanding complaint about the Australian mental health system is the lack of adequate resourcing, particularly in relation to service delivery.<sup>31</sup> National laws will make it easier to identify funding and service delivery issues and make funding and planning more effective.

## *4 Structural Issues and Reforms*

A major issue connected to civil commitment laws is the institutions that administer the law and monitor it. It is necessary to consider

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<sup>31</sup> The Burdekin Report, above n 26; Senate Select Committee on Mental Health, Parliament of Australia, *A National Approach to Mental Health - From Crisis to Community* (Final Report, April 2006); Mental Health Council of Australia, above n 26. Carney et al, above n 24.

which institution or institutions could undertake critical functions for developing a model, best practice system of civil commitment. The essential functions would include the following with respect to the laws and associated policy:

- planning, policy and co-ordination;
- supervision and monitoring;
- complaints handling;
- research and data collection;
- training and education;
- general advocacy for the mentally ill; and
- legal advice, research and policy.

Many countries around the world, including many common law countries, have developed mental health commissions, authorities or councils to carry out these sorts of functions, with typical functions being policy and supervision. There are such bodies, for example, in England,<sup>32</sup> Scotland,<sup>33</sup> Ireland,<sup>34</sup> New Zealand,<sup>35</sup> and Canada.<sup>36</sup> Discussion of establishing such bodies is not new in Australia.<sup>37</sup>

The Australian Government has recently established the National Mental Health Commission.<sup>38</sup> Its primary function is planning more effectively for the future mental health needs of the community, creating greater accountability and transparency in the mental health system and giving mental health prominence at a national level.

The NSW government has also established a Mental Health Commission with the key purpose to ensure that there is quarantined and accountable funding for mental health expenditure and that resources are focused on where they are most needed through the most appropriate models of care. Other priorities for the Mental Health Commission include:

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<sup>32</sup> *Health and Social Care Act 2012* (UK).

<sup>33</sup> Mental Welfare Commission for Scotland <<http://www.mwscot.org.uk>>.

<sup>34</sup> Mental Health Commission of Ireland <<http://www.mhrcirl.ie>>.

<sup>35</sup> New Zealand Mental Health Commission <<http://www.mhc.govt.nz>>.

<sup>36</sup> Mental Health Commission of Canada <<http://mentalhealthcommission.ca>>.

<sup>37</sup> See, eg, I Hickie et al, 'Australian Mental Health Reform: Time for Real Outcomes' (2005) 182(8) *Medical Journal of Australia* 401.

<sup>38</sup> National Mental Health Commission <<http://www.mentalhealthcommission.gov.au>>. It commenced operation on 1 January 2012.

- to better manage the experience of people with mental illness, their families and carers;
- divert people with mental illness away from the prison system; and
- help ensure a smooth operation of the Mental Health Review Tribunal.<sup>39</sup>

There is also a Western Australian Mental Health Commission, whose major functions include policy, evaluation, monitoring and ensuring accountability of the system.<sup>40</sup>

It is too early to judge the performance of the new Australian Commissions but their role is clearly significant in any development of national civil commitment laws. One issue is the extent to which such bodies will actively supervise the working of the law and the relevant institutions or investigate issues or complaints about mental health law decisions and operation including, for example, decisions by doctors, mental health facilities and officers, tribunals or courts. Their general objectives make no specific mention of the mental health legal system so there is at least the potential that the law will not be a focus. The other point is that there is a danger in our federal system of a multitude of federal and state bodies and strategies all operating at once with the real risk of consumer and stakeholder confusion about responsibilities, cases falling into the gaps, uncoordinated results, duplication and even competition between the different institutions.

A major example of the current uncoordinated approach is the potential complaints avenues about civil commitment or other aspects of mental health law. The bodies that could be involved in complaints investigation and referral could include:

- courts and tribunals;
- the Australian Human Rights Commission (AHRC);
- State and territory anti-discrimination agencies;
- Commonwealth, and state and territory ombudsmen;
- official visitors to mental health facilities;
- consumer groups;
- legal aid commissions and community legal centres;

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<sup>39</sup> Mental Health Commission Bill 2011 (NSW) introduced 24 November 2011; see also [http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20111124008?open&refNavID=HA8\\_1](http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20111124008?open&refNavID=HA8_1).

<sup>40</sup> Western Australian Mental Health Commission  
<<http://www.mentalhealth.wa.gov.au>>.

- mental health facilities;
- health departments; and
- health complaints units.

The complaints could range from trivial to serious and could include human rights violations. Currently there is no body with any overall responsibility to oversee the handling of such complaints. It is clear that there could be gaps in complaints handling, needless duplication, wasting of resources and no proper understanding or monitoring of the performance of the mental health system including its legal processes.

What would be preferable would be a national Mental Health Commission to be given overall supervision and monitoring of complaints with respect to mental health nationally including complaints arising from laws and the legal process. The Commission could have protocols with all of the relevant agencies as to the recording and investigation of complaints. For example, the Commission could determine when it wished to itself investigate a complaint, when it wished to supervise the handling of a complaint by another body or when it determined that it did not need to have any direct input into the complaint.

It is likely that one overarching federal institution with national laws to administer and a national strategy will constitute the most desirable and effective outcome. This institution could have different divisions for research, planning, supervision and monitoring, complaints handling, training and education and advocacy. In the writer's view, national laws and policy would mean that there should preferably be one specialist Mental Health Commission which would have appropriate divisions dealing with the essential functions. It would then have regional offices in each state and territory. This would provide a holistic response to mental health law but allow regional input. It would reduce the problems associated with diverse institutions and agencies all engaged in similar tasks but with differences in approach, improve coordination with national strategies and other services, enhance accountability and improve data collection including establishing national standards. The divisions could assist each other, for example, research and data could assist policy making as would the complaints process. The current National Mental Health Commission could be expanded to take up this greater involvement.

*D National Laws would Enhance Accessibility and be more Consumer Friendly*

A significant advantage of one piece of national legislation is that it would make the law more accessible to users. Currently any effort to consider Australia's civil commitment laws involves searching for and considering a multitude of Acts. This affects researchers, policy makers, lawyers and consumers and their advocates.

The differences in laws between Australian jurisdictions on civil commitment 'is a constant source of frustration and concern for organizations looking at issues from a consumer perspective'.<sup>41</sup>

National laws are more likely to assist in the system being more integrated, transparent and accountable. There are less likely to be gaps, ambiguities and inconsistencies between laws and between policies. In the writer's view, the national law should contain all the applicable human rights at issue together with the consequences of breaches of those rights including redress and reference to the investigation of alleged human rights abuses.

*E National Laws would Facilitate Data Collection and Monitoring*

A major concern is that there is a lack of empirical research and data about the nature, effectiveness and fairness of Australian civil commitment laws. The Law and Justice Foundation of NSW has produced a pioneering and valuable empirical report on some aspects of the functioning of three mental health tribunals being those of NSW, Victoria and the ACT.<sup>42</sup> However, there are in total, eight jurisdictions that need to be assessed for a more comprehensive picture.

A set of national laws would clearly encourage more comprehensive and accurate data collection about consumers, the law and its application right across Australia. It would enable more accurate analysis of policy impacts on the rate and dynamics of civil commitment and it could better inform policy making and service delivery. It would also facilitate monitoring on a national scale because there would be only one set of laws to deal with.

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<sup>41</sup> Carney et al, above n 24, 74; See also Sophie Delaney, 'An Optimally Rights Recognising Mental Health Tribunal: What can be Learned from Australian Jurisdictions' (2003) 10(1) *Psychiatry, Psychology and Law* 71.

<sup>42</sup> Carney et al, above n 24.



### *F National Laws Would be Cost Effective on a Systemic Level*

One argument against national laws might be that introducing them would be costly and time consuming. While there is no doubt that introducing the laws, particularly after a national inquiry, would be relatively expensive, it is necessary to consider this issue in context. The introduction of national laws would in the longer term be cost effective for all Australians because it would remove the current multitude of state and territory inquiries and reviews of their own legislation. Moreover, in many cases, the states and territory reviews of legislation and policy are not comprehensive, do not engage with the entire community and to some extent each of them 'reinvents the wheel' when identifying relevant issues and in considering what the other jurisdictions are doing with respect to civil commitment.

### *G National Laws Need not Stifle Innovation*

A national law and associated policy could take into account state or regional differences where appropriate. Moreover, as the paper has indicated there are significant inconsistencies, gaps, ambiguities and defects among the jurisdictions. A national review could identify and adopt the best parts of the various jurisdictions' approaches. In addition, where change is needed the national laws, once enacted, would be monitored and could be subject to periodic review. Therefore, national laws could be improved and refined and would not be set in stone.

### *H National Laws would Reduce Cross Border Issues and Complexities*

Increasingly people are becoming more mobile and are more likely to move between jurisdictions. The absence of national laws means that there are complexities and issues arising from consumers moving between states and territories and hence becoming subject to different laws and processes. These issues may be very significant in areas or towns on state and territory borders.

There may be issues, for those not fully aware of the rules, about conflicting orders applying or which order takes precedence.<sup>43</sup> The interplay of different jurisdictions can be confusing not only to consumers and to their relatives and advocates but also to state and

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<sup>43</sup> Eg for NSW agreements with other States, see NSW Government Health <[http://www.health.nsw.gov.au/aboutus/legal/agreements.asp#para\\_3](http://www.health.nsw.gov.au/aboutus/legal/agreements.asp#para_3)>.

territory medical authorities, tribunals, and police and emergency services. National laws would obviously remove most of these concerns.

### III SPECIFIC PROBLEMS WITH THE CURRENT LEGAL APPROACHES

It could be argued that there would be no need for a national inquiry if it could be satisfactorily established that the laws and policies of the states and territories each appeared as at least adequate or acceptable and worked tolerably well in achieving their objectives. However, the writer considers that a more persuasive argument is that the standard of achievement should be more than adequate or acceptable and instead should be pitched at excellent or first class given the importance of the objectives, particularly the protection of important human rights of individuals and the protection of the community. In any event, there are sufficient concerns and doubts about the content and operation of these laws to justify a national inquiry. The current state and territory approaches need to be assessed both in terms of legislative and policy including improvements to legislative definitions, court and tribunal review, the litigation system and government policy regarding supervision, co-ordination and resourcing.

While it might be hoped that each state and territory legislature might eventually reach some sort of legislative consensus on civil commitment this is highly unlikely. A history of their legislation indicates, on the contrary, that they continue to take different approaches and use different terms, different language and have different priorities.<sup>44</sup>

In any event, there are also specific problems with the current Australian jurisdictions' approaches. The following discussion draws heavily upon the findings of the Law and Justice Foundation of NSW report which, as noted above, is the first major examination of the operation of involuntary civil commitment laws in Australia.<sup>45</sup> The problems and concerns about the current civil commitment laws and policy in Australia include the following matters.

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<sup>44</sup> See Carney et al, above n 24.

<sup>45</sup> *Ibid.*

### *A Divergent and Inadequate Approaches*

There are significant differences across jurisdictions on matters such as definitions of mental illness and disorders, and justifications and criteria for civil commitment, methods and frequency of review, the availability of legal representation, and practice and procedure.<sup>46</sup> Moreover, there are jurisdictional differences in mental health service delivery and policy initiatives on mental health which will affect laws and policies and the use of civil commitment.<sup>47</sup> There is also the experience of overseas jurisdictions to consider.<sup>48</sup>

There are some major differences in focus between jurisdictions. For example, the Law and Justice Foundation of NSW report found that the NSW laws and approach are geared towards due process and tribunal control of civil commitment, that is a legal model, while Victoria and South Australia are much more within the clinical control model.<sup>49</sup>

This diversity produces a fragmented, often limited and inconsistent approach to civil commitment within Australia which can frustrate and confuse consumers, advocates and institutions.<sup>50</sup>

The Law and Justice Foundation of NSW report concluded that Australian mental health tribunals are 'unduly constrained by underfunding of their operations, and by the absence or scant provision of adjuncts such as routine second medical opinions or the advocacy and legal representation schemes which are becoming the gold standard internationally'.<sup>51</sup> The report also concluded that tribunals have become the 'poorest cousin in an already under-resourced mental health service system'.<sup>52</sup>

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<sup>46</sup> Ibid 12-14.

<sup>47</sup> See, eg, ibid 118-147 on some of the differences between NSW, the ACT and Victoria.

<sup>48</sup> Eg, Jill Peay, *Tribunals on Trial: A Study of Decision-Making under the Mental Health Act 1983* (Clarendon Press, 1989); Elizabeth Perkins, *Decision-Making in Mental Health Review Tribunals* (London Central Books, 2002); Elizabeth Perkins, S Arthur and J Nazroo, *Decision-Making in Mental Health Review Tribunals* (University of Liverpool Health and Community Care Research Unit, 2000).

<sup>49</sup> Carney et al, above n 24, 74.

<sup>50</sup> Ibid 12; see also S Delaney, 'An Optimally Rights Recognising Mental Health Tribunal: What can be Learned from Australian Jurisdictions' (2003) 10(1) *Psychiatry, Psychology and Law* 71-84.

<sup>51</sup> Carney et al, above n 24, 21.

<sup>52</sup> Ibid 315.

### B Failure to Properly Protect Human Rights

State and territory legislation fail to include a positive and cohesive list of human rights and a means by which a person can make complaints, seek personal redress or take action against institutions in relation to civil commitment.<sup>53</sup> Diverse civil commitment laws in mental health Acts do not optimally balance the civil rights of the mentally ill including a right to treatment or to refuse treatment<sup>54</sup> and the needs of the community.

The Mental Health Council in the 2005 report *Not for Service* stated that 'the stories related by consumers and practitioners ... suggest that either the legislation is not yet consistent with the [Mental Illness principles] or that the legislation has not been effective in protecting consumers and carers against abuses'.<sup>55</sup>

### C Inappropriate and Inconsistent Legislative Criteria for Commitment

Again, there is a diversity of approaches that do not always satisfactorily deal with significant issues such as definitions of mental illness, criteria for commitment, and the role of lack of insight or lack of capacity.<sup>56</sup> There are different approaches as to whether mental illness should be defined and if so how.<sup>57</sup> There are variations on what level or type of harm is necessary to engage commitment; for example, Tasmania uses 'significant' harm,<sup>58</sup> NSW 'serious harm'<sup>59</sup> while in Western Australia there is explicit provision that harm includes serious financial harm, lasting or irreparable harm to personal relationships

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<sup>53</sup> See, eg, M Donnelly, 'Community-Based Care and Compulsion: What Role for Human Rights?' (2008) 15(5) *Journal of Law and Medicine* 782; Ian Freckelton and B Loff, 'Health Law and Human Rights' in D Kinley (ed), *Human Rights in Australian Law* (Federation Press, 1998) Ch 14; S Delaney, 'The United Nations Principles for the Protection of People with Mental Illness' (1992) 18 *Melbourne University Law Review* 565; Carney et al, above n 24, 23-46.

<sup>54</sup> RL Binder and DE McNeil, 'Involuntary Patients' Right to Refuse Medication: Impact of the Riese Decision on a California Inpatient Unit' (1991) 19 *Bulletin of the American Academy of Psychiatry and the Law* 351; D Hermann, 'Autonomy, Self Determination, and the Right of Involuntarily Committed Persons to Refuse Treatment' (1990) 13 *International Journal of Law and Psychiatry* 361.

<sup>55</sup> Carney et al, above n 24, 38; Mental Health Council of Australia, above n 31.

<sup>56</sup> I Markova and G Berrios, 'The Meaning of Insight in Clinical Psychiatry' (1992) 160 *British Journal of Psychiatry* 850.

<sup>57</sup> Carney et al, above n 24, 53.

<sup>58</sup> *Mental Health Act 1996* (Tas) s 24.

<sup>59</sup> *Mental Health Act 2000* (NSW) s 14(1)(b).

due to damage to the person's reputation, and serious damage to the reputation of the person.<sup>60</sup> Harm can be a difficult concept to encapsulate and may involve different interpretations.<sup>61</sup>

#### *D Reliance upon Non-legislative Criteria*

Research and critiques have suggested that tribunals may use factors and criteria that are not expressly referred to in their governing legislation.<sup>62</sup> Key concepts that may not be used in legislation but nevertheless seem to be of great significance in decision making are insight, consent and capacity. One of the reasons for this may be that review tribunals find that the legislative criteria are too ambiguous, too complex or inadequate.<sup>63</sup> The fact that using extra legal criteria has continued may be due to the relative lack of appellate review of decision making.

Queensland, Victoria, Western Australia and the Northern Territory have an additional consent criterion that the person has refused, or is unable to consent to, the proposed treatment.<sup>64</sup> The Law and Justice Foundation of NSW study reported that there were 'numerous murky and unresolved issues' about the definition and operation of 'consent and capacity and [tribunals] may resort to broad therapeutic considerations'.<sup>65</sup> The use of extra-legislative criteria is a significant problem because it impugns the integrity and authority of the legal system, thereby affecting the predictability, accountability and transparency of the review process. It leaves much to the potentially unfettered discretion of tribunal decision makers. If the legislative criteria are problematic then they must be reconsidered and if necessary amended.

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<sup>60</sup> *Mental Health Act 1998* (WA) s 26(2).

<sup>61</sup> Carney et al, above n 24, 202.

<sup>62</sup> Kate Diesefeld, 'Insights on "Insight": the Impact of Extra-Legislative Factors on Decisions to Discharge Detained Patients' in Ian Freckleton and Kate Diesefeld (eds), *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (Ashgate, 2003) 359; Elizabeth Perkins, 'Mental Health Review Tribunals' in Ian Freckleton and Kate Diesefeld (eds), *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (Ashgate, 2003) 221.

<sup>63</sup> Elizabeth Perkins, above n 62, 221, 228; See also Jill Peay, *Decisions and Dilemmas: Working with Mental Health Law* (Hart Publishing, 2003) 160.

<sup>64</sup> Carney et al, above n 24, 56; *Mental Health Act 2000* (Qld) s 14(1)(f).

<sup>65</sup> Carney et al, above n 24, 305.

*E Concerns about Consumer Confidence in Involuntary Processes*

Empirical studies note numerous expressions of consumer dissatisfaction with the law and tribunal operation and decision making. Australian empirical studies suggest the following expressions of consumer dissatisfaction:

- Consumers believing that they are forced into a passive role, unable to effectively voice their concerns;<sup>66</sup>
- Lack of effective communication between tribunal and consumers;
- Tribunal systems that are confusing to navigate;<sup>67</sup>
- Concerns about consumers not being able to understand what options they had or who they could talk to about their experiences and whether an independent person or body could assist in this task;<sup>68</sup>
- Lack of access to information for consumers including treatment plans and clinical reports;<sup>69</sup>
- Concerns about bias with an inadequate system of review from tribunals and courts that tends to 'rubber stamp' the views of hospitals and decision makers with resulting concerns about the lack of time, effort and resources expended to properly review cases.<sup>70</sup> A number of consumers and their legal advocates think that tribunals place too much weight on the evidence of the treating team and not enough on their case.<sup>71</sup> The treating team's opinion was treated as the authority for whether there was a mental illness and its severity;<sup>72</sup> and

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<sup>66</sup> Ibid 272.

<sup>67</sup> Ibid 280.

<sup>68</sup> Ibid 240.

<sup>69</sup> Ibid 13, 189.

<sup>70</sup> The rates that review tribunals tend to set aside decisions is generally well below 15% - see Ian Freckleton, 'Involuntary Detention Decision-Making, Criteria and Hearing Procedures' in Ian Freckleton and Kate Diesfeld (eds), *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (Ashgate, 2003) 296; T O'Brien et al, 'A One Year Analysis of Appeals Made to Mental Health Review Tribunals' (1995) 29 *Australian and New Zealand Journal of Psychiatry* 661; Perkins, above n 62, 228.

<sup>71</sup> Carney et al, above n 24, 227.

<sup>72</sup> Ibid 232.

- A lack of proper discussion of treatment including medication levels, types or forms.<sup>73</sup>

#### *F Problems with Participation*

There appear to be problems with sufficient participation which varies according to jurisdiction. For example, clinicians may not attend many hearings instead sending junior staff to review clinical notes.<sup>74</sup> There may be a relatively low rate of attendance by consumers; for example, about 60% in Victoria.<sup>75</sup>

In addition, there is a great variety as to the mode of participation with different uses being made of personal hearings, videolink and telephone hearings.<sup>76</sup> These different modes raise issues about the nature and impact of hearings, particularly on consumers.

#### *G Legal Representation and Advocacy*

There are significant differences among jurisdictions on the level, source and quality of legal representation which often does not extend beyond inpatient admissions.<sup>77</sup> Overall, legal representation is not the norm and can be very low (for example, 5-10% in Victoria).<sup>78</sup> In addition, there is a need for consumers to see legal representatives prior to hearing (which does not always happen), so that the representative can properly obtain instructions and prepare a case.<sup>79</sup> There is also a divergence of views about the approach by lawyers as to whether they may be too adversarial or, on the other hand, they may not sufficiently test evidence.<sup>80</sup>

#### *H Tribunal Membership*

There are general concerns about budgetary constraints threatening interdisciplinary, multidisciplinary tribunals, which overall are

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<sup>73</sup> Ibid.

<sup>74</sup> Ibid 96.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid 140-143.

<sup>77</sup> Ibid 44.

<sup>78</sup> Ibid 96.

<sup>79</sup> Ibid 166.

<sup>80</sup> Ibid 241, 252.

considered to be a preferable option than a single member constituted tribunal, particularly in terms of providing a holistic review of orders.<sup>81</sup>

### *I Inconsistent Procedural Standards*

There appear to be inadequate and inconsistent procedural standards across jurisdictions.<sup>82</sup> For example, not all jurisdictions expressly refer to the requirements of natural justice or to the rights of access to information for consumers or some may have narrow versions of such rights.<sup>83</sup>

Some consumers and their advocates have complained about:

- statement of reasons not being asked for by consumers and when they are given they vary in quality;<sup>84</sup>
- the timeliness and adequacy of notification about hearings and assistance to parties including access to clinical reports and treatment plans;<sup>85</sup>
- a divergent approach to the timeframes for Tribunal review of commitment decisions and then differences in the frequency of tribunal monitoring of consumers; and
- the lack of treatment plans being reviewed.<sup>86</sup>

### *J Time Constraints*

A striking concern from the Law and Justice Foundation report is that of the limited time and resources available to hear individual matters. The median time for hearings is around 20 minutes, which seems comparatively short when compared to other tribunal jurisdictions in Australia such as social security matters and also seems much less than comparable mental health jurisdictions overseas (for example, Britain).<sup>87</sup> The authors of the report conclude that the average time spent 'appears unreasonably short'.<sup>88</sup> Time constraints can clearly

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<sup>81</sup> Ibid 96-115.

<sup>82</sup> Ibid 45.

<sup>83</sup> Ibid. See also, B McKenna, A Simpson and J Coverdale, 'What is the Role of Procedural Justice in Civil Commitment?' (2000) 34 *Australia and New Zealand Journal of Psychiatry* 671.

<sup>84</sup> Carney et al, above n 24, 235.

<sup>85</sup> Ibid 189.

<sup>86</sup> Ibid 73.

<sup>87</sup> Ibid 309.

<sup>88</sup> Ibid.



damage the quality of decision making, the credibility of the process and consumer confidence.

### *K Limited Role of Appellate Courts*

There are very few civil commitment orders taken on appeal and this seems to be the case across common law countries.<sup>89</sup> This means that there is comparatively little court supervision of the approach of tribunals to civil commitment and their interpretation of the legal requirements. This is a matter that warrants further attention including why there is such a low rate and the extent to which the status and personal difficulties of the clients and perhaps the reluctance of legal services to run such matters, impacts on the rate of appeal.

## IV THE NEED FOR A PUBLIC, NATIONAL INQUIRY TO HELP DEVELOP NATIONAL LAWS

The main reasons for the need for a public, national inquiry are as follows. First as discussed above, achieving best practice civil commitment laws for all Australians should be regarded as a significant national priority and a comprehensive national and public inquiry would best achieve that result. Secondly, civil commitment laws are controversial and therefore the laws and policy need to be considered and debated widely within the community. There are a wide variety of views about civil commitment within the community.<sup>90</sup> A diversity of views is inevitable given the complexities of the issues, for example, the problematic nature of defining and explaining mental illness and its treatment, the interaction between medicine and law, the need to justify detention and to balance the potentially competing interests of the individual against the community represented by the state.

Perspectives on civil commitment include rights based approaches as discussed above, philosophical,<sup>91</sup> sociological,<sup>92</sup> ethical,<sup>93</sup> critical,<sup>94</sup>

<sup>89</sup> TA O'Brien et al, above n 70, 661-665; Perkins, above n 62, 228.

<sup>90</sup> See, eg, Clive Bridge 'Civil commitment: A Multi-Disciplinary Analysis' (1984) 14 *Victoria University of Wellington Law Review* 145.

<sup>91</sup> JK Mason and R McCall Smith, *Law and Medical Ethics* (Butterworths, 4<sup>th</sup> ed, 1994).

<sup>92</sup> Joan Busfield, *Rethinking the Sociology of Mental Health* (Blackwell Publisher, 2001).

<sup>93</sup> Ian Kerridge, Peter Saul and John McPhee, 'Moral Frameworks in Health Care: An Introduction to Ethics' in Ian Freckelton and Kerry Petersen (eds), *Controversies in Health Law* (Federation Press 1999) 276; Paul Chodoff, 'Involuntary Hospitalization of the Mentally Ill as a Moral Issue' (1984) 141 *American Journal of Psychiatry* 384.

feminist,<sup>95</sup> theoretical, personal/consumer and therapeutic jurisprudence.<sup>96</sup> There is also a variety of interest groups including a range of consumer groups and advocates with different agendas, carers, the legal profession, legal aid, community legal services, the medical profession, hospitals, health departments, official visitors, the police, tribunals, courts and governments. Each may well have different perspectives and views. There is also the real potential for turf wars between medical and legal models.

Some medical practitioners and elements of organised psychiatry may complain and react against what they see as the over legalisation of civil commitment with too much focus on legal criteria and procedural safeguards which may lead to patients 'dying with their rights on'.<sup>97</sup> On the other hand, lawyers with a particular concern for protection of the civil rights of patients, may be skeptical of allowing the medical profession to have too much power in relation to civil commitment or to overemphasise the need for preserving the therapeutic alliance between patients and doctors.<sup>98</sup>

A third reason for a national public inquiry is the need for a very broad, comparative and interdisciplinary approach. The inquiry would have to take such an approach if it were to consider the range of issues, information and reform options, conduct the necessary research and consultations, and devise a model response. This would best be achieved by a properly funded national inquiry.

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<sup>94</sup> Martin Forst, *Civil Commitment and Social Control* (Lexington Books, 1978); Ronald D Laing, *The Divided Self: An Existential Study in Sanity and Madness* (Penguin, 1960); Ronald D Laing, *Self and Others* (Routledge, 1961); Ronald D Laing and Aaron Esterson, *Sanity, Madness and the Family* (Penguin, 1964).

<sup>95</sup> Katherine Bartlett and Rosanne Kennedy (eds), *Feminist Legal Theory: Critical Readings in Law and Gender* (Westview Press, 1991).

<sup>96</sup> See, eg, Michael L Perlin, 'Preface' in Ian Freckleton and Kate Diesfeld (eds), *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment*, (Ashgate, 2003) xxxiii; Michael L Perlin, *Mental Disability Law: Civil and Criminal* (Lexis Law Publication, 2<sup>nd</sup> ed, 1989) Ch 1; David Wexler and Bruce Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996).

<sup>97</sup> Paul S Appelbaum, *Almost a Revolution: Mental Health Law and the Limits of Change* (Oxford University Press, 1994); Darold Treffert, 'Dying with their Rights On' (1973) 130 *American Journal of Psychiatry* 1041, 1042.

<sup>98</sup> *Ibid.*

Civil commitment is an area particularly suitable for comparative analysis because it is used in the majority of countries and it involves issues that are common to most countries.<sup>99</sup>

The fourth reason for a broad based national, inquiry is the multitude of complex issues and options for reform. The main questions that the review needs to answer are the following:

- When, if at all, is the civil commitment of mentally ill people justified?
- What should be the objectives of civil commitment laws?
- What principles and standards should be used to form the foundation of civil commitment laws?
- what are the problems with the current legal responses including legislation, review of decision-making by tribunals and courts, and the litigation system associated with civil commitment in particular, by applying the identified principles and standards and assessing to what extent the laws achieve the desired objectives?
- How can these legal responses to civil commitment be improved taking into account domestic and international legislation and developments so that the new law and policy optimally meet the standards of assessment?
- What should the role be of specialist mental health review tribunals including their rationale, their organisation, membership<sup>100</sup> and decision making processes?<sup>101</sup>
- What should be the general roles of representatives in civil commitment process,<sup>102</sup> particularly lawyers and should deal,

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<sup>99</sup> Perlin, above n 96; Paul S Appelbaum, 'Almost a Revolution: An International Perspective on the Law of Involuntary Commitment' (1997) 25 *Journal of the American Academy of Psychiatry and Law* 135; Constantijn Kelk and Johannes Legemaate, 'Legal Protection on Psychiatry: A Comparative Perspective' (Netherlands Association for Comparative Law, 1990).

<sup>100</sup> Phillip A Swain, 'Admitted and Detained - Community Members and Mental Health Review Boards' (2000) 7 *Psychiatry, Psychology and Law* 79.

<sup>101</sup> J Mulvaney, 'The Review of the Compulsory Detention of the Mentally Ill: Who Should Decide?' (1993) 28(3) *Australian Journal of Social Issues* 211; A Eldergill, *Mental Health Review Tribunals: Law and Practice* (Sweet and Maxwell, 1997); Ian Freckelton, 'Decision-Making about Involuntary Psychiatric Treatment: An Analysis of the Principles Behind Victorian Practice' (1998) 5(2) *Psychiatry, Psychology and Law* 249; J Higgenbottam et al, 'Variables Affecting the Decision-Making of a Review Panel' (1985) 30 *Canadian Journal of Psychiatry* 577.

<sup>102</sup> Bruce Winick, 'Therapeutic Jurisprudence and the Role of Counsel in Litigation' (2000) 37 *California Western Law Review* 105; Bruce Winick, 'The Civil Commitment

for example, with issues as to taking instructions, acting on them and to what extent the role should be adversarial or otherwise.

- what should be the interaction with criminal laws, guardianship laws and also forensic mental health laws?<sup>103</sup>

Each of the above is complex and contains many sub-issues.

The final and perhaps most important reason for such an approach is that a review of civil commitment law, as a major piece of law reform, requires a broad and inclusive consultation process. This is borne out by the experience of various law reform bodies. Justice Kirby has noted the great value of broad consultation for successful law reform.<sup>104</sup> It is important because it improves the democratic process, enhances the public's perceptions of law reform, gives the report and process legitimacy, and provides practical benefits of learning how the law operates thus producing a better report.<sup>105</sup>

## V THE MOST APPROPRIATE INSTITUTIONAL RESPONSE

In the writer's view the most appropriate approach to the review of commitment laws would be for the following process to occur. The Standing Council on Law and Justice (SCLJ), which has replaced the Standing Committee of Attorney's-General (SCAG),<sup>106</sup> should formally request the AHRC to investigate and report on the current Australian civil commitment laws for the mentally ill and the policy that underpins them and draft at least the major provisions of model laws. The AHRC should be specifically funded for this project. The Commission's report would then be considered by the SCLJ with a view to enacting national laws.

The SCLJ (and SCAG before it), is intended to achieve the Council of Australian Governments' (COAG) strategic themes by pursuing and monitoring priority issues of national significance which require

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Hearing: Applying the Law Therapeutically' in Lynda E Frost and Richard J Bonnie (eds), *The Evolution of Mental Health Law* (American Psychological Association, 2001).

<sup>103</sup> S Riordan et al, 'Diversion at the Point of Arrest: Mentally Disordered People and Contact with the Police' (2000) II *Journal of Forensic Psychiatry* 683.

<sup>104</sup> Michael Kirby, *Reform the Law: Essays on the Renewal of the Australian Legal System* (Oxford University Press, 1983) 65-67.

<sup>105</sup> Ibid.

<sup>106</sup> The SCLJ started operation from 17 September 2011 <<http://www.scag.com.au>>.

sustained, collaborative effort and addressing key areas of shared Commonwealth, State and Territory responsibility and funding. Civil commitment would appear to satisfy both of those criteria. Furthermore, a consideration of the successful transitions to national laws indicates that national laws for civil commitment for mental illness would not be out of place. Past projects have included national laws for defamation, evidence, foreign judgments, arbitration, apprehended violence orders, and the corporations power. The process can readily encompass diverse, complex and controversial topics.

The current projects also suggest that civil commitment is not out of place. The current projects include victims of crime, surrogacy, suppression orders, and the national legal profession. Again, this is a diverse set of topics each with a degree of complexity and variations between jurisdictions.

The Commonwealth can have powers referred to it under s 51(xxxvii) of the Constitution.<sup>107</sup> Another alternative is mirror legislation which occurs when state parliaments enact identical legislation to achieve consistency across the states.

The AHRC has functions that would encompass such an inquiry including conducting public inquiries into human rights issues and making recommendations for reform; and giving advice and making submissions to parliament and government on the development of laws, policies and programs consistent with human rights. The Commission not only has the investigatory experience and the law and policy functions to carry out the inquiry but also has the necessary human rights focus which must be an important part of the process.

The AHRC, formerly known as the Human Rights and Equal Opportunity Commission (HREOC), also has the institutional background and history as it produced the first, and so far only, major public report on the rights of the mentally ill in Australia, known widely as the Burdekin Report.<sup>108</sup> It also coproduced the *Not for Service* Report in association with the Mental Health Council of Australia and

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<sup>107</sup> Section 51 (xxxvii) provides: 'Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.'

<sup>108</sup> Mental Health Council of Australia, above n 49.

the Brain and Mind Research Institute.<sup>109</sup> As noted, the writer considers that broad and public, national consultation with government and other stakeholders may be crucial in the development of best practice national laws and approaches.

## VI CAN NATIONAL LAWS BE ACHIEVED?

While there is no doubt that achieving national laws would be a difficult task there are reasons for some optimism and for a concerted effort to be made for such an outcome. The first is that when the arguments for national laws are examined as above the case becomes strong and the suggested problems of time and cost and apparent lack of importance are minimised. Moreover, there are other reasons to feel greater optimism.

The broad similarity of the current Australian jurisdictions and the fact that each faces essentially the same issues and challenges means that this is a suitable topic for a national law with already at least a reasonable amount of consensus on the basic approach both in terms of legislative form and content, forms of review and major issues. Moreover, the topic is sufficiently important in terms of its drastic consequences to individuals and to the community to justify the effort to make national laws.

There seems no compelling justification politically, economically or culturally for the continuation of diverse State and Territory laws with doubts and concerns about so much of the content and practical operation of those laws. Australia has in world terms a relatively small population, a relatively successful multicultural society, a stable liberal democracy and modern communication and transport systems. Issues of State rights or concerns about the invasive or creeping influence of federal government do not seem relevant in this area. There appear to be no major sectional interests such as competing economic interests.

There is sufficient international and national discussion about approaches and laws to enable national laws to be drafted after an effective inquiry that included research and widespread consultation. The other necessary ingredient for arriving at national laws is that stakeholders, experts and interest groups and those in government and its bureaucracies should advocate the cause of national laws and desirably form a lobby group for that purpose.

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<sup>109</sup> Ibid.

## VII CONCLUSION

This paper has assessed the arguments for national laws and in the course of so doing examined the arguments against such a course of action. The fundamental argument is that there is no unified Australian system of civil commitment laws which therefore creates a situation for major differences in treatment and operation between jurisdictions. This is difficult to support when what is at stake are fundamental human rights, and access to treatment for those who are seriously ill and the protection of the community. The criteria and elements of a national best practice response need to be identified, developed and applied. The system will constitute the best overall balance between the rights of mentally ill people and the rights of the community in relation to civil commitment. The inquiry and the formulation of national laws should bring together all of the major elements to develop a model approach for Australia. It would be a comprehensive analysis that presents a vision for a much improved response and system.

The desired outcome is to develop an integrated legal response to civil commitment which covers all of the main elements of such a system, namely objectives, principles and standards, legislation, review processes and the role of legal institutions such as courts and tribunals, and the litigation system, training and education, research, coordination, supervision and investigation of complaints. This proposed system would remedy as much as possible the identified defects of the current Australian systems and meet the desired objectives and standards which have been discussed in this paper. When the issue is considered carefully and rationally there is no reason to believe that national laws are unrealistic.

It is possible that a national inquiry could be expanded to specifically make recommendations and draft laws about other elements of mental health law, such as the legal status of voluntary patients, CTOs, invasive treatment, guardianship and the forensic patient system. It is beyond the scope of this paper to canvass all of those issues. The terms and scope of the inquiry would depend upon the resources, timeframe and impetus for the inquiry.

The time is ripe for action.

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# THE 'DAY FINE' - IMPROVING EQUALITY BEFORE THE LAW IN AUSTRALIAN SENTENCING

BENEDICT BARTL\*

## ABSTRACT

*In sentencing offenders in Australia to a fine it has long been considered uncontroversial that the principle of equality before the law is upheld. This is because similar sanctions are imposed on offenders convicted of the same offence and the circumstances of the financially disadvantaged offender are taken into account in the imposition of a reduced fine. However, this long-held view fails to address the large number of offences for which a minimum fine is legislatively prescribed and where, in circumstances where judicial discretion is allowed, fines are not increased relative to the offender's wealth. In contrast, Germany and many other continental European countries have adopted an income-based fining system known as the 'day fine'. This is a fining system in which the economic burden of the fine is felt similarly by both the wealthy offender and the financially disadvantaged offender. With a particular emphasis on Germany, this article argues that the 'day fine' has the potential to reduce Australia's reliance on imprisonment, increase public confidence in sentencing and better meet the principle of equality before the law.*

## I INTRODUCTION

From time to time newspaper reports appear in Australian newspapers of exorbitant fines being sanctioned in European courts for what appear to be minor transgressions. Examples include a Finnish businessman ordered to pay a staggering €116,000 for speeding, a German footballer penalised €90,000 for insulting a policeman and an Englishman fined £1,200 for littering. While these sentences at first appear to be disproportionately harsh, they are in fact founded on recognition of the principle of equal treatment, that is, that the impact of the sentence should be similar despite the wealth or financial disadvantage of the offender.<sup>1</sup>

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<sup>1</sup> See Section II.



In Germany and many other continental European countries the principle that the fine should have a similar punitive bite on all offenders is applied in practice.<sup>2</sup> Alternatively, Australia and the majority of jurisdictions with a common law tradition have embraced a different system, in which judicial starting points or 'tariffs' of what an appropriate fine is, mean that there is little discretion to increase the amount of a fine on a wealthy offender. Additionally, many offences require the imposition of a minimum fine, for which no discretion exists to reduce the amount of the fine for financially disadvantaged offenders.<sup>3</sup> Paradoxically, despite the well-reported difference in fine amounts imposed, the principle of equal treatment is aspired to in both systems, with Australia adopting literally the mantra 'like penalty for like offence', whereas in Germany the mantra is 'like punitive bite of penalty for like offence'.

At first the European 'day fine' appears to encourage unequal treatment, as offenders committing similar offences may be sanctioned to significantly different fine amounts. However, the underlying justification is that fairness in the imposition of a fine is best achieved through the adoption of a two-step process. Firstly the gravity of the offence is assessed on the basis of the culpability of the offender to determine the number of day fine units, and then the value of each unit is dependent on the means of the offender to ensure that the economic burden is felt equally on offenders.<sup>4</sup> The ability of the day fine to both reflect the seriousness of the offence and to equalise the impact of the sentence has ensured that it remains the preferred sanction for a broad spectrum of criminal offences, some of which were formerly subject to a custodial sentence.<sup>5</sup> In Australia on the other hand, proposals for the introduction of the day fine continue to be rejected, despite criticism of the sentencing system's reliance on imprisonment and its failure to adequately consider the financial circumstances of the offender when imposing a fine.<sup>6</sup> With a particular emphasis on Germany, this article argues that the day fine system legitimises the credibility of the fine as a

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<sup>2</sup> Other European countries that have adopted forms of the 'day fine' system include Austria, Denmark, Finland, France, Hungary, Poland, Portugal, Spain, Sweden and Switzerland. See, eg, Gerhardt Grebing, *The Fine in Comparative Law: A Survey of 21 Countries* (Institute of Criminology, Occasional Papers No 9, 1982).

<sup>3</sup> For the purposes of this article the imposition of a minimum fine refers to a statutory provision requiring a court to impose a fine of a minimum amount. Driver-related offences such as speeding or breathalyser offences are examples.

<sup>4</sup> See Section V.

<sup>5</sup> See Section VII.

<sup>6</sup> See, eg, Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 70 (2005) 110 [7.15].

sentencing sanction, ensuring broad application and concomitantly reducing dependence on custodial sentences.

This article begins with an overview of the principle of equality before the law including the right to non-discrimination and equal treatment. A brief outline is provided of how the criminal justice system sanctions a disproportionate number of socially and financially disadvantaged offenders and it is argued that the sanctions imposed against them often fail to meet the principles of non-discrimination and equal treatment. A critical discussion of Australia's imprisonment system follows, in which it is argued that many of the assertions underpinning legislative and judicial support for custodial sentences are either false or can be achieved through less intrusive sanctions. The article then turns to a comparison of the Australian and German fining systems, concluding that the establishment of the day fine system in Australia's sentencing regime would lead to greater adherence to both non-discrimination and equal treatment, and thereby better meet the important principle of equality before the law.

## II EQUALITY BEFORE THE LAW: NON-DISCRIMINATION AND EQUAL TREATMENT

Equality before the law is one of the fundamental rights of the international community, recognised in human rights instruments internationally, nationally and in Australia at a state level.<sup>7</sup> Equality before the law seeks to safeguard two principles: non-discrimination and equal treatment.<sup>8</sup> The principle of non-discrimination requires that people are not discriminated against on grounds including race, gender, religion, sexual orientation or wealth.<sup>9</sup> Equal treatment on the other hand recognises that difference exists, but seeks to ensure that substantive equality is achieved.<sup>10</sup> In short, the principle of equality

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<sup>7</sup> See, eg, *International Covenant on Civil and Political Rights*, opened for signature 19<sup>th</sup> December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2, 26; *Universal Declaration of Human Rights*, opened for signature 10 December 1948, 217 A (III) (entered into force 10 December 1948) arts 2, 7; *American Convention on Human Rights*, opened for signature 21 November 1969, 1144 UNTS 143 (entered into force 18 July 1978) art 1; *African Charter on Human and People's Rights*, opened for signature 27 June 1981, 21 ILM 58 (1982) (entered into force 21 October 1986) art 2, *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] art 3; *United States Constitution* amend XIV; *Human Rights Act 1998* (UK) c 42 sch 1 pt 1 art 14; *Bill of Rights Act 1990* (NZ) s 19; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(3); *Human Rights Act 2004* (ACT) s 8(3).

<sup>8</sup> Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 2010) 99.

<sup>9</sup> *Ibid.*

<sup>10</sup> See, eg, *Purois v New South Wales (Department of Education and Training)* (2003) 217 CLR 92, 154-155 [202] in which Gummow, Hayne and Heydon JJ noted: "Substantive equality"

seeks to prevent like situations being treated differently, and different situations being treated alike.

In Australia, the principle of equality before the law is assured through a number of measures including the requirement that judicial officers take an oath to administer the law without fear, favour, affection or ill-will and the availability of legal assistance through Legal Aid Commissions and Community Legal Centres. In sentencing, the principle is thought to be achieved through the long-held common-law principle that in imposing a fine on financially disadvantaged offenders the amount will be reduced. In such cases, non-discrimination is assured through the courts sanctioning of both the wealthy and the financially disadvantaged offender with a fine, thereby upholding the principle that offenders convicted of the same offence will be sanctioned similarly where the degree of culpability is comparable.<sup>11</sup> Equal treatment is also recognised through the sanctioning of a socially disadvantaged offender with a reduced fine. The fine amount is different but at the same time equal in terms of impact.

Unfortunately, for a number of reasons, the principle of equality in Australia's criminal justice system has been compromised. Firstly, financially disadvantaged offenders are more likely than their more wealthy counterparts to be sanctioned in the criminal courts.<sup>12</sup> A good example is social security fraud, which is more likely to be prosecuted than tax fraud, although the economic impact of tax fraud is significantly higher.<sup>13</sup> Additionally, crimes committed

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directs attention to equality of outcome or to the reduction or elimination of barriers to participation in certain activities. It begins from the premise that "in order to treat some persons equally, we must treat them differently".

<sup>11</sup> See, eg, *Lowe v Plaister* (1986) 4 MVR 41. In this Tasmanian case Wright J observed: 'It is a consistent tenet of penal philosophy that an offender should not be permitted to buy his way out of a distasteful sentencing option': at 42. See also *Hollett v The Queen* (1985) 14 A Crim R 467, 469-470 (Wallace J), citing *R v Cobby* [1983] WACCA 19 (19 April 1983). His Honour acknowledged that the fine should be considered an alternative to imprisonment, but should 'avoid giving the impression that a rich person can purchase absolution from a crime for cash'.

<sup>12</sup> See, eg, Christine Coumarelos, Zhigang Wei and Albert Zhou, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas* (Law and Justice Foundation of NSW, 2006). The authors argue that there is an association between being socially disadvantaged and vulnerability to legal problems. See also Beth Midgely, 'Achieving Just Outcomes for Homeless People through the Court Process' (2005) 15(2) *Journal of Judicial Administration* 82. Midgely argues that the homeless are disproportionately represented in the criminal justice system.

<sup>13</sup> See, eg, *Annual Report 2010/11* (Report, Commonwealth Director of Public Prosecutions, September 2011) 142-144 [Table 15]. This report shows that 60.27 percent of prosecuted offenders had been referred from Centrelink whilst only 2.17 percent had been referred from the Australian Taxation Office. See also *Annual Fraud Indicator* (Report, National

disproportionately by the wealthy, such as white-collar crime, are far more frequently dealt with outside the formal criminal justice system, such as a statutory agency 'policing' and where prosecution is considered a last resort.<sup>14</sup>

In fining offenders, the disproportionate number of financially disadvantaged offenders means that the tariff adopted by the courts will usually be at the lower end ensuring that the fine imposed on wealthier offenders cannot meet the principle of equal treatment. It should also be acknowledged that even a reduced tariff does not ensure that the effect of the fine will not be onerous for the financially disadvantaged offender. As well, the widely accepted judicial view holds that unless legislatively mandated, the fine will not be increased because of the offender's wealth,<sup>15</sup> meaning that the fine continues to be imposed disproportionately harshly on financially disadvantaged offenders.

Further, despite the common-law assurance of a fine reduction for financially disadvantaged offenders, there is no guarantee that consideration of the financial circumstances of the offender actually occurs in practice. For example, a study carried out in 2004 in the Brisbane Magistrates Court established that whilst more than half (56 percent) of those convicted of public nuisance offences were financially disadvantaged, the fine imposed was *higher* than that imposed on offenders convicted of the same offence but not assessed as financially disadvantaged.<sup>16</sup> The failure to consider the financial circumstances of the offender is not limited to Queensland with a survey of Magistrate Courts carried out in New South Wales during 2007 reporting that 76 percent of Magistrates would only 'sometimes' impose an alternative sentence in circumstances where the offender could not afford to pay the fine.<sup>17</sup>

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Fraud Authority, January 2011) 15. This report shows that in the United Kingdom in 2008 tax fraud amounted to more than £15 Billion in lost revenue whereas social security fraud amounted to a little more than £1 Billion.

<sup>14</sup> Ashworth, above n 8, 253.

<sup>15</sup> Ibid 329; Kate Warner et al, *Sentencing in Tasmania* (Federation Press, 2002) 128.

<sup>16</sup> Tamara Walsh, 'Won't Pay or Can't Pay? Exploring Fines as a Sentencing Alternative for Public Nuisance Types' (2005) 17 *Current Issues in Criminal Justice* 217. This study also found that the court granted only one extra week as grace for re-payment of the fine ensuring that the financially disadvantaged were required to pay more per month than those assessed as not financially disadvantaged.

<sup>17</sup> Katherine McFarlane and Patrizia Poletti, 'Judicial Perceptions of fines as a Sentencing Option: A Survey of NSW Magistrates' (Monograph 1, NSW Sentencing Council, August 2007) 14-15. This high figure should be accepted with some caution however due to the fact that for some offences no sanction other than a fine is available.

Additionally, the principle of non-discrimination, with its emphasis on ensuring that financially disadvantaged offenders are not treated less favourably, is breached when wealthier offenders, who have paid restitution, receive a reduced sentence, when compared with the financially disadvantaged offender, who is unable to make such payment.<sup>18</sup> Further, the courts may discriminate by imposing a more severe sentence on the financially disadvantaged offender. For example, Ashworth noted that the financially destitute are more likely to be sanctioned with the more severe sentence of community service, when they should in fact receive either a conditional or absolute discharge.<sup>19</sup>

With the evidence demonstrating that the criminal courts continue to sanction a disproportionate number of socially and financially disadvantaged offenders and that the sanctions imposed are often harsher than those imposed on their wealthy counterparts, it is no surprise that Australia's prisons are filled with a disproportionate number of socially and financially disadvantaged offenders.<sup>20</sup> An analysis of Australia's increasing reliance on custodial sentences and its underlying rationales follows.

### III THE EFFECTIVENESS OF IMPRISONMENT IN REDUCING CRIME

In Australia the sentencing system increasingly relies on imprisonment, with the imprisonment rate having almost doubled in little more than a quarter of a century from 89.8 per 100,000 persons in 1982 to 168 per 100,000 persons in July 2012.<sup>21</sup> As well as the increased rate of imprisonment, there has also been an increase in the numbers of prisoners serving longer sentences with government statistics pointing out that between 1999-2009 the percentage of offenders sentenced to between 1-5 years imprisonment increased from 35.8 percent to 43.4 percent.<sup>22</sup> These statistics show that in Australia custodial sentences are imposed more often and for longer periods, pointing to a harsher sentencing system. However, while Australia and other common law

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<sup>18</sup> Ashworth, above n 8, 251-254.

<sup>19</sup> Ibid 252.

<sup>20</sup> Mark Halsey, 'Imprisonment and Prisoner Re-Entry in Australia' (2010) 34(4) *Dialectical Anthropology* 545, 548 (footnote 3).

<sup>21</sup> Australian Bureau of Statistics, *Prisoners in Australia 2012* (2012) 4517.0 ABS Canberra; Ibid, 545-546. In comparison, Germany had an imprisonment rate of 89.3 and the United Kingdom 152.3 per 100,000 persons in 2009: Council of Europe, *Annual Penal Statistics* (Strasbourg, 22 March 2011) 26.

<sup>22</sup> Halsey, above n 20, 547.

countries, such as the United Kingdom and the United States of America, continue to rely heavily on imprisonment to achieve a range of sentencing aims, legislatures in Germany and other European countries have implemented a sentencing regime where the same aims are met by the imposition of a fine. A critical discussion of Australia's reliance on the imprisonment system is therefore necessary, as an alternative exists.

There are four often-repeated assumptions for the belief that imprisonment will lead to a reduction in crime.<sup>23</sup> Firstly, that the threat of imprisonment acts as a form of general deterrence, in which offenders are discouraged from offending through an assessment of the likely consequences. Secondly, that imprisoning more offenders will lead to a reduction in crime. Thirdly, that imprisonment achieves the aims of specific deterrence in which identified offenders will be deterred from committing crimes in the future. Finally, it is sometimes suggested that imprisonment can rehabilitate offenders. All of these assumptions are reviewed and conclusions drawn.

With regards to general deterrence, research has shown that an increased probability of being punished is a more effective deterrent than the severity of the punishment.<sup>24</sup> It is the increased likelihood of detection that leads to deterrence rather than the length or harshness of the sentence. A good example of the failings of harsher sanctions is outlined in Walker's book *Why Punish?* in which he reviews the murder rate in two jurisdictions with death penalty provisions. Walker points out that in the United States, the criminological evidence is unable to point to any difference in the murder rate between those states that have abolished and those that retain the death penalty. A similar finding is also observed in New Zealand where despite the abolition, re-introduction and re-abolition of the death penalty between 1924-1969 no noticeable change in the murder rate could be demonstrated.<sup>25</sup> Although some economic modeling studies have been able to demonstrate limited support for the deterrence effects of the death penalty,<sup>26</sup> there remains no compelling evidence establishing the greater

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<sup>23</sup> Don Weatherburn, 'The Effect of Prison on Adult Re-Offending', *Crime and Justice Bulletin No 143* (NSW Bureau of Crime Statistics and Research, 2010) 1.

<sup>24</sup> See, eg, Andrew von Hirsch et al, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Hart Publishing, 1999).

<sup>25</sup> Nigel Walker, *Why Punish?* (Oxford University Press, 1991) 15-16.

<sup>26</sup> Isaac Ehrlich, 'The Deterrent Effect of Capital Punishment: A Question of Life and Death' (1975) 65(3) *American Economic Review* 397; Isaac Ehrlich, 'Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence' (1977) 85(4) *Journal of Political Economy* 741.

deterrent effects of the death penalty compared with life imprisonment.<sup>27</sup>

Another example used by Walker to highlight the failure of harsher sentences on general deterrence is an English study that investigated the rate of robbery both before and after an offender was sentenced to twenty years imprisonment for a particularly brutal robbery. The harsh sentence attracted significant media interest and it was expected that a corresponding decrease in the rates of robbery would follow. However, the study found no evidence of a decrease in robberies, despite the extraordinary sentence imposed.<sup>28</sup>

More recently, following an extensive literature review of deterrence studies, Doob and Webster concluded that they 'could find no conclusive evidence that supports the hypothesis that harsher sentences reduce crime through the mechanism of general deterrence'.<sup>29</sup> This led the authors to conclude that 'we propose acceptance of the null hypothesis that variations within the limits that are plausible in Western countries will not make a difference'.<sup>30</sup> In other words sentence severity, at least when it remains within reasonable boundaries, plays no role in effecting the levels of crime in society.

The difficulty of general deterrence as a sentencing aim is three-fold. Firstly, the theory assumes that an offender will rationally consider the consequences of his or her actions and will be deterred from committing the crime.<sup>31</sup> In actual fact, most criminal offences are committed on the spur of the moment and under the influence of alcohol and other drugs.<sup>32</sup> Secondly, studies indicate that people generally underestimate the severity of sanctions imposed, and hence offenders are generally not fully aware of the repercussions.<sup>33</sup> Finally, it

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<sup>27</sup> For an analysis of the studies see Janet Chan and Deborah Oxley, 'The Deterrent Effect of Capital Punishment: A Review of the Research Evidence' (Crime and Justice Bulletin No 84, NSW Bureau of Crime Statistics and Research, 2004).

<sup>28</sup> Walker, above n 25, 20.

<sup>29</sup> Anthony Doob and Cheryl Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice* 143, 187.

<sup>30</sup> *Ibid* 191.

<sup>31</sup> Ashworth, above n 8, 79.

<sup>32</sup> See, eg, Australian Institute of Health and Welfare, 'Statistics on Drug Use in Australia 2002' (Drug Statistics Series No 12) 79. In this self-reporting study of male prisoners in Australia 53.1 percent of all violent offenders, 65.7 percent of all property offenders and 62.5 percent of all other offenders were under the influence of alcohol and/or other drugs at the time of the offence.

<sup>33</sup> Paul Robinson and John Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation?' (2004) 24(2) *Oxford Journal of Legal Studies* 173, 175-177; von Hirsch et al, above n 24.

is widely acknowledged that for many reasons most crimes do not result in arrest and conviction, which leads to the optimistic view of many offenders that they will not be caught.<sup>34</sup>

As well as the practical limitations of sentencing an offender to imprisonment for the purposes of achieving general deterrence, critics also point to the inherent unfairness of the sentence, as offenders are essentially made an example of in order to assure societal obedience to the law.<sup>35</sup> As an Australian offender observed about the judicial treatment meted out to him:

In my case, the sentencing judge specifically stated that a relatively severe sentence was required to achieve the effect of general deterrence that is, modifying future behavior of other practitioners in the tax industry... I have great difficulty with the concept of making someone the 'scapegoat' with the objective of modifying the future behavior of others. The offender should be charged with the offence they committed without reference to the sentence's potential deterrent effect on others...<sup>36</sup>

The second often recited assumption is that a custodial sentence for those offenders likely to re-offend can reduce crime. Collective incapacitation refers to the general lengthening of custodial sentences, as well as the lengthening of custodial sentences for those convicted of particular offences and is often characterised by the use of mandatory or mandatory minimum terms of imprisonment.<sup>37</sup> Specific incapacitation on the other hand targets offenders, who are likely to re-offend at a frequency or seriousness that warrants a longer custodial sentence.<sup>38</sup> However, according to criminological research neither collective nor specific incapacitation has been successful in efforts to reduce crime. Research from around the world suggests that released prisoners in comparison to offenders sanctioned to other sentences are more likely to once again be sentenced before the courts.<sup>39</sup>

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<sup>34</sup> Ashworth, above n 8, 83.

<sup>35</sup> Critics include most famously Immanuel Kant, who insisted 'Always recognize that human individuals are ends, and do not use them as means to your end': Immanuel Kant, *Metaphysik der Sitten* [Metaphysics of Morals] (Meiner, 1945) 197; See also John Rawls, who wrote that justice can only occur and be seen to occur when every offender is treated as an individual: John Rawls, *A Theory of Justice* (Clarendon Press, 1972) 3-4.

<sup>36</sup> Australian Law Reform Commission, above n 6, 49-50 [4.10].

<sup>37</sup> Bernadette McSherry, 'Indefinite and Preventative Detention Legislation: From Caution to an Open Door' (2005) 29 *Criminal Law Journal* 94.

<sup>38</sup> For an analysis of collective and specific incapacitation in Australia see the McSherry article, cited in n 37.

<sup>39</sup> William Spelman, 'The Limited Importance of Prison Expansion' in Alfred Blumstein and Joel Wallman (eds), *The Crime Drop in America* (Cambridge University Press, 2000) 97,



Imprisonment also proves to be ineffectual when the offender is easily replaced, such as for drug trafficking and burglary. In such circumstances imprisoning the offender may well increase crime rates.<sup>40</sup> As well, collective incapacitation is often criticised on cost grounds. For example, a study carried out in Australia estimated that a 10 percent reduction in crime could only take place by doubling the prison population.<sup>41</sup> The folly of adopting such a radical policy is exemplified in the United States, where despite the prison population having skyrocketed from 110 inmates per 100,000 persons in 1973 to 680 per 100,000 at the end of the twentieth century,<sup>42</sup> a recent analysis concluded that even if half of all prisoners convicted of non-violent offences were released back into the community not only would there be a cost saving of \$16,900,000,000 *per year* but there also would be no increase in the crime rate.<sup>43</sup>

Some reports suggest that the effect of imprisonment is most effective when imposed on particularly dangerous offenders. However, serious crimes are relatively rare events ensuring that their accurate prediction is difficult. This acknowledgement has been borne out in numerous criminological studies with predictions of the dangerousness of offenders having a success rate of between one-third and 50 percent.<sup>44</sup> Expressed in another way, up to two-thirds of offenders labeled dangerous will not re-offend. Selective incapacitation is also criticised for conflicting with the principle of finality, that an offender should be released after having served their sentence<sup>45</sup> and the principle of legality, which demands that 'persons become criminals because of their acts, not simply because of who or what they are'.<sup>46</sup>

The third assumption is that an offender will be deterred from committing crimes in the future when they are sentenced to

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124; Jörg-Martin Jehle et al, *Legalbewährung nach Strafrechtlichen Sanktionen: Eine bundesweite Rückfalluntersuchung 2004 bis 2007* [Probation following criminal sanctions – a nationwide study of recidivism between 2004 - 2007] (Bundesministerium der Justiz, 2010) [Federal Ministry of Justice, 2010]; Halsey, above n 20.

<sup>40</sup> Spelman, above n 39, 116-117; Janet Chan, 'The Limits of Incapacitation As a Crime Control Strategy', *Crime and Justice Bulletin No 25* (NSW Bureau of Crime Statistics and Research, 1995).

<sup>41</sup> Chan, above n 40.

<sup>42</sup> David Garland, 'Introduction: The Meaning of Mass Imprisonment' (2001) 3 *Punishment & Society* 5, 5.

<sup>43</sup> John Schmitt, Kris Warner and Sarika Gupta, 'The High Budgetary Cost of Incarceration' (2010) *Center for Economic and Policy Research* 1.

<sup>44</sup> Ashworth, above n 8, 235-236.

<sup>45</sup> McSherry, above n 37, 106.

<sup>46</sup> Francis Allen, 'The Habits of Legality: Criminal Justice and the Rule of Law' cited in McSherry, above n 37, 107.

imprisonment instead of other available sentences such as a suspended sentence or a fine. Alternatively, that the offender will be deterred from further crime through the imposition of a more severe custodial sentence. Unfortunately, a large number of studies have proved the opposite, namely that the rate of re-offending by otherwise similar offenders will often be higher for the offender sentenced to imprisonment.<sup>47</sup> For example, researchers in the United States examined similar drug offenders (similar in terms of sex, age, race/ethnic background, criminal record and employment status), who were sentenced to either a custodial sentence or a suspended sentence. The results demonstrated

that offenders who were sentenced to imprisonment were significantly more likely than offenders placed on probation to be arrested and charged with a new offence; they were also significantly more likely to be convicted of a new offence and sentenced to jail or prison for a new offence.<sup>48</sup>

Comparable results were found in a study recently published in Australia, in which almost 200 burglary offenders and 800 non-aggravated assault offenders were matched, with one member of the pair having been sentenced to imprisonment and the other to a non-custodial sentence.<sup>49</sup> The study results demonstrated that particularly offenders, who were sentenced to terms of imprisonment following non-aggravated assault, were more likely to re-offend. The study warned that

the consistency of the current findings with overseas evidence on the effects of prison on re-offending suggests that it would be unwise to imprison offenders when the only reason for doing so is a belief in the specific deterrent effects of prison.<sup>50</sup>

The final assumption about imprisonment is that an offender may be 'cured' through his or her time spent in prison. However, as has already been noted, offenders sentenced to terms of imprisonment generally have an increased risk of re-offending. An excellent example is

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<sup>47</sup> Alec Samuels, 'The Fine: The Principles' [1970] *Criminal Law Review* 201, 206-207; Ashworth, above n 8, 289.

<sup>48</sup> Cassia Spohn and David Holleran, 'The Effect of Imprisonment on Recidivism Rates for Felony Offenders: A Focus on Drug Offenders' (2002) 40(2) *Criminology* 329, 342.

<sup>49</sup> The pairs were matched on the basis of the offence, the number of offences, as well as prior prison and court experience. Typical criminological differences such as age, sex, and race/ethnic background as well as age of first sanction, and whether legal representation was available were also taken into account: Weatherburn, above n 23, 10.

<sup>50</sup> *Ibid.*

demonstrated in a German study in which the files of all persons sanctioned for criminal offences during 2004, as well as all prisoners released during 2004, were re-examined three years later. The results showed that those sentenced to a fine had a re-offending rate of 28 percent compared to offenders, who received suspended sentences with a re-offending rate of 41 percent and those sentenced to imprisonment with a re-offending rate of 52 percent.<sup>51</sup> Similar results in other western democratic countries<sup>52</sup> have led to the widely accepted view that imprisonment does not rehabilitate and 'even if imprisonment does not change an offender for the worse, it may affect society's response to him, making it more difficult for him to find stable employment, secure suitable housing or reconcile with his family'.<sup>53</sup>

Further grounds for reducing the reliance on imprisonment is the unified belief of the international community that imprisonment should be a sentence of last resort<sup>54</sup> and the cost. Official statistics from Australia calculated prisoner costs in 2010/2011 at \$289 per day or \$105,485 per prisoner per year. When it is noted that in the same year there were on average 28,711 prisoners per day, the Australian prison system cost a staggering \$3.28 billion.<sup>55</sup>

When it is recognised that imprisonment is by far the most expensive sentencing option, has limited effectiveness in reducing crime and has proved to be 'an expensive way of making bad people worse',<sup>56</sup> alternatives need to be found. This acknowledgement is confirmed in the warning that increasingly harsh sanctions with their incapacity to reduce crime will lead to demands for harsher sentences. As the Australian Law Reform Commission cautioned more than twenty years ago:

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<sup>51</sup> Jehle et al, above n 39.

<sup>52</sup> In Australia, for example, it has been noted that over half (55 percent) of prisoners in custody at 30 June 2012 had served a sentence in an adult prison prior to the current episode. Of those prisoners sentenced in the last twelve months, 60 percent had served time previously in a prison: Australian Bureau of Statistics, *Prisoners in Australia 2012* (2012) 4517.0 ABS Canberra.

<sup>53</sup> Spohn and Holleran, above n 48, 351; See also Eileen Baldry et al, 'Ex-Prisoners, Homelessness and the State in Australia' (2006) 39(1) *Australian and New Zealand Journal of Criminology* 20; Halsey, above n 20, 551.

<sup>54</sup> See, eg, General Assembly of the United Nations, *Standard Minimum Rules for Non-Custodial Measures*, UN Doc 45/110 (14 December 1990).

<sup>55</sup> Steering Committee for the Review of Government Service Provision, *Report on Government Services 2012* (2012) [8.5], [8.26].

<sup>56</sup> Great Britain Home Office, *White Paper: Crime Justice and Protecting the Public* (1990) [2.7] cited in Ashworth, above n 8, 289.

Imprisonment should therefore be a sanction applied only in cases of the most serious crimes. The value of imprisonment as a punishment option will be enhanced by its being used more sparingly. If imprisonment continues to be used as frequently as it presently is for a broad range of crimes, a community perception will tend to arise that serious cases of serious offences are not being punished appropriately even by the imposition of a custodial order. Pressure will arise for unacceptable punishments to be re-introduced. An overuse of imprisonment will reinforce this pressure.<sup>57</sup>

The broader use of the fine provides one such option for reducing our reliance on imprisonment, with its ability to meet the sentencing aims of retribution, denunciation, deterrence, rehabilitation and restitution, while at the same time limiting the harmful effects of imprisonment. In the words of Lord Lane of the English Court of Appeal 'if people can be dealt with properly by means of non-custodial sentences, and fines are possibly the best of all the non-custodial sentences, then that should be done'.<sup>58</sup> This article now turns to examining the Australian fining system with its emphasis on statutorily required minimum fines and tariff fines, before then turning to the German day fine system.

#### IV THE FINE IN AUSTRALIA

In Australia the fine is available as a sentencing option for both summary and indictable offences. In general, the fine is imposed for summary offences, that is, offences able to be dealt with summarily, for example minor traffic offences. For such offences, the fine often requires the imposition of a statutorily required minimum amount.<sup>59</sup> Although the fine is available as a sentencing option for indictable offences,<sup>60</sup> the generally accepted judicial and legislative view is that the fine remains at the lower end of the sentencing spectrum.<sup>61</sup> It is therefore not

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<sup>57</sup> Australian Law Reform Commission, *Sentencing*, Report No 44 (1988) 26-27 [52].

<sup>58</sup> *Olliver v Olliver* (1989) 11 Cr App R (S) 10 cited in Ashworth, above n 8, 250.

<sup>59</sup> Warner et al, above n 15, 128.

<sup>60</sup> The potential of the fine as a criminal sanction is clearly demonstrated at a Federal level, where s 4B of the *Crimes Act 1914* (Cth) allows for the conversion of imprisonment into a fine. For similar provisions at a State level see the *Crime (Sentencing Procedure) Act 1999* (NSW) s 15; *Criminal Law (Sentencing) Act 1988* (SA) s 18; the *Criminal Code 1924* (Tas) s 389(3). See also the Western Australian decision of *James v R* (1985) 14 A Crim R 364 in which the Court of Appeal held that the fine was a true alternative to a term of imprisonment and should not only be considered for those cases in which no term of imprisonment can be imposed.

<sup>61</sup> Michael Tonry and Mary Lynch, 'Intermediate Sanctions' (1996) 20 *Crime and Justice* 99, 128; Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 2006) 18; *Sentencing Act 1995* (WA) s 39; the *Sentencing Act 1991* (Vic) s 5(7); New South Wales

surprising that in Magistrates Courts, where summary offences are dealt with, the fine is the most frequently imposed sentence, whereas in the Supreme Court it is seldom imposed.<sup>62</sup>

Where the court is of the view that the fine is the most appropriate sanction, the court will normally adopt a starting point or 'tariff', which depends on the seriousness of the offence; mitigating and aggravating circumstances and prior criminal convictions, which can either increase or decrease the fine amount.<sup>63</sup> For some offences the minimum amount that must be imposed is determined by legislation.<sup>64</sup> In most jurisdictions the maximum amount that may be imposed is noted, although in some jurisdictions the maximum is expressed in units rather than a dollar amount.<sup>65</sup>

In circumstances in which the fine will be imposed, all Australian jurisdictions require that the court consider the financial circumstances of the offender.<sup>66</sup> However, as a general rule, there is no duty on the offender to disclose this information to the court. Section 6 of the *Fines Act 1996* (NSW), for example, provides that the court consider 'such information regarding the means of the accused as is reasonably and

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Sentencing Council, *Interim Report: The Effectiveness of Fines as a Sentencing Option: Court Imposed Fines and Penalty Options* (2007) 9-10.

<sup>62</sup> Statistics from the Magistrates Court in Victoria show that in 2008-2009 the fine was imposed on 52 percent of offenders, while imprisonment was imposed on 4 percent of offenders. In the Supreme Court the imposition of sanctions were reversed with 50 percent of offenders sentenced to imprisonment and 4 percent sentenced to a fine: Statistics are available on the Sentencing Advisory Council of Victoria website: <[www.sentencingcouncil.vic.gov.au](http://www.sentencingcouncil.vic.gov.au)>; Similar statistics are found in New South Wales with 42.5 percent of offenders sentenced to a fine in the Local Court during 2010 and 7.1 percent sentenced to imprisonment. In the higher courts (defined as District and Supreme Courts) it is noted that the 'most frequently imposed principal penalty' was imprisonment (70 percent), the suspended sentence (17.6 percent) and the Bond (7.4 percent): New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2010* (Department of Attorney General and Justice).

<sup>63</sup> Andrew Ashworth, 'Sentencing' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (Oxford University Press, 2007) 990, 1006-1007; Sally Hillsman and Judith Greene, 'Tailoring Criminal Fines to the Financial Means of the Offender' (1988) 72(1) *Judicature* 38, 39.

<sup>64</sup> Drink driving laws and other traffic offences are good examples.

<sup>65</sup> The worth of the unit depends on the jurisdiction: \$110 at a federal level (*Crimes Act 1914* (Cth) s 4AA); \$100 in Victoria (the *Sentencing Act 1991* (Vic) s 110) and; \$100 in Queensland (*Penalty and Sentences Act 1992* (Qld) s 5).

<sup>66</sup> *Crimes Act 1914* (Cth) s 16C; *Fines Act 1996* (NSW) s 6; *Sentencing Act 1991* (Vic) s 50(1); *Penalties and Sentences Act 1992* (Qld) s 48; *Sentencing Act 1995* (WA) s 53(1); *Criminal Law (Sentencing) Act 1988* (SA) s 13(1); *Sentencing Act 1995* (NT) s 17; *Crimes (Sentencing) Act 2005* (ACT) s 14(3). In Tasmania the case of *Broughton v Lowe* [1979] Tas R (NC 7) Serial No 7/1979 is a precedent for the requirement that the financial circumstances of the offender be considered.

practicably available to the court for consideration'. In general, the widely accepted judicial view is that although the fine can be reduced because of financial disadvantage, unless legislation provides otherwise, the fine cannot be increased because of the offender's wealth.<sup>67</sup>

Different systems of collecting the fine have been adopted by Australian jurisdictions, however, a common problem is enforcement in the case of offenders either not paying or unable to pay the fine.<sup>68</sup> Non-payment of the fine may lead to offenders having to reappear in court leading to a congested court system, increased administrative costs and in some instances imprisonment. During the 1970s and 1980s blame for non-payment of the fine was partly attributed to the courts and their failure to take the financial circumstances of the offender into account.<sup>69</sup> Criticism of the judiciary's failure followed, particularly where the imposition of a fine on an impecunious offender resulted in imprisonment, which was considered both disproportionately harsh and increased the risk of re-offending.<sup>70</sup> As a result, all Australian jurisdictions introduced amendments to ensure that when sentencing, courts had to consider the financial circumstances of the offender.<sup>71</sup> However, this course of action remains meaningless, when a minimum amount is legislatively prescribed or in cases in which the court pays scant regard to the financial circumstances of the offender. Not surprisingly, despite supposed recognition of financial circumstances, some commentators continue to point out that the number of prisoners imprisoned, due to non-payment of fines, remains unsatisfactory.<sup>72</sup>

Continued criticism of the disproportional effect of the fine saw legislative amendments introduced at the end of the twentieth century in all Australian states. Instead of imposing a custodial sentence for non-payment of the fine, at least as a first step, suspension of the offender's driver's license was made available. The driver's license remained suspended, according to the relevant legislative provisions,

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<sup>67</sup> Ashworth, above n 8, 329; Warner et al, above n 15, 128.

<sup>68</sup> John Raine, Eileen Dunstan and Alan Mackie, 'Financial Penalties: Who Pays, Who Doesn't and Why Not?' (2004) 43(5) *Howard Journal of Criminal Justice* 518, 519-521.

<sup>69</sup> See, eg, Alec Samuels, 'The Fine: The Principles' [1970] *Criminal Law Review* 268, 268.

<sup>70</sup> Samuels, above n 46, 206.

<sup>71</sup> Mary Dauntun-Fear, 'The Fine as a Criminal Sanction' (1971-1972) 4 *Adelaide Law Review* 307, 311-313; Rod Morgan and Roger Bowles, 'Efficiency and Magistrates' Courts Expenditures' (1983) 61(3) *Public Administration* 203, 205.

<sup>72</sup> Ashworth, above n 8, 337-338; Tasmanian Law Reform Institute, *Sentencing*, Final Report No 11 (2008) 148 [3.9.8].

until the fine was paid.<sup>73</sup> In terms of reducing the number of offenders imprisoned, due to non-payment of the fine, the measure has been a success with South Australia, the Northern Territory and New South Wales reporting nine, seven and zero persons respectively being imprisoned for fine default in 2008-2009.<sup>74</sup> However, these figures are probably misleading, with the New South Wales Sentencing Council for example noting that some non-payment of fine offenders are continuing to be imprisoned, but as a result of secondary offences, such as driving whilst disqualified.<sup>75</sup> Estimates suggest that one in every ten disqualified drivers, who are caught driving are imprisoned,<sup>76</sup> which is a significant figure, when it is recognised that studies in the United Kingdom, the United States and Canada have demonstrated that the percentage of disqualified drivers, who continue to drive, lies between 30-75 percent.<sup>77</sup>

Despite the amendments introduced by legislatures over the last thirty years to improve the principle of equal treatment, it is clear that the underlying system of fining in Australia remains flawed. Fines are often subject to legislatively prescribed minimum amounts, ensuring that courts are often restricted in their ability to reduce the disproportionate effects of the fine on financially disadvantaged offenders. Additionally, in circumstances in which the discretion to sanction a fine amount is left to the courts, the widely accepted judicial view holds that the fine will not be increased because of the offender's wealth. In Australia, these legislative and judicial restrictions on the fine's application mean that disproportionate, unjust and ultimately inequitable outcomes follow, leading to calls for the introduction of the 'day fine'.

## V THE FINE IN GERMANY

Less than fifty years ago, the Federal Republic of Germany (West Germany) had a traditional fining system in which the court

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<sup>73</sup> *Fines Act 1996* (NSW) ss 66-67; *Infringements Act 2006* (Vic) pts 7-8; *State Penalties Enforcement Act 1999* (Qld) ss 104-105; *Fines, Penalties and Infringement Notices Act 1994* (WA) ss 42-43; *Criminal Law (Sentencing) Act 1988* (SA) s 70E; *Monetary Penalties Enforcement Act 2005* (Tas) s 54; *Crimes (Sentencing) Act 2005* (ACT) s 30; *Fines and Penalties (Recovery) Act 2001* (NT) s 60.

<sup>74</sup> Mary Williams and Robyn Gilbert, *Reducing the Unintended Effects of Fines* (Indigenous Justice Clearinghouse, Current Initiatives Paper 2, 2011).

<sup>75</sup> New South Wales Sentencing Council, above n 61, 157.

<sup>76</sup> Anna Ferrante, *The Disqualified Driver Study: A Study of Factors Relevant to the Use of Licence Disqualifications as an Effective Legal Sanction in Western Australia* (Crime Research Centre, 2003) 66.

<sup>77</sup> *Ibid.*, 6. See also Franz Streng, 'Modernes Sanktionsrecht' [Modern Sanctions] (1999) 111(4) *Zeitschrift für die gesamte Strafrechtswissenschaft* [Journal of Criminal Law], 827, 855.

determined the amount of the fine based on the gravity of the offence and mitigating and aggravating circumstances.<sup>78</sup> The financial circumstances of the offender were rarely considered, although section 27(c) of the *Criminal Code* (West Germany) required that the court 'consider the financial circumstances of the offender'. Following a major review of the *Criminal Code* (West Germany) during the 1950s and 1960s, West Germany introduced two significant legislative reforms, which both complement the dominant role of the fine in German sentencing practice.

In 1969 the *First Criminal Law Amendment Act* (West Germany) came into effect, abolishing custodial sentences of less than one month<sup>79</sup> and requiring custodial sentences of less than six months, except in exceptional circumstances and where there would be no 'undue hardship', to be converted into fines or suspended sentences.<sup>80</sup> The *Second Criminal Law Amendment Act* (West Germany) saw the introduction of the day fine, a sentence that remains to this day Germany's primary sanction.

In German sentencing, the *Geldstrafe* (fine), along with a custodial sentence, are the two principal sanctions imposed under the German *Strafgesetzbuch* (Criminal Code). The *Geldstrafe* can only be imposed for criminal offences, both summary and indictable,<sup>81</sup> and is determined following a consideration of the offender's income.<sup>82</sup> This is known as the *Tagessatzsystem* (day fine system). According to sentencing statistics from the German Bureau of Statistics 81.6 percent of all offenders convicted of a criminal offence in 2010 were sentenced to a day fine.<sup>83</sup> In

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<sup>78</sup> Gerhardt Grebing, 'Die Geldstrafe im deutschen Recht nach Einführung des Tagessatzsystems' [The Fine in German Law following the introduction of the Day Fine] in Hans-Heinrich Jescheck and Gerhardt Grebing (eds), *Die Geldstrafe im deutschen und ausländischen Recht* [The Fine in German and Foreign Law] (Nomos Verlagsgesellschaft, 1978) 72.

<sup>79</sup> *Strafgesetzbuch* [Criminal Code] (Germany) § 38 ('StGB').

<sup>80</sup> StGB § 47; *Strafprozeßordnung* [Criminal Procedure Code] (Germany) § 459f ('StPO'). Examples of 'undue hardship' include a partner's illness leading to inability to care for children or loss of employment where long-term unemployment is the likely outcome: Löwe-Rosenberg Großkommentar, *Die Strafprozeßordnung und das Gerichtsverfassungsgesetz* [The Criminal Procedure Code and the Court Constitution Act] (Walter de Gruyter, 2010) § 459f, 288.

<sup>81</sup> Section 24 of the *Gerichtsverfassungsgesetz* [Court Constitution Act] (Germany) provides that the *Amtsgericht* [Magistrates Court] will have jurisdiction over criminal matters where a custodial sentence of more than four years is not expected to be imposed. While s 74 of the same Act provides that offences likely to attract a custodial sentence of more than four years will be heard by the *Landgericht* [Supreme Court].

<sup>82</sup> Fixed-sum fines are available but may only be imposed for *Ordnungswidrigkeiten* [infringements] and are referred to as a *Geldbuße* [Infringement notice].

<sup>83</sup> Statistisches Bundesamt [Bureau of Statistics], *Strafverfolgungsstatistik 2010* (Fachserie 10, reihe 3, 2010), Tabelle 2.3 'Verurteilte nach Art der Entscheidung' [Criminal Justice



Germany the day fine is measured in units,<sup>84</sup> with the amount of each unit dependant on the personal and financial circumstances of the offender:

**Section 40 - Day fine units**

(1) A fine shall be imposed in daily units. The minimum fine shall consist of five and, unless the law provides otherwise, the maximum shall consist of three hundred and sixty full daily units.

(2) The court shall determine the amount of the daily unit taking into consideration the personal and financial circumstances of the offender. In doing so, it shall typically base its calculation on the actual average one-day net income of the offender or the average income he could achieve in one day. A daily unit shall not be set at less than one and not at more than thirty thousand euros.

(3) The income of the offender, his assets and other relevant assessment factors may be estimated when setting the amount of a daily unit.

(4) The number and amount of the daily units shall be indicated in the decision.

The fine amount is arrived at through the application of a two-stage process. First, the court determines the culpability of the offender, based on the gravity of the offence and mitigating and aggravating circumstances.<sup>85</sup> This process determines the *number* of day fine units to

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Statistics 2010 (Series 10, row 3, 2010), Table 2.3 (Type of sentence imposed') 90. This figure has remained remarkably consistent with one study finding that during the 1980s and 1990s the number of offenders sentenced to a day fine lay between 81.1 percent in 1984 and 83.9 percent in 1993: Elske Fehl, *Monetäre Sanktionen im Deutschen Rechtssystem* [Monetary Sanctions in the German Legal System] (Peter Lang Verlag, 2002) 15. Of the 18.4 percent of offenders sentenced to imprisonment, the statistics demonstrate that approximately two-thirds receive suspended sentences. In 2010 for example of the 129,717 persons sentenced to imprisonment, 92,057 received suspended sentences (71 percent): Statistisches Bundesamt [Bureau of Statistics], *Strafverfolgungssstatistik 2010* (Fachserie 10, reihe 3, 2010), Tabelle 3.1 'Verurteilte nach Dauer der Freiheitsstrafe' [Criminal Justice Statistics 2010 (Series 10, row 3, 2010), Table 3.1 (Length of custodial sentence imposed) 153.

<sup>84</sup> The day fine is usually imposed as a minimum of five and a maximum of three hundred and sixty units, however in cases in which more than one offence has been committed, the number may be increased to a maximum of 720 day fine units: StGB § 54(2). Additionally StGB § 49 reduces the maximum number of day fines units able to be imposed for particular offences to 270. Examples include aiding and abetting or inducing another to commit a crime (StGB § 27, 30 respectively).

<sup>85</sup> StGB § 46. The financial circumstances of the offender may only be assessed as a mitigating or aggravating factor when it relates directly to the offender's culpability, such as acting out of necessity: Adolf Schönke and Horst Schröde, *Strafgesetzbuch Kommentar*

be imposed. It is only after this determination has been concluded that the court turns its mind to the personal and financial circumstances of the offender, that is, the *amount* of each day fine. It is the multiplication of these two factors that produces the total amount of the fine.

The legal minimum amount of each unit is €1 and the maximum amount is €30,000.<sup>86</sup> The starting point for assessing the fine amount is the net income of the offender including allowances<sup>87</sup> pensions and other financial benefits, such as interest accrued or share dividends.<sup>88</sup> The extent to which the courts take into account the offender's assets is discretionary, but generally larger assets, such as a house or investment portfolios, will be considered.<sup>89</sup> Net income deductions include work-related expenses, maintenance costs and other necessary financial obligations.<sup>90</sup> The system allows for a consideration of the total amount of each day fine unit in circumstances in which the offenders income is likely to change, for example where employment is foreseeable for the unemployed offender or where the offender has intentionally foregone employment in an attempt to reduce the severity of the sanction.<sup>91</sup> The amount of the day fine unit takes into consideration financially disadvantaged groups, such as students, the unemployed and other social security recipients. In most cases involving such persons, the amount of the day fine unit will be set at a very low level.<sup>92</sup> On the other

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[Criminal Code Commentary] (CH Beck, 2010) § 40, 718-719; Bernd-Dieter Meier, *Strafrechtliche Sanktionen* [Criminal Sanctions] (Springer, 2006) 63.

<sup>86</sup> Day fine units must not always be considered in full Euros. The day fine unit may be assessed for example at €2.50: Schönke and Schröde, above n 85, 719.

<sup>87</sup> Case law has determined that 'allowances' include free board and lodging at the parents home, or board and lodging provided for soldiers at a barracks: Schönke and Schröde, above n 85, 720; Meier, above n 85, 65-66.

<sup>88</sup> To better attain fairness in net income, the courts will usually divide income over the full twelve months in circumstances in which the offender's income fluctuates, such as for the self-employed or seasonal workers: Meier, above n 85, 65.

<sup>89</sup> In the case of the offender's house the court will usually include the rental value of the property in the income. At the same time smaller assets such as savings and family jewellery will not be considered: Gerhard Schäfer, Günther Sander and Gerhard van Gemmeren, *Praxis der Strafzumessung* [Imposing Sentences] (CH Beck, 2008) 26. One-off sources of income such as an inheritance, a present or lotto win are not assessed as income, whereas pensions, such as social security and aged pensions will be assessed: Schönke and Schröde, above n 85, 721-723.

<sup>90</sup> There is general agreement that legal costs, including compensation, restitution, lawyers and court costs will not be considered. However out of the ordinary costs, such as those associated with a disability or with care of children will be considered: Meier, above n 85, 67-68; Schönke and Schröde, above n 85, 721.

<sup>91</sup> StGB § 40(2). See also Schönke and Schröde, above n 85, 722; Schäfer, Sander and van Gemmeren, above n 89, 29.

<sup>92</sup> Schönke and Schröde, above n 85, 722.

hand, the financial circumstances of a stay-at-home partner will often be based on half of the 'working' partner's income.<sup>93</sup>

In many cases the offender's income will be voluntarily provided, particularly when requested. It is unclear exactly how many offenders provide income information but studies suggest that it is around 50 percent.<sup>94</sup> This figure is achieved through a co-operative system in which the police, the prosecution and the courts work together to collect information necessary for estimating the offender's income. Specific details of the offender such as age, address, occupation, income, family status and number of children are normally sought in a police questionnaire.<sup>95</sup> Prosecution powers then allow for more detailed investigations and finally the judge is able to ask questions of the offender during the hearing.<sup>96</sup> For those cases in which the offender's financial circumstances are unclear,<sup>97</sup> the court is able to estimate the offender's income.<sup>98</sup> This estimation may be adopted where the carrying out of an investigation would not be proportional to the day fine likely to be imposed.<sup>99</sup> Courts are not allowed to estimate the offender's income by selecting an arbitrary amount, but rather, must base their decision on information provided to the court.<sup>100</sup> In exercising their right to silence, the offender runs the risk of being sanctioned with a

<sup>93</sup> Although this principle is adopted as a general rule and is in line with *Bürgerliches Gesetzbuch* [Civil Code] (Germany) § 1360 ('BGB') providing for equality of 'family maintenance' the court may deviate from this rule in circumstances in which the stay-at-home partner is seen to have a higher or lower income: Schäfer, Sander and van Gemmeren, above n 89, 29; Meier, above n 85, 65-66.

<sup>94</sup> A study by the Max-Planck Institute for Foreign and International Criminal Law for example, noted that 46 percent of offenders sanctioned to a fine had provided income information to the police and that the prosecution initiated further investigations in only 1.7 percent of cases reviewed: Hans-Jörg Albrecht, *Strafzumessung und Vollstreckung bei Geldstrafen* [Imposition and Enforcement of Fines] (Duncker & Humblot, 1980) 204-205; In a further study carried out of all offenders sanctioned to the day fine in one municipality of Germany, it was noted that 65.5 percent had provided either the police or prosecution with income information: Wolfgang Fleischer, *Die Strafzumessung bei Geldstrafen* [The Imposition of Fines] (Gahmig Druck, 1983) 188.

<sup>95</sup> For copies of police and prosecution questionnaires see Fleischer, above n 94, 105-116; 124-131.

<sup>96</sup> *Ibid.*

<sup>97</sup> Either because the offender relies on the right to silence (StGB § 136), the information provided is considered unreliable or the investigating authorities have carried out an inadequate investigation.

<sup>98</sup> StGB § 40(3). This estimation is arrived at by dividing the assumed monthly income of the offender by thirty to arrive at the amount of each day fine unit.

<sup>99</sup> This is generally applied to fines likely to attract less than 90-day fine units: Heinz Zipf, *Probleme der Neuregelungen der Geldstrafe in Deutschland* [Problems of the new Fine provisions in Germany] (1974) 86(2) *Zeitschrift für die gesamte Strafrechtswissenschaft* [Journal of Criminal Law] 513.

<sup>100</sup> Schäfer, Sander and van Gemmeren, above n 89, 32.

higher day fine amount, although appellate courts have made it clear that courts cannot intentionally overestimate the offender's income in an attempt to extract accurate information from the offender.<sup>101</sup> As a 'rule of thumb', the courts will usually apply a 20-25 percent reduction for an unemployed partner and a 10-15 percent reduction for the upkeep of a child.<sup>102</sup> Nevertheless it is generally accepted that the total amount of the day fine unit must not be reduced by more than 50 percent.<sup>103</sup>

It is expected that the offender will repay the day fine in one lump sum, if possible, but the court may grant an extension of time or allow for payment in installments, which in practice has resulted in almost one third of all fines paid in installments.<sup>104</sup> In circumstances in which the offender fails to pay the fine, the court is able to convert the fine into a custodial sentence, whereby one day fine unit corresponds to one day of imprisonment.<sup>105</sup> This has the benefit of ensuring that courts cannot impose disproportionate sentences. The court cannot increase the number of day fine units imposed because the offender is being sentenced to a fine rather than to imprisonment.<sup>106</sup> In practice, most custodial sentences for non-payment of a fine are converted into a community service order.<sup>107</sup>

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<sup>101</sup> Ibid; Meier, above n 85, 71.

<sup>102</sup> Schönke and Schröde, above n 85, 724.

<sup>103</sup> Thomas Fischer, *Strafgesetzbuch und Nebengesetze* [The Criminal Code and Supplementary Statutes] (Beck Juristischer Verlag, 2009) 333; Peter König, 'Grundwissen zur Zumessung der Geldstrafe' [Basic Knowledge of the Fine's Imposition] (2009) *Juristische Arbeitsblätter* [Legal Worksheets] 809, 815; Schönke and Schröde, above n 85, 724.

<sup>104</sup> *Criminal Code*, s 42; Albrecht, above n 94, 274.

<sup>105</sup> StGB § 43. A similar provision is contained in Article 36 of the *Schweizerisches Strafgesetzbuch* [Switzerland Criminal Code]: StGB § 36. In Austria, s 19(3) of the *österreichisches Strafgesetzbuch* [Austrian Criminal Code] provides that two day fine units equate to one day in prison. Two day fine units for one day in prison is also imposed in Finland but imprisonment for nonpayment of a fine can only be imposed for at least four days and at most ninety days: Tapio Lappi-Seppälä, 'Sentencing and Punishment in Finland' in Michael Tonry and Richard Frase (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press, 2001) 92, 94.

<sup>106</sup> StGB § 47(2) notes that 'If the law provides for an increased minimum term of imprisonment, the minimum fine... shall be determined by the minimum term of imprisonment...'. This ensures that where an offence provides for a minimum custodial sentence of 3 months, that the number of day fine units imposed must be at least 90. An example is grievous bodily harm (StGB § 224) which provides that an offender 'shall be liable to imprisonment from six months to ten years, in less serious cases to imprisonment from three months to five years'.

<sup>107</sup> *Einführungsgesetz zum Strafgesetzbuch* [Introductory Act to the Criminal Code] (Germany) § 293 ('StGBEG'): Generally, 6 hours community service = 1 day imprisonment. The program is often referred to as 'Sweat it out instead of sitting it out' (Schwitzen statt Sitzen); See, eg, Justizministerium Baden-Württemberg [Ministry of

The day fine is usually imposed for offences likely to attract a custodial sentence of less than six months. For example 94.5 percent of offenders sentenced in 2010 to traffic offences,<sup>108</sup> 86.8 percent of offenders sentenced to fraud and embezzlement offences<sup>109</sup> and 73.3 percent of offenders sentenced to property crime offences<sup>110</sup> under the *Strafgesetzbuch* (*Criminal Code*) received a day fine. That the day fine is usually applied to light and moderately serious offences is confirmed in the acknowledgement that the overwhelming majority (93 percent) of imposed day fine units amounted to less than 90 day fine units.<sup>111</sup> The day fine is also available for more serious offences, including offences against the person with 79 percent of offenders convicted of assault in 2010 sentenced to a day fine.<sup>112</sup>

Despite regional differences in the average number of day fine units imposed, the courts in Germany, particularly for drink driving offences, have adopted tariffs.<sup>113</sup> The use of tariffs mirrors the practice adopted in

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Justice Baden-Württemberg], *Schwitzen statt Sitzen* <<http://www.olg-karlsruhe.de/servlet/PB/menu/1238838/index.html>>

<sup>108</sup> Statistisches Bundesamt [Bureau of Statistics], *Strafverfolgungsstatistik 2010* (Fachserie 10, reihe 3, 2010), Tabelle 2.3 'Verurteilte nach Art der Entscheidung' [Criminal Justice Statistics 2010 (Series 10, row 3, 2010), Table 2.3 (Type of sentence imposed')] 90. There are a large number of offences included within the term 'traffic offences' but the main offences are drink-and-other-drug driving and endangering road traffic.

<sup>109</sup> Statistisches Bundesamt [Bureau of Statistics], *Strafverfolgungsstatistik 2010* (Fachserie 10, reihe 3, 2010), Tabelle 2.3 'Verurteilte nach Art der Entscheidung' [Criminal Justice Statistics 2010 (Series 10, row 3, 2010), Table 2.3 (Type of sentence imposed')] 90. Fraud and embezzlement offences are those provisions contained within StGB §§ 263-266b and include fraud, obtaining services by fraud, deception and abuse of trust.

<sup>110</sup> Statistisches Bundesamt [Bureau of Statistics], *Strafverfolgungsstatistik 2010* (Fachserie 10, reihe 3, 2010), Tabelle 2.3 'Verurteilte nach Art der Entscheidung' [Criminal Justice Statistics 2010 (Series 10, row 3, 2010), Table 2.3 (Type of sentence imposed')] 90. Property crime offences are those provisions contained within StGB §§ 242-248c. These provisions include theft, aggravated theft, carrying of a weapon during theft and unlawful appropriation.

<sup>111</sup> Statistisches Bundesamt [Bureau of Statistics], *Strafverfolgungsstatistik 2010* (Fachserie 10, reihe 3, 2010) Tabelle 3.3 'Verurteilte nach Zahl und Höhe der Tagessätze der Geldstrafe' [Criminal Justice Statistics 2010 (Series 10, row 3, 2010) Table 3.3 (Number and amount of fine imposed')] 190. According to one commentator the judicial avoidance of sanctioning more than 90 day fine units is because there are increasing difficulties in payment of the fine and the general view that the aims of special or general deterrence are not achieved in imposing a fine of more than 90 day fine units: Meier, above n 85, 76.

<sup>112</sup> Statistisches Bundesamt [Bureau of Statistics], *Strafverfolgungsstatistik 2010* (Fachserie 10, reihe 3, 2010) Tabelle 2.3 'Verurteilte nach Art der Entscheidung' [Criminal Justice Statistics 2010 (Series 10, row 3, 2010) Table 2.3 (Type of sentence imposed')] 90.

<sup>113</sup> For example a first time drink-driving offender is usually sanctioned with around 40 day fine units. According to the German Bureau of Statistics the average German wage in 2011 was around €33,600 per year meaning that a first time drink-driving offender would be sentenced to a fine of around €3,700 euros before deductions, such as for children and maintenance costs. This is worked out by dividing the monthly income €2800 by the

Australia with similar offences attracting a similar number of day fine units. However, this does not mean that the fine amount will be similar, as there is a clear separation between the gravity of the offence and the culpability of the offender (to which the court will often apply a tariff) and to the fine amount, which depends solely on the personal and financial circumstances of the offender.

## VI AN ANALYSIS OF THE FINING SYSTEMS

The imposition of a fine in Australian courts will sometimes be dictated by the prescribed minimum amount provided for in legislation. Where there is discretion, the courts will generally apply a tariff based principally on the gravity of the offence, meaning in practice (as a result of the disproportionate number of socially and financially disadvantaged offenders) that the tariff tends towards the lower end of the sentencing spectrum. This legal position is confirmed in the widely acknowledged judicial view that while social and financial disadvantage may be considered a mitigating circumstance, leading to a reduced fine, the wealth of the offender cannot lead to a higher than reasonable fine.<sup>114</sup>

The failure to ensure that the fine has a similar punitive bite means that the principle of equal impact is not met. When two offenders pay the same fine but one has a higher income, the fine cannot have the same effect. For wealthy offenders the fine may be too easily paid and hence no real punishment<sup>115</sup> or even seen as payment of a 'license fee' in order to continue offending. These outcomes both result in the important aims of sentencing including retribution, deterrence and rehabilitation not being met.<sup>116</sup> As the New Zealand Court of Appeal observed:

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calendar month and then multiplying it by the 40 day fine units sanctioned. For first time property crime offenders the number of day fine units imposed will usually be between 20-60 day fine units, although this is dependant on the worth of the goods stolen. Stolen property valued at less than €50 will generally not be prosecuted (StGB § 248a). Fraud offences depend largely on the value of the goods fraudulently obtained but for the first time offender where the value of the goods is less than €500 the number of day fine units imposed will usually be between 20-40 day fine units. Assault offences are usually sanctioned with 40-60 day fine units, although again this depends on the damage caused: Schäfer, Sander and van Gemmeren, above n 89, 369-388.

<sup>114</sup> Ashworth, above n 8, 329; Warner et al, above n 15, 128.

<sup>115</sup> Hans-Jörg Albrecht, 'Post-Adjudication Dispositions in Comparative Perspective' in Michael Tonry and Richard Frase (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press, 2001) 293, 308.

<sup>116</sup> Dennis Ryan, 'Criminal Fines: A Sentencing Alternative to Short-term Incarceration' (1983) 68 *Iowa Law Review* 1285, 1303.

If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences.<sup>117</sup>

On the other hand, as both the Chief Justice of the Supreme Court of Tasmania and a large number of the Justices of the Supreme Court of New South Wales have noted, the fine can have a particularly 'draconian' effect on economically disadvantaged offenders, leading to an inability to repay the fine and ultimately imprisonment.<sup>118</sup> Another effect may be that a court may hesitate to sentence a financially disadvantaged offender to a fine either because of the resulting injustice or because of the belief that an inability to pay will result in imprisonment. All of these objections may lead to discontent in the sentencing process. For example, a study of the socially and financially disadvantaged in Australia, who had been in contact with the criminal justice system, noted that the effect of punishment was often unjust depending on whether the offender was rich or poor.<sup>119</sup> In contrast to the legislatively prescribed minimum amount or tariff fine, the day fine system expressly requires a consideration of the offender's financial circumstances.

A further advantage of the day fine system is its 'transparency of proportionment'<sup>120</sup> achieved by the sentencing process being separated into two discernable steps. Proportionality is assured in the first-step because of its focus on the gravity of the offence and the culpability of the offender. The second-step, namely a consideration of the offender's personal and financial circumstances, assures that the principle of equal treatment is achieved. On the other hand, in Australia 'the extent to which the two factors, guilt and financial circumstances are reflected in the sum imposed cannot be established'.<sup>121</sup> As a result, the ability of the offender to follow the court's decision-making process means that the day fine system avoids any perception of arbitrariness, ensuring a better

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<sup>117</sup> *R v Radich* [1954] NZLR 86, 87.

<sup>118</sup> According to the former Chief Justice of the Supreme Court of Tasmania the legislatively prescribed minimum fine was capable of being 'draconian': Tasmanian Law Reform Institute, above n 72, 151-152 (3.9.18). Just under half of the judges surveyed in New South Wales (48 percent) noted that the fine for socially disadvantaged offenders was disproportionately severe: McFarlane and Poletti, above n 17, 31.

<sup>119</sup> Midgely, above n 12.

<sup>120</sup> Grebing, above n 2, 70.

<sup>121</sup> *Ibid* 90.

understanding of the sentencing process and trust in the sentencing system.<sup>122</sup>

The day fine system also improves the perceived legitimacy of the fine as a sentencing option. In other words, the fine is not just considered a mild punishment but is available for more serious offences such as property crime, fraud and assault. The broader use of the fine should in turn lead to the reduced use of the custodial sentence, and 'consequently, day fines help concentrate criminal justice resources on the small group of most serious offenders'.<sup>123</sup>

A final advantage of the day fine system is that a clear method is applied in the conversion of the fine into a custodial sentence. In Australia the common practice is that when alternative sanctions, such as driver disqualification have failed, non-payment of a fine will be converted into a term of imprisonment in which approximately \$100 corresponds to one day in custody.<sup>124</sup> In Germany, imprisonment for failure to pay a fine is not based on dollar amounts but rather the number of day fine units imposed.<sup>125</sup> Hence, it is the gravity of the offence and not the financial circumstances of the offender that determines the number of days the offender must spend in prison.

The strongest objection to the day fine system arises from the difficulty of ascertaining the offender's financial circumstances.<sup>126</sup> Critics point to the day fine systems of Sweden and Finland where income tax declarations are readily accessible,<sup>127</sup> submitting that without such accessibility the day fine system is impaired.<sup>128</sup> Further, it would be 'uncomfortable' for courts to have to request information about the financial circumstances of the offender prior to conviction, and yet if requested following conviction, a further court appearance would be

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<sup>122</sup> Nicholas Queloz, 'Vorschläge zur Verstärkung der Rechtmässigkeit der Geldstrafe, der Hauptstrafe Nummer 1 in der Schweiz' [Proposals to Improve the Legitimacy of the Fine, the Primary Sentence in Switzerland] (2010) *Schweizerische Zeitschrift für Kriminologie* [Swiss Journal of Criminology] 31-32.

<sup>123</sup> Albrecht, above n 115, 308.

<sup>124</sup> See, eg, *Sentencing Act 1997* (Tas) s 51(1); *Sentencing Regulations 2008* (Tas) r 8.

<sup>125</sup> Albrecht, above n 115, 308.

<sup>126</sup> See, eg, the Sentencing Commission for Scotland, *Basis on which Fines are Determined* (2006) 37 [7.26].

<sup>127</sup> Hans Thornstedt, 'Skandinavische Erfahrungen mit dem Tagesbußensystem' [Scandinavian Experiences with the Day Fine] (1974) 86(2) *Zeitschrift für die gesamte Strafrechtswissenschaft* (Journal of Criminal Law) 595, 600; Morgan and Bowles, above n 71, 213.

<sup>128</sup> Similar concerns have been raised in relation to penalty notices with critics pointing to both the administrative complexity and prohibitive implementation costs as reasons why the day fine could not be introduced for penalty notices: New South Wales Law Reform Commission, *Penalty Notices*, Report No 132 (2012) 114 [4.105] 238 [11.18].



required, resulting in a congested court system.<sup>129</sup> Although there are impediments to Australia introducing the day fine based on the Swedish or Finnish models, the difficulties are not insurmountable. For example, in order to resolve the problem of tax declaration secrecy,<sup>130</sup> Germany implemented measures in which police questionnaires, prosecution powers and court questioning ensure that the required information is obtained.<sup>131</sup> Alternatively, provisions could be introduced in Australia in which offenders are requested to fill in a financial circumstances questionnaire prior to the hearing.<sup>132</sup> New Zealand courts for example may request a financial statement from the offender, although admittedly only in cases in which the court is unsure as to whether the offender has the means to pay the fine.<sup>133</sup> Whichever model is introduced, there will continue to be offenders, who refuse to provide income information, resulting in possible overestimations and default of payment for some offenders. In Germany for example statistics point to increasing numbers of persons being sent to prison as a result of their failure to repay the fine,<sup>134</sup> although studies suggest that this may be the result of self-represented offenders not being aware that they are able to request an extension of time or for payment in installments.<sup>135</sup>

A further concern is that the courts could deliberately circumvent the two-step day fine system by continuing to sentence offenders to amounts similar to those currently imposed. Rather than imposing a number of day fine units on an offender based on their culpability and then determining the value of each unit, the court may instead continue to impose a 'fair' sentence by first determining the offender's income

<sup>129</sup> Sentencing Commission for Scotland, above n 126, 36-37 [7.24].

<sup>130</sup> StGB § 355.

<sup>131</sup> Fleischer, above n 94, 105-116, 124-131.

<sup>132</sup> This questionnaire could declare that it is an offence to provide false or misleading information, and to encourage completion, it could note that income details may otherwise be obtained from the employer: Gerhardt Grebing, 'Probleme der Tagessatz-Geldstrafe' [Problems of the Day Fine] (1976) 88(4) *Zeitschrift für die gesamte Strafrechtswissenschaft* [Journal of Criminal Law] 1049, 1102.

<sup>133</sup> *Sentencing Act 2002* (NZ) ss 40-43.

<sup>134</sup> Bernd-Dieter Meier, 'Kriminalpolitik in kleinen Schritten' [Crime policy in small steps] (2008) 28(5) *Der Strafverteidiger* [The Defence lawyer] 263, 269. In 2009 around 4000 offenders who failed to re-pay the fine were imprisoned (around 8 percent of the prison population): Schönke and Schröde, above n 85, 733.

<sup>135</sup> For example a study of payment default resulting in imprisonment demonstrated that in more than half the cases (49.1 percent for traffic offenders; other crimes 56.6 percent) in which imprisonment was imposed, the offender had not asked for either an extension of time or for payment in installments, leading the author to conclude that they lacked knowledge of court procedures: Helmut Janssen, *Die Praxis der Geldstrafvollstreckung* [Fine Enforcement] (Peter Lang Verlag, 1994) 147.

and then imposing the necessary number of day fine units so that the amount is reached. According to one law reform commission this could result, due to judicial support for the present system or the belief that the application of the day fine system is too complicated.<sup>136</sup> However, at least in Germany this does not appear to have transpired. Following the introduction of the day fine system the Max Planck Institute for Foreign and International Criminal Law examined the effects of the new fining system (1972-1975) finding that although the imposition of fines of less than 1500 DM (*Deutschmark* - German Dollar) remained consistent, a rise in fines of more than 1500 DM increased to 14 percent of all cases compared to 8 percent of cases heard three years prior.<sup>137</sup> Mindful that this increase may have been the result of increased judicial harshness the authors were also able to establish that in 54 percent of cases reviewed the court was not aware of the offender's income prior to the number of day fine units being imposed.<sup>138</sup>

Another criticism of the day fine is that whereas imprisonment or community service ensures that offenders are personally punished for offences committed, the day fine can provide no such guarantees.<sup>139</sup> This means that particularly for offences carried out during the course of employment, such as environmental or traffic offences, the day fine will often be paid by the employer, meaning that the offender escapes punishment.<sup>140</sup> On the other hand, the day fine imposed may detrimentally extend to family and others financially dependant on the offender.<sup>141</sup> In response to these criticisms it should be noted that whether the fine is a day fine or a conventional fine, the employer has always been able to pay the fine. Additionally, when comparing the fine with imprisonment, the fine has the advantage of maintaining bonds with family and community while at the same time ensuring that habits learnt in prison are avoided.<sup>142</sup> As well, consideration of the offender's personal circumstances is taken into account in the imposition of a day

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<sup>136</sup> This objection was raised during the 1970s by the Law Reform Commission of France. Found in Albrecht, above n 115, 309.

<sup>137</sup> Albrecht, above n 94, Graph 4, 202-203; Herbert Tröndle, 'Die Geldstrafe in der Praxis und Probleme ihrer Durchsetzung unter besonderer Berücksichtigung des Tagessatzsystems' [The Fine in Practice and Problems with its Implementation with particular regard to the Day Fine System] (1974) 86(2) *Zeitschrift für die gesamte Strafrechtswissenschaft* (Journal of Criminal Law) 545, 549.

<sup>138</sup> Albrecht, above n 94, Graph 4, 204-205.

<sup>139</sup> Meier, above n 85, 59.

<sup>140</sup> Other examples noted include young offenders, who may have the fine paid for by the parents or grandparents, and stay-at-home partners, who may have the fine paid for by their spouse: *ibid*.

<sup>141</sup> Ryan, above n 116, 1302-1303; Meier, above n 134, 268.

<sup>142</sup> Spohn and Holleran, above n 48, 351.

fine, an option often not available for offenders sentenced to a legislatively prescribed minimum fine in Australia.

Finally, it is sometimes suggested that the imposition of a fine may lead to more crime, with the offender forced to carry out additional offences in order to repay the fine. An English study has however found this claim to be unsubstantiated with the fine usually paid out of regular sources of income.<sup>143</sup> In Germany, the evidence demonstrates that the day fine is generally imposed on offenders convicted of light and moderately serious offences and who are generally unlikely to re-offend.<sup>144</sup> The sanctioning of a fine for such offenders is ideal, as it provides the courts with the option of imposing a sentence that reflects the seriousness of the offence but at the same time allows the court to impose a more severe sanctions in circumstances in which the offender re-offends.

## VII THE DAY FINE IN AUSTRALIA?

The greatest advantage of the day fine system is the potential for reduced custodial sentences. In West Germany, for example, the introduction of the day fine saw a sharp drop in the number of offenders imprisoned, from 110,000 short-term custodial sanctions (defined as six months or less) shortly before the introduction of the day fine Criminal Code reforms, to 10,000 persons in 1976.<sup>145</sup> In contrast, the imposition of the short-term custodial sentence remains firmly entrenched in Australia.<sup>146</sup> In the Magistrates Court of Tasmania, for example, between 2001-2006, 67 percent of custodial sentences were for three months or less, and 89 per cent for six months or less, while in the Supreme Court of Tasmania, 18 percent of sentences for imprisonment were for three months or less, and 47 percent for six months or less.<sup>147</sup> The research demonstrates that short-term custodial sentences are most often imposed for light and moderately serious offences, making them particularly suitable to the day fine. The NSW Bureau of Crime

<sup>143</sup> Paul Softley, 'A Survey of Fine Enforcement' (Home Office Research Study No 16, 1973) in Sally Hillsman, 'Fines and Day Fines' (1990) 12 *Crime and Justice* 49, 53.

<sup>144</sup> FehI, above n 83, 84.

<sup>145</sup> Robert Gillespie, 'Fines as an Alternative to Incarceration: The German Experience' (1980) 44(4) *Federal Probation* 20, 20-21. These statistics have remained steady. In 2001 for example 11.1 percent of offenders were sentenced to short-term custodial sentences: Bernd-Dieter Meier, 'Alternatives to Imprisonment in the German Criminal Justice System' (2003-2004) 16(3) *Federal Sentencing Reports* 222, 227.

<sup>146</sup> According to one Report, 6.8 percent of prisoners in NSW, 11.4 percent in Victoria and 7.2 percent in Queensland have been sentenced to short-term prison terms: Weatherburn, above n 23, 10.

<sup>147</sup> Tasmanian Law Reform Institute, above n 72, 547.94 [3.2.6].

Statistics and Research for example reported that more than 90 percent of offenders sentenced to short-term custodial sentences in NSW had committed assault, theft, breach of justice orders and traffic offences.<sup>148</sup> In Germany, all of these offences, with the exception of a breach of justice order, would normally attract a day fine, with the added benefit of reduced custodial costs.

It is also submitted that in Australia the day fine system could be particularly helpful in the sentencing of corporations. First, there is general acceptance that corporations will employ a cost-benefit analysis of the financial circumstances of particular actions prior to the commission of an offence. Consequently, general and specific deterrence could be particularly effective:

[c]orporate crimes are almost never crimes of passion: they are not spontaneous or emotional, but calculated risks taken by rational actors. As such they should be more amenable to control by policies based on utilitarian assumptions of the deterrence doctrine.<sup>149</sup>

Nevertheless, the efficacy of deterrence can only be considered a success, when the fine is considered a punishment and not simply a license fee or work expense.<sup>150</sup> In the English case of *R v F Howe & Son (Engineers) Ltd*<sup>151</sup> it was pointed out that in relation to corporations, the fine should not only consider the gravity of the offence but also the corporation's wealth.<sup>152</sup> On the other hand, studies show that the imposition of a fine is low in relation to corporations. A study from New South Wales for example, found that corporations punished following the death of an employee at the workplace were in 75 percent of all cases sanctioned to less than 20 percent of the maximum fine.<sup>153</sup> A good example that captured the attention of the Australian public was the case of *Director of Public Prosecutions v Esso Australia Pty Ltd*<sup>154</sup> in which two employees were killed and eight seriously injured. The offending corporation was sentenced to a \$2,000,000 fine, the largest

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<sup>148</sup> Bronwyn Lind and Simon Eyland, 'The Impact of Abolishing Short Prison Sentences', *Crime and Justice Bulletin No 73* (NSW Bureau of Crime Statistics and Research, 2002) 5.

<sup>149</sup> John Braithwaite and Gilbert Geis, 'On Theory and Action for Corporate Crime Control' (1982) 28 *Crime and Delinquency* 292, 305. See also John Braithwaite and Gilbert Geis, 'Developments in the Law - Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions' (1979) 92 *Harvard Law Review* 1227, 1235.

<sup>150</sup> Albrecht, above n 115, 308.

<sup>151</sup> [1992] 2 All ER 249.

<sup>152</sup> *R v F Howe & Son (Engineers) Ltd* [1992] 2 All ER 249, 255 (Scott Baker J).

<sup>153</sup> Found in NSW Legislative Council Standing Committee Report, *Serious Injury and Death in the Workplace* (2004) 109-110.

<sup>154</sup> [2001] VSC 263.

fine for a workplace offence in Australia's history. However the severity of the sentence was called into question by some commentators in their observance that in the same year the offending corporation made a profit of US\$18 Billion.<sup>155</sup> Although some jurisdictions expressly provide that the fine for corporations is either unlimited or many times higher than for natural persons,<sup>156</sup> the generally accepted judicial position in Australia is that the amount of the fine is not dependant on the financial resources of the corporation but rather should be based on the fines imposed on corporations in similar cases.<sup>157</sup>

Another advantage of introducing the day fine would be that in relation to companies listed on the stock exchange access to financial records as a result of the duty to publicly publish records would be relatively simple. At least in the jurisdictions of the United Kingdom and New South Wales, courts are able to conclude that corporations that do not provide financial records are able to pay any and all fines imposed.<sup>158</sup>

## VIII CONCLUSION

Less than fifty years ago the fine in both West Germany and Australia was often a sanction resulting in imprisonment, with the courts rarely, if at all, considering the financial circumstances of the offender. On the other hand, often disproportionately mild fines were imposed on wealthier offenders.<sup>159</sup> Increasing criticism of short-term custodial sentences and the imposition of imprisonment for non-payment of a fine led to reform.<sup>160</sup> West Germany introduced a new *Criminal Code* in which the custodial sentence was restricted to cases of last resort and the overwhelming majority of offences were sanctioned with a day fine. In contrast, Australia introduced small ad-hoc amendments including that courts should consider the financial circumstances of the financially disadvantaged offender, as well as introducing broader sanctions for non-payment of a fine.

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<sup>155</sup> Karen Wheelwright, 'Corporate Liability for Workplace Deaths and Injury – Reflecting on Victoria's Laws in the Light of the Esso Longford Explosion' (2002) 7 *Deakin Law Review* 323; For other examples see Tasmanian Law Reform Institute, *Criminal Liability of Corporations*, Final Report No 9 (2007) 58-59 [7.2.3].

<sup>156</sup> *Crimes Act 1914* (Cth) s 4B; *Criminal Code 1924* (Tas) s 389(3).

<sup>157</sup> Ashworth, above n 8, 336.

<sup>158</sup> *R v F Howe & Son* [1999] 2 All ER 249, 254-255; *Port Stephens Council v Robinsons Anna Bay Sand Pty Ltd* [2007] NSWLEC 240 [23].

<sup>159</sup> See Sections IV-V.

<sup>160</sup> *Ibid.*

While the modest reforms introduced in Australia appeared to address concerns that the financially disadvantaged were subject to imprisonment by default, in reality, as the evidence shows, injustice remains with a failure to adhere to the principle of equal treatment and the financially disadvantaged continuing to be imprisoned, albeit for secondary offences. In practice, the financially disadvantaged offender will generally receive a harsher sentence than their wealthier counterpart, with either the fine being converted into a more severe sentence or little consideration being taken of the offender's wealth. In contrast, the introduction of the day fine in Germany has seen a significant reduction in the prison population as the sanctioning emphasis has shifted from imprisonment to the fine. This shift of emphasis has led to better safeguarding of the principles of both non-discrimination and equal treatment.

Australia can learn from the example set by Germany. The introduction of the day fine system offers a more transparent process, which will in turn increase public confidence in the criminal justice system. Additionally, there is likely to be a reduction in the prison population with concomitant reductions in recidivism and prison costs. Nevertheless, the most important goal achieved will be not only that justice and fairness towards both the rich and poor is done, but that it is also seen to be done.

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# AUSTRALIAN STATUTORY LABOUR LAW AND THE NEAR DEATH EXPERIENCE OF THE DOCTRINE OF MANAGERIAL PREROGATIVES

FRANK CARRIGAN\*

## I INTRODUCTION

The study of how the different arms of the state apparatus operate is a fascinating and politically important aspect of a capitalist democracy. One of the key state apparatuses is the judiciary. Law exercises its authority in a number of ways. Whilst it plays a key role in securing the extant social formation it achieves this aim largely in the ideological sphere. Operating as ideological functionaries the judiciary has developed a degree of autonomy from vested interests that enables it to arbitrate disputes in a society enmeshed in a web of competing financial arrangements. The competitive individualism of capital ensures disunity in its ranks, and this combined with a subordinated working class, provides the elbow room for the judiciary to exercise to a substantial extent a free hand in its dispute settlement procedures.<sup>1</sup> This judicial autonomy is exhibited in myriad ways. For example, judges are conceptual ideologists who engage in the type of creative thinking that is required to solve problems that emerge from economic class conflict. Moreover, in a divided society judges are strategically placed to safely channel the numerous contradictions that bedevil class societies. Operating within the prism of ostensibly depoliticised rules, the judicial apparatus of the state is empowered to mediate relations between rulers and ruled. Following on from this observation, industrial arbitration is a core area where judges can canalise the class issues that emerge from asymmetrical labour contracts into the safe pastures of the courts. Legalism replaces the direct action of strikes or other challenges to the rule of capital. Judges are indispensable agents in facilitating the reproduction of social and power relationships, and they achieve that objective in the context of relative independence from the ruling class. They are not simply mouthpieces of the system. Whilst

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<sup>1</sup> Edward Thompson, *Whigs & Hunters* (Penguin, 1990) 263.

law is a coercive component of the state machine that serves the power elite it is more than an instrument that simply endorses the selfish requirements of rulers. Judges utilise their partial independence to circumscribe the actions of members of the economic elite threatening the overall stability of the system. In the name of social cohesion judges will assert the rights of unionists who are being confronted by the arbitrary behaviour of employers. State intervention in the judicial sphere is not a one way street. Within the limits set by capitalist relations of production the judiciary will on occasion exercise their power to support and extend the position of workers. The judges are key state actors at the forefront of the battle to perpetuate the age of capital.<sup>2</sup> However, it is important to recognise that they are not one-dimensional figures. They tame the more destructive aspects of the hubris unleashed by property rights. They give pluralist democracy some substance. Their complex and contradictory role can be gauged by investigating the structural forces within Australia during the twentieth-century that shaped the judicial doctrine that ruled in the sphere of statutory labour law. As the epoch of the centrality of the labour power provision of the *Constitution* in regulating industrial relations in Australia fades from view, it is worth examining the judicial interpretation of the constitutional and legislative texts that governed labour relations in Australia for the bulk of the twentieth-century. Such an analysis sheds light on judicial intervention both retarding or extending workers' rights and how ideological divisions within the judiciary are reflected in legal reasoning. It also illuminates the process of how law acts to allocate political power to the rulers whilst not requiring the complete submission of the ruled.

The High Court is the third branch of government and an integral part of the state and since federation it has been responsible for interpreting the *Australian Constitution*. The *Constitution* defines the scope of the Commonwealth's power to issue laws regulating the labour market. This supervisory role of the High Court in relation to its interpretive constitutional function has ensured that the framing of labour law bears a strong judicial stamp.<sup>3</sup> In performing its role of characterising whether the subject matter of legislation was constitutionally valid, the High Court has been kept busy.<sup>4</sup> Not surprisingly, in the course of the twentieth-century as the pace of economic development quickened, and a manufacturing sector expanded, industrial conflict spawned a wealth of litigation. The task of identifying the jurisdiction of the

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<sup>2</sup> John Griffith, *The Politics of the Judiciary* (Manchester University Press, 1977) 198.

<sup>3</sup> Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 2<sup>nd</sup> ed, 1994) 56.

<sup>4</sup> *Ibid.*



unique Commonwealth compulsory arbitration system that was a product of legislation based on the labour power provision contained in s 51(35) of the *Constitution* fell to the High Court. As the appellate court of last resort in Australia, the legal doctrine developed by this ultimate court has been instrumental in fashioning the contours of the organisation of work and political power in the workplace. The zone of operation of arbitration tribunals established to set wages, terms and conditions of employment within Australia was circumscribed by the judicial decisions of the High Court. The power of the High Court in shaping the history of Australian capitalism due to its role in interpreting the meaning and scope of phrases contained in s 51(35) of the *Constitution*, and key statutory clauses in the *Conciliation and Arbitration Act 1904 (Cth)* governing the ambit of the arbitration tribunals cannot be exaggerated. It offers a striking example of how the judicial state apparatus has relative autonomy and law is more than just an instrument of the ruling class.

This article considers how the High Court during the twentieth-century interpreted the jurisdictional scope of the words 'industrial matters'. This was a pivotal phrase in the 1904 *Conciliation and Arbitration Act*, and whenever the statute was revised in the course of the century this term retained its preeminent place. It was a term that was a prerequisite to establishing the jurisdiction of commonwealth arbitration tribunals to settle industrial disputes. In effect, the arbitration tribunals could only deal with disputes that fell into the category of 'industrial matters.' For a dispute to come within the ambit of the regulatory powers of the arbitration tribunals it had to be a dispute between parties who stood in an industrial relationship, and be a disagreement about industrial matters such as wage levels and working conditions. Utilising a number of key cases the paper will track judicial decisions that determined the meaning and scope of the phrase 'industrial matters.' The paper will canvass the judicial philosophy that guided the High Court in its role as an arbiter of the parameters of the dispute resolution function of arbitration tribunals. The High Court espoused apolitical legalism as the source of its legal reasoning, but the cases will be excavated to discern to what degree the court adopted the doctrine of managerial prerogatives and thus the sovereignty of capital as its criterion of jurisdiction. The historical backdrop that formed the context of the legal doctrine of the High Court will be sketched, particularly as this relates to the genesis of statutory labour law at the dawn of the twentieth-century. The paper also explores how in the latter part of the twentieth-century there was a brief interlude where the High Court ushered in a progressive

expansion of the jurisdiction of arbitration tribunals and what this signalled for the role of managerial prerogatives. Thus the paper will pinpoint how in practice the judiciary acts to consolidate the interests of the dominant class while engaged in a parallel exercise of pursuing reforms that dampen class conflict.

The period of progressive jurisprudence in the sphere of employment law was replaced by a lurch to the right as neo-liberalism unfolded. In essence, the political apparatus of the state moved to restore ground that had been lost by the economic elite as a result of judicial activism. The upshot was the jettisoning of s 51(35) and the body of law developed under its aegis and a move to s 51(20), the Corporations power provision in the *Constitution*. This stage of constitutional and legislative history is in its infancy. A sustained examination of its evolution is beyond the scope of this study. However, it can be noted in passing that its guiding thread has been a move away from the era of collectivism and the steps towards industrial democracy that was slowly enshrined under s 51(35) statutory law. Its theme is an emphasis on private rather than public regulation. With hindsight, the case law built up during the epoch of s 51(35) that reinforced the pillars of a regulatory system based on compulsory arbitration appears even more impressive when contrasted to the period of deregulation that followed in its wake, as s 51(20) became the touchstone of statutory labour law in Australia.

## II THE POLITICS OF STATUTORY LABOUR LAW AND THE SPECTRE OF THE DOCTRINE OF MANAGERIAL PREROGATIVES

The 1890s economic crash and resultant industrial upheavals paved the way for the insertion of s 51(35) in the *Australian Constitution*.<sup>5</sup> This constitutional head of power enabled the Commonwealth Parliament to form industrial tribunals to prevent and settle industrial disputes. The move to statutory labour law at the beginning of the twentieth-century, and the expansion of the role of the state in regulating the labour market, was not embraced by every captain of industry.<sup>6</sup> Intra-capitalist rivalry ensured there was not a unilateral approach on the

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<sup>5</sup> Stuart Macintyre, 'Neither Capital nor Labour: The Politics of the Establishment of Arbitration' in Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890-1914* (Oxford University Press, 1989) 178.

<sup>6</sup> David Plowman, 'Forced March: The Employers and Arbitration' in Stuart Macintyre, Richard Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890-1914* (Oxford University Press, 1989) 145.

part of business to a system of compulsory arbitration becoming the arbiter of the rules governing the buying and selling of labour hours.

The embryonic union movement was smashed in the 1890s and many employers wanted to retain the common law regulatory system based on choice, individual bargaining and freedom of contract.<sup>7</sup> The common law contract of employment was based on juridical equality and the freedom-of-contract mantra that sanctioned individuals bent on maximising their own material self-interest. In practice, free of the libertarian gloss provided by the supporters of an unbridled market system, the employment contract tracked the predilections of bourgeois interests. It enshrined the property rights of the employer and the prerogative to organise and control labour in a relationship based on hierarchical subordination.<sup>8</sup> The imagery of freedom-of-contract painted an egalitarian relationship but beyond the rhetoric the disparity of wealth constituted an opportunity for one party to create a system of rules that ensured contractual relations became an instrument for the enforcement of managerial prerogatives.<sup>9</sup> Max Weber was an articulate champion of capitalism and its greatest liberal thinker. But his penetrating intellect forced him to go with the logic of an argument and he perceived that contractual freedom exploited the benefit of property ownership in a market economy and vested the employer with the capacity to impose terms on the employment seeker.<sup>10</sup> Adam Smith, the founder of free market economics also grasped the inequality of bargaining power that suffused the employment contract.<sup>11</sup> Property ownership and its corresponding managerial rights to control and distribute work was the taproot of power relations and both Weber and Smith by anatomising the underlying dynamic of an unequal wage contract system exhibited forensic analysis on this cardinal point.

For workers, the liberal individualistic credo encapsulated by contract doctrine was a legal fiction as Otto Kahn-Freund has eloquently noted; for its much vaunted juridical equality masked inequality of bargaining power, and thus the employment contract from its inception was an act of submission and subordination.<sup>12</sup> The common

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<sup>7</sup> Brian Fitzpatrick, *A Short History of the Australian Labor Movement* (Macmillan, 1968) 154.

<sup>8</sup> Lord Wedderburn, 'Labour Law: Autonomy From The Common Law?' (1987) 9 *Comparative Labour Law Journal* 222.

<sup>9</sup> Friedrich Kessler, 'Contracts of Adhesion -Some Thoughts about Freedom of Contract' (1943) 43 *Columbia Law Review* 629.

<sup>10</sup> Max Weber, *Economy and Society* (Bedminster Press, 1978) vol 2, 730.

<sup>11</sup> Adam Smith, *Wealth of Nations* (Penguin, 1999) 169.

<sup>12</sup> Otto Kahn-Freund, *Labour and the Law* (Stevens & Sons Limited, 3<sup>rd</sup> ed, 1983) 18.

law of employment became an instrument for the judicial enforcement of managerial prerogatives and the perpetuation of social inequality. For many employers, letting go of reliance on contract law and adopting a collective system based on industrial tribunals and compulsory arbitration was anathema.<sup>13</sup> It entailed a shift from private law and the minimal nineteenth-century Australian state to public law and the prospect of the state regulating markets on behalf of community values and social bonding. Moreover, state regulation would unleash a bureaucratic elite spearheaded by the High Court charged with enforcing regulation and armed with the potential to achieve relative autonomy whilst playing a major role in shaping civil society. Statutory labour law opened up the prospect of a reconfiguration of political power between the rulers and ruled.

As Brian Fitzpatrick realised, it took a breakdown in the capital accumulation process and social strife to detach influential powerbrokers from the freedom-of-contract model.<sup>14</sup> The shift to a statutory scheme was achieved by a coalition of political forces. The 1890s crash sparked a nascent insurgency movement as strikes and unemployment soared.<sup>15</sup> The social strife revealed that unfettered capitalism posed a risk to the longevity of the operation of a market economy. For a number of elite groups a laissez-faire approach lost its allure. The Commonwealth government, liberal intellectuals, right wing unions and a powerful body of business leaders acting on the promise of a protected domestic market operating behind high tariff walls intervened to force acceptance of a compulsory arbitration scheme.<sup>16</sup> The swing of the pendulum from contract law to a centralised wage-fixing system underpinned by s 51(35) offered the prospect of joint employer/employee regulation of the workplace exercised by an independent tribunal system. A vision of a social democratic order based on an egalitarian balance of power between unions and employers beckoned. However, powerbrokers intent on preserving the economic status quo and the prerogatives of capital

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<sup>13</sup> Stuart Macintyre, 'Labour, Capital and Arbitration 1890-1920' in Brian Head (ed), *State and Economy in Australia* (Oxford University Press, 1983) 103.

<sup>14</sup> Brian Fitzpatrick, *The British Empire in Australia: An Economic History, 1834-1939* (Melbourne University Press, 1949) 195.

<sup>15</sup> Robin Gollan, *Radical and Working Class Politics: A Study of Eastern Australia, 1850-1910* (Melbourne University Press, 1976) 109.

<sup>16</sup> Ray Markey, 'Trade Unions, the Labor Party and the Introduction of Arbitration in New South Wales and the Commonwealth' in Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890-1914* (Oxford University Press, 1989) 170; See Gollan, above n 15, 204; Humphrey McQueen, *A New Britannia: An Argument Concerning the Social Origins of Australian Radicalism and Nationalism* (Penguin Books, 1978) 218.

understood statute law exhibited the capacity of institutionalising class conflict by channelling it into legal disputes.<sup>17</sup> By canalising disputes into state controlled courts the aim of the power elite was the elimination of strikes and the neutering of independent trade unions, as legal preoccupations displaced the role of direct action in industrial affairs.<sup>18</sup> For far sighted employers compulsory arbitration offered the vision of integrating workers into a judicial framework based on class control and the defusing of any prospect of an assault on the extant property regime and its corresponding state apparatus.<sup>19</sup> By proposing the erection of tariff walls, the political arm of the state alleviated some of the business pangs involved in letting go of the autocratic legal culture embodied in the common law employment contract.

For employer groups the issue then became one of applying pressure on the new Court of Conciliation and Arbitration and the High Court.<sup>20</sup> The aim was to ensure that the content of judicial doctrine in statutory employment law would be circumscribed by the accumulation and profit imperatives of capitalist relations of production. Fundamentally this required that the relative autonomy of the judiciary be constrained by the straitjacket of property rights. In its role of judicial review and interpreter of the Commonwealth's legislative capacity to regulate the labour market the High Court was in a position to patrol the jurisdictional reach of the arbitration courts. The High Court's decisions would decisively impact on the balance of power between capital and labour. The High Court became a linchpin of the state and a political player wielding enormous power since it had been handed the task of picking industrial winners and losers. The common law contract of employment was a mechanism for enforcing managerial prerogatives.<sup>21</sup> Set against this backdrop it was predictable that capital would set out to subordinate statutory employment law to its acquisitive needs. Unsurprisingly, at the dawn of the new statutory scheme, employers could be expected to mobilise to secure doctrinal tests that would ensure the new regulatory regime upheld managerial prerogatives, whilst employees would seek to shrink the range of the employers' unilateral control of the workplace. The answer to how the High Court would adjudicate on regulating the labour market and its conceptual approach to managerial prerogatives under the new statutory regime was not long in coming.

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<sup>17</sup> John Rickard, *Class and Politics New South Wales, Victoria and the Early Commonwealth, 1890-1910* (Australian National University Press, 1976) 286.

<sup>18</sup> Macintyre, above n 5, 179.

<sup>19</sup> McQueen, above n 16, 220.

<sup>20</sup> Markey, above n 16, 173. Also see Plowman, above n 2, 147, 149.

<sup>21</sup> Alan Fox, *Beyond Contract, Power and Trust Relations* (Faber and Faber, 1974) 184.

In the first reported judgment of the High Court on the jurisdiction of the industrial tribunals established under the umbrella of the labour power provision of the *Constitution*, a Maginot line was built. An exclusionary zone forbidding the industrial tribunals from interfering with managerial prerogatives was established. Right at the outset of the new statutory system of labour law, judicial support for the concept that industrial tribunals were forbidden to arbitrate on issues that were considered the prerogative of capital was established. A key clause in the 1904 *Conciliation and Arbitration Act* that was the chosen instrument of the constitutional power embodied in s 51(35) dealt with 'industrial matters' and this term was interpreted in the first High Court judgment in a way that upheld the doctrine of managerial prerogatives.

In 1904, in *Clancy v Butchers' Shop Employees' Union* ('*Clancy*'),<sup>22</sup> O'Connor J interpreted the legislative parameters of the phrase 'industrial matters.' He found the scope of the relevant Act that included the buzz phrase 'industrial matters' invalidated an agreement about the trading hours of butchers' shops. O'Connor J held that 'every stipulation in the agreement must refer only to industrial matters', and this proviso was infringed when it was applied to the opening and closing hours of shops.<sup>23</sup> O'Connor J was adamant that the construction of 'industrial matters' only embraced the regulation of the direct relationship between employers and employees.<sup>24</sup> It did not encapsulate matters that indirectly touched upon work in an industry.<sup>25</sup> Thus a demand from workers that intruded on political or social issues was not an industrial matter that came within the arbitral jurisdiction. The effect of such a barrier was to ensure that the content of any demand emanating from workers would be circumscribed by capitalist relations of production. In order to pursue this aim O'Connor J engineered a direct/indirect test for 'industrial matters.' Only factors that stringently focused on wage rates and hours of work, or similar terms and conditions of work had a relevant connection with the relationship of employer and employee and thus were within the ambit of the federal arbitration power. O'Connor J noted that if the arbitration tribunals were to have carriage over issues like the opening and closing of shop hours it could trigger a movement towards 'the

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<sup>22</sup> *Clancy* (1904) 1 CLR 181.

<sup>23</sup> *Ibid* 205.

<sup>24</sup> *Ibid* 207.

<sup>25</sup> *Ibid*.

regulation and control of businesses and industries in every part.<sup>26</sup> The latent fear of industrial democracy is evident in the chain of reasoning utilised by O'Connor J. Implicitly O'Connor J believed that the integrity of property rights was being challenged by employees. The economic backdrop of the legal reasoning of O'Connor J was the intense nature of the lobbying campaign of employers bent on using the 'High Court to constrain the operations of the Commonwealth Court of Conciliation and Arbitration.'<sup>27</sup> Judges are not separated by a Chinese wall from the intellectual milieu and allure of ideas propounded by capital. Judges' decisions are broadly shaped by their location on the outer rim of the ruling class. In that sense, O'Connor J was a conceptual ideologist engaging in the provision of ideas that advanced the prerogatives of capital. O'Connor J narrowed the scope of the jurisdiction of industrial tribunals to settle disputes. The motor force of his restrictive legal reasoning that resulted in limits on the adjudication powers of arbitration judges was the need to protect the economic status quo. The judgment in *Clancy* marked the inception of a long historical period when the term 'industrial matters' would be used as a code for upholding the doctrine of managerial prerogatives. In essence, the jurisprudence of O'Connor J was governed by an approach that viewed employment law as a zone where the assumptions of the employer's property rights prevailed.

Energised by the conservative legalism exhibited on legislative and constitutional issues evident in *Clancy*, the employers pressed home their success in getting the High Court to adopt the doctrine of managerial prerogatives in the new statutory law regime. They undertook a campaign of deliberately clogging up the High Court with cases designed to weaken the jurisdiction of arbitration tribunals.<sup>28</sup> In 1906, State government employees were removed from the ambit of federal arbitration<sup>29</sup>, and then the *Excise Tariff Act 1906* (Cth) which had forged the link between protection and a minimum wage regime was declared invalid.<sup>30</sup>

In 1913, in *Australian Tramway Employees' Association v Prahran and Malvern Tramway Trust* ('*Australian Tramway Case*'),<sup>31</sup> the doctrine of managerial prerogatives as the criterion for fixing the jurisdictional

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<sup>26</sup> *Ibid.*

<sup>27</sup> Plowman, above n 6, 147.

<sup>28</sup> Markey, above n 16, 173.

<sup>29</sup> *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees' Association* (1906) 4 CLR 488.

<sup>30</sup> *The King v Barger* (1908) 6 CLR 41.

<sup>31</sup> (1913) 17 CLR 680.

reach of industrial tribunals was examined by the High Court. Barton ACJ sought to provide a rationale for the sovereignty of property rights in employment law. He proffered his overarching vision of how he interpreted statute law in the field of employment relations. He noted that in order to successfully conduct a business either the worker or entrepreneur must prevail. And for Barton ACJ it was obvious that the entrepreneur must carry the day. He noted '...the decision [of] what to do with his own property and therefore the conduct of it, belongs to the employer, who takes the risks of the enterprise.'<sup>32</sup> Prior to this, in the same judgment, Barton ACJ had engaged in a discussion about freedom-of-contract and the way it reinforced the prerogatives of the employer. He noted '[h]is freedom to contract in such matters remains to him, and as to them he is the judge, not this Court, nor the President, nor the employees.'<sup>33</sup> Not surprisingly Barton ACJ adopted the direct/indirect test pioneered by O'Connor J in *Clancy*, and he was not prepared to water down the parameters of the *Clancy* test. Barton ACJ asserted:

[b]ut it is argued that every matter which affects or may affect the successful conduct of the business is an industrial matter. That is certainly not the meaning of the *Constitution*. Businesses are every day affected by matters quite extraneous to them, and it would be absurd to say that such matters become for that reason industrial.<sup>34</sup>

The narrow view of Barton ACJ on what was required of a claim before it came within the ambit of the federal arbitration power was not shared by the majority in this case. The majority believed the issue of unionists wearing a badge denoting membership of the union was a subject matter giving rise to an industrial dispute that could be settled by the Arbitration Court. Isaacs and Rich JJ were prepared to categorise this dispute as one that came within the scope of an industrial matter and could be resolved by arbitration. They argued that the matter impacted directly on the employment relationship because; 'the direct object of the claim to wear a badge as a mark of unionism is to place the workers in a stronger position relatively to their employers with respect to the conditions of their employment.'<sup>35</sup> In other words, the demand made by the unionists had a relevant connection to the relationship of employer and employee. The upshot of this broad view of the jurisdiction of the Arbitration Court that extended workers' right was to put a check on the arbitrariness of a section of the economic elite

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<sup>32</sup> Ibid 689.

<sup>33</sup> Ibid 688.

<sup>34</sup> Ibid 689.

<sup>35</sup> Ibid 702.



that was abusing its exercise of the doctrine of managerial prerogatives.

In 1919, in *Federated Clothing Trades v Archer* (*'Federated Clothing'*)<sup>36</sup> the parameters of the doctrine of managerial prerogatives were again taxing the legal reasoning of the High Court. The majority endorsed the broad view exemplified by the 1913 *Australian Tramway* case. Isaacs and Rich JJ repeated the train of reasoning they exhibited in the earlier case. In that case they found the wearing of a union badge whilst on duty by employees was a matter pertaining to their conditions of employment.<sup>37</sup> In the *Federated Clothing* case Isaacs and Rich JJ held the employees claim that all garments made by an employer should indicate by a label the name of the actual manufacturer was a demand based on an industrial matter for it impacted on 'the employees' wages.'<sup>38</sup> Put simply, Isaacs and Rich JJ stated that if employers refused to put the manufacturer's name on garments it would open the door to the practice of using non-union labour and the undercutting of union rates of pay.<sup>39</sup> Barton J delivered a dissenting judgment in this case just as he did in the 1913 *Australian Tramway* case. He simply adopted a narrow view of what could be said to directly affect employees in the performance of their duties and labelling garments was for the owner of a business to determine, and was irrelevant to any questions connected to industrial matters.<sup>40</sup> Higgins J was in the majority and with a touch of irony noted that even on the narrowest view of 'industrial matters' any attempt to evade union rates of pay pertained to the employment relationship.<sup>41</sup> Of overarching importance is that despite this show of internal dissension on the bench, none of the judges were challenging the existence of the doctrine of managerial prerogatives. It was the limits of the doctrine that divided them. Differing interpretations on a range of matters and whether these constituted a matter pertaining to the employment relationship divided the judiciary, but the caveat was that any claim that sought to interfere with the affairs of management was beyond the jurisdiction of industrial tribunals. Higgins J was a left liberal and proponent of social welfarism but he was unflagging in his championing of managerial prerogatives in the workplace. Higgins J was adamant 'that industrial tribunals were not empowered to adjudicate about the manner in

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<sup>36</sup> (1919) 27 CLR 207.

<sup>37</sup> *Australian Tramway Case* (1913) 17 CLR 680, 702.

<sup>38</sup> *Federated Clothing* (1919) 27 CLR 207, 214.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid* 211.

<sup>41</sup> *Ibid* 217.

which an employer should conduct his business.’<sup>42</sup> Only well into the twentieth century would the High Court begin to depart from the principle that a matter in dispute could not be categorised as an industrial matter if it fell within the prerogative of management and its capacity to decide how a business enterprise operated.

By 1950, the judicial view that there was a forbidden zone where the prerogative to make all decisions relating to the management of an enterprise had hardened. The unbridled rule of capital still existed in Australia so it was little wonder that the industrial jurisprudence of the early part of the twentieth-century still prevailed in matters touching on the sacred rights of property. Any business decision regarded as being within the realm of management was interpreted as being beyond the scope of industrial tribunals. The judicial apparatus of the state had reached unanimity on the doctrine that the management of a business enterprise was not an industrial matter. The internal dissension on the High Court had dissipated, and the bench was unified in declaring a restrictive interpretation of ‘industrial matters.’ For example, in 1950 the justices of the High Court in *The King v Kelly; Ex parte State of Victoria* (‘Kelly’)<sup>43</sup> revisited the issue of the opening and closing of butchers’ shops. In this case, the High Court was unified in declaring that the jurisdiction of industrial tribunals was forbidden from adjudicating on the subject matter of when a shopkeeper can open and close their business. This was a matter for businesspeople to decide and it could never form the basis of a judicial settlement by an industrial tribunal. The High Court affirmed that this was a province that was not ‘a matter pertaining to the relations of employers and employees’.<sup>44</sup> They opined that what O’Connor J stated in *Clancy* about opening and closing of shop hours was still valid. Any other view would involve an excess of the powers conferred by s 51(35) and violate the correct interpretation of what ‘industrial matter’ signified within the meaning of the *Conciliation and Arbitration Act 1904 (Cth)*. For the High Court, in a pristine example of legalistic analysis, the sole focus was on an interrogation of the term ‘industrial matter.’ This term was defined by s 4(1) of the *Conciliation and Arbitration Act 1904 (Cth)* as meaning ‘[all] matter[s] pertaining to the relations of employers and employees.’<sup>45</sup> The crux of the legal reasoning of the High Court was that opening and closing hours of shops was not an industrial matter

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<sup>42</sup> Quoted in *Federated Clerks’ Union of Australia v Victorian Employers’ Federation* (1984) 154 CLR 472, 490 (Mason J).

<sup>43</sup> *The King v Kelly; Ex parte the State of Victoria* (1950) 81 CLR 64.

<sup>44</sup> *Ibid* 84.

<sup>45</sup> *Ibid*.

for such a practice had only a tangential link to the relationship of employer and employee. This boiled down to the narrowest possible interpretation of 'industrial matters.' Viewed through this light the regulation of shop hours was forbidden territory apropos the jurisdiction of the arbitration system. The longevity of the High Court's fear that industrial tribunals had to be constrained from assuming a function of regulating and controlling enterprises to any degree is evident in the way the justices fully quoted the salient passage of O'Connor J in *Clancy* on this aspect.<sup>46</sup> Through periods of economic depression and war, and its resultant social transformations, the High Court remained wedded to legalism and its unequivocal support of the property rights of employers.

### III THE CHANGING OF THE GUARD AND THE DOCTRINE OF MANAGERIAL PREROGATIVES

Until the late 1970s the shadow of strict legalism dominated the constitutional adjudication and statutory interpretation of the High Court. Leslie Zines, noted in his review of 1951-1976 that legalism had prevailed in the High Court as the hegemonic judicial method throughout this period, and that there had been 'no great changes of technique or shifts of approach.'<sup>47</sup> Conservative legalism based on the guiding principle that judicial methodology was immune from the influence of political, social or economic factors prevailed in the High Court. But the tectonic plates were moving. In 1977, Murphy J, in *R v Holmes; Ex parte Public Service Association of New South Wales*,<sup>48</sup> stated: 'The emerging subject of industrial disputes is industrial democracy — the demand by workers for an effective voice and power of decision in the processes which affect their working lives and indirectly their family and social lives.'<sup>49</sup> The High Court was still in the grip of legal conservatism at this stage of history and Murphy J was an isolated left-liberal maverick but social forces were beginning to move his way. As early as the late 1960s the degree of union mobilisation was being felt in the corridors of power. In his annual report of 1969, the Arbitration Commission president Richard Kirby averred '[t]he balance of power in the field has swung more than ever one way.'<sup>50</sup> As the 1970s unfolded worker mobilisation increased and this was reflected in

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<sup>46</sup> Ibid 84.

<sup>47</sup> Quoted in Brian Galligan, *Politics of the High Court: A Study of The Judicial Branch of Government in Australia* (University of Queensland Press, 1987) 187.

<sup>48</sup> *R v Holmes; Ex parte Public Service Association of New South Wales* (1977) 140 CLR 63.

<sup>49</sup> Ibid 89.

<sup>50</sup> Quoted in Tom Bramble, *Trade Unionism in Australia: A History from Flood to Ebb Tide* (Cambridge University Press, 2008) 46.

greater union coverage and rises in wages that lifted the labour share of national income.<sup>51</sup> The end of the long post-war boom in the mid-1970s took some of the steam out of the union upsurge. But in the late 1970s and reaching into the 1980s, the strike rate skyrocketed and the unions were willing to fight in the industrial tribunals for higher wages and better conditions.<sup>52</sup> While the vicissitudes of economic depression and war had failed to register within the walls of industrial tribunals and the High Court, direct action posed a sterner test for state power and the dominant philosophy of its legal bodies. Growing social unrest at the workplace was the backdrop against which there was to be a challenge to apolitical legalism in the field of the doctrine of managerial prerogatives. The realignment of the balance of power in the workplace offered the prospect of a doctrinal shift at some stage of statutory labour law. Law always lags behind social developments, but the mobilisation of the labour movement as the final decades of the twentieth-century loomed held a promise of changes being reflected in the doctrine of employment law.

During the reign of Barwick CJ, High Court legalism and its advocacy of the autocratic property rights of employers in the workplace governed employment law. In 1964 Garfield Barwick made a seamless transition from Minister for External Affairs in the Menzies conservative government to Chief Justice of the High Court. His reactionary conservatism was transplanted from Parliament to the High Court. He became the longest serving Chief Justice and only after his retirement in 1981 was there clear air for the growing profile of trade unions to be matched with a wider ambit for industrial tribunals to deal with industrial disputes. As long as Barwick CJ dominated the High Court there would be no expansion of the arbitration power and thus curtailing of the doctrine of managerial prerogatives. The hobbling of industrial tribunals by the credo that a settlement of an industrial dispute was impossible if the issue at stake conflicted with the autonomy of management to organise the production process was sacrosanct. Barwick CJ was an inherent opponent of the concept of industrial democracy. For Barwick CJ, there was a class of matters that were simply outside the boundaries of the regulatory power of government and arbitration tribunals.<sup>53</sup> Any industrial matter that encroached on the managerial sphere was branded as being only indirectly connected with the employment relationship and beyond the

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<sup>51</sup> Ibid 62-63.

<sup>52</sup> Ibid 113.

<sup>53</sup> Breen Creighton, William Ford, Richard Mitchell, *Labour Law* (Law Book Company, 1993) 490.

jurisdiction of industrial tribunals. Management had an exclusive right to control work and the enterprise. In essence, Barwick CJ implemented Edmund Burke's unflinching view that the workplace was the crucible of economic hierarchies and the wage relation was a part of the chain of subordination linking employers and employees.<sup>54</sup> When Barwick CJ was off duty he felt no compunction about asserting that it was the function of business to guide the workforce and at the apex of command it was for 'leaders to point out the way.'<sup>55</sup> Marr notes that during the tenure of Barwick CJ he was 'the man on the High Court bench who most often voted for employers in disputes with employees.'<sup>56</sup>

During his tenure, Barwick CJ normally possessed the capacity and prestige to create the ambience necessary to bend the bulk of his brethren on the bench to his viewpoint on what constituted a non-industrial claim of employees. For example, in *The Queen v Commonwealth Conciliation and Arbitration; Ex parte Melbourne and Metropolitan Tramways Board*,<sup>57</sup> Barwick CJ opposed granting the industrial tribunal the right to force the employer in certain circumstances to operate trams and buses with two employees rather than one. Barwick CJ declared:

[w]hat is sought to be done in this case is to make a demand which directly concerns only the management of the transport system. The subject matter of the demand is the management of the transport system. This, in my opinion, is not an industrial demand.<sup>58</sup>

In other words, the manning of buses was an issue that was beyond the regulatory role of industrial tribunals. McTiernan, Taylor, Menzies, Owen JJ also adopted the line that that this was a subject that did not constitute an industrial matter.<sup>59</sup> But the strength of conviction on the part of Barwick CJ regarding his premise that the doctrine of managerial prerogatives unilaterally ruled out the management of enterprises being subject to industrial regulation was not always successful. There was an example during his tenure as Chief Justice when his fellow brethren decided in favour of the employees involved

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<sup>54</sup> Frederick Lock, *Edmund Burke Volume Two: 1784-1797* (Oxford University Press, 2006) 518.

<sup>55</sup> David Marr, *Barwick* (Allen & Unwin, 1980) 248.

<sup>56</sup> *Ibid* 289.

<sup>57</sup> *The Queen v Commonwealth Conciliation and Arbitration; Ex parte Melbourne and Metropolitan Tramways Board* (1966) 115 CLR 443.

<sup>58</sup> *Ibid* 451.

<sup>59</sup> *Ibid* 453-457.

in a dispute with their employers. However, it has to be recognised that Barwick CJ was not sitting on the bench in this particular case.<sup>60</sup> In 1968 in *R. v Gallagher; Ex parte Commonwealth Steamship Owners' Association*<sup>61</sup> in a case concerning whether a ship should be required to carry three cooks rather than two it was held the claim had the relevant connection with the relationship of employer and employee thus it was a matter subject to the industrial tribunals award-making authority. However, Barwick CJ was unshaken by the outcome in *Gallagher* and, in 1971, in *R. v Flight Crew Officers' Industrial Tribunal; Ex parte Australian Federation of Airline Pilots*<sup>62</sup> he felt confident enough to trenchantly observe it was settled law that 'management or managerial policy as such is not...a proper subject for an award or order.'<sup>63</sup>

With the exit of Barwick CJ from the High Court, the electoral victory of Hawke in March 1983, and the inception of the ALP-ACTU Accord, the scene was set for a strategic alliance that put business and government on a footing with a union movement that was now at the centre of national economic and political life.<sup>64</sup> These events were the harbinger of a new dawn on the High Court as Murphy J and a new generation of judges was finally emancipated from the suffocating shadow of Barwick CJ. The lag between law and what had been happening in the workplace and the streetscape for a number of years now had an opportunity to close the circle by ushering in a different style of judging. An era of judicial activism and the eclipse of apolitical legalism opened up. In 1983, the Full Court of the Victorian Supreme Court overturned a decision made by the Victorian Industrial Relations Commission that allowed the insertion of a provision in an agreement requiring employers to consult with employees over the introduction of new technology.<sup>65</sup> The Victorian Supreme Court took the view that technological changes were an issue that fell within managerial prerogatives for 'decisions as to management are not the elements of an industrial matter.'<sup>66</sup> The union representing the employees appealed

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<sup>60</sup> *R v Gallagher; Ex parte Commonwealth Steamship Owners' Association* (1968) 121 CLR 330.

<sup>61</sup> *Ibid.*

<sup>62</sup> *R v Flight Crew Officers' Industrial Tribunal; Ex parte Australian Federation of Airline Pilots* (1971) 127 CLR 11.

<sup>63</sup> *Ibid* 20.

<sup>64</sup> Bramble, above n 50, 128. See also Frank Stilwell, *The Accord... And Beyond: The Political Economy of the Labor Government* (Pluto Press, 1986); Gwynneth Singleton, *The Accord and the Australian Labour Movement* (Melbourne University Press, 1990).

<sup>65</sup> For the seminal article on this case in its progression from an industrial tribunal to the High Court see: Andrew Stewart, 'The Federated Clerks Case: Managerial Prerogative in Retreat?' (1985) 59(12) *Australian Law Journal* 722.

<sup>66</sup> *Victorian Employers' Federation v Registrar of Industrial Relations Commission of Victoria* [1983] 2 VR 395, 408.

the Victorian Supreme Court decision to the High Court. A reinvigorated High Court in 1984 quashed the decision of the Victorian Supreme Court. It was Murphy J who spearheaded the charge for expanding the range of disputes that could fall within the jurisdiction of industrial tribunals. Murphy J boldly drew a line under the doctrine of managerial prerogatives. In *Federated Clerks' Union of Australia v Victorian Employers' Federation* ('*Federated Clerks' case*')<sup>67</sup> he stated:

It is an error to regard managerial prerogatives and industrial matters as mutually exclusive areas. For decades, the argument has been advanced that a dispute cannot...concern an industrial matter because it concerns management prerogatives...In the history of industrial law, many matters which were within the exclusive managerial prerogative of employers have been brought within the scope of industrial regulation, by the legislature or industrial tribunals.<sup>68</sup>

Murphy J was in the majority in this case, and of vital importance was the support given to his reasoning by Mason J. At this point Mason J was beginning to flourish on the bench. Barwick CJ had disappeared and Mason J was on the path to becoming not only the Chief Justice but also the most influential High Court judge since Dixon CJ. In the *Federated Clerks'* case, Mason J was far more equivocal than Murphy J but he foreshadowed a future toughening of his standpoint on the doctrine of managerial prerogatives. He noted 'whether the concept of management or managerial decisions can be sustained as an absolute and independent criterion of jurisdiction...is an important question that may require future consideration.'<sup>69</sup>

Three years later, the High Court in *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* ('*Cram*')<sup>70</sup> in a joint judgment under the leadership of Mason CJ decisively rejected the concept that there was an opaque and impassable veil that divided industrial matters from managerial prerogatives. In this case that hinged on the manning and recruitment of labour, in a coal mine the mechanical jurisprudence ghosts of Barton A. C. J and Barwick CJ were almost completely laid to rest. The closing of the era of managerial prerogatives being effectively the criterion of jurisdiction in industrial law cases was signalled. The Court noted that:

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<sup>67</sup> *Federated Clerks' case* (1984) 154 CLR 472.

<sup>68</sup> *Ibid* 493.

<sup>69</sup> *Ibid* 491.

<sup>70</sup> *Cram* (1987) 163 CLR 117.

[i]n reaching this conclusion we reject the suggestion, based on the remarks of Barwick CJ in *Melbourne and Metropolitan Tramways Board*, that managerial decisions stand wholly outside the area of industrial disputes and industrial matters. There is no basis for making such an implication.<sup>71</sup>

Henceforth, industrial tribunals were vested with the power to make industrial settlements without being held hostage to the notion that there was a business policymaking sphere that was immune to judicial review. It took Breen Creighton and Andrew Stewart to pinpoint a caveat. They adroitly noted that the High Court in *Cram* endorsed an aspect of the decision in the 1950 case *Kelly* that dealt with the opening and closing of shops.<sup>72</sup> In brief, if the matter in issue dividing employers and employees is tangential to the employment relationship instead of inextricably linked to it then it remains a forbidden zone beyond the jurisdiction of industrial tribunals. The *Clancy* and *Kelly* example of shop trading hours of employers retains its legitimacy because it only impacts indirectly on employees. Creighton and Stewart are excoriating on the illogicality of this premise. They note '[i]t is difficult to see how that could be correct, given that trading hours almost inevitably dictate a major part of retail employees' working hours.'<sup>73</sup> In effect, the 1904 *Clancy* direct/indirect test was intact. The doctrine of managerial prerogatives had been liberalised but it was not extinct. It was still the case that not every matter within the prerogative of capital would be brought within the scope of industrial regulation. The judicial apparatus of the state still ensured there were limitations on the range of matters that could be adjudicated upon by arbitration courts. Any claims by workers would still be circumscribed by capitalist relations of production, and any infringement on core aspects of property rights would be rejected. Thus any demand that smacked of a political or social nature would not be interpreted as an industrial matter. *Cram* highlights a shifting of the line is permissible, but on issues that would infringe on capital accumulation, profitmaking, investment policies and the understanding that jobs belong to the employer and not employee there are limits to the reach of industrial law.

Whatever qualification is placed on the decision in *Cram* it was a turning point for the labour movement and judicial philosophy. It diluted the dialectical bond between property rights and their legal reflection in managerial prerogatives, whilst also highlighting that

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<sup>71</sup> Ibid 136.

<sup>72</sup> Creighton and Stewart, above n 3, 68.

<sup>73</sup> Ibid.



strict legalism can be usurped when there is a confluence between social forces and bold judges prepared to perceive a role for public policy, and eschew the pretence that the application of law is a mechanical function.

With the advantage of hindsight, *Cram* was a high point and then the tide ebbed. This phenomenon is outside the scope of this work and only a few preliminary points will be made. With the triumph of neo-liberalism, there was a rolling back of employment rights and the memory of the progressive jurisprudence that was a hallmark of the Mason Court's interpretation of statute law in this field faded from view. McCallum argued that as neo-liberalism became the vogue, its deregulatory ideology swept through Australian labour law in the early 1990s.<sup>74</sup> Neo-liberalism set about creating an institutional framework where property rights were strengthened, and the power of economic elites and free markets reinvigorated. The Keating Labor Government responded in 1993 to the triumph of market fundamentalism by introducing an enterprise bargaining system that diluted the pillars of the collective system established by the arbitration tribunals and progressive jurists.<sup>75</sup> The unbridled march of free market capitalism culminated in Howard's legislative program that spanned the years 1996-2007. Work Choices laws established in 2005 claimed the scalp of the one hundred year old compulsory arbitration system.<sup>76</sup> Weakening trade unions and restoring managerial prerogatives underpinned the employment relations legislation executed during the Howard years.<sup>77</sup> Gillard's Fair Work Act reclaimed some of the ground but with s 51(35) supplanted by the corporations power contained in s 51(20) managerial prerogatives seem once again unassailable. The balance of power had shifted back to property rights during the long conservative reign of Howard, and its corollary the doctrine of managerial prerogatives appears well entrenched. The Gillard legislative reform program retained key aspects of Work Choices and its genuflection to managerial power and obeisance to the mantra of property rights is exhibited by the retention of the ban on pattern

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<sup>74</sup> Ron McCallum, 'The New Work Choices Laws: Once Again Australia Borrows Foreign Labour Law Concepts' (2006) 19(2) *Australian Journal of Labour Law* 104.

<sup>75</sup> Anthony Forsyth, 'Exit Stage Left, Now Centre Stage: Collective Bargaining under Work Choices and Fair Work' in Anthony Forsyth and Andrew Stewart (eds), *Fairwork: The New Workplace Laws And The Work Choices Legacy* (Federation Press, 2009) 120.

<sup>76</sup> McCallum, above n 74, 98.

<sup>77</sup> Richard Mitchell et al, 'Assessing the Impact of Employment Legislation : The Coalition Government's Labour Law Program 1996-2007' (2010) 23(4) *Australian Journal of Labour Law* 275.

bargaining and restrictions on strikes and union right of entry.<sup>78</sup> Those critics who brand the Fair Work Act as a diluted version of Work Choices, and claim it is a pale imitation of the old arbitration system and that it elevates the rights of the individual over promoting collective bargaining make a telling point.<sup>79</sup> Such epithets only add lustre to the brief interlude of progressive industrial jurisprudence unleashed by activist High Court judges acting under the umbrella of an arbitration system that is now an increasingly distant memory.

#### IV CONCLUSION

The aim of this article has been to illuminate the socio-legal forces that shaped the High Court's twentieth-century definition of 'industrial matters' that was a keynote of the legislation that established the jurisdiction of the arbitration tribunals that stood at the heart of Australian labour law for over a century. At the dawn of the twentieth-century if the High Court decided that the subject of a dispute between employer and employees failed the litmus test of 'industrial matters' then it fell outside the adjudication powers of industrial tribunals. The High Court was the gatekeeper monitoring access to industrial tribunals. For many decades the High Court decided managerial prerogatives were outside the ambit of state supervision. A key state institution refused to break free from the shibboleth that it was the prerogative of the employer to be the sole organiser of the production process. The High Court exhibited in practice that property rights were the sovereign principle in civil society and entrenching the extant pyramid of power at the workplace was the fundamental dynamics of its concept of industrial law. There was internal dissension on the bench about the limits of managerial prerogatives, but unity on the assumption that a range of matters, particularly if they touched on political or social issues were beyond the jurisdiction of industrial tribunals. It is submitted that in adopting the doctrine of managerial prerogatives the High Court highlighted that extra-legal factors governed its approach to the arbitration system. In brief, by erecting a Maginot line that circumscribed the matters that would attract adjudication by industrial tribunals the High Court ensured that property rights considered sacrosanct to the owners and controllers of enterprise would remain unchallenged. In the field of industrial jurisprudence, the High Court demonstrated that law is a condensation of the economic interests of the ruling class. The judicial method of strict legalism that treats issues as technical puzzles abstracted from

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<sup>78</sup> Forsyth, above n 75, 235.

<sup>79</sup> *Ibid* 237.

social, political and economic factors is a haven for legal conservatives. In the case of the workplace disputes that came before the High Court it provided a legitimating judicial ideology for the prerogatives of capital. By its reluctance to engage openly in a discussion about asymmetrical relationships and the endemic nature of the omnipresent contest over the distribution of work the High Court hid below the surface the fact that its touted apolitical legal reasoning shielded from criticism the role of managerial prerogatives as the driving force of its industrial jurisprudence.

Only when trade unions began to push against the walls of the arbitration system and the High Court experienced a liberal replenishing of its ranks as the Mason Court took command was there a judicial sea-change. There was an expansion of the jurisdiction of industrial tribunals and the prospect of a sharp reduction in managerial prerogatives. With the rise of neo-liberalism there was a conservative backlash, and the restoration of the unbridled hegemony of capital prerogatives. Work Choices toppled the labour power provision in the *Constitution* that for over a century had been used to settle and prevent industrial disputes and installed the corporation power as the mechanism for enacting labour laws. Corporatising labour law was symbolic of a shift to the right in Australia and it heralded a retreat from the erosion of managerial prerogatives. An incorporated business is in effect a legal and soulless fiction that is only responsible to shareholders, and an entity that eschews morality and prioritises earning profits. It is an instrument that is inherently opposed to watering down managerial prerogatives. Unsurprisingly the progressive jurisprudence established by the Mason court has now slipped into history and the days of the near death experience of the doctrine of managerial prerogatives has been replaced by a different political and juridical landscape. However, the virtues of those enlightened statutory labour law cases combined with the contrarian judicial voices that breached the walls of managerial prerogatives stand testimony to the hope of industrial democracy and a different way of constructing an industrial civilisation.

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# EDUCATING CULTURALLY SENSIBLE LAWYERS: A STUDY OF STUDENT ATTITUDES ABOUT THE ROLE CULTURE PLAYS IN THE LAWYERING PROCESS

ANDREA A CURCIO\*, TERESA M WARD\*\* AND NISHA DOGRA\*\*\*

## ABSTRACT

*Lawyers' cultural experiences, biases, and perspectives may differ from those of clients, colleagues, and judges. Awareness of such differences is critical to effective representation because cultural perspectives may affect numerous aspects of the lawyering process, such as interviewing, counseling, negotiating, strategising, and persuading. Empirical data that informs the debate about the need to teach students to work across cultures is particularly relevant as lawyers serve increasingly diverse populations and transnational practice continues to grow. In this article, we describe a survey developed to provide law faculties with data to help assess the need for cultural competence education and to inform the discussion of what that education might encompass. In this article, we discuss the reasons to consider developing students' abilities to work effectively across cultures, the survey design and methodology, and the survey findings. Initial results indicate that the students surveyed largely want to learn about how culture may affect the lawyering process, generally are aware that culture may affect client behaviours, but may be less aware of the effect culture has on their own perceptions and behaviours. They also indicate that simply taking a survey such as the one described herein has an educational benefit. We discuss the implications of those findings for law teaching. While the work described herein was done in the United States, we believe the issue transcends national borders and we hope this article provokes discussion across borders about the need to develop law students' abilities to work effectively amongst countries' own diverse populations as well as transnationally.*

## I INTRODUCTION

Today's lawyers practice in a multi-national and multi-cultural world and must be able to interact effectively with people from cultures different than their own. While some legal educators recognise the importance of teaching students to understand and address the role

culture plays in the lawyering process,<sup>1</sup> other legal educators may be less familiar with the importance of developing students' ability to work effectively across cultures. Similarly, medical educators have confronted the need to educate colleagues about the importance of developing students' abilities to work with patients from a wide range of cultural backgrounds.<sup>2</sup>

In 2000, the Liaison Committee for Medical Education (LCME), the medical school accrediting authority for U.S. medical schools, introduced a cultural-competence standard.<sup>3</sup> Development of the standard was prompted by the recognition that 'language and culture

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<sup>1</sup> See, eg. Lisa Bliss, Sylvia Caley and Robert Pettignano, 'Client and Patient Relationships: Understanding Cultural and Social Context' in Elizabeth Tobin Tyler et al (eds), *Poverty, Health and Law Readings and Cases for Medical-Legal Partnership* (Carolina Academic Press, 2011) 125; Susan Bryant, 'The Five Habits: Building Cross-Cultural Competence in Lawyers' (2001) 8 *Clinical Law Review* 33; Anthony O'Donnell and Richard Johnstone, *Developing a Cross-Cultural Law Curriculum* (Cavendish Publishing, 1997); Ascanio Piomelli, 'Cross-Cultural Lawyering by the Book: The Latest Clinical Texts and a Sketch of a Future Agenda' (2006) 4 *Hastings Race & Poverty Law Journal* 131; Antoinette Sedillo Lopez, 'Making and Breaking Habits: Teaching (And Learning) Cultural Context, Self-Awareness, and Intercultural Communication Through Case Supervision in a Client-Service Legal Clinic' (2008) 28 *Washington University Journal of Law and Policy* 37; Paul R Tremblay, 'Interviewing and Counseling Across Cultures: Heuristics and Biases' (2002) 9 *Clinical Law Review* 373; see also Ellen Grote, Indigenous Higher Education Advisory Council (IHEAC), *Principles and Practices of Cultural Competency: A Review of the Literature* (August 2008) 32-5 <<http://www.deewr.gov.au/Indigenous/HigherEducation/Programs/IHEAC/Documents/PrinciplePracCulturalComp.pdf>> (discussing the Indigenous Law Program at Griffith University and the cultural competence studies that are part of the Justice Studies program at Queensland University of Technology).

<sup>2</sup> Joseph R Betancourt, 'Cultural Competence - Marginal or Mainstream Movement' (2004) 351 *New England Journal of Medicine* 953; Nisha Dogra and Niranjan Karnik, 'Teaching Cultural Diversity to Medical Students' (2004) 26 *Medical Teacher* 677.

<sup>3</sup> Liaison Committee on Medical Education, *Functions and Structure of a Medical School, Standard for Accreditation of Medical Education Programs Leading to the M.D. Degree* (June 2010) 10-1 [ED 21]-[ED 22] <<https://www.med.unc.edu/ome/lcme/Sub-Committees/lcme-documents/LCMEFunctionsStructMS10-11.pdf>>.

affect health care beliefs, choices and treatment'<sup>4</sup> and that the different cultural experiences of health care providers and their patients contribute to racial and ethnic disparities in health and health care access.<sup>5</sup> In the years since that standard was introduced, medical educators have treated development of students' abilities to work with people from a wide range of cultures as an important subject for both pedagogy and research. Health care educators have designed numerous teaching methodologies and cultural-competence learning outcome measurement tools in health education.<sup>6</sup> Based upon this work, we began exploring whether similar instruments could be developed for legal educators. Before developing an instrument to measure student learning outcomes, we believe it is useful to develop an instrument that measures law students' understandings of, and desires to learn about, how culture affects the lawyering process. The instrument can help inform the debate about the need for educating law students to work across cultures and what that education should encompass – a necessary prelude to conversations about student learning outcomes.

Although 'cultural competence' is the most commonly used term to describe teaching students to work effectively across cultures, we prefer not to use it because that term implies one can become 'competent' in another's culture. We find that problematic because it assumes that culture is possessed by the Other, rather than all people, and because it assumes all people from the same culture act and think alike. In this work, we conceptualise the skill of being able to work effectively across cultures as one that requires: self-awareness of the lawyer's own cultural lens; the ability to understand the cultural forces that affect the lawyer and all those with whom the lawyer

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<sup>4</sup> Cindy Brach and Irene Fraserirector, 'Can Cultural Competence Reduce Racial and Ethnic Health Disparities, A Review and Conceptual Model' (2000) 57 *Supplement 1 Medical Care Research and Review* 181, 183; see also Michael Paasche-Orlow, 'The Ethics of Cultural Competence' (2004) 79 *Academic Medicine* 347 (discussing the role of cultural and linguistic competency in ensuring valid informed consent).

<sup>5</sup> Joseph R Betancourt et al, 'Defining Cultural Competence: A Practical Framework for Addressing Racial and Ethnic Disparities in Health and Health Care' (2003) 118 *Public Health Report* 293.

<sup>6</sup> See, eg, Aysegul Gozu et al, 'Self-Administered Instruments to Measure Cultural Competence of Health Professionals: A Systematic Review' (2007) 19 *Teaching and Learning in Medicine* 18 (reviewing studies on effectiveness of cultural competence curricula and self-assessment tools used to determine the efficacy of cultural competence teaching interventions for health care providers); Desiree A. Lie et al, 'Does Cultural Competency Training of Health Professionals Improve Patient Outcomes? A Systematic Review and Proposed Algorithm for Future Research' (2011) 26 *Journal of General Internal Medicine* 317 (reviewing studies of patient outcomes after health care provider cultural competency training).

communicates; the ability to identify the interaction of those cultural forces; and openness to changing one's perspective based upon what has been learned.<sup>7</sup> Because this construct adopts the 'cultural sensibility' model identified by Drs. Dogra and Karnik,<sup>8</sup> throughout the remainder of this article as we discuss our work, we refer to developing students' 'cultural sensibility' because we believe this term best describes the skills law students need and that the survey attempts to capture.

In Part I, this article briefly explains how cultural sensibility skills permeate all practice areas and undergird a wide range of lawyering skills. Part II provides an overview of medical educators' work to develop and measure student learning outcomes and briefly discusses the theoretical constructs developed by U.S. clinical legal educators seeking to enhance their students' abilities to work cross culturally because this work laid the groundwork for the development of our survey instrument. Part III discusses the survey design and methodology. Parts IV and V present findings from a study based upon the survey and discuss those findings in light of both the information learned about law students' knowledge and attitudes and the implications for developing teaching methods and materials designed to enhance students' cultural sensibility. Parts VI and VII discuss ways to improve the study instrument as well as potential future studies.

We acknowledge, at the outset, that the survey and its results are merely an initial foray into relatively uncharted waters for legal educators and we do not claim that the survey results are the definitive statement about student attitudes and knowledge about the role culture plays in the lawyering process. Rather, we hope this article sparks discussion about the need for legal educators across the globe to further explore these issues and hope the survey lays the groundwork for others to build upon in that exploration.

## II WHY CULTURAL SENSIBILITY IS A NECESSARY LAWYERING SKILL

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<sup>7</sup> This conceptualisation was drawn from the work of some U.S. clinical legal educators as well as the work done by Drs. Dogra and Karnik to develop cultural sensibility learning outcomes for medical students. See Bliss, Caley and Pettignano, above n 1; Bryant, above n 1; see also Niranjana S. Karnik and Nisha Dogra, 'The Cultural Sensibility Model: A Process-Oriented Approach for Children and Adolescents' (2010) 19 *Child and Adolescent Psychiatric Clinics of North America* 719.

<sup>8</sup> See, eg, Karnik and Dogra, above n 7, 721.

While definitions of culture are complex, nuanced and varied depending upon context and discipline,<sup>9</sup> medical educators define culture as 'integrated patterns of human behaviour that include the language, thoughts, communications, actions, customs, beliefs, values and institutions of racial, ethnic, religious or social groups'.<sup>10</sup> They recognise that culture is multi-faceted and a 'part of all of us and our individual influences (including socioeconomic status, religion, gender, sexual orientation, occupation disability, etc.)'.<sup>11</sup> As is clear from that definition, today's lawyers are likely to work with people from cultures different than their own.

What makes developing law students' ability to work across cultures a complex endeavor is that all people have multiple cultural backgrounds and experiences that affect their perceptions and interactions<sup>12</sup> and, of course, all members of a particular race, ethnicity, religion, or social group do not have the same cultural experiences, perceptions, beliefs, or attitudes.<sup>13</sup> While lawyers cannot become 'competent' in a particular culture<sup>14</sup> they can become 'culturally sensible'. Lawyers can learn to recognise, understand, and effectively deal with how their own and others' cultural beliefs, perceptions, attitudes and understandings affect legal analysis and interpersonal interactions.<sup>15</sup>

Lawyers' understandings of, and abilities to deal with, their own and others' cultural perspectives serve as the foundation to support a wide range of other lawyering skills. Because culture affects verbal and non-verbal communication as well as expressions and perceptions of

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<sup>9</sup> John R Bolden et al (eds), *Redefining Culture Perspectives Across the Disciplines* (Lawrence Erlbaum Associates, 2008).

<sup>10</sup> Association of American Medical Colleges, 'Cultural Competence Education for Medical Students' (Education Paper No 1, Association of American Medical Colleges 2005) <<https://www.aamc.org/download/54338/data/culturalcomped.pdf>>.

<sup>11</sup> Joseph R Betancourt, 'Cross-cultural Medical Education: Conceptual Approaches and Frameworks for Evaluation' (2003) 78 *Academic Medicine* 560, 561.

<sup>12</sup> *Ibid.*

<sup>13</sup> See Angela Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stanford Law Review* 581, 585, 588 (criticising gender, racial and ethnic essentialism, i.e. the notion that there is a unitary 'women's experience' or a monolithic 'black experience' or 'Chicano experience'); Grote, above n 1, 35 (noting Indigenous students' concern that they were often called upon in class to "speak on behalf of all indigenous peoples").

<sup>14</sup> Bliss, Caley and Pettignano, above n 1, 144.

<sup>15</sup> For a description of teaching methodologies designed to enhance law students' ability to enhance students' abilities to work effectively across cultures, see Bliss, Caley and Pettignano, above n 1; Bryant, above n 1; O'Donnell and Johnstone, above n 1; Beverly Moran, 'Disappearing Act: The Lack of Values Training in Legal Education – A Case for Cultural Competency' (2010) 38 *Southern University Law Review* 1; Sedillo-Lopez, above n 1.



emotions,<sup>16</sup> lack of cultural sensibility skills make it more difficult for lawyers to effectively interview, counsel, negotiate, strategise, or resolve conflicts.<sup>17</sup> For example, in some cultures, it is considered improper to publicly display emotion.<sup>18</sup> Failure to recognise and account for this may leave the lawyer, and the trier of fact, with a misimpression about the client's reaction to a key event. Or, in business law transactions and settlement negotiations, if a lawyer is unaware that in some cultures directly confronting disagreements is considered inappropriate<sup>19</sup> the lawyer may be an ineffective dealmaker and negotiator. In today's multi-cultural world, regardless of practice area, lawyers cannot accurately analyse a case without understanding the context, and they cannot understand the context if they are unaware of the cultural forces that may be in play. Without the ability to understand their own and others' cultural lenses and how such lenses affect interactions, lawyers risk errors in perception and judgment that may harm clients.<sup>20</sup> Those risks of miscommunication and misunderstandings may occur when working with under-represented populations or with multi-national industries and law firms. In fact, legal educators have written about the role culture plays in a number of different substantive practice areas, including: international transactional legal work,<sup>21</sup> mediation,<sup>22</sup> domestic litigation,<sup>23</sup> elder

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<sup>16</sup> See generally William B Gudykunst and Bella Mody (eds), *The Handbook of International and Intercultural Communication* (Sage Publications, 2<sup>nd</sup> ed, 2002) 69-126.

<sup>17</sup> Marjorie A Silver, 'Emotional Competence, Multi-Cultural Lawyering and Race' (2001-2002) 3 *Florida Coastal Law Journal* 219, 242; see also Tremblay, above n 1; see also Terri Farrelly and Bronwyn Carlson, 'Towards Cultural Competence in the Justice Sector', (Report No 3, Indigenous Justice Clearinghouse June 2011) <<http://www.indigenousjustice.gov.au/initiatives/initiative003.pdf>> (discussing the need for cultural competence training of Australian justice system government employees and noting how that lack of training may hamper the lawyer/client interviewing process).

<sup>18</sup> Nathan Yrizarry et al, 'Culture and Emotion' in Leonore Loeb Adler and Uweter Gielen (eds), *Cross-Cultural Topics in Psychology* (Praeger Publishers, 2<sup>nd</sup> ed, 2001) 131, 136-7 (discussing studies of how facial displays of emotion are modified by cultural display rules).

<sup>19</sup> Lynn E Metcalf et al, 'Cultural Tendencies in Negotiation: A Comparison of Finland, India, Mexico, Turkey and the United States' (2006) 41 *Journal of World Business* 382 (discussing various cultural differences in negotiation approaches).

<sup>20</sup> Carwina Weng, 'Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness' (2005) 11 *Clinical Law Review* 369, 374.

<sup>21</sup> Nancy S Kim, 'Reasonable Expectations in Sociocultural Context' (2010) 45 *Wake Forest Law Review* 641; Lauren R Frank, 'Ethical Responsibility and the International Lawyer: Mind the Gaps' (2000) 2000 *University of Illinois Law Review* 957.

<sup>22</sup> Fred D Butler, 'The Question of Race, Gender & Culture in Mediator Selection' (2001) 44 *Dispute Resolution Journal* 26; John Barkai, 'What's A Cross-Cultural Mediator to Do? A Low-Context Solution for a High-Context Problem' (2008) 10 *Cardozo Journal of Conflict Resolution* 43.

law,<sup>24</sup> international human rights,<sup>25</sup> criminal law,<sup>26</sup> health care law,<sup>27</sup> and poverty law.<sup>28</sup>

In many ways, the ability to understand the cultural biases and perceptions at work in a case is akin to the ability to perform legal analysis. In each instance, lack of knowledge may lead to missing or misunderstanding a critical element necessary to accurately analyse the case and devise an appropriate course of action. In developing students' cultural sensibilities, legal educators provide students with tools that allow them 'to incorporate into their knowledge base different considerations, sensibilities and lines of reasoning which serve to exponentially augment their analytical proficiency'<sup>29</sup> and to enhance other lawyering skills, all of which prepares law students to better serve their clients.

### III WORK DONE BY MEDICAL AND CLINICAL LEGAL EDUCATORS TO DEVELOP STUDENTS' CULTURAL SENSIBILITY

Medical educators have developed a myriad of ways to enhance students' abilities to work with people from different cultures including interactive lectures, videos, simulations, demonstration role plays, workshops, patient interviews, community based service learning and online problem based learning.<sup>30</sup> Recognising that the ability to work effectively across cultures occurs on a continuum and that students progress through various stages as they develop their

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<sup>23</sup> Leslie Espinoza Garvey, 'The Race Card: Dealing with Domestic Violence in the Courts' (2003) 11 *American University Journal of Gender, Social Policy & the Law* 287.

<sup>24</sup> Helen Y Kim, 'Do I Really Understand Cultural Concerns in Determining Diminished Competency' (2007) 15 *Elder Law Journal* 265.

<sup>25</sup> Kathleen Kelly Janus and Dee Smythe, 'Navigating Culture in the Field: Cultural Competency Training Lessons from the International Human Rights Clinic' (2011/12) 56 *New York Law School Law Review* 445.

<sup>26</sup> Micheal L Perlin and Valerie Rae McClain, 'Where Souls are Forgotten: Cultural Competencies, Forensic Evaluations and International Human Rights' (2009) 15 *Psychology, Public Policy and Law* 257, 265-9 (discussing why cultural competency is important when conducting forensic interviews of criminal defendants, witnesses, and the defendant's family members to develop mitigating factors in capital cases).

<sup>27</sup> Bliss, Caley and Pettignano, above n 1, 144-6.

<sup>28</sup> Bryant, above n 1; Sedillo Lopez, above n 1.

<sup>29</sup> Tanya M Washington, 'The Diversity Dichotomy: The Supreme Court's Reticence to Give Race a Capital "R"' (2004) 72 *University of Cincinnati Law Review* 977, 1008 (arguing why experiential diversity is critical to law student learning).

<sup>30</sup> See Sonia J Crandall et al, 'Applying Theory to the Design of Cultural Competency Training for Medical Students: A Case Study' (2003) 78 *Academic Medicine* 588, 589 (listing the numerous forms of cultural competency educational initiatives in medical education); Joseph R Betancourt, 'Cross-cultural Medical Education: Conceptual Approaches and Frameworks for Evaluation' (2003) 78 *Academic Medicine* 560 (discussing various conceptual approaches medical educators use in cross-cultural education).

knowledge/attitudes/skills, theoretical models identifying various stages of cultural competence have been developed and adapted by medical educators to help define course and curricular goals.<sup>31</sup> They also have identified cultural competence learning outcomes<sup>32</sup> and devised numerous instruments to measure medical students' cultural competence learning outcomes.<sup>33</sup> Although methodological problems remain,<sup>34</sup> some progress has been made by medical educators who seek to teach their students to work across cultures and to measure the effectiveness of their teaching.

In the United States, some legal educators, largely those working in clinics, have explicitly recognised the need to develop students' abilities to work effectively with people from a wide range of cultural backgrounds and many have articulated numerous theories about how best to teach this skill.<sup>35</sup> Over a decade ago, Professor Susan Bryant articulated the need to develop law students' 'cross-cultural competence' by helping students: become aware of, and knowledgeable about, their own cultural assumptions and biases; understand why people use stereotypes and think in ethnocentric ways; and discover new ways to think and behave.<sup>36</sup>

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<sup>31</sup> Crandall et al, above n 30; Fern R Hauck, 'Cultural Competency in the Curriculum Final Report' (Report, Cultural Competency in the Curriculum Advisory Committee, 18 June 2008) <<http://pages.shanti.virginia.edu/ucare/files/2011/06/cultcompfinalreport.pdf>> (discussing a theoretical model that could be used to track University of Virginia medical school students' cultural competence learning outcomes).

<sup>32</sup> Association of American Medical Colleges, *Tool for Assessing Cultural Competence Training (TACCT)* <<https://www.aamc.org/initiatives/tacct/>>.

<sup>33</sup> See, eg, Mary Catherine Beach et al, 'Cultural Competence A Systematic Review of Health Care Provider Educational Interventions' (2005) 43 *Medical Care* 356 (reviewing the efficacy of a wide range of interventions designed to improve health professionals' cultural competence); Gozu, above n 6 (reviewing studies of cultural competence training that used self-administered tools to assess efficacy of interventions).

<sup>34</sup> For critiques of medical educators learning outcomes measurement methodology, see Eboni G Price et al, 'A Systematic Review of the Methodological Rigor of Studies Evaluating Cultural Competence Training of Health Professionals' (2005) 80 *Academic Medicine* 578; Gozu et al, above n 6. For critiques of cultural competence education teaching models and instrument measurement tools, see, eg, Zofia Kumas Tan et al, 'Measures of Cultural Competence: Examining Hidden Assumptions' (2007) 82 *Academic Medicine* 548.

<sup>35</sup> Bliss, Caley and Pettignano, above n 1; Bryant, above n 1; Sedillo Lopez, above n 1; Weng, above n 20; see also Piomelli, above n 1 (discussing various clinical textbooks that provide materials and guidance on how to teach cross-cultural lawyering). For a discussion of ways to integrate cross-cultural perspectives throughout the doctrinal curriculum, see generally O'Donnell and Johnstone, above n 1; Moran, above n 15.

<sup>36</sup> Bryant, above n 1.

Building upon Professor Bryant's work, other legal educators in the United States have emphasised the need to help students understand that we all have cultural beliefs and biases that influence our perceptions and actions.<sup>37</sup> Grounding their arguments in the social-cognition research that suggests all people operate with an inherent, and often unconscious, set of cultural perceptions and biases, these authors argue that lawyers must not only understand the client's cultural perspective, but must also be aware of their own cultural biases and how the two cultural perspectives interact.<sup>38</sup> They argue that with this information and understanding, lawyers can appropriately frame problems and propose solutions in ways that best serve the client's interest.<sup>39</sup>

Although many legal educators accept the need to develop students' cultural sensibility skills, others may not yet be convinced that law schools need to develop those skills. Even amongst legal educators who believe law schools should help students learn how to work effectively across cultures, there may be uncertainty about what skills and attitudes should be developed. We believe the starting point to answering those questions is to explore students' attitudes about, and awareness of, how culture affects the lawyering process. The survey described below begins that exploration process. The data we gathered provides information that may be helpful as legal educators consider whether students need to be educated about the role culture plays in the lawyering process and as they determine what that education might encompass. The data also hopefully provides insights to those who want to identify cultural sensibility learning outcomes and prompts consideration of ways one might measure the achievement of those outcomes.

#### IV SURVEY INSTRUMENT DESIGN AND DATA ANALYSIS

The survey instrument had multiple objectives:

- 1) To assess law students' attitudes and knowledge, including their general level of knowledge about the role culture plays in the lawyering process, their self-assessment of their ability to recognise their own and others' cultural biases, and their views

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<sup>37</sup> Nelson Miller et al, 'Equality as Talisman: Getting Beyond Bias to Cultural Competence as a Professional Skill' (2008) 25 *Thomas M Cooley Law Review* 99, 105-6; Weng, above n 20, 389-99.

<sup>38</sup> Miller et al, above n 37, 105-7; Weng, above n 20, 391-401.

<sup>39</sup> Cf Miller et al, above n 37, 106; Weng, above n 20, 378.

- about whether legal education should include teaching students about how culture affects the work lawyers do;
- 2) To develop a tool that was a valid and reliable measure of those attitudes; and
  - 3) To provide law professors with information they could use to develop their cultural sensibility teaching objectives and potential learning outcomes.

### *A The Instrument*

Using the work done by Drs. Dogra and Karnik, who have worked to develop cultural sensibility learning outcomes for medical students,<sup>40</sup> as well as the work done by clinical legal educators,<sup>41</sup> we conceptualised 'cultural sensibility' for law students as the development of self-awareness of the lawyer's own cultural lens, the ability to understand the cultural forces that effect the lawyer and all those with whom the lawyer communicates, and the ability to identify the interaction of those cultural forces.

With that theoretical construct as a guide, we designed a 29-question, anonymous, electronic survey using a 5-point semantic differential response scale (1 = strongly disagree to 5 = strongly agree). The survey also contained a series of open-ended questions seeking information about survey design as well as students' thoughts about the role culture plays in their worldview and interactions. The survey also sought demographic information.

After obtaining Institutional Review Board approval, we administered the survey during the orientation week to incoming law students at a United States urban law school that has both a full- and part-time program. It was also distributed to a small number of upper-level students enrolled in an in-house legal clinic course. Students were told that the survey sought their views about the role culture plays in the lawyering process.

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<sup>40</sup> See Karnik and Dogra, 'The Cultural Sensibility Model', above n 7; see also Nisha Dogra, 'The Development and Evaluation of a Programme to Teach Cultural Diversity to Medical Undergraduate Students' (2001) 35 *Medical Education* 232; Nisha Dogra, 'Cultural Competence or Cultural Sensibility? A Comparison of Two Ideal Type Models to Teach Cultural Diversity To Medical Students' (2004) 5 *International Journal of Medicine* 223; Nisha Dogra, Sylvia Reitmanove and Olivia Carter-Pokras, 'Twelve Tips for Teaching Diversity and Embedding it in the Medical Curriculum' (2009) 11 *Medical Teacher* 990.

<sup>41</sup> See above nn 36-9 and accompanying text.

Initially, the survey was distributed during orientation to 120 students enrolled in the full-time program. Students were asked to complete the survey during a designated time period. However, due to a computer glitch, only 31 students were able to do so. Another 36 full-time students completed the survey via an email link provided later that day. Fifty-eight out of 60 incoming students enrolled in the law school's part-time program completed the survey during the designated time period. An additional 13 out of 15 students enrolled in a health law client services clinic completed the survey. A total of 138 students responded, for a total response rate of 71.5%.

Of the 138 student respondents, 71 (51%) were women and 63 were men (the remaining four did not self-identify). Most of the respondents (83%) were age 30 and under. Using the same race/ethnicity classifications the United States government requires universities to use when reporting race/ethnicity statistical data,<sup>42</sup> along with the same instructions to 'choose all that apply', 82% of the respondents self-identified as 'white' and 33% self-identified as belonging to a race/ethnicity other than white because many respondents chose multiple classifications. The survey asked respondents 'what ethnic group do you identify with'. Fifty-eight people (42%) responded, with 20 of those responding self-identifying their ethnicity as Caucasian or white, 7 self-identifying as black or African-American, the remainder identifying their ethnicity as arising from a wide range of diverse backgrounds and with a few respondents self-identifying as having multiple ethnic identities. Respondents' annual family income ranged from under \$25,000 (15%), to \$200,000 (16%), with most respondents identifying a family income of between \$25,000 - \$199,000. Finally, 25% of the respondents reported having lived outside of the United States for periods ranging from six weeks to 13 years.

### *B Data Analysis*

The quantitative data were analysed using SPSS and Stata. Atlas.ti (a computer-assisted qualitative data analytical program) was used to analyse the data derived from the open-ended questions. Although the sample size was low for exploratory factor analysis (EFA), the Bartlett's Test of Sphericity result ( $p < .000$ ) supported the factorability of the

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<sup>42</sup> Office of Management and Budget (OMB), *Directive No. 15: Race and Ethnic Standards for Federal Statistics and Administrative Reporting* (1997). For a breakdown of respondents' self-identified race/ethnicity, see Appendix A, Table 1. In the United States, law schools must report their students' race and ethnicity to the Department of Education using categories specified by the government's Office of Management and Budget. Those categories are: American Indian/Alaska; Native Asian; Black; Hispanic/Latino(a); Pacific Islander; White; Other.

data. We did a preliminary EFA to ascertain the patterns associated with inter-item relationships in order to better assess the internal consistency of the instrument. The Kaiser-Meyer Olkin Measure of Sampling Adequacy test result (.713) was acceptable and the EFA indicated that a six-factor solution best accounted for 62% of the variance. The reliability statistic (Cronbach's Alpha) for the six factors ranged from .504 to .817. The EFA was used primarily to aid us in determining which items contributed to the overall conceptual consistency of the instrument and to facilitate further iterations of the instrument.

As noted earlier, the instrument response scale ranged from 1 (strongly disagree) to 5 (strongly agree).<sup>43</sup> It should be noted that '3' does not represent a 'neutral' category, but a mid-point. For reporting purposes, we collapsed numeric categories in reporting percentages (e.g., 1 and 2 are reported as 'disagree' and 4 and 5 are reported as 'agree').

#### V SURVEY FINDINGS

The quantitative responses are grouped into the key areas that were explored, namely students':

- 1) Views about how culture affects clients;
- 2) Views about how culture affects lawyers and judges;
- 3) Views about how well they can recognise their own cultural perspectives and biases; and
- 4) Desire to learn how culture affects lawyering processes.

Qualitative findings included responses to open-ended questions involving the survey-taking experience and comments on the survey. All quantitative data discussed below are included in Appendix B, Table 2.<sup>44</sup>

#### *A Quantitative Findings*

##### *1 Students' Views About How Culture Affects Clients*

Almost three-quarters of the respondents (72%) agreed that how legal information is understood and communicated by a client is influenced by the client's race/ethnicity/cultural background. Students also largely agreed (78%) that what an individual believes to be an appropriate legal solution is influenced by his or her background, including factors such as race, ethnicity and culture.

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<sup>43</sup> See Appendix B, Table 2.

<sup>44</sup> Ibid.

Responses indicated that students were aware that certain types of client conduct could be based upon cultural beliefs and practices. An overwhelming majority (84%) of respondents indicated that they disagreed with the statement 'when a client refuses to look his or her lawyer in the eyes, the lawyer should assume that the client is not being truthful'. Slightly less than half (49%) disagreed with the proposition that if a client shakes hands with a man but refuses to shake hands with a woman it is an indication that the client is sexist.<sup>45</sup> One-third of the respondents disagreed with the statement 'adult clients should not defer legal decision making to other family members',<sup>46</sup> with almost a quarter agreeing with this statement.

### *2 Students' Views about How Culture Affects Lawyers and Judges*

Although a large majority (76%) of students agreed that, in general, people look at legal problems through their own cultural lens, only slightly more than half (52%) agreed that lawyers look at legal problems through their own cultural lens. Approximately one-quarter of the students disagreed with the statement 'judges often impose their own cultural values on the decisions they make in legal cases', while 41% agreed with that statement. A relatively small percentage of the respondents (34%) agreed that white lawyers bring culturally biased assumptions into the lawyer/client relationship, and an even smaller percentage (25%) agreed with the statement 'Lawyers belonging to racial/ethnic minorities bring culturally-biased assumptions into the lawyer/client relationship'.

### *3 Students' Views About How Well They Can Recognise Their Own Cultural Perspectives and Biases*

A substantial majority of student respondents (72%) believed they could recognise their own culturally-biased assumptions about others who were from different racial/ethnic/cultural backgrounds and only 4% felt that they could not do so. Approximately the same number (73%) also believed that they could generally recognise when their reactions to others were based on stereotypical beliefs with 5% of students feeling that they could not do so. Students rated their own

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<sup>45</sup> Sayadeh Kasmal-Nazeran, 'Between Gender Equality and Religious Freedom', *Islamic Insights* (online), 23 November 2008 <<http://islamicinsights.com/news/community-affairs/between-gender-equality-and-religious-freedom.html>>. Some Muslims and Orthodox Jews religious beliefs prohibit them from shaking hands with someone of the opposite sex.

<sup>46</sup> Kim, above n 24, 281. In some cultures, the practice is to defer decision-making to respected elders.



ability to recognise cultural biases and perspectives as much higher than the ability of other people to do the same.

#### *4 Students' Desire to Learn How Culture Affects the Lawyering Process*

An overwhelmingly number of students (88%) felt that they should learn about how culture may affect their interactions with clients. An equally high percentage (85%) also agreed that 'lawyers should learn about the perspectives of people from racial/ethnic/cultural backgrounds different from their own', while 68% thought that law professors should discuss cultural assumptions embedded in appellate legal opinions.

### *B Qualitative Findings*

#### *1 Taking the Survey Was an Educational Experience*

In the open-ended questions, students were asked 'In what ways has the questionnaire made you think about the impact of people's racial/ethnic/cultural backgrounds on the lawyer/client relationship?' Half of the respondents (69 of 138) answered that question, with many students noting that they learned something from just taking the survey. For example, one student wrote 'made me think twice about the impact of race, culture, ethical [sic] backgrounds on relationships with future clients. Not something I previously really thought about'.

In a similar vein, a student noted, 'made me think about my own prejudices or stereotypes that I may hold which would affect my ability to effectively represent all people. It opened my eyes to the fact that different cultures may have different identities and ideals that need to be respected and included in the practice of law'. Yet another wrote, 'made me consider how often my decisions are influenced by stereotypes'. A few students specifically noted that questions about cultural practices prompted them to examine their potentially stereotypical beliefs. As one student noted, '[I] don't often think of differences in body language as being cultural - I do often think that if someone avoids eye contact that there is an issue, this made me look at my own conscious stereotyping'.

The educational value of simply taking the survey, and thus prompting students to consider the role race/ethnicity/culture plays in the lawyering process, was consistent with the views of medical students

about the educational value of using similar instruments in both the United States and United Kingdom.<sup>47</sup>

### *2 Comments About The Questionnaire*

In the open-ended section of the questionnaire, students were told 'we would appreciate any additional comments or suggestions you may have regarding the questionnaire'. Eighteen percent of the respondents (19 of 138) made comments in this section. Students raised two issues with the survey construction. Firstly, 5 of the 19 people responding to this question raised the concern that the survey conceptualised culture too narrowly in that it focused mainly on race and ethnicity while ignoring other factors, such as religion and gender, cultural factors that played an important role in the students' worldview. Secondly, 3 of the 19 noted that they felt the questions had a 'correct' answer.

## VI SURVEY INSTRUMENT: DISCUSSION OF FINDINGS

### *A Openness to Learning About the Role Culture Plays in the Lawyering Process*

We were surprised that over 85% of the respondents believed that lawyers should learn about the perspectives of people from cultural backgrounds different than their own and an even higher percentage (88%) felt that law students should learn about cultural issues that may arise when providing legal services to people from cultures different than their own. We are uncertain whether this response rate was due to students' desire to answer in the 'correct' way or because of a genuine desire to learn. The comments tend to indicate the latter. However, because approximately one-quarter of respondents self-selected to reply due to a computer glitch, it may be that these numbers are skewed in favor of students who consider cultural sensibility issues an important component of legal education. Additionally, 90% of the survey respondents were incoming law students and the other 10% were law students enrolled in an in-house clinic. It may be that this cohort is particularly open to learning about this issue. Future studies should further explore both incoming and upper level students' willingness to learn about these issues.

Although survey respondents overwhelmingly indicated openness to learning how culture affects lawyer/client interactions, survey

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<sup>47</sup> Nisha Dogra and Niranjana Karnik, 'First-Year Medical Students' Attitudes Toward Diversity and its Teaching: An Investigation at One US Medical School' (2003) 78 *Academic Medicine* 1191; Dogra, 'Development and Evaluation', above n 40.

responses indicate that many students felt that they understood their own biases and how those affected their interactions.<sup>48</sup> Thus, students may want to explore how culture affects clients' behaviours and perceptions, but may be less motivated to examine their own cultural lenses and how these lenses affect their actions and reactions.<sup>49</sup> As discussed below, helping students acknowledge and understand their own cultural lenses and biases may be the most critical, and the most challenging, aspect of cultural sensibility education.<sup>50</sup>

### *B Ability to Recognise Others' Cultural Perceptions/Behaviours*

Students generally recognised that lawyer/client communication may be affected by cultural beliefs and practices. However, they may require further education about the need to explore whether specific behaviours or viewpoints may be culturally rooted. While 84% of the students presumably recognised that lack of eye contact may be due to cultural beliefs, students' responses to survey items addressing a client's refusal to shake hands with a woman or deferring decision-making to other adults were more mixed. Even in context of taking a survey they understood was looking at the role culture plays in the lawyering process, many students did not seem to recognise that some behaviours could be based upon a person's cultural beliefs and practices.<sup>51</sup>

The different response rates for the questions about eye contact versus shaking hands with a woman or deferring decision-making could be explained by relatively common knowledge that eye contact can be a culturally based practice while the other conduct is not as widely known to have a cultural context. Or, it could be that the questions about shaking hands and deferring decision-making were worded more ambiguously than the question about eye contact and thus somewhat confusing. For example, the survey asked students if they agreed that 'if a client shakes hands with a man but will not shake hands with a woman, this indicates that the client is sexist'. Some students may have felt this statement was true without considering whether the behaviour was culturally-based, although others were

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<sup>48</sup> Appendix B.

<sup>49</sup> Jerry Kang, 'Trojan Horses of Race' (2005) 118 *Harvard Law Review* 1489, 1529 (noting that to counter the impact bias has on an individual's behaviour, the person must first be aware of the problem).

<sup>50</sup> See below Part V(D)-(E).

<sup>51</sup> See above nn 45-6 and accompanying text (discussing the fact that refusal to shake hands and deferring decision making to other family members may be culturally based behaviour).

clearly prompted to consider the cultural context. As one student noted, 'originally, I was struck by the question suggesting a man may not shake my (a woman's) hand simply because of cultural differences. I think initially I would be extremely insulted and may not take him as my client. After thinking about it, I may have to find the reason why he would not shake my hand before getting upset, or simply get over it and refer him to a male associate'. Nonetheless, the question could be written to more clearly identify whether students understand the cultural prohibition against touching unrelated women.<sup>52</sup>

Whatever the reasons for students' responses, the survey indicates that many students would benefit from learning not to judge actions through their own cultural lens. As Professor Weng observed, lawyers who approach a legal problem from an ethnocentric model, even an unconscious one, may be unable to perceive and understand clients' different values and worldviews.<sup>53</sup> A lawyer may misperceive when the client is acting based upon the client's cultural beliefs or practices. Or, a lawyer could act based upon the lawyer's own cultural experiences without recognising how that behaviour may be interpreted by the client. In either instance, the cultural disconnect could result in miscommunication and a less-than-optimal framing of legal problems and strategies.<sup>54</sup>

### *C Views About the Impact of Culture on Lawyers' Perception/Behaviour*

It is unclear why students felt lawyers were less likely than clients to look at problems through their own cultural lens and that lawyers did not approach legal problems through a culturally biased perspective. Perhaps students believe that lawyers, as professionals, can identify and account for their cultural perspective. Or, perhaps they believe that legal training allows one to transcend one's cultural biases. Or perhaps the responses may be explained by the students, as soon-to-be lawyers, wanting to think of themselves as being able to approach their future job in an unbiased manner. Whatever the explanations for these findings, it is clear that students need to be educated that all lawyers and judges approach the world through their own cultural lenses and, like everyone else, have cultural biases that affect how they interpret events and make decisions.<sup>55</sup>

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<sup>52</sup> Kasnai-Nazeran, above n 45.

<sup>53</sup> Weng, above n 20, 378.

<sup>54</sup> Ibid.

<sup>55</sup> Jeffrey J Rachlinski et al, 'Does Unconscious Racial Bias Affect Trial Judges' (2009) 84 *Notre Dame Law Review* 1195 (discussing how judges hold unconscious racial biases); Russell K Robinson, 'Perceptual Segregation' (2008) 108 *Columbia Law Review* 1093

### D Views About Their Own Biases

The students surveyed believed that they are generally better than most people at discerning when they hold and act upon cultural biases and stereotypical beliefs. Although many students commented that the survey prompted them to consider their own biases and the impact of these biases on the lawyer/client relationship, an overwhelming majority of respondents (72%) believed they were generally able to recognise their culturally-biased assumptions and an equal number (73%) believed they could identify when their actions were based upon stereotypical beliefs. These results suggest a lack of awareness that we all have biases that often unconsciously affect our interactions. In fact, only 4% of the respondents believed they could not accurately identify their culturally biased assumptions and when they were acting based upon stereotypical beliefs. This result may be an example of the 'Dunning-Kruger effect' in which those with the strongest skills underestimate themselves while those with the least well-developed skills over-estimate their abilities and lack the metacognitive ability to identify accurately what they don't know.<sup>56</sup> Or, perhaps students simply are unaware that most people hold, and act upon, unconscious and implicit biases.

Implicit bias has been explained as 'the stereotypical associations so subtle that people who hold them might not even be aware of them'.<sup>57</sup> Thus, someone may in good faith self-report lack of prejudice while implicit bias tests indicate that the person holds negative attitudes toward a particular group based upon their race, ethnicity, religion, gender, sexual orientation, or other cultural factors.<sup>58</sup> Implicit bias is much more likely to predict how people act in socially sensitive situations, such as racial interactions, than explicit self-reported measures of bias.<sup>59</sup> Implicit bias may affect eye contact, seating distance, and how frequently one smiles when interviewing clients and

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(discussing how outsiders and insiders engage in different cognitive processes when interpreting discriminatory events and how those different processes have profound implications for judicial rulings given that the majority of judges in the United States are white males).

<sup>56</sup> Justin Kruger and David Dunning, 'Unskilled and Unaware of It: How Difficulties in Recognising One's Own Incompetence Lead to Inflated Self-Assessments' (1999) 77 *Journal of Personality and Social Psychology* 1121; Joyce Ehrlinger et al, 'Why the Unskilled are Unaware: Further Explorations of (Absent) Self- Insight Among the Incompetent' (2008) 105 *Organizational Behaviour and Human Decision Processes* 98.

<sup>57</sup> Rachlinski et al, above n 55, 1196.

<sup>58</sup> Kang, above n 49, 1513.

<sup>59</sup> Ibid 1518; Anthony G Greenwald and Linda Hamilton Kreiger, 'Implicit Bias; Scientific Foundations' (2006) 94 *California Law Review* 945, 954-5.

witnesses.<sup>60</sup> Implicit bias may play a role in how one attempts to persuade a judge or jury.<sup>61</sup> It also may play a significant role in the formulation of laws and policies across a wide spectrum of substantive areas.<sup>62</sup> The problem with implicit bias is it is just that—implicit. Because it is implicit, it is difficult to recognise.

Students' self-assessed abilities to recognise their cultural biases may be an accurate reflection of their self-perceptions. However, it may not be an accurate reflection of whether they are, in fact, able to regularly recognise when their conduct is based upon their own cultural norms and beliefs.<sup>63</sup> In a study described by Professors Greenwald and Kreiger, only one-third of the respondents self-reported a bias in favour of relatively advantaged groups, although the implicit association tests indicated that nearly three-quarters of the respondents had a bias that favoured relatively advantaged groups.<sup>64</sup>

Our survey responses suggest that law students, like others, probably over-estimate their ability to recognise when their reactions are based upon cultural biases and stereotypical beliefs. This is problematic because, as one scholar has stated:

In order to counter otherwise automatic behaviour, one must accept the existence of the problem in the first place. In other words, we must be both aware of the bias and motivated to counter it – if we instead trust our own explicit self-reports

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<sup>60</sup> Greenwald and Kreiger, above n 59, 961.

<sup>61</sup> See, eg, Anna Roberts, 'Re(forming) the Jury: Detection and Disinfection of Implicit Juror Bias' (2012) 44 *Connecticut Law Review* 827 (discussing ways to ameliorate the problem of jurors' implicit bias).

<sup>62</sup> See Justin D Levinson and Robert J Smith (eds), *Implicit Racial Bias Across the Law* (Cambridge University Press, 2012) (discussing various areas of law impacted by implicit racial bias).

<sup>63</sup> See Andrew Scott Baron and Mahzarin R Banaji, 'The Development of Implicit Attitudes: Evidence of Race Evaluations from Ages 6 and 10 and Adulthood' (2006) 17 *Psychological Science* 53, 55–6 (finding that pro-white racial bias exists at an early age but as people become older, they self-report less biased attitudes and by adulthood, people self-report equally favourable attitudes towards whites and blacks); Joshua Correll et al, 'Measuring Prejudice, Stereotypes and Discrimination' in John F Dovidio et al (eds), *The SAGE Handbook of Prejudice, Stereotyping and Discrimination* (SAGE Publications, 2010) 45 (noting that studies show explicit measures of bias may be problematic because people do not want to admit bias and may not be fully aware of their own attitudes); Kang, above n 49, 153 (discussing social science literature that indicates a person may honestly self-report positive attitudes toward some social category, such as Latinos, but may still hold negative attitudes toward Latinos which manifest in disparate behaviour toward that social group regardless of explicit commitments in favour of racial equality).

<sup>64</sup> Greenwald and Kreiger, above n 59, 955.

about bias – namely that we have none – we will have no motivation to self-correct.<sup>65</sup>

Although it may be difficult, or even impossible, to totally eliminate the effects of implicit bias,<sup>66</sup> awareness of the problem and motivation to change it can make a difference in how people act and react.<sup>67</sup> One study indicates that ‘when judges become aware of the need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so’.<sup>68</sup> Another study indicates that specific interventions may have long-term effects in reducing racial bias, especially in those concerned about discrimination.<sup>69</sup>

Without self-awareness, even if law students learn about their client’s cultural background, they will miss an important piece of the puzzle. Students not only need to understand the client’s cultural perspective, they need to see how their interpretation of the client’s perspective is based upon their own cultural experiences and lenses. They also need to understand the social-cognition theory underlying implicit bias to fully grasp how deeply bias runs, even in well-intended people. It is that multi-level awareness about the role culture plays for both client and lawyer, and the interaction of these perspectives, which facilitates effective cross-cultural lawyering both domestically and internationally.<sup>70</sup> One could posit that many students lack this awareness based upon students’ likely over-estimation of their ability to identify when they are acting based upon stereotypical beliefs or cultural biases. The survey results thus suggest the need to educate students about their potential cultural biases because if they are unaware that they have biases, they will be equally unaware that their perceptions, judgments, and actions are based upon those biases.

### *E Implications for Cultural-Sensibility Teaching*

Cultural-sensibility education involves the steps identified by Professor Bryant a decade ago. Those steps include: developing law students’ awareness of, and knowledge about, their own cultural

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<sup>65</sup> Kang, above n 49, 1529.

<sup>66</sup> Ibid 1528–35.

<sup>67</sup> See, eg, Rachlinski et al, above n 55, 1221 (noting that judges’ conscious awareness of implicit racial bias helped change behaviour).

<sup>68</sup> Ibid.

<sup>69</sup> Patricia Devine, ‘Long Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention’ (2012) 48 *Journal of Experimental Social Psychology* 1267.

<sup>70</sup> Weng, above n 20, 399.

assumptions and biases; helping them understand why people use stereotypes and think in ethnocentric ways; and working with them to discover new ways to think and behave.<sup>71</sup> The survey data suggests law students are open to learning about the role culture plays in the lawyering process and that they recognise that clients see the legal system through their own cultural lens. However, even with this awareness and desire to learn, the data indicates the need for legal educators to help students understand the need to investigate their own, and others', cultural beliefs and practices prior to making judgments. Students would also be likely to benefit from learning to recognise that their own cultural experiences have resulted in the development of a set of cultural values, attitudes, and behavioural norms that influence their perceptions and behaviours.<sup>72</sup>

One barrier to cultural-sensibility education is students' belief that lawyers do not approach problems from a culturally-biased perspective coupled by the fact that the overwhelming majority of respondents believed that they already recognise their own biases.<sup>73</sup> To the extent students believe they already know how their biases affect their interactions, they will be less motivated to explore how their perceptions, judgments, and actions are based upon cultural biases and less able to counteract the effect of those biases. Unless students accept that they are not 'bad people' because of their biases, they are likely to remain resistant to learning about how their cultural lens affects their perspectives and interactions.

Those interested in teaching students to be 'culturally sensible' may want to expose students to the implicit bias literature<sup>74</sup> and have students take one or more of the online Implicit Association Tests which measure implicit bias for a wide range of cultural backgrounds, including race, ethnicity, gender, sexual orientation, and religion.<sup>75</sup> Professors may also want students to review studies that suggest that peoples' cultural experiences may lead them to perceive discriminatory events through different psychological frameworks.<sup>76</sup> If students understand that all people, including lawyers and judges, have cultural biases and perspectives, it may increase their openness to learning

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<sup>71</sup> Bryant, above n 1.

<sup>72</sup> *Ibid* 40.

<sup>73</sup> Appendix B, Table 2.

<sup>74</sup> Professor Kang aptly summarises much of the social science literature on implicit bias, see Kang, above n 49. Students may also benefit from reading Rachlinski et al, above n 55 which discusses the role of implicit bias in judicial decision making. For an excellent summary of the science underlying implicit bias, see Greenwald and Kreiger, above n 59.

<sup>75</sup> Project Implicit, <<https://implicit.harvard.edu/implicit/demo/selectatest.html>>.

<sup>76</sup> Robinson, above n 55.



about how their own cultural biases affect their interactions with clients, witnesses, judges, juries, staff, and colleagues, both locally and across borders. It also would be useful to engage students in discussions about culture in the context of their work in clinics and externships as well as to engage students in discussions about cultural assumptions embedded in judicial opinions and legal rules.<sup>77</sup> Because cultural sensibility skills need to become as second nature as issue spotting and legal analysis if there is any hope that students will internalise the need to investigate their own and others' cultural beliefs and practices, it is our hope that the survey data may help spark discussion about the need for cultural-sensibility education across the law school curriculum.

## VII SURVEY LIMITATIONS

The survey sample size was relatively small (138 respondents). Additionally, a computer glitch and subsequent self-selection process and response rate for the full-time students who participated<sup>78</sup> may have resulted in an over-representation of respondents who believe it is important to consider the role culture plays in the lawyering process. The self-selection process may also have resulted in an over-representation of the number of students who want to learn about cultural perspectives as well as an over-representation of students who were aware of behaviours that may be attributable to culture.

A few students critiqued the fact that survey questions focused on race and ethnicity.<sup>79</sup> This critique echoes some scholars' critiques of health care cultural-competence survey instruments.<sup>80</sup> Definitions of culture are contextual and steeped in history, economics and politics and it is important to acknowledge that there is not an agreed upon definition of culture.<sup>81</sup> Race, ethnicity and culture are themselves social constructs that will vary between, and even within, a given country or society and are based upon context and history.<sup>82</sup> While we initially discussed asking questions that isolated numerous facets of culture such as sexual orientation, socio-economic status, and religious background,

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<sup>77</sup> Moran, above n 15, 45-51; see generally O'Donnell and Johnstone, above n 1 (discussing how to use various doctrinal courses to enhance students' knowledge of the role culture has played in the development and application of legal doctrine).

<sup>78</sup> See above Part (II)(A).

<sup>79</sup> See above Part (IV)(B)(2).

<sup>80</sup> Kumas Tan et al, above n 34, 549-51; Gozu et al, above n 6, 187.

<sup>81</sup> See generally Bolden et al, above n 9; see also O'Donnell and Johnstone, above n 1, 6-12.

<sup>82</sup> O'Donnell and Johnstone, above n 1, 7-8.

given the limited number of questions we wanted to ask, and our concerns about students not understanding the broad parameters of culture, we decided to focus mainly on two components of culture that play a significant role in cultural identity in the United States – race and ethnicity. In retrospect, we should have chosen to expand the survey to encompass specific questions that isolated a broader range of cultural factors. In fact, the critique about the survey’s focus on race and ethnicity is particularly salient to the extent the survey is to be administered in countries other than the United States, where race has not played as large a role in shaping the dominant culture. Future surveys should make clear that cultural identity is multi-faceted and may include factors such as race, ethnicity, religion, socio-economic background, gender and sexual orientation. This could be done both through providing an initial definition of culture, and asking questions that seek information related to experiences based upon a wide range of cultural factors, including but not limited to, race, ethnicity, socio-economic status, religion, sexual orientation, etc. Ensuring the survey conceptualises culture broadly not only better reflects the cultural sensibility model,<sup>83</sup> it also may enhance the survey’s educational value by helping students understand the multi-faceted aspects that comprise one’s cultural identity.

As with all self-assessment instruments, especially those dealing with socially sensitive material such as views on race and ethnicity, there is a concern that survey respondents will answer in the ‘socially desirable’ manner.<sup>84</sup> Future surveys may want to include a validation instrument, such as the Marlowe-Crown social-desirability scale,<sup>85</sup> to check for social-desirability bias.

Finally, and perhaps most importantly, this type of survey has significant limits, and any results must be used with knowledge of the instrument’s limitations. Many aspects of the ways in which culture influences the lawyering process cannot be captured by a short

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<sup>83</sup> Dogra, ‘Cultural Competence or Cultural Sensibility’, above n 40.

<sup>84</sup> Ann Mallat Killenbeck, ‘Bakke, with Teeth?: The Implications of *Grutter v Bollinger* in an Outcomes-Based World’ (2009) 36 *Journal of College and University Law* 1, 55; Madonna Constantine and Nicholas Ladany, ‘Self-Report Multicultural Counseling Competence Scales: Their Relation to Social Desirability Attitudes and Multicultural Case Conceptualization Ability’ (2000) 47 *Journal of Counseling Psychology* 155 (finding high correlation between multi cultural competence self-reports and social desirability scales); Thea F Van de Mortel, ‘Faking It: Social Desirability Response Bias in Self-Report Research’ (2008) 25 *Australian Journal of Advanced Nursing* 40 (which found that almost half the self-report studies using a social desirability scale found that socially desirable response bias influenced their results).

<sup>85</sup> William M Reynolds, ‘Development of Reliable and Valid Short Forms of the Marlowe-Crown Social Desirability Scale’ (1982) 38 *Journal of Clinical Psychology* 119.

differential-scale survey. It is difficult to draw conclusions or make definitive statements about respondents' attitudes based *solely* upon the survey instrument. The survey instrument is just one way to gather information about students' views and the information should be considered in light of the limitations inherent in a self-assessment survey on a complex and nuanced topic.

#### VIII FUTURE STUDIES

For future studies, it would be useful to administer this survey to a larger sample of incoming law students to get a sense of whether the results are unique to the students already sampled or are widespread responses to each question. It also would be interesting to administer the survey to both incoming and upper level law students and compare the results to see what, if any, effect legal education has had upon students' knowledge and attitudes about the role culture plays in the lawyering process. A comparative study of students from different countries might also be informative.

Well-documented social-science literature demonstrates that we all approach the world from our own cultural perspectives and that those perspectives influence our communication and interactions.<sup>86</sup> We also are largely unaware of our own implicit biases.<sup>87</sup> We suspect it is unlikely that 75% of incoming law students are generally aware of their cultural biases and when they are acting based upon stereotypical beliefs. Thus, it would be revealing if this survey was followed by Implicit Association Tests (IAT) in areas such as race, gender, sexual orientation and religion. The results of the survey and the IAT tests could be compared.

The work done with this survey can also be used as a starting point for developing a survey to measure law students' cultural-sensibility learning outcomes. Many questions from this survey were adapted from health care educators' cultural-competence learning-outcome tools. Many of these questions are likely to be useful measures of the impact of a course or teaching module designed to raise students' knowledge and awareness of their own biases and how those impact the lawyering process. We say this with the caveat that to the extent the survey is adapted as a learning-outcome-measurement tool, it is useful to think about it as one tool, not *the* tool. In addition to adapting this

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<sup>86</sup> For an overview of some of the social science literature that documents how our cultural perspectives and biases influence our interactions, see Kang, above n 49, 1514-28.

<sup>87</sup> Ibid 1494.

survey in order to use it as a pre/post court assessment, learning outcomes for cultural sensibility could also be assessed via hypothetical vignettes, essay questions, and self-reflective journals, as well as through observation of student/client interactions in law school clinics.<sup>88</sup>

## IX CONCLUSION

This survey is an initial foray into the exploration of law students' general level of knowledge and attitudes about the role culture plays in the lawyering process. This initial study indicates law students generally are aware that culture plays a role in the lawyering process and they want to learn more about how that occurs. The mere act of taking the survey served an educational purpose in that it prompted students to consider how culture affects lawyers' interactions. Administering the survey may be a useful incoming student orientation exercise, or a useful exercise at the start of clinical courses, because it prompts students to think about the role culture plays in the lawyering process.

The survey results indicate some students may be unaware of the need to investigate others' cultural beliefs and practices before making judgments. It also suggests that students may be unaware of the effect culture has on their own beliefs and behaviours.<sup>89</sup> Their self-reported awareness of when they are acting based upon cultural stereotypes is inconsistent with social-science data about people's abilities to discern when their actions are predicated upon cultural bias. The students' belief that they already understand their cultural biases and when they operate based upon stereotypical beliefs may lead to resistance to cultural sensibility education as it relates to their own behaviours. If students believe they are bias-free, or that they already know their biases and have ably dealt with them, they will not see a need to explore the impact of their cultural biases on their interactions. Thus a critical piece of cultural-sensibility education requires developing students' awareness that most people have culturally-biased

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<sup>88</sup> See Beach et al, above n 33 (discussing various methods used to teach cultural competence and measure the efficacy of the teaching methodologies); Crandall et al, above n 30 (discussing methods of cultural competence education used by various medical educators); see also Patricia Hudelson, N Junod Perron and Thomas Perneger, 'Using Clinical Vignettes to Assess Doctors' and Medical Students' Ability to Identify Sociocultural Factors Affecting Health and Health Care' (2011) 33 *Medical Teacher* 564 (discussing use of vignettes to assess knowledge, attitudes, and practices regarding the care of immigrant patients).

<sup>89</sup> Bryant, above n 1, 76-8; Sedillo Lopez above n 1, 63; Weng, above n 20, 392-6

perspectives. This hopefully will allow students the freedom to admit their biases and thus become more aware of how their own cultural beliefs and experiences affect their interactions.<sup>90</sup> Only when this happens can they begin to understand the role their cultural views, perspectives and biases play in the lawyering process.

For educators already engaged in cultural sensibility education, we hope the survey provides information that will be useful in developing additional curricular materials and teaching methods. For legal educators who are less familiar with the skill of cultural sensibility and the need to teach it, we hope that this article helps inform the debate about whether cultural sensibility should be integrated into the law school curriculum, and provides insights about what some of the cultural-sensibility learning outcomes might encompass.

The survey described in this article is the first small step in developing data about law students' cultural sensibility knowledge and attitudes. As discussed herein, there are many ways in which this survey can be improved. However, the survey demonstrates that it is possible to adapt the work done by medical educators to legal education to begin exploring students' knowledge of, and attitudes about, the role culture plays in the lawyering process. We hope that this article lays the groundwork for others to consider using the work that has already been done by medical and clinical legal educators to further explore cultural-sensibility education and to develop and measure student cultural-sensibility learning outcomes.

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<sup>90</sup> See, eg, Weng, above n 20, 390 (noting that the "key to developing multicultural competence is cultural self-awareness").

Appendix A. Table 1. Race/Ethnicity

n = 138*	%
American Indian/ Alaska Native	3.0
Asian	6.1
Black	9.8
Hispanic/Latino(a)	6.8
Pacific Islander	1.5
White	81.8
Other	5.3

\*Percentages will be greater than 100.0 due to multiple selections (choose all that apply).

Appendix B. Table 2. Cultural Sensibility Scale Items: Frequencies, Means, and Standard Deviations

	Strongly disagree (1)	2	3	4	Strongly Agree (5)	N	Mean (SD)
<i>Please indicate the extent to which you agree with the following statements:</i>	%	%	%	%	%		
1. My racial/ethnic/cultural background influences my attitudes about the law and legal systems.	10.1	15.2	21.7	41.3	11.6	138	3.29 (1.17)
2. If a client shakes hands with a man but refuses to shake hands with a woman, that is an indication that the client is sexist.	14.6	34.3	24.1	23.4	3.6	137	2.67 (1.10)
3. Lawyers belonging to racial/ethnic minorities bring culturally-biased assumptions into the lawyer/client relationship.	11.6	33.3	31.2	20.3	3.6	138	2.71 (1.03)
4. What an individual believes to be an appropriate way to resolve conflict is influenced by his or her background, including factors such as race, ethnicity, and culture.	2.2	4.3	15.9	44.9	32.6	138	4.01 (0.93)
5. Judges often impose their own cultural values on the decisions they make in legal cases.	1.5	23.4	34.3	36.5	4.4	137	3.19 (0.90)
6. The way clients communicate with their lawyers is influenced by the client's racial/ethnic/cultural background.	.0	6.5	18.8	58.0	16.7	138	3.85 (0.77)
7. Appropriate legal solutions should not vary depending upon the client's race/ethnicity/cultural background.	1.4	15.9	20.3	40.6	21.7	138	3.65 (1.04)
8. When a client refuses to look his or her lawyer in the eyes, the lawyer should assume that the client is not being truthful.	40.6	43.5	11.6	3.6	.7	138	1.80 (0.84)
9. How legal information is understood by a client is influenced by his or her race/ethnicity/cultural background.	.7	15.9	11.6	58.7	13.0	138	3.67 (0.92)

	Strongly disagree (1)	2	3	4	Strongly Agree (5)	N	Mean (SD)
<i>Please indicate the extent to which you agree with the following statements:</i>	%	%	%	%	%		
10. In general, people look at legal problems through their own cultural lens.	.0	5.1	19.0	60.6	15.3	137	3.86 (0.73)
11. White lawyers bring culturally-biased assumptions into the lawyer/client relationship.	16.1	27.0	22.6	29.9	4.4	137	2.80 (1.16)
12. Most people are unable to recognise when their reactions to other people are based on stereotypical beliefs.	1.4	24.6	28.3	41.3	4.3	138	3.22 (0.92)
13. In general, I am able to recognise when my reactions to others are based on stereotypical beliefs.	1.5	3.6	21.9	56.2	16.8	137	3.83 (0.80)
14. Most people cannot accurately identify their culturally-biased assumptions about others who are from different racial/ethnic/cultural backgrounds.	.7	28.5	35.0	32.8	2.9	137	3.09 (0.87)
15. Law students should learn about cultural issues that may arise when providing legal services to people from different racial/ethnic/cultural backgrounds than their own.	.7	1.5	9.5	40.9	47.4	137	4.33 (0.77)
16. In general, I can accurately identify my culturally-biased assumptions about others who are from different racial/ethnic/cultural backgrounds.	.0	3.7	24.3	64.0	8.1	136	3.76 (0.65)
17. Law professors should discuss cultural assumptions embedded in appellate legal opinions.	3.7	5.9	21.3	50.7	18.4	136	3.74 (0.95)



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**ENFORCING HUMAN RIGHTS  
INCREMENTALLY: REVIEW OF JEFF KING,  
*JUDGING SOCIAL RIGHTS* (CAMBRIDGE  
UNIVERSITY PRESS, 2012)**

MURRAY WESSON\*

In Australia, discussion of Bills of Rights has tended to focus on the human rights statutes adopted in Victoria and the Australian Capital Territory, and the broader question of whether Australia should adopt a national Bill of Rights. However, it is well-known that Australia is unusual amongst liberal democracies in lacking a Bill of Rights. In other democracies, the principle of judicial protection of constitutional rights is now widely accepted. And in many of these jurisdictions, debate has moved onto a further question, which is whether constitutional rights protection should be extended beyond civil and political rights to social rights, or rights to housing, healthcare, food, water, social security and education. A related question is the role of the courts in giving effect to these obligations. In South Africa, for example, the post-apartheid Constitution protects social rights and the Constitutional Court has produced an influential body of social rights jurisprudence.<sup>1</sup> Social rights are likewise constitutionally protected in many jurisdictions in Central and Eastern Europe and Latin America. The United Kingdom has for several years been debating whether to replace the Human Rights Act 1998 – which incorporates the European Convention on Human Rights – with a British Bill of Rights and there too a key question for the Joint Committee on Human Rights, the previous Labour government and the Commission on a Bill of Rights established by the current coalition government has been a possible role for social rights.<sup>2</sup> These developments have been accompanied by

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<sup>1</sup> The important provisions of the Constitution are sections 26-29 dealing with housing, healthcare, food, water, social security, education and children's rights. For a general overview of the South African social rights case law see Sandra Liebenberg, 'South Africa: Adjudicating Social Rights under a Transformative Constitution' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008) 75.

<sup>2</sup> Briefly, the Joint Committee on Human Rights favours the inclusion of social rights in a future British Bill of Rights, albeit subject to certain qualifications. See Joint Committee on Human Rights, *Twenty-Ninth Report 2007/08: A Bill of Rights for the UK?* (2008). The

an extraordinary proliferation of academic commentary on the subject, which has been characterised by increasing depth and sophistication. It is therefore no exaggeration to say, as Philip Alston does, that 'the debate about the justiciability of social rights has come of age.'<sup>3</sup>

From one perspective, the idea of social rights as human rights might seem uncontroversial. After all, as Jeff King notes in his important new book *Judging Social Rights*, different theories of human rights – dignity, freedom, utilitarianism and social citizenship – all converge in supporting the idea of social rights.<sup>4</sup> As well as this, the welfare state is now a settled feature of most liberal democracies. Even so, and even for readers unfamiliar with the literature on social rights, it should also be apparent that there are reasons to doubt whether social rights truly belong in Bills of Rights and specifically whether they should be subject to judicial enforcement. Some of these objections are more easily disposed of than others. For example, it might seem that social rights impose positive obligations on the state – in the sense that the state is required to provide goods such as healthcare – whereas the obligations imposed by civil and political rights such as freedom of expression are essentially negative in nature. It might also seem that social rights are resource intensive whereas civil and political rights are relatively cost-free, meaning that the latter are more readily subject to judicial enforcement. However, these dichotomies should not be overstated. Many quintessential civil and political rights – such as the right to a fair trial and the right to vote – require state action and expenditure.<sup>5</sup> Furthermore, to the extent that social rights are more expensive than civil and political rights, this is recognised in the fact that social rights are typically framed so that they are made subject to progressive realisation and the available resources of the state.<sup>6</sup>

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previous Labour government was willing to consider a role for non-justiciable principles reflecting existing welfare provisions in a future Bill of Rights. See UK Ministry of Justice, *Rights and Responsibilities: Developing our Constitutional Framework* (2009).

However, only a minority of the Commission on a Bill of Rights favours the inclusion of social rights in a Bill of Rights. See Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (2012) 8.24-8.28.

<sup>3</sup> Philip Alston, 'Foreword' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008) ix.

<sup>4</sup> Jeff King, *Judging Social Rights* (Cambridge University Press, 2012) 20-28.

<sup>5</sup> See Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008) 66-70.

<sup>6</sup> In the South African Bill of Rights, for example, the social rights set out in ss 26-27 are framed in the following form: (1) Everyone has the right to have access to [the relevant good]; (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. These provisions mirror Article 2(1) of the International Covenant on Economic, Social and Cultural Rights

There are, however, far more formidable objections to constitutional social rights, which are outlined by King in the first chapter of *Judging Social Rights*. Firstly, judicially enforced social rights might seem to lack democratic legitimacy. As King notes, nearly all of us pay into and take out of the public system. There could therefore hardly be a better scenario in which the voice of each should count equally which would suggest that the appropriate forum for resolving disputes involving resource allocation is the legislature, not the courtroom. To this we might add that even if the welfare state is a settled feature of most liberal democracies, it remains the case that reasonable disagreement about the nature and extent of the state's welfare obligations constitutes a key political fault line. Constitutional social rights might therefore threaten to remove important and contested issues from the political process to the hands of unelected judges. Secondly, the legal philosopher Lon Fuller coined the term 'polycentricity' to describe issues that he regarded as unsuitable for adjudication on the basis that they involve a vast number of interconnected variables.<sup>7</sup> Fuller famously employed the metaphor of a spider's web to describe problems where a decision on one issue – or a pull on one strand of the web – will have far-reaching and unforeseeable consequences. Fuller's point was not that such problems are incapable of resolution but rather that courts – with their reliance on an adversarial procedure typically involving two parties – are inappropriate forums for the resolution of polycentric issues, given that the full range of affected parties will not normally be represented. The allocation of scarce resources amongst competing needs would seem to be a paradigmatic example of a polycentric problem, given that a decision to allocate resources to a particular party will frequently have complex repercussions for other parties. Thirdly, many decisions relating to social rights – for example, whether a particular drug is safe – would seem to involve considerable expertise not typically possessed by judges. Fourthly, there is a clear need for flexibility in the provision of social rights because of the possibility of unforeseen information or changing circumstances. Courts, with their capacity to issue binding orders subject to a system of precedent, might threaten to introduce an unwelcome element of rigidity into the welfare state. All of this leads King to characterise the constitutionalisation of social rights as a 'risky enterprise'.<sup>8</sup>

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which states that: 'Each State Party to the present Covenant undertakes to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant...'

<sup>7</sup> Lon Fuller, 'The Forms and Limits of Adjudication' (1979) 92 *Harvard Law Review* 353.

<sup>8</sup> King, above n 4, 7-8.

Nevertheless, the aim of his book is to provide a convincing answer to these 'daunting arguments.'<sup>9</sup>

To this end, King's basic response is to emphasise caution and restraint. This is firstly evident in his discussion of the content of social rights. For King, social rights should be understood as rights to a 'social minimum', or a bundle of resources that would secure a 'minimally decent life.'<sup>10</sup> The social minimum should satisfy three thresholds: a healthy subsistence threshold, a social participation threshold, and an agency threshold.<sup>11</sup> King's emphasis on constitutional social rights as securing a social minimum – derived from the work of Frank Michelman<sup>12</sup> – is ingenious because it defuses much of the concern that constitutional social rights might function as a Trojan horse for a complete theory of distributive justice. To put this point differently, even if we reasonably disagree about the ultimate extent of the state's welfare responsibilities, we can presumably at least agree that the state should provide a social minimum. This much is now widely accepted. The role of the courts then becomes to play a subsidiary but nevertheless important role in securing the social minimum in cooperation with the other branches of government.<sup>13</sup>

In my view, King is clearly correct to regard constitutional social rights as securing the conditions for a minimally decent life. However, it is important to recognise that King's approach may not endear him to many other commentators working in this field. For a start, a more ambitious approach is evident in the text of key legal instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR recognises not merely a right to healthcare but instead 'the right of everyone to the highest attainable standard of physical and mental health.'<sup>14</sup> States Parties commit themselves to ensuring the 'continuous improvement of living conditions'<sup>15</sup> and providing an education directed to the 'full development of the human personality.'<sup>16</sup> Many academic commentators also make no secret of their desire to utilise constitutional social rights as a means of protecting social democracy, or an ample welfare state, in the face of

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<sup>9</sup> Ibid 8.

<sup>10</sup> Ibid 17.

<sup>11</sup> Ibid 29-30.

<sup>12</sup> Frank Michelman, 'Foreword: On Protecting the Poor through the Fourteenth Amendment' (1968) 83 *Harvard Law Review* 7.

<sup>13</sup> King, above n 4, 18.

<sup>14</sup> Article 12(1).

<sup>15</sup> Ibid art 11(1).

<sup>16</sup> Ibid art 13(1).

political losses.<sup>17</sup> These tendencies are perhaps understandable but the effect is to cast social rights as essentially political claims that are unlikely to secure the broad cross-spectrum of support necessary for inclusion in constitutions. For this reason, King's discussion of the social minimum is an important addition to the existing literature.

However, this does not yet address the issue of the value that constitutional social rights might add to existing mechanisms for protecting the social minimum. In this regard, a strength of King's book is that unlike much of the literature in this area it engages with empirical studies on the impact of judicial review. Some of these studies are highly sceptical about the capacity of courts to deliver progressive social change,<sup>18</sup> or contend that even well-intentioned judicial interventions actually worsen the functioning of bureaucracies.<sup>19</sup> In essence, King argues that it is a mistake to look to courts to deliver significant social change. However, the balance of empirical evidence indicates that there are benefits to the type of enhanced legal accountability associated with constitutional social rights.

As for the concern that even well-intentioned judicial interventions may prove counter-productive to the realisation of social rights, this brings us to the heart of *Judging Social Rights*. King argues that the objections to social rights that have been outlined above – democratic legitimacy, polycentricity, expertise and flexibility – should not be taken to exclude the justiciability of social rights altogether. Instead, these objections should be recast as principles of deference. These principles should then be accorded weight in social rights adjudication – and human rights adjudication more generally<sup>20</sup> – so as to restrain judicial interventions in inappropriate cases. King characterises this as an 'institutional' approach to judicial restraint that recognises the advantages and disadvantages of the judicial process as a problem solving mechanism, and hence emphasises the problems of uncertainty and judicial fallibility.<sup>21</sup>

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<sup>17</sup> Thus Sandra Fredman cites the 'icy winds of Thatcherism' as evidence for the necessity of constitutionally protected social rights. See Fredman, above n 5, vii.

<sup>18</sup> The classic study in this regard is Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 1991).

<sup>19</sup> See Jerry Mashaw, *Bureaucratic Justice* (Yale University Press, 1985).

<sup>20</sup> Jeff King, 'Institutional Approaches to Judicial Restraint' (2008) 28(3) *Oxford Journal of Legal Studies* 409.

<sup>21</sup> King, above n 4, 121.

Much of King's book consists of an elaboration of each of the four principles of judicial deference. Within the scope of this review, it is not possible to do justice to King's rich and detailed discussion. However, briefly, regarding democratic legitimacy, King argues that legislation adopted by a democratically elected legislature should generally be accorded great weight in political decision-making about rights. But this presumption does not apply where there has been an absence of legislative focus on a rights issue, or where the legislation addresses the right of someone belonging to a politically marginalised group.<sup>22</sup> On the issue of polycentricity, King has argued elsewhere that polycentricity is a pervasive feature of adjudication – after all, the very idea of *stare decisis* implies repercussions for unrepresented parties – so the adjudication of polycentric issues cannot be categorically excluded.<sup>23</sup> King therefore seeks to identify the circumstances in which polycentricity is relevant to adjudication and to list and elaborate factors that might mitigate the weight it ought to be given.<sup>24</sup> In relation to expertise, King identifies different forms of expertise and discusses how judicial deference should vary in accordance with the type of decision-maker under review. King similarly identifies different forms of inflexibility and considers how administrative and legislative flexibility can be accommodated in social rights adjudication. These discussions are elaborate and insightful and will be of interest not only to social rights scholars but public lawyers generally.

This lengthy discussion leads King to his central recommendation, which is that courts should adopt an 'incrementalist' approach to social rights adjudication. By incrementalism – a term borrowed from organisation theory<sup>25</sup> – King means that courts should avoid judgments that generate significant, nationwide allocative impact. Courts should instead give decisions on narrow, particularised grounds or, where far-reaching implications are unavoidable, decide cases in a manner that preserves flexibility. It follows that judicial decision-making should 'ordinarily proceed in small steps, informed by past steps, and small steps might affect large numbers of people, but in ways that preserve latitude for adaptation.'<sup>26</sup> Incrementalism should not be viewed as inert but rather as a dynamic and searching process that takes place in a controlled fashion.<sup>27</sup> This, King believes, is an appropriate response to

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<sup>22</sup> King, above n 4, Ch 6.

<sup>23</sup> Jeff King, 'The Pervasiveness of Polycentricity' [2008] *Public Law* 101.

<sup>24</sup> King, above n 4, Ch 7.

<sup>25</sup> See, in particular, Charles Lindblom, 'The Science of Muddling Through' (1959) 19 *Public Administration Review* 79.

<sup>26</sup> King, above n 4, 293.

<sup>27</sup> *Ibid.*

the uncertainty that characterises social rights adjudication and the concern that courts may accidentally or intentionally inhibit the realisation of social rights by other branches of government.

In general, I am sympathetic to the argument that courts should proceed incrementally in social rights adjudication, even if this leads King to some overly cautious conclusions.<sup>28</sup> However, my main difficulty with King's argument is that the concept of incrementalism might specify an *approach* towards judicial decision-making but tells us very little about the *substance* of social rights. By this, I do not mean that courts should specify the exact content of the social minimum. Here I agree with King that this is not first and foremost a task for the judiciary.<sup>29</sup> Instead, my concern is that King provides very little analysis of the principles that should be applied by a court in a social rights case, other than to outline a highly sophisticated theory of deference coupled to an injunction that courts should proceed incrementally. The question that is left open is the nature of the legal principles that the courts should apply and develop. In parts, King gives the impression that courts should incrementally develop whatever legal principles are available in a given legal system, bearing in mind the principles of deference that he has outlined.<sup>30</sup> But if human rights are to mean anything, they must be associated with a set of core principles that are intrinsic the rights themselves.<sup>31</sup> Of course, King might argue that this criticism misses the point. Courts should take small steps, learning as they go, and it is not for him to specify the shape of the jurisprudence that emerges. But this ignores that there is already a considerable body of social rights jurisprudence, grappling with issues such as whether courts should apply a reasonableness or

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<sup>28</sup> For example, King criticises the South African case of *Khosa v Minister of Social Development* (2004) 6 BCLR 569 (CC), in which the Constitutional Court ordered that social security benefits be made available to permanent residents, on the basis that the fiscal impact was excessive. See King, above n 4, 319. However, this ignores that citizenship had previously been recognised by the Constitutional Court as a ground of discrimination. The equality dimension to the case means that it would have been difficult for the Court to reach a contrary conclusion. Indeed, the case could be viewed as an incremental application of existing non-discrimination principles.

<sup>29</sup> See Murray Wesson, 'Disagreement and the Constitutionalisation of Social Rights' (2012) 12(2) *Human Rights Law Review* 33.

<sup>30</sup> Thus King writes that 'judges should act incrementally, taking small steps to expand the coverage of existing rules and principles...' See King, above n 4, 2.

<sup>31</sup> Elsewhere I have attempted to draw a distinction between principles of deference that apply in the adjudication of *all* rights and principles that are specific to *particular* rights. See Wesson, above n 29, 26. My concern is, in essence, that King does not sufficiently discuss the latter set of principles.

proportionality standard.<sup>32</sup> One cannot escape the conclusion that King's analysis would have benefited from further consideration of issues such as these.

An additional point of concern is that King has surprisingly little to say about cases of retrogression, or where a state takes backwards steps in the realisation of a social right. Subsequent to the global financial crisis, many European countries, the United Kingdom included, have adopted austerity policies in an attempt contain burgeoning debt and budget deficits. Austerity impacts directly upon social rights given that cuts are frequently made to spending on health, education, social security and so on. It is fascinating to consider what role constitutional social rights might play in this process. Applying King's analysis, there is no doubt that austerity is a highly polycentric issue that implicates considerable expertise. King would therefore presumably take the view that these principles of deference should be accorded great weight. It is possible that courts might specify certain procedural obligations but King would probably take the view that these should be particularised in the sense that they are not generally stipulated but applied as and when issues arise.<sup>33</sup> However, King's theory must also entail that courts should be vigilant to ensure that the social minimum is not threatened. It is the reader's loss that King does not have more to say about these issues.

From the above, it should be clear that to the extent that I have criticisms of *Judging Social Rights* they are mainly requests for further elaboration. There is no doubt that King has written a deeply impressive book that will be of great interest to social rights scholars and indeed anyone interested in public law. It is highly recommended.

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<sup>32</sup> For an overview of the emerging social rights jurisprudence, see Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008).

<sup>33</sup> See, for example, King, above n 4, 277 where the author discusses the 'meaningful engagement' procedure formulated by the South African Constitutional Court in *Occupiers of 51 Olivia Road v City of Johannesburg* (2008) 3 SA 208 (CC) for instances where the state is carrying out evictions.



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# JUDICIAL REVIEW FOR THE CONVICTED FELON IN AUSTRALIA - A CONSIDERATION OF STATUTORY CONTEXT AND THE DOCTRINE OF ATTAINDER

JASON DONNELLY\*

## ABSTRACT

*The decision of Patsalis v State of New South Wales [2012] NSWCA 307 represents a fundamental development in the common law of Australia. The extent to which the Felons (Civil Proceedings) Act 1981 (NSW) applied to applications for judicial review brought by prisoners convicted of a serious indictable offence or a felony remained unclear before the decision of Patsalis in New South Wales.*

*This article examines some of the important implications which flow from the decision of Patsalis, such as the fact that “civil proceedings” in the statutory context of the Felons (Civil Proceedings) Act 1981 (NSW) (the FCPA) was held not to apply to applications for judicial review of administrative decisions brought by a prisoner convicted of a serious indictable offence or a felony who sought to challenge his or her incarceration. The article also examines the common law principle of attainder in light of the statutory enactment of the FCPA.*

## I INTRODUCTION

The judgment of *Patsalis v State of New South Wales* [2012] NSWCA 307 (*Patsalis*) is a decision of significance for the law in New South Wales for various reasons. This paper will explore the implications of the judgment and examine some of the important legal principles that flow from it.

*Patsalis* represents a bastion of protection for the civil rights of prisoners in New South Wales convicted of serious indictable offences. Moreover, it provides an important analysis of the legal meaning of the phrase ‘civil proceedings’, delivers a useful discussion of important principles of statutory interpretation more generally and otherwise

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examines the effect of the common law principle of attainder in Australia.

## II THE FACTS

On 24 September 1999, Michael Patsalis (the applicant) was convicted of murder.<sup>1</sup> On 23 February 2000, the applicant was sentenced to imprisonment for 21 years and 6 months, with a minimum term of 16 years. Accordingly, the applicant is serving a sentence for a serious indictable offence.<sup>2</sup>

On 9 May 2011 the applicant filed a statement of claim seeking damages for negligence from the State of New South Wales (the respondent).<sup>3</sup> The negligence was said to relate to the failure of the respondent to protect the applicant from an assault by another inmate, and also the conduct of the respondent in denying him access to his legal documents (the negligence proceedings).<sup>4</sup>

In accordance with section 4 of the *Felons (Civil Proceedings) Act 1981* (NSW) (the *FCPA*), the applicant sought leave to commence the negligence proceedings.<sup>5</sup> The statutory effect of section 4 of the *FCPA* is that a person who is in custody as a result of being convicted of a serious indictable offence is prohibited from instituting any 'civil proceedings' in any court except by leave of that court.

When the 'leave question' in accordance with section 4 of the *FCPA* came on for hearing, Schmidt J refused to grant the applicant leave to proceed with his substantive claim against the respondent for access to his legal documents.<sup>6</sup> In a judgment delivered on 26 July 2011, her Honour held that 'leave to commence proceedings in respect of the complaints as to the access given Mr Patsalis to his legal documents, must be refused as an abuse of process'.<sup>7</sup>

The applicant's substantive claim of access to his legal documents was said to be based upon his right of access to the courts and, by extrapolation, his right to petition the Governor under section 76 of the *Crimes (Appeal and Review) Act 2001* (NSW) (*CARA*) 'for review of his

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<sup>1</sup> *Patsalis* [2012] NSWCA 307, [9].

<sup>2</sup> *Crimes Act 1900* (NSW) s 4.

<sup>3</sup> *Patsalis* [2012] NSWCA 307, [10].

<sup>4</sup> *Ibid* [14].

<sup>5</sup> *Patsalis v State of New South Wales* [2011] NSWSC 1583 [14] (Schmidt J); *Patsalis v State of New South Wales* [2011] NSWCA 364.

<sup>6</sup> *Patsalis v State of New South Wales* [2011] NSWSC 1583.

<sup>7</sup> *Ibid*.

conviction or sentence or the exercise of the Governor's pardoning power'.<sup>8</sup>

The applicant sought leave to appeal to the New South Wales Court of Appeal against the decision of Schmidt J 'refusing' the applicant leave to commence proceedings in relation to his claim for access to his legal documents (the appeal proceedings).<sup>9</sup> With the benefit of legal representation in the appeal proceedings, a primary contention advanced by the applicant was that in circumstances where a prisoner seeks judicial review of an administrative decision, section 4 of the *FCPA* had no application.

Accordingly, in the appeal proceedings, the New South Wales Court of Appeal had to determine a number of important questions of law. First, whether section 4 of the *FCPA* applied to the applicant's application for judicial review. Secondly, whether section 4 of the *FCPA* imposes a leave requirement in cases where there had been no disability under the principle of attainer.

### III IMPLICATION 1 – LEGAL MEANING OF 'CIVIL PROCEEDINGS'

The first important implication to be drawn from the decision in *Patsalis* relates to the statutory construction of the phrase 'civil proceedings' given by the Court of Appeal. The Court had to determine whether section 4 of the *FCPA* applied to the applicant's application for judicial review. The answer to that question turned ultimately upon whether the phrase 'civil proceedings' in section 4 of the *FCPA* was co-extensive with judicial review proceedings.

The Court unanimously held that in the statutory context of the *FCPA*, the phrase "civil proceedings" was not to be reconciled with 'judicial review proceedings'. This meant that the applicant did not need leave at all to proceed with his judicial review action against the decision of the Commissioner of Corrective Services refusing him access to all of his legal documents in his prison cell.<sup>10</sup> However, this finding by the Court has much wider consequences for the law in New South Wales.

First, since the statutory enactment of the *FCPA* in 1981, the general trend of jurisprudence in New South Wales had been to apply the

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<sup>8</sup> *Patsalis* [2012] NSWCA 307, [51].

<sup>9</sup> *Ibid* [9].

<sup>10</sup> *Ibid* [110] (Basten JA).

leave requirement imposed by section 4 to prisoners in custody who were convicted of a serious indictable offence and who otherwise sought to commence judicial review proceedings in a New South Wales court.<sup>11</sup>

Accordingly, in finding that the phrase 'civil proceedings' in the *FCPA* does not encapsulate judicial review proceedings, *Patsalis* has effectively overturned 31 years of jurisprudence in those cases which have found to the contrary – albeit, without really deciding the question but merely assuming the *FCPA* applied to a prisoner in custody convicted of a serious indictable offence who sought to commence judicial review proceedings in a New South Wales court.

Secondly, more expressly, *Patsalis* appears to have directly overturned the decision in *Potier v Director-General, Department of Justice* [2011] NSWCA 105 ('*Potier*'). In *Potier*, Handley AJA held that the implication from the statutory text and background to the enactment of the *FCPA* 'is that proceedings are either civil or criminal, and proceedings which are not criminal are civil'.<sup>12</sup>

Accordingly, *Potier* held that section 4 of the *FCPA* applied even where a prisoner in custody convicted of a serious indictable offence sought judicial review of an administrative decision. Despite this finding, Basten JA in *Patsalis* held:

Contrary to the intimation in *Potier*, the historical background does not support the proposition that all legal proceedings are necessarily either criminal or civil proceedings. Nor as a matter of policy does there seem to be any good reason why a prisoner should be able to bring criminal proceedings without leave, but not civil proceedings.<sup>13</sup>

Thirdly, the decision of *Patsalis* appears to have settled an apparent disquiet or ambiguity in relation to the question of whether the *FCPA* has application where a prisoner in custody convicted of a serious indictable offence or felony seeks judicial review of an administrative decision.

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<sup>11</sup> *Potier v Magistrate Moore* [2004] NSWSC 1131, [7], [14], [16]; *Potier v District Court of New South Wales* [2004] NSWCA 303, [6]; *Whisprun Pty Ltd v Sams* [2002] NSWCA 394; *Sleiman v Commissioner, NSW Department of Corrective Services* [2008] NSWSC 617, [26]; *Potier v Ruddock and MRRC* [2008] NSWSC 153, [2], [12]; *Potier v Magistrate Maloney and Ors* [2005] NSWSC 336, [4]; *Sinanovic v New South Wales Department of Public Prosecutions* [2002] NSWSC 82, [20]-[21]; *Schmeidas v Jackson* [1982] 2 NSWLR 969, [972G].

<sup>12</sup> *Potier* [2011] NSWCA 105, [10].

<sup>13</sup> *Patsalis* [2012] NSWCA 307, [45].

As noted previously, the general trend of cases in New South Wales have applied the *FCPA* in circumstances where a prisoner in custody convicted of a serious indictable offence or felony seeks judicial review. Despite this trend, the apparent 'disquiet' or 'ambiguity' appears in the fact that there are a series of other cases in New South Wales which have permitted prisoners in custody convicted of a serious indictable offence or felony to commence judicial review proceedings without any consideration of the *FCPA* at all.

For example, in *Potier v General Manager & Governor, MRRC (Metropolitan Reception & Remand Centre)* [2007] NSWSC 1031, Potier (a person convicted of a serious indictable offence) brought an application for writ of *habeas corpus* in order to prepare his appeal with better facilities and access to his legal team. Rothman J dismissed the application. Importantly, his Honour did not deal with the *FCPA* at all, despite stating that: 'These are civil proceedings; not criminal'.<sup>14</sup>

Fourthly, all three judges in *Patsalis* expressly provided an important analysis of what was meant by the phrase 'civil proceedings' in the statutory context of the *FCPA* – it appears that such an analysis had not been undertaken in any great detail before the decision of *Patsalis*. In Australia and England, the expression 'civil proceedings' has been the subject of judicial consideration on various occasions.

In *Cheney v Spooner* (1929) 41 CLR 532 ('*Cheney*'), the High Court of Australia held that a public examination by a liquidator was a "civil proceeding" within the meaning of section 16(1) of the *Service and Execution of Process Act 1901* (Cth). In *Cheney*, Starke J stated that: 'A civil proceeding... includes any application by suitor to a Court in its civil jurisdiction for its intervention or action'.<sup>15</sup>

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<sup>14</sup> *Potier v General Manager & Governor, MRRC (Metropolitan Reception & Remand Centre)* [2007] NSWSC 1031, [17]. Other cases which do not appear to have considered the statutory effect of the *Felons (Civil Proceedings) Act 1981* (NSW) include: *Anderson, Dunn and Alister v Release on License Board* [1984] 2 NSWLR 312; *Baba v Parole Board (NSW)* (1986) 5 NSWLR 338; *Bromby v Offenders' Review Board* (1990) 22 ALD 249; 51 A Crim R 249; *Clarke v Minister for Corrective Services* (1988) 18 NSWLR 553; *Jackson v Director-General of Corrective Services* (1990) 21 ALD 261; *Johns v Release on License Board* (1987) 9 NSWLR 103; *Kelleher v Parole Board of New South Wales* (1984) 156 CLR 364; *Maybury v Osborne & Corrective Services Comm of NSW* [1984] 1 NSWLR 579; *Modica v Commissioner for Corrective Services* (1994) 77 A Crim R 82; *Montgomery v Parole Board* (1988) 40 A Crim R 8; *Potier v Maughan* [2004] NSWSC 590; *Potier v Huber and Ors* [2004] NSWSC 720; *Prisoners A to XX Inclusive v State of New South Wales* (1995) 38 NSWLR 622; *Rendell v Release on License Board* (1987) 10 NSWLR 499; *Riley v Parole Board of New South Wales* (1985) 3 NSWLR 606; *State of New South Wales v Bates* (1991) 24 ALD 467; *Todd v Parole Board* (1986) 6 NSWLR 71.

<sup>15</sup> *Cheney* (1929) 41 CLR 532, [538]-[539].

In another Australian decision, the ultimate construction of the phrase 'civil proceedings', contrary to *Cheney*, appeared to have gone the other way. In *Ainsworth v the Ombudsman* (1988) 17 NSWLR 276 ('*Ainsworth*'), Enderby J held of the *Ombudsman Act 1974* (Cth), which protected the Ombudsman in his or her office from liability 'to....any civil or criminal proceedings' unless the relevant act or omission was done or omitted to be done in bad faith, extended to judicial review proceedings.

It appears that Enderby J in *Ainsworth*<sup>16</sup> came to the conclusion that civil proceedings were co-extensive with judicial review proceedings for at least three reasons. First, the history of section 35A of the *Ombudsman Act 1974* (Cth) indicated that it had been inserted in response to a decision in which mandamus was sought against the Ombudsman.<sup>17</sup> Secondly, when section 35A was enacted, equivalent provisions in other jurisdictions of Australia had been judicially interpreted to apply to judicial review proceedings.<sup>18</sup> Thirdly, because the Ombudsman did not make legally-binding decisions, the concerns about loss of civil liberties that informed the English Court of Appeal's decision in *Ex parte Waldron* [1986] 1 QB 824 ('*Waldron*') were not present.<sup>19</sup>

In *Waldron*, the English Court of Appeal held that the expression 'civil proceedings' in section 139 of the *Mental Health Act 1983* (UK) did not encapsulate judicial review proceedings. The statutory effect of section 139 was a partial privative clause which protected any act under the *Mental Health Act 1983* (UK) in 'civil or criminal proceedings' unless the conduct was done in bad faith or without reasonable care. The applicant in *Waldron* had sought such certiorari and mandamus in respect of a decision of two doctors to compulsorily admit her to hospital, despite the fact she had subsequently been granted a conditional leave of absence.

Ackner LJ in *Waldron* referred to various authorities to support the proposition that certiorari and mandamus were not to be taken away

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<sup>16</sup> An analogous statutory construction issue that was decided in *Ainsworth* came before the New South Wales Court of Appeal in *Botany Council v the Ombudsman* (1995) 27 NSWLR 357. Kirby P (with whom Sheller and Powell JJA agreed) expressly avoided deciding the issue (see paragraph 358D) and left open the correctness of the decision of *Ainsworth* (see paragraph 366G).

<sup>17</sup> *Ainsworth* (1988) 17 NSWLR 276, [283D].

<sup>18</sup> *Ibid* [286G].

<sup>19</sup> *Ibid* [288A-B].

except by 'the most clear and explicit words'.<sup>20</sup> Ackner LJ concluded in the following significant terms:

In my judgment the words of section 139 do not provide the clear and explicit words that are necessary to exclude the jurisdiction of the court to grant the remedy of certiorari. On the contrary, the words "civil proceedings" unless specifically defined, are apt only to cover civil suits involving claims in private law proceedings. The words are not apt to include proceedings for judicial review.<sup>21</sup>

Outside the context of statutory interpretation, jurisprudence relevant to the phrase 'civil proceedings' is fickle. In *Rich v The Secretary, Department of Justice and Ors (No 3)* [2011] VSC 224, [8] ('*Rich*'), Whelan J held that judicial review proceedings were "civil proceedings" to distinguish the proceedings from the plaintiff's pending criminal appeal. In *Director of Housing v Sudi* [2011] VSCA 266, [230] ('*Sudi*'), Weinberg JA referred to an 'ordinary civil action' to distinguish between judicial review proceedings and a claim in tort raising a collateral challenged administrative action.

Despite the useful judicial consideration of the phrase 'civil proceedings' in decisions such as *Ainsworth, Cheney, Waldron, Rich* and *Sudi*, those decisions clearly had a limited application in *Patsalis* - particularly because the foregoing decisions plainly were dependent upon a particular statutory context.

Allsop P held that the phrase 'civil proceedings' in the *FCPA* should be 'aptly understood as a claim for a private remedy to redress an injury from wrongful conduct. Its form may be at common law, in equity or in statute'.<sup>22</sup> His Honour went further and stated: 'The challenge to the exercise of public power (at least insofar as it concerns the conviction, sentencing and incarceration of the person covered by the Act) is not easily conformable with the expression of an action for a civil wrong'.<sup>23</sup>

Basten JA held that 'civil proceedings has an 'apparent simplicity about it which, may, on reflection, prove to be misleading'.<sup>24</sup> In this respect, his Honour found that civil proceedings 'applies to civil claims for damages (and related proceedings), but not to applications for judicial review of administrative decisions or other applications in the

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<sup>20</sup> *Waldron* [1986] 1 QB 824, [841A-B].

<sup>21</sup> *Waldron* [1986] 1 QB 824, [845C-D].

<sup>22</sup> *Patsalis* [2012] NSWCA 307, [5].

<sup>23</sup> *Ibid* [6].

<sup>24</sup> *Ibid* [43].

supervisory jurisdiction of the Court reflected in s 69 of the *Supreme Court Act 1969* (NSW).<sup>25</sup>

Sackville AJA agreed with the reasoning of Basten JA, adding: 'a statutory prohibition on persons instituting civil proceedings may not prevent a person applying to the Court for judicial review of administrative decisions or conduct said to be beyond power'.<sup>26</sup> Accordingly, his Honour found that in the statutory context of the *FCPA*, the phrase 'civil proceedings' did not extend to judicial review proceedings.

Given the foregoing, *Patsalis* represents a landmark decision in New South Wales law. The decision provides clear appellate authority for the proposition that persons in custody in New South Wales convicted of a serious indictable offence or felony who seek judicial review of an administrative decision do not need leave under section 4 of the *FCPA*.

#### IV IMPLICATION 2 – PROTECTION OF THE CIVIL RIGHTS OF PRISONERS

The second important implication from *Patsalis* is the protection of the civil rights of prisoners in New South Wales. In effect, the New South Wales Court of Appeal was faced with whether to adopt either a narrow or broad construction of the phrase 'civil proceedings' in the *FCPA*.

A narrow construction would mean that the phrase 'civil proceedings' is not co-extensive with judicial review proceedings in the context of the *FCPA*. A broad construction would mean, in effect, that "civil proceedings" in the *FCPA* are inclusive of judicial review proceedings.

Basten JA, who wrote the leading judgment in *Patsalis*, sought to give effect to protecting the civil rights of prisoners by favouring a narrow construction of the phrase 'civil proceedings' in the *FCPA*. In this respect, his Honour cited with approval the decision of *Raymond v Honey* [1983] AC 1 where Lord Wilberforce held that: 'a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication'.<sup>27</sup>

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<sup>25</sup> Ibid [9].

<sup>26</sup> Ibid [116].

<sup>27</sup> Ibid [52]. See further, *Reg v Board of Visitors of Hull Prison, Ex parte St Germain* [1979] QB 425, [455] and *Solosky v The Queen* (1979) 105 DLR (3d), 745, 760 (Dickson J), a decision of the Supreme Court of Canada.



Basten JA subsequently reasoned: “Thus, where a prisoner has a legal right enforceable by a court under the general law.... such a right may be removed or conditioned by statute, but the intention in that respect must be clear”.<sup>28</sup> Given the apparent ambiguity of what legal meaning was to be ascribed to the phrase ‘civil proceedings’ in the *FCPA*, his Honour reasoned that the ambiguity must be construed in favour of the prisoner:

While the imposition of a leave requirement, which vests control of access to the courts within the court themselves, will involve a lesser intrusion on civil rights than other forms of restraint, the presumption in favour of non-interference will mean that the leave requirement will not be given an expansive construction.<sup>29</sup>

Basten JA went further, notably stating:

The requirement for leave is itself a constraint on access to the courts, being an important civil right which is no longer removed from those convicted of serious indictable offences. Accordingly, it is appropriate to adopt an approach to the question of statutory construction which limits the civil rights in question only to the extent necessary to give effect to the statutory provision.<sup>30</sup>

*Patsalis* represents a prime example of a case where civil rights will not be taken away unless the intention of parliament is abundantly made plain in the passing of relevant laws.<sup>31</sup> Given that it was not clear that the enactment of the *FCPA* was to place greater limits on access to the courts by prisoners than applied at common law (given the common law principle of attainder), a broad construction could not be adopted. As Allsop P held: ‘The purpose of the leave provision was to ameliorate the perceived harshness of the doctrine of attainder’.<sup>32</sup>

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<sup>28</sup> *Patsalis* [2012] NSWCA 307, [53].

<sup>29</sup> *Ibid* [53].

<sup>30</sup> *Ibid* [56].

<sup>31</sup> The formal derogations of the rights and privileges of prisoners from the entitlements of ordinary citizens are considerable. See further, G Zdenkowski, ‘Judicial Intervention in Prisons’ (1980) 6 *Monash University Law Review* 294; G Zdenkowski, ‘Review of Disciplinary Proceedings in Australian Prisons’ (1983) 7 *Criminal Law Journal* 3; JF Staples, *Courts, Convicts and Labor Governments in New South Wales – from Cable to Dugan and Beyond*, Eleventh Annual John Curtin Memorial Lecture, Australian National University, Canberra, 1981; JF Nagle, *The Report of the Royal Commission into NSW Prisons*, NSW Government Printer, Sydney, 1978; Australian Law Reform Commission, *Sentencing: Prisons*, Discussion Paper No 31 (1987).

<sup>32</sup> *Patsalis* [2012] NSWCA 307, [4].

More modern thinking holds that the loss of liberty is the proper measure of the punishment imposed by the court, and that goals of rehabilitation and respect for authority will be better served if prisoners retain their civil rights in other respects.<sup>33</sup> In the past the courts showed greater reluctance to accede to judicial review applications than is now the case.<sup>34</sup>

It was formerly considered that there was a public policy which prevented the review of decisions made in the course of administering prisons,<sup>35</sup> on the basis that such interference might promote discord and undermine authority.<sup>36</sup> Such a policy was consistent with the view that imprisonment was accompanied by a loss of civil rights.<sup>37</sup>

Accordingly, *Patsalis* appears to accord with modern thinking which allows prisoners to retain their civil rights. Despite a change in judicial attitudes, willingness to intervene depends on where the decision under review falls along a spectrum, intervention being most likely when a right to release, albeit conditional, is directly affected and least likely where the decision made affects the enjoyment of amenities and is justified on administrative grounds.<sup>38</sup>

## V IMPLICATION 3 – THE COMMON LAW PRINCIPLE OF ATTAINDER IN AUSTRALIA

The third and final important implication to flow from *Patsalis* is the significant discussion by the Court of the common law principle of attainder. The ancient common law doctrine of attainder led to

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<sup>33</sup> *Halsbury's Laws of Australia*, "Judicial Review, [335-950] Availability of review", LexisNexis Australia [Accessed 13/11/2012]; *Patsalis* [2012] NSWCA 307, [56] (Basten JA).

<sup>34</sup> *Flynn v R* (1949) 79 CLR 1; [1949] ALR 850; *R v Classification Committee; Ex parte Finnerty* [1980] VR 561; *Ex parte Johns* [1984] 1 Qd R 450; *R v Walker* [1993] 2 Qd R 345; (1992) 60 A Crim R 463; *R v Board of Visitors of Hull Prison; Ex parte St Germain* [1979] 1 QB 425; [1979] 1 All ER 701; [1979] 2 WLR 42.

<sup>35</sup> *Gibson v Young* (1900) 21 LR (NSW) L 7; 16 WN (NSW) 158. Compare *Quinn v Hill* [1957] VR 439 at 452; [1957] ALR 1127 (Smith J) (public policy is no defence); *Hall v Whatmore* [1961] VR 225.

<sup>36</sup> See, eg, *Becker v Home Office* [1972] 2 All ER 676, 682 (Lord Denning MR).

<sup>37</sup> *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583; 22 ALR 439; 53 ALJR 166; Compare *R v Board of Visitors of Hull Prison; Ex parte St Germain* [1979] 1 QB 425, 455-6; [1979] 1 All ER 701; [1979] 2 WLR 42 (Shaw LJ).

<sup>38</sup> *Smith v Corrective Services Cmr of New South Wales* (1980) 147 CLR 134; 33 ALR 25; 55 ALJR 68; *Burke v R* (1981) 148 CLR 146; 38 ALR 223; *Burr* (1981) 4 A Crim R 188; *Kelleher v Parole Board (NSW)* (1984) 156 CLR 364; 57 ALR 37; 59 ALJR 96; 14 A Crim R 293; *Riley v Parole Board of New South Wales* (1985) 3 NSWLR 606; *Gibbs v New South Wales* (1990) 21 NSWLR 416; 51 A Crim R 306; *New South Wales v Bates* (1991) 24 ALD 467.

automatic extinction of various civil rights and capacities, such as the rights to inherit and to hold or deal with property, where the accused was sentenced to death or outlawry having been convicted of treason or a felony.<sup>39</sup>

The ancient common law doctrine of attainder is no longer part of Australian law.<sup>40</sup> However, various legal disabilities still affect prisoners in Australia. At common law a prisoner serving a life sentence for a capital felony is disabled from suing in the courts until his or her sentence is served or a pardon is received.<sup>41</sup> The common law restriction has also been held to extend to non-capital felonies.<sup>42</sup> In some jurisdictions the effect of this common law<sup>43</sup> rule has been expressly abolished or modified by statute.<sup>44</sup>

Importantly, the common law principle of attainder was considered in *Patsalis* in the context of the application of relevant principles of statutory interpretation. In the appeal proceedings in *Patsalis*, the applicant argued that the phrase “civil proceedings” is to be construed consistent with the objects and purposes of the *FCPA*.

The history of enactment of the *FCPA* demonstrates that its purpose was to remove the bar to bringing civil proceedings that the common law placed on felons convicted and sentenced to death. In that respect, the *FCPA* was preceded by the *Report of the Royal Commission into New South Wales Prisons* (Commissioner: Nagle J), 1978 (*‘Nagle Royal Commission Report’*).

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<sup>39</sup> *Halsbury's Laws of Australia*, “Legal Incidents of Imprisonment, [335-320] Legal capacity”, LexisNexis Australia [Accessed 13/11/2012].

<sup>40</sup> R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria*, 2nd ed, Oxford University Press, Melbourne, 1999.

<sup>41</sup> *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583; 22 ALR 439; 53 ALJR 166.

<sup>42</sup> *Macari v Mirror Newspapers Ltd* (unreported, SC (NSW), Cantor J, CLD No 10312/1980, 4 March 1980). This decision has been criticised: G Zdenkowski, ‘Prisoners Denied Access to the Courts’ (1980) 5 (5) *Legal Service Bulletin* 239.

<sup>43</sup> As to the Commonwealth position it appears that the common law applies to federal prisoners. In the Australian Capital Territory the common law appears to apply despite change of law in New South Wales: *Seat of Government Acceptance Act 1909* (Cth) s 6 (all laws in force in the Territory immediately before 1 January 1911 continue in force until other provision is made); As to South Australia see *Milera v Wilson* (1980) 23 SASR 485 (decision based on *Criminal Law Consolidation Act 1935* (SA) s 330 (repealed)); *Bromley v Dawes* (1983) 34 SASR 73; 10 A Crim R 98.

<sup>44</sup> *Criminal Code* (NT) s 435A; *Felons (Civil Proceedings) Act 1981* (NSW); *Public Trustee Act 1978* (QLD) s 95; *Prisoners (Removal of Civil Disabilities) Act 1991* (TAS) (repealed *Criminal Code* (TAS) ss 435-437 which provided that there were no proceedings for recovery of any property, debt or damage); *Crimes (Amendment) Act 1973* (VIC) s 5(1) (repealed *Crimes Act 1958* (VIC) ss 549-561); *Criminal Code* (WA) s 730 (common law restrictions have been abolished).

The Commission recognised the injustice of the common law rule<sup>45</sup> and recommended that the rule be abolished and that prisoners should have full access to legal advisors and to the courts.<sup>46</sup> Accordingly, the *Nagle Royal Commission Report* was followed by the enactment of the *FCPA* in 1981.<sup>47</sup>

The applicant argued that a fundamental object and purpose of the *FCPA* was to 'expand' the rights of prisoners in New South Wales, by allowing them to commence 'civil proceedings' in New South Wales subject to a grant of leave. In this respect, it was assumed by the applicant that at common law, prisoners did not have legal rights to commence 'civil proceedings' as convicted felons (*as convicted capital or non-capital felons*).

A number of passages from the second reading speech of the *FCPA* demonstrate that the purpose of the Act was to give convicted felons the opportunity to institute private civil actions from which they had previously been barred and thus to expand and not contract the rights of prisoners.

For example, The Honourable Mr Walker said the following in the *Second Reading Speech of the Felons (Civil Proceedings) Bill (FCPB)*:

The bill represents an important reversal of an extraordinary aberration in New South Wales common law. That aberration was long regarded as extinct, an archaic and feudal denial of rights which had disappeared from the common law in the same way as trial by battle and witch burning. I am speaking of the ancient doctrines of felony and corruption of the blood. Without embarking on a detailed historical analysis of their origins, their remaining practical effect is the complete abrogation of the right of a person convicted of a felony to institute or maintain civil proceedings in any court. Perhaps I should say this is their known effect, for the full extent of the application of the doctrines have never been judicially considered. In fact the continued application of the doctrines in New South Wales law had not really been formally acknowledged until Darcy Dugan commenced defamation proceedings against Mirror Newspapers Limited.<sup>48</sup>

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<sup>45</sup> The Honourable Justice Nagle, *Report of the Royal Commission into New South Wales Prisons*, 1978, [372]-[373].

<sup>46</sup> *Ibid* 179-180 [474].

<sup>47</sup> *Schneidas v Jackson* [1982] 2 NSWLR 969, [971A].

<sup>48</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 March 1981, 4831 (Frank Walker).

In a similar fashion, The Honourable Mr Dowd made the following comments in the Second Reading Speech of the *FCPB*:

A felon, who may not be serving a sentence significantly longer than a person serving a sentence for a misdemeanour, must have the right to protect his property and to bring proceedings for personal injuries received in or out of the prison system. Prison officers are not exempt from obligations to prisoners. Felons must have rights in respect of personal physical injury, and the Opposition supports the measures in the bill which will give those rights. A felon must also have rights to protect property by way of injunction, declaration or proceedings for damages. He must be able to protect his property except where it is necessary to use that property to meet an order for damages awarded to his victim.<sup>49</sup>

The Honourable Mr D P Landa said the following during the *Parliamentary Debates* of the *FCPB* in the Legislative Council:

One such archaic remnant of the common law that came to notice comparatively recently is a doctrine that effectively denies convicted felons under sentence the right to commence or maintain civil proceedings in any courts. This consequence is also the last practical effect of a doctrine of attainder, which treated persons convicted of capital felonies as 'civilly dead'. These doctrines operate to prevent a life-sentence prisoner from instituting civil proceedings for the term of his life, even though he may be released from gaol after serving a portion of the life sentence.<sup>50</sup>

The Applicant argued that it was clearly not the object of Parliament, following the *Nagle Royal Commission Report*, to place a greater restriction on the rights of prisoners than what they had at common law. It was therefore necessary to identify the scope of the common law rule. Did it prevent felons from accessing the courts in respect of public law remedies?

It seems to be the case that an attainder could always be falsified by writ of error.<sup>51</sup> The executors of the estate of an outlawed deceased

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<sup>49</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 April 1981, 5586 (John Dowd).

<sup>50</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 April 1981, 5799-5800 (Paul Landa).

<sup>51</sup> M Hale, *Pleas of the Crown* (R Tonson, 1678) 234. This edition of *Hale's Pleas of the Crown* provides no express authority for this proposition. It is to be noted that the 1716 edition merely cites Coke; M Hale, *Pleas of the Crown* (The Savoy: Printed by J Nutt, 1716) citing '3 Inst. 231' where it appears the proposition is implicit.

could use a writ of error to demonstrate a defect in the outlawry.<sup>52</sup> The writ of error, from about 1615 "lay only of grace and required the fiat of the Attorney-General".<sup>53</sup>

In *Earl of Leicester v Heydon* (1571) 1 Plowden 384 the plaintiff brought an action in trespass against the defendant. The defendant pleaded that the plaintiff was the subject of attainder by reason of a trial for treason.<sup>54</sup> In response, the plaintiff argued that the purported attainder was void, on the basis that the Commission of Oyer and Terminer before which the treating case had been heard had not been properly constituted as a matter of law.<sup>55</sup> The Court held that the defendant's plea was "insufficient in law to preclude" the plaintiff from his action.<sup>56</sup>

Sir Edward Coke made reference to the decision of *Earl of Leicester* as authority for the following legal principle: '...wheresoever the judgment of attainder is void or *coram non iudice*, the party is not driven to his Writ of Error, but may falsify the attainder by plea, showing the special matter which proveth it void, or *coram non iudice*'.<sup>57</sup> It appears that Blackstone also adopted the view of Coke.<sup>58</sup>

That the common law rule applied in New South Wales was confirmed in *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583. The origin of the common law rule was explained on the basis that a person convicted of a felony and sentenced to death '...was attained so long as the attainder endured. Every person so attained was 'disabled to bring any action; for he is extra legem positus and is accounted in law *civilliter mortuus*'.<sup>59</sup>

Jacobs J<sup>60</sup> in *Dugan*, with whom Barwick CJ<sup>61</sup>, Gibbs J<sup>62</sup>, Stephen J<sup>63</sup> and Mason J<sup>64</sup> agreed, referred to A V Dicey's *A Treatise on the Rules for*

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<sup>52</sup> *Marshe's Case* (1591) 78 ER 528, [529], Croke Eliz 273, [274].

<sup>53</sup> J H Baker, *The Legal Profession and the Common Law* (Hambleton Press, 1986) 299, citing *Gargrave* (1615) 1 Rolle Rep 175.

<sup>54</sup> *Earl of Leicester v Heydon* (1571) 1 Plowden 384, [389].

<sup>55</sup> *Ibid* [396].

<sup>56</sup> *Ibid* [400].

<sup>57</sup> Edward Coke, *The Third Part of the Institutes of the Law of England: Concerning High Treason, and other Pleas of the Crown, and Criminal Cases* (M Flesher, 1644) 231.

<sup>58</sup> William Blackstone, *Commentaries on the Law of England: Book the Fourth* (Clarendon Press, 1769) [383]-[384].

<sup>59</sup> *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583, [602] (Jacobs J) citing *Co. Litt.* 130 a.

<sup>60</sup> *Ibid* [602]-[603].

<sup>61</sup> *Ibid* [587].

<sup>62</sup> *Ibid* [588].

<sup>63</sup> *Ibid* [592].

<sup>64</sup> *Ibid* [601].

*Selection of the Parties to an Action* (1870) as authority for the nature and scope of the common law rule. Dicey also stated the following, citing *Coke upon Littleton* 128a, [3] as authority: 'An outlaw cannot, while his outlawry lasts, come into any court for any other object than to apply to have his outlawry reversed or set aside'.

Sir Edward Coke had put the matter thus in the following terms:

In a writ of error to reverse and utlary, utlary in that suit, or at any stranger's suit, shall not disable the plaintife, because if he in that action should be disabled if he were outlawed at several men's suits, he should never reverse any of them.<sup>65</sup>

The same exception to attainder is recognised in *Blackstone's Commentaries on the Laws of England* where, after setting out the implications of attainder, the following is stated:

This is after judgement: for there is a great difference between a man convicted and attained; though they are frequently through inaccuracy thrown together. After conviction only a man is liable to none of these disabilities: for there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest of judgment: the indictment may be erroneous, which will render his guilt uncertain, and thereupon the present conviction may be quashed: he may obtain a pardon or be allowed the benefit of clergy: those which suppose some latent sparks of merit, which plead in extenuation of his fault.<sup>66</sup>

There is also judicial consideration in the United States of the common law issue in relation to the legal status of a convicted felon. It appears that the predominant view with respect to the non-capital felony is that, as creature of statute, it is not part of the common law.<sup>67</sup> A wide-ranging account of the application of the doctrine of attainder in the United States is given treatment in a publication titled 'The Collateral

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<sup>65</sup> Sir Edward Coke, *Commentary upon Littleton* (18<sup>th</sup> ed, revised and corrected by Charles Butler, 1823) 128 a.

<sup>66</sup> Wayne Morrison (ed), *Blackstone's Commentaries on the Laws of England* (Psychology Press, 2001) vol IV, 381.

<sup>67</sup> *Platner v Sherwood*, 6 Johns Ch 118, 2 NY Ch Ann 73, 1822; *Chesapeake Utilities Corp v Hopkins*, 340 A2d 154, 1975, [155], fn3 ('Although not without uncertainty, it appears that...civil death, at common law, followed as a consequence of a death sentence, and that the attribute of civil death has been attached to life imprisonment and imprisonment for less than life by specific statutory enactments since 1766').

Consequences of a Criminal Conviction' (1970) 23 *Vanderbilt Law Review* 929.<sup>68</sup>

In the *Vanderbilt* publication, reference is made<sup>69</sup> to an *obiter* statement in the decision of *Kenyon v Saunders*, 18 RI 590, 1894, to the effect that the common law rule precluding suits 'was founded upon the reason that, as the conviction worked a forfeiture of goods to the Crown, a prisoner convicted of a felony no longer had any property to sue for'.

The view taken in *Saunders* in relation to the common law doctrine of attainder appears to be supported by closer consideration of the *Forfeiture Act 1870* (UK) (*FA*). In *Dugan*, Stephen J<sup>70</sup> held that the *FA* removed some of the disabilities of attainder but expressly preserved the prohibition on bringing proceedings. The statutory effect of section 8 of the *FA* prevented a person sentenced to death for treason or felony from bringing 'any action at law or in equity for the recovery of any property, debt or damage whatsoever'. It is plain that section 8 would not have precluded judicial review proceedings. Accordingly, to the extent that the *FA* is regarded as a codification of the common law position of attainder, it supports the narrower view adopted in *Saunders*.

Even aside from the remedies of suit that were available to a person subject to attainder, such a person was not beyond the protection of the law - for example, he or she was protected from torture from ancient times (*Mohamed v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 at [16] citing *Coke's Third Institute*).

Accordingly, in light of the foregoing, the unqualified breadth of some statements of the doctrine, e.g. that an attained person is 'civilly dead', was not to be taken literally. As a result, the Applicant argued successfully in *Patsalis* that the common law rule of attainder did not apply at least in respect of a felon's right to bring proceedings related to his or her status as an outlaw. A pardon would bring that status to an end.<sup>71</sup>

The High Court of Australia in *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 confirmed that a *convicted capital felon* was prohibited from

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<sup>68</sup> Walter Mathews Grant et al, 'The Collateral Consequences of a Criminal Conviction' (1970) 23 *Vanderbilt Law Review* 929.

<sup>69</sup> *Ibid* 1019, footnote 622.

<sup>70</sup> *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583, [593].

<sup>71</sup> *Hay v Justices of the Tower Division of London* (1890) 24 QBD 561, [567].



maintaining an action in an Australian court. However, despite *Dugan*, Sackville AJA held in *Patsalis* that the position with respect to the legal restriction on *non-capital felons* from commencing an action and the extent of the principle of attainder in Australia remained unclear:

Dugan... did not decide that an attained person was incapable of instituting proceedings claiming prerogative or declaratory relief in relation to the conditions of his or her incarceration. It is not clear whether the common law disability extended this far.<sup>72</sup>

Accordingly, the New South Wales Court of Appeal in *Patsalis* was invited by the applicant to provide an analysis of the interaction of the common law principle of attainder and the statutory object and purpose of the *FCPA* – in the statutory context of resolving the correct legal construction of the phrase “civil proceedings” in the *FCPA*.

Allsop P in *Patsalis* provided a construction of “civil proceedings” by having regard not only to the statutory objects and purposes of the *FCPA*, but by considering the historical nature of the passing of the Act: “Whilst the context may be seen to be the whole historical context of English and Australian colonial law, the High Court’s decision in *Dugan* as the apparent catalyst for the Act is the primary point of context”.<sup>73</sup>

Allsop P held that: “The substantive legal context to the passing of the *Felons (Civil Proceedings) Act 1981* (NSW) was the decision of the High Court in *Dugan v Mirror Newspapers Ltd* [1978] HCA 54; 142 CLR 583”.<sup>74</sup> Given the statutory context and history of the passing of the *FCPA*, his Honour found that the effect of the phrase ‘civil proceedings’ in the Act did not place greater limits on prisoners than the ‘perceived harshness of the doctrine of attainder’.<sup>75</sup>

Such a statutory construction of the phrase ‘civil proceedings’ in the *FCPA*, according to Allsop P, places that phrase in its proper context.<sup>76</sup> Basten JA agreed, indicating contrary ‘reasoning ignores historical considerations’ in the passing of the *FCPA*.<sup>77</sup> Sackville AJA also agreed, adding that since:

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<sup>72</sup> *Patsalis* [2012] NSWCA 307, [113].

<sup>73</sup> *Ibid* [5].

<sup>74</sup> *Ibid* [2].

<sup>75</sup> *Ibid* [4].

<sup>76</sup> *Ibid* [5].

<sup>77</sup> *Ibid* [38].

s 4 of the Felons Act is no more extensive than the common law rule, a person in custody by reason of having being convicted of a serious indictable offence would not require leave to institute judicial review proceedings seeking relief in relation to administrative decisions which he or she would otherwise have standing to challenge.<sup>78</sup>

## VI CONCLUSION

The law should always attempt to be not only consistent, but clear.<sup>79</sup> Before the judgment of *Patsalis*, the extent to which the *FCPA* applied to prisoners convicted of a serious indictable offence or felony who sought to bring a judicial review claim challenging his or her incarceration remained unclear.

The extent otherwise of the application of the *FCPA* to prisoners convicted of a serious indictable offence or felony who seek judicial review independent of a challenge to his or her incarceration remain unclear. As Allsop P observed in *Patsalis*, it 'is unnecessary to chart the metes and bounds of the phrase "civil proceedings" in the *FCPA*'.<sup>80</sup> Whilst the legal operation and application of the *FCPA* has not been fully tested, *Patsalis* undoubtedly represents a step in the right direction for eliminating the apparent ambiguity of the proper legal operation of this important Act of Parliament.

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<sup>78</sup> *Ibid* [114].

<sup>79</sup> G Wilson, 'Unconscionability and Fairness in Australian Equitable Jurisprudence' (2004) 11 *Australian Property Law Journal* 1.

<sup>80</sup> *Patsalis* [2012] NSWCA 307, [7].

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# BOARD OF BENDIGO REGIONAL INSTITUTE OF TECHNICAL AND FURTHER EDUCATION V BARCLAY

THE HONOURABLE JUSTICE SHANE MARSHALL\* & AMANDA  
CAVANOUGH\*\*

## I INTRODUCTION

On 7 September 2012, the High Court of Australia unanimously allowed an appeal by the Bendigo Regional Institute of Technical and Further Education ('BRIT') from the Full Court of the Federal Court of Australia.<sup>1</sup> The High Court held that BRIT's Chief Executive Officer, Dr Louise Harvey did not take adverse action against Mr Greg Barclay for a reason prohibited by the *Fair Work Act 2009* (Cth) ('the Act'). At the relevant time, Mr Barclay was an employee of BRIT and also the Sub-Branch President of the Australian Education Union ('AEU') at BRIT.

The central issue, at first instance and on appeal, concerned the correct approach to a determination under s 346 of the Act, which prohibits an employer from taking adverse action against an employee because of the employee's union role or activities. From the outset of the litigation, BRIT conceded that it had taken 'adverse action' against Mr Barclay, but denied that such action was taken because of Mr Barclay's industrial activity or association with the AEU in contravention of the Act.

## II THE FACTS

The material facts were mostly uncontroversial. Mr Barclay was employed as a senior teacher and was a delegate of the AEU at BRIT. On 29 January 2010, he sent an email to members of the AEU employed by BRIT. The subject line of the email read 'AEU - A note of caution'. It referred to an upcoming audit of BRIT, which was being held for the purpose of securing re-accreditation and funding for the organisation. In the body of the email, Mr Barclay said that he was aware of reports of serious misconduct by unnamed individuals in connection with the

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\* Justice of the Federal Court of Australia.

\*\* Associate to the Honourable Justice Shane Marshall.

<sup>1</sup> *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 ('Bendigo').

preparations for the audit. He did not advise management of such reports before sending the email, which read:

...It has been reported by several members that they have witnessed or been asked to be part of producing false and fraudulent documents for the audit... It is stating the obvious but, **DO NOT AGREE TO BE PART OF ANY ATTEMPT TO CREATE FALSE/FRAUDULENT DOCUMENTATION OR PARTICIPATE IN THESE TYPES OF ACTIVITIES...**

A footnote to the email indicated that the message was 'for the named person's use only' and 'may contain confidential, proprietary or legally privileged information'. Despite this, some of the email recipients forwarded the email to management. On 1 February 2010, it was brought to the attention of Dr Harvey.

Dr Harvey considered the email indicated a *prima facie* contravention of the *Code of Conduct for Victorian Public Sector Employees*. She met with Mr Barclay the following day and gave him a letter which set out her proposed course of action and asked him to 'show cause' why he should not be subject to disciplinary action for serious misconduct. Mr Barclay was suspended from duty on full pay and required not to attend BRIT premises. His internet access was also suspended pending a full investigation. Mr Barclay and the AEU applied to the Federal Court for a declaration that BRIT contravened s 346 of the Act.

### III THE DECISION AT FIRST INSTANCE

At the hearing before Tracey J, Dr Harvey denied having taken adverse action against Mr Barclay because of his membership of the AEU or associated activities. She claimed that she decided to suspend Mr Barclay 'because [she] was of the view that the allegations against him were serious and... [she] was concerned if Mr Barclay was not suspended he might cause further damage to the reputation of [BRIT] and [its] staff'<sup>2</sup> due to the way in which he raised the allegations of misconduct.

#### *A The Statutory Interpretation Issue*

Section 361 of the Act places the onus on the employer to prove on the balance of probabilities that the reason for adverse action was not one

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<sup>2</sup> [2010] FCA 284, [52].

which is prohibited.<sup>3</sup> Mr Barclay and the AEU argued that, in determining whether or not action was taken ‘because’ of the aggrieved person’s status or activities, the subjective intentions of the decision-maker are irrelevant and the test to be applied is purely objective. Alternatively, the applicants argued that BRIT had not established that it had not acted because of Mr Barclay’s activities as an officer of the AEU.

Justice Tracey rejected the respondents’ submission that the reasons given by a decision-maker were irrelevant as ‘inconsistent with the legislative history, relevant principles of statutory construction and authority’.<sup>4</sup> Rather, his Honour said:

The task of the court, in a proceeding such as the present is...to determine why the employer took the adverse action against the employee. Was it for a prohibited reason or reasons which included that reason? In answering this question, evidence from the decision-maker which explains why the adverse action was taken will be relevant. If it supports the view that the reason was innocent and that evidence is accepted the employer will have a good defence. If the evidence is not accepted the employer will have failed to displace the presumption that the adverse action was taken for a proscribed reason.<sup>5</sup>

Justice Tracey found Dr Harvey ‘a somewhat tentative and nervous witness’<sup>6</sup> but nevertheless found her evidence as to her reasons for acting ‘convincing and credible’.<sup>7</sup> His Honour was satisfied that Dr Harvey did not act for any prohibited reason, but for the reasons she gave and dismissed the application. The respondents appealed to the Full Court of the Federal Court.

## VI THE FULL COURT

The Full Court, by majority, allowed the appeal. In a joint judgment, Gray and Bromberg JJ explained:

The central question under s 346 is why was the aggrieved person treated as he or she was? If the aggrieved person was subjected to

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<sup>3</sup> This reverse onus of proof was introduced into the statutory framework around 100 years ago (see *Conciliation and Arbitration Act (No 2) 1914* (Cth)).

<sup>4</sup> [2010] FCA 284, [24]; as to the legislative history, see *Elliott v Kodak Australasia Pty Ltd* [2001] FCA 807.

<sup>5</sup> [2010] FCA 284, [34].

<sup>6</sup> *Ibid* [54].

<sup>7</sup> *Ibid*.

adverse action, was it “because” the aggrieved person did or did not have the attributes, or had or had not engaged or proposed to engage in the industrial activities... The determination of those questions involves characterisation of the reason or reasons of the person who took the adverse action. The state of mind or subjective intention of that person will be centrally relevant, but it is not decisive. What is required is a determination of what Mason J in *Bowling* (at 617) called the “real reason” for the conduct. The real reason for a person’s conduct is not necessarily the reason that the person asserts, even where the person genuinely believes he or she was motivated by that reason. The search is for what *actuated* the conduct of the person, not for what the person *thinks* he or she was actuated by. In that regard, *the real reason may be conscious or unconscious and where unconscious or not appreciated or understood, adverse action will not be excused simply because its perpetrator had a benevolent intent*. It is not open to the decision-maker to choose to ignore the *objective connection* between the decision he or she is making and the attribute or activity in question.<sup>8</sup> [emphases added]

Justices Gray and Bromberg explained this approach as being consistent with the objects of the Act, to protect the right of freedom of association and the right to union participation at work. Their Honours added, the ‘real reason or reasons for the taking of adverse action must be shown to be “dissociated from the circumstances” that the aggrieved person [engaged in industrial activity]’.<sup>9</sup> It followed, from this reasoning, that their Honours found BRIT to have engaged in prohibited adverse action because ‘all of the relevant conduct in issue... involved Mr Barclay in his union capacity’.<sup>10</sup>

In a dissenting judgment, Lander J agreed with the primary judge’s approach. His Honour said:

In my opinion, his Honour’s approach was correct. The question is why was the adverse action taken? That question will be answered by reference to the subjective intention of the decision maker. Ordinarily the decision maker will have to give evidence as to the reason or reasons why the adverse action was taken. If the decision maker’s evidence having regard to “established facts” is accepted, then the decision maker will have discharged the onus imposed upon the decision maker by s 361 of the Act.<sup>11</sup>

By special leave, BRIT appealed to the High Court.

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<sup>8</sup> (2011) 191 FCR 212, [27]-[28].

<sup>9</sup> Ibid [32].

<sup>10</sup> Ibid [73].

<sup>11</sup> Ibid [208].

## V THE HIGH COURT

The High Court unanimously allowed the appeal, holding that Dr Harvey's evidence, which was accepted by the primary judge and not challenged on appeal, established that the adverse action taken against Mr Barclay had not been for a prohibited reason.

*A The Parties' Submissions*

In challenging the judgment of the Court below, BRIT argued that a contravention of s 346 required that the employer's subjective reason for taking action was because of the employee's position as a union officer or industrial activities. This construction was said to be supported by the text of s 346 and related provisions, the legislative history and weight of authority concerning predecessor provisions.

The competing submission put for Mr Barclay and the AEU was that contravention is to be determined objectively without reference to the state of mind of the decision maker. This liberal approach was said to be appropriate because the provisions concern human rights, so the fact that Mr Barclay was engaged in industrial activity at the time adverse action was taken was sufficient to bring him within the Act's protection.

*B The High Court's Approach*

In a joint judgment, French CJ and Crennan J rejected Mr Barclay and AEU's submission and endorsed the approach of Tracey J. Their Honours noted that the respondents' submission, if accepted, would 'destroy the balance between employers and employees'<sup>12</sup> central to civil penalty regime established under the Act. Their Honours added, in reference to the Full Court majority's reasoning, 'it is a misunderstanding of, and contrary to, [authority] to require that the... reason for adverse action must be entirely dissociated from an employee's union position or activities'.<sup>13</sup>

Gummow and Hayne JJ also approved the primary judge's approach in their joint judgment holding that 'it was the reasons of the decision-maker at the time the adverse action was taken which was the focus of the inquiry'.<sup>14</sup>

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<sup>12</sup> *Bendigo* [2012] HCA 32, [61].

<sup>13</sup> *Ibid* [62].

<sup>14</sup> *Ibid* [127].

In a separate judgment, Justice Heydon concurred in upholding the approach and decision of the primary judge. His Honour was critical of the Full Court majority's approach of differentiating between 'conscious' and 'unconscious' reasons, noting that such an approach would impose an 'impossible burden'<sup>15</sup> on employers facing accusations of prohibited adverse action.

#### VI COMMENT

This case has clarified an important provision of the Act, which is intended to balance the right of workers to participate in union activity at work with the right of employers to discipline employees for what employers regard as inappropriate behaviour, whatever the role or position of the relevant employee.

The approach of the primary judge, which was upheld by the High Court, suggests that the subjective intention of the decision-maker, if accepted by the primary judge in the context of relevant objective facts, will usually provide a good defence to an accusation of adverse action. This is not to say, however, that the mere assertion that a prohibited reason was not the reason for taking adverse action will always be accepted by a primary judge. Whether an employer took adverse action for a prohibited reason is a question of fact for a primary judge to determine on all the relevant evidence before the Court, bearing in mind the onus on the employer to show that it did not take adverse action for a prohibited reason.

Whether that onus is discharged in any particular case is a matter to be assessed by the primary judge on all the evidence pertinent to that issue. The primary judge will scrutinise the evidence given as to the asserted reason for adverse action and will rely on it only if it is credible and rationally acceptable when viewed in the context of the entire factual matrix in the proceeding. Although subject to an appeal, a useful example of where such an onus was not discharged is the case of *Fair Work Ombudsman v Maclean Bay*.<sup>16</sup> That case can be contrasted with the case of *Elliott v Kodak*<sup>17</sup> where the Court accepted the evidence of the employer that it did not target the employee for discriminatory treatment in the redundancy process because of his position as a union delegate.<sup>18</sup>

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<sup>15</sup> Ibid [146].

<sup>16</sup> [2012] FCA 10, [121] - [123].

<sup>17</sup> [2001] FCA 807.

<sup>18</sup> Ibid [84].



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# FEES? NOT SO SIMPLE: ANDREWS AND ORS V AUSTRALIA NEW ZEALAND BANKING GROUP LTD [2012] HCA 30 (6 SEPTEMBER 2012)

LUDMILLA K ROBINSON\*

## I INTRODUCTION

On 22 September 2010 the appellants commenced representative proceedings in the Federal Court of Australia against the Australia New Zealand Banking Group ('ANZ') pursuant to Part IV of the *Federal Court of Australia Act 1976* (Cth). There were approximately 38,000 group members. John Andrews, Angelo Saliba and Geoffrey Field were the 'head' applicants, or representatives, for the group members. Their claim was based upon the premise that certain 'fees' charged by the ANZ are not, in effect, fees at all, but penalties imposed upon the Bank's customers and, as such, are void or unenforceable pursuant to the doctrine of penalties. As a consequence, the appellants further claimed restitution for money had and received or, in the alternative, damages.

At first instance, Gordon J held that the majority of the fees charged by the ANZ could not be characterised as penalties because the penalty doctrine could only be invoked when the impost arose from a breach of contract or where there was no responsibility or obligation upon the appellants to avoid the events which triggered the imposition of the fees.

The appellants appealed against this finding to the High Court, which allowed the appeal with costs, determining that the penalty doctrine could be applied where there was no breach of contract or occurrence of an 'uncontrolled' event. The High Court remitted the matter to the Full Court of the Federal Court for determination as to whether the ANZ fees were penalties within the parameters discussed in its judgment.

In addition to the proceedings under consideration, six similar proceedings were commenced in the Federal Court against other

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Australian financial institutions, including the other major banks, bringing the total of represented litigants to approximately 170,000 and the total value of the claims in excess of \$223 million.

Apart from the significance of the number of litigants involved in the representative actions, the ultimate effect of the High Court's decision and the subsequent findings of the Full Court of the Federal Court in this matter upon banking and finance practice, bank/client relations and financial institution profitability, cannot be overstated.<sup>1</sup>

## II BACKGROUND: THE FEDERAL COURT PROCEEDINGS

The Federal Court proceedings were commenced in the Victorian Registry of the Federal Court<sup>2</sup> and claimed relief against:

fees identified as honour, dishonour, and non-payment fees charged by the ANZ in respect of various retail deposit accounts and business deposit accounts, and fees identified as over limit and late payment fees charged by the ANZ in respect of consumer credit card accounts and commercial credit card accounts.<sup>3</sup>

Although the initial pleadings filed by the applicants contained a number of grounds upon which their claim was based, including unconscionable conduct on the part of the ANZ<sup>4</sup> and the use by the Bank of 'unfair' terms<sup>5</sup> in its contracts and which were accordingly 'unjust' transactions,<sup>6</sup> the principal emphasis of their claim was for:

1. declarations that the disputed 'fees' were void or unenforceable as penalties; and
2. the repayment of all or part of the disputed fees by way of restitution for money had and received or damages.

In addition, separate questions were presented to the court for resolution. These questions included the issues of:

1. whether the fees were payable by the applicants upon breach of contractual obligations and, or in the alternative,

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<sup>1</sup> The practical effect of the decision will be discussed in the Conclusion to this Note.

<sup>2</sup> *Andrews v Australia New Zealand Banking Group Ltd* (2011) 288 ALR 611.

<sup>3</sup> *Andrews v Australia New Zealand Banking Group Ltd* [2012] HCA 30 (6 September 2012), [19].

<sup>4</sup> In contravention of the *Australian Securities and Investments Commission Act 2001* (Cth) and the *Fair Trading Act 1999* (Vic) ('FTA').

<sup>5</sup> Pursuant to ss 32W and 32Y FTA.

<sup>6</sup> Pursuant to the *Consumer Credit (Victoria) Code*.

2. whether the applicants had a responsibility to ensure that the circumstances giving rise to the fees did not occur.

As pointed out on appeal by the High Court in its judgment: 'If there was an affirmative answer to either of the alternative questions, it was then asked whether the fees were capable of being characterised as a penalty by reason of that fact.'<sup>7</sup>

What had been conceded by the ANZ, and was therefore not in issue, was the fact that the disputed fees were not based upon an estimate by the Bank of the damage it would suffer should a breach of the Bank's requirements occur. It was therefore accepted by the parties and consequently by the court, that the fees charged were disproportionately high in relation to the costs incurred and the resultant loss suffered by the Bank.

Gordon J, the primary judge, found that a late payment fee was payable on breach of contract and, as such, could be characterised as a penalty and was therefore void. In respect of the other fees, however, her Honour found that the charges were not imposed as a result of any breach of contract, nor did the applicants have a responsibility to avoid the occurrence of any event which would give rise to the imposition of the fees. Thus, these fees could not be brought within the ambit of the penalty doctrine. In arriving at this decision, her Honour followed the reasoning *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd*<sup>8</sup> ('*Interstar*').

On 21 December 2011, the applicants filed an Application for Leave to Appeal in the Federal Court against part of the orders made by Gordon J. In January 2012, application was made by the applicants to have the Leave Application and the Appeal itself, if Leave were granted, removed to the High Court. On 11 May, the High Court granted the Application.

### III PROCEEDINGS IN THE HIGH COURT OF AUSTRALIA

#### *A Grounds for the Appeal*

The appellants appealed to the High Court to set aside the findings, set out in orders 1 and 2 and as handed down by Gordon J in the primary proceedings on 13 December 2011:

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<sup>7</sup> Ibid [20].

<sup>8</sup> [2008] NSWCA 310; (2008) 257 ALR 292.

1. that the honour, dishonour, non-payment and over limit fees were not charged by the ANZ upon breach of contract by its customers; and
2. that the customers had no responsibility or obligation to avoid the occurrence of events upon which these fees were charged, and

accordingly, the fees could not be characterised as penalties.

The effect of Gordon J's decision was to limit the application of the penalty doctrine to those instances where the fee was imposed as a result of:

- breach of contract, or
- the occurrence of an event which the appellants had no obligation or responsibility to control (i.e. an uncontrolled event).

It could be argued this limitation of the penalty doctrine puts a 'block' upon equitable relief by confining it solely to the remediation of injustices arising from the enforcement of contractual rights.<sup>9</sup>

In the grounds for their appeal, the appellants pleaded that:

1. 'the fees in question were imposed upon or in default of the occurrence of stipulated events but were out of all proportion to the loss or damage which might have been sustained by the ANZ by reason of the occurrence of those events';<sup>10</sup>
2. the fees were charged for a service with no content, and
3. 'despite the form of the dishonour fee, with the provision of further accommodation by the ANZ to the customer, in substance it is a disguised penalty.'<sup>11</sup>

The appellants also sought to challenge various statements from *Interstar*<sup>12</sup> relied upon by Gordon J in her judgment.

Further, in her judgment Gordon J also raised the issue as to whether the ANZ requirement to pay the fees was not:

a security for performance by the customer of its obligations to the ANZ, or whether the fees were charged by the ANZ, as specified in pre-existing arrangements with the customer, and ANZ respectively, for the further accommodation provided to the customer by its

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<sup>9</sup> See part C below.

<sup>10</sup> *Andrews* [2012] HCA 30 (6 September 2012), [27].

<sup>11</sup> *Ibid* [28].

<sup>12</sup> *Interstar* [2008] NSWCA 310; (2008) 257 ALR 292.

authorising payments upon instructions by the customer upon which the ANZ otherwise was not obliged to act, or upon refusal of accommodation.<sup>13</sup>

However, the Court decided that such ‘live issues’ of this nature ‘is entirely a matter upon further trial,’<sup>14</sup> and therefore, pursued the question no further.

Thus, in formulating their joint decision regarding the application of the penalty doctrine, French CJ, Gummow, Crennan, Keifel and Bell JJ, addressed (*inter alia*) the following issues:

1. the genesis, nature, scope and effect of the penalty doctrine;
2. the *Interstar* decision;
3. the various meanings of the term ‘condition’ in bonds and contracts; and
4. the common law action of *assumpsit*.

### B *The Penalty Doctrine*

A penalty is a ‘punishment’ imposed for non-compliance with a term or condition of an agreement which demands from the party in breach ‘an additional or different liability’<sup>15</sup> from the requirement set out in the original term or condition. Thus, a penalty will arise in the following circumstances:

- In an agreement between A and B, there is a stipulation<sup>16</sup> which imposes a liability upon A, such as the repayment of a debt by instalments paid at particular intervals, This is referred to as the primary stipulation.
- Collateral to this primary stipulation is a secondary obligation which comes into effect if, and only if, A breaches the primary

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<sup>13</sup> *Andrews* [2012] HCA 30 (6 September 2012), [79].

<sup>14</sup> *Ibid* [83].

<sup>15</sup> *Ibid* [9].

<sup>16</sup> The High Court chose to use the term ‘stipulation’ in reference to the clauses in which the fees were prescribed, rather than the words ‘term,’ ‘obligation’ or ‘condition’ because it better reflected ‘the origin of the penal obligation or condition, as known today, in the stipulation (*stipulatio*) in Roman law at a period where stipulations for the payment of money were alone valid,’ *ibid* [37]. The utility of the word ‘stipulation’ in attempting to clarify the nature of a penalty, in preference to the more common appellations is questionable. It is arguable that the mere derivation of a word from a Latin (or Greek) source does little to elucidate the concept it encapsulates. Indeed, it might also be argued that the opposite effect is the most common outcome of detailed etymological discussion.

stipulation. For example, if A fails to make the required repayment instalment on time.

- The collateral stipulation imposes a detrimental condition upon A, such as the payment of an additional impost, but confers a benefit upon B.<sup>17</sup>
- As a result, the collateral stipulation may be regarded as being in the nature of a security for the proper performance by A of the primary stipulation.<sup>18</sup>
- Thus, provided that B can be compensated for any detriment occasioned by A's failure to observe the primary stipulation, A is required to provide compensation, but only to the extent of the damage suffered by B.
- However, if the compensation prescribed by the collateral stipulation exceeds the loss and/or damage suffered by B, the impost will be characterised as a penalty.

It is important, however, to note the following:

- A penalty cannot be imposed if B cannot be compensated financially for the loss or damage caused by A's default. 'It is the availability of financial compensation which generates the "equity" upon which the court intervenes; without it the parties are left to their legal rights and obligations.'<sup>19</sup>
- The primary stipulation may relate to the occurrence of an event unrelated to the obligation imposed upon A to make a payment or repayment.<sup>20</sup>
- Nor is it necessary for the collateral stipulation to require A to make a money payment to B in order to be characterised as a penalty. The stipulation which requires A to transfer to B some other type of property may also be a penalty, if the compensation imposed exceeds the quantum of loss or damage suffered by B.<sup>21</sup>

Thus, the character of a penalty will be accorded to a stipulation which requires A to provide compensation to B in excess of any loss or damage suffered by B as a result of A's failure to fulfill a primary obligation.

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<sup>17</sup> Ibid [10].

<sup>18</sup> Ibid. Here the High Court cites both *Rolfe v Peterson* (1722) 2 Bro PC 436, 442; 1 ER 1048, 1052 and *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, 86.

<sup>19</sup> Ibid [11].

<sup>20</sup> Ibid [12].

<sup>21</sup> Ibid [13].

The penalty doctrine developed in equity<sup>22</sup> to provide relief against insistence by one party upon their legal rights, when such insistence would result in an unfair or unconscionable outcome for the other party. Indeed, 'the relief afforded by equity against penalties and forfeitures and unconscionable insistence upon legal rights generally brings into focus the antithetical attitude of equity and the common law.'<sup>23</sup> However, as pointed out by Priestly J in *Austin v United Dominions Corporation Ltd*,<sup>24</sup> in the nineteenth century 'the courts showed a restlessness with their longstanding duty to relieve against penalties.'<sup>25</sup> His Honour went on to suggest that this restlessness was the outcome of the rise of the concept of freedom of contract which in turn resulted in incorporation of the penalty doctrine into the common law.<sup>26</sup> He also noted that 'the operation of that law was clarified by the recognition of the distinction between a penalty and a genuine pre-estimate of liquidated damages.'<sup>27</sup>

It is highly arguable that Priestly J's implied acceptance of the proposition that an equitable doctrine had, in fact, been 'incorporated' into the common law is a manifestation of the so-called 'fusion fallacy.'<sup>28</sup> Indeed, the High Court in *Andrews* was at pains to distinguish between the concept of a penalty, on the one hand and on the other, a pre-estimate of liquidated damages,<sup>29</sup> thereby prefiguring their criticism<sup>30</sup> of the New South Wales Court of Appeal statement in *Interstar* that 'the modern rule against penalties is a rule of law, not equity.'<sup>31</sup>

Not only did the High Court reaffirm that the penalty doctrine was one of equity, but it unambiguously rejected the ANZ contention that the scope of the doctrine was limited to instances of breach of contract.<sup>32</sup> Moreover, the penalty doctrine was not applied exclusively to compensation for breaches of contract, but could be triggered by the

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<sup>22</sup> The genesis of the doctrine is uncertain, but it was certainly extant in its modern form in Chancery during the Chancellorship of Lord Nottingham (1673-1682). See R Meagher, D Heydon and M Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4<sup>th</sup> ed, 2002) 577 [18-010].

<sup>23</sup> *Ibid.*

<sup>24</sup> [1984] 2 NSWLR 612.

<sup>25</sup> *Ibid* 626.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> Discussed briefly in Part 4 below.

<sup>29</sup> *Andrews* [2012] HCA 30 (6 September 2012), [15].

<sup>30</sup> *Ibid* [31]-[32].

<sup>31</sup> *Interstar* (2008) 257 ALR 292, 320.

<sup>32</sup> *Andrews* [2012] HCA 30 (6 September 2012), [46].

failure of an occurrence of an event<sup>33</sup> which was stipulated in the agreement between the parties but did not, of itself, impose a contractual obligation.<sup>34</sup> The Court cites with approval<sup>35</sup> the statement of Brereton J in *Interstar* at first instance, who states that:

relief may be granted in cases of penalties for non-performance of a condition, although there is no express contractual promise to perform a condition – apparently on the basis that despite the absence of such an express promise, a penalty conditional on failure of a condition is for these purposes in substance equivalent to a promise that the condition will be satisfied.<sup>36</sup>

This reflects the ‘regard paid by equity to substance rather than merely to form,’<sup>37</sup> and is demonstrated by ‘the grant of relief in the case of penal bonds for non-performance of a condition which was not the subject of any contractual promise.’<sup>38</sup> Thus, the attempt by the Court of Appeal in *Interstar* to limit the scope of the penalty doctrine to a contractual promise arose from a misunderstanding of the doctrine itself and was therefore erroneous.

### *C The Interstar Decision*

The appellant in *Interstar* was a finance company and the respondent, Integral Home Loans Pty Ltd (‘IHL’) conducted a business as a ‘mortgage originator’ (aka a mortgage broker). IHL was paid commissions by Interstar pursuant to a series of agreements on any mortgages it introduced to the finance company. These agreements also empowered Interstar to terminate the agreements if ‘any one of a range of events’<sup>39</sup> occurred. Not all of the events constituted breaches by IHL, nor were all of the events subject to IHL’s control.

At first instance, Brereton J found that the termination clause constituted a penalty provision and was therefore void on the basis that ‘the event giving rise to the penalty, as the act or event upon which liability was conditioned, could be the termination of the agreements even if the ground for termination was not a breach

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<sup>33</sup> Or, conversely, the actual occurrence of the event.

<sup>34</sup> *Ibid* [49].

<sup>35</sup> *Ibid* [67].

<sup>36</sup> *Interstar* [2007] NSWSC 406; (2007) Aust Contracts Reports 90-261, 90,037

<sup>37</sup> *Andrews* [2012] HCA 30 (6 September 2012), [49].

<sup>38</sup> *Ibid*.

<sup>39</sup> *Interstar* (2008) 257 ALR 292, 320.



thereof.<sup>40</sup> Thus, because the provision was void, IHL were entitled to continued receipt of the commissions.

The Court of Appeal, however, held that the agreements conferred no accrued rights upon IHL. Moreover, since there was no forfeiture of property upon termination, the provisions of the agreements were neither a means of ensuring compliance with the contracts nor a penalty.<sup>41</sup>

The High Court, however, disagreed with the Court of Appeal in its findings that:

1. Brereton J, at first instance, had erred in 'denying that the [penalty] doctrine had ceased to be one of equity';<sup>42</sup>
2. that the doctrine was now wholly legal in nature;<sup>43</sup>
3. the application of the doctrine was limited to failures of stipulations which were breaches of contract;<sup>44</sup>
4. the penalty doctrine reflects the public policy 'of keeping parties to their bargains.'<sup>45</sup>

Accordingly, the High Court upheld the appellants' challenge to the *Interstar* decision and went so far as to state that the Court of Appeal had 'misunderstood the scope of the penalty doctrine.'<sup>46</sup>

#### D Definition of the term 'condition'

Further to its discussion of the decision in regard to *Interstar*, the High Court turned its attention to both the definition of the term 'condition' and the consideration of nature of a bond.<sup>47</sup> First, 'like the term "rescission," the term "condition" has several distinct meanings and application.'<sup>48</sup> Second, the nature of the bond is relevant because 'it was here that equity first intervened.'<sup>49</sup> A bond, unlike a simple contract or exchange of promises, is an instrument under seal 'whereby the obligor is bound to the obligee.'<sup>50</sup>

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<sup>40</sup> Ibid 319.

<sup>41</sup> Ibid.

<sup>42</sup> *Andrews* [2012] HCA 30 (6 September 2012), [29].

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid [31].

<sup>46</sup> Ibid [50].

<sup>47</sup> Ibid [33]-[45].

<sup>48</sup> Ibid [33].

<sup>49</sup> Ibid.

<sup>50</sup> Ibid [34].

In the modern context, a 'condition' is taken to denote 'a vital or material promise, the breach of which will repudiate a contract.'<sup>51</sup> However, the term 'condition' does not have either this denotation or connotation when used in connection with a bond. Rather, the term 'condition' is used to indicate the agreement to perform the condition: it is an 'acknowledgement of indebtedness.'<sup>52</sup>

In the early years of the common law, a bond was used to secure the strict performance of an obligation and was thus, in the nature of a penalty, which could be invoked if a particular condition did, or did not, eventuate. The condition need not be the occurrence of an event, but could also have been an act or omission. In such cases, equity would only intervene if the failure of the condition were compensable. From here, the courts of equity went on 'to extend their jurisdiction to deal with stipulations which were penal provisions in simple contracts. However, it does not follow that this extension was a change in the nature of the jurisdiction.'<sup>53</sup>

Thus, the High Court's carefully argued discussion of the term 'condition' and the nature of a bond served to demonstrate that:

- (a) the first field for the operation of the equitable doctrine concerned the enforcement of bonds, (b) with respect to the bonds, the expressions "obligation" and "condition" are not employed in the same or corresponding sense as appears in dealing with the breach of contractual promises, and (c) it does not follow, as the ANZ would have it, that in a simple contract the only stipulations which engage the penalty doctrine must be those which are contractual promises broken by the promisor.<sup>54</sup>

*E The common law action of assumpsit*

Finally, in its discussion of the issues raised in *Andrews*, and in particular, the decision in *Interstar*, the High Court turned its attention to the apparent confusion between the penalty doctrine and the common law action of assumpsit. Although assumpsit was abolished by the *Judicature Act 1873* (36 & 37 Vict c 66) ('*Judicature Act*'), the term has survived and is used today to denote an action for damages for breach of a simple contract.

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<sup>51</sup> Ibid [35].

<sup>52</sup> Ibid [36].

<sup>53</sup> Ibid [44].

<sup>54</sup> Ibid [45].

In its submissions, and based upon the *Interstar* decision, the ANZ claimed that the scope of the penalty doctrine had been 'restricted to those cases today where, hypothetically, an assumpsit action would have lain at common law in the nineteenth century.'<sup>55</sup>

However, in regard to the *Interstar* decision, the High Court notes that the Court of Appeal: 'rather than acknowledging the concurrent administration in New South Wales (as elsewhere) of law and equity, appears to treat the penalty doctrine as having disappeared from equity by absorption into the common law action of assumpsit. This proposition should be rejected.'<sup>56</sup>

Assumpsit developed in common law courts as a remedy for breaches of agreements not under seal and for which an action for breach of covenant would not lie. It was further 'extended to certain cases where there was no more than an implied undertaking to pay, thus giving rise to the unhappy expression "quasi-contract."<sup>57</sup> Eighteenth century English statutes regulated the enforcement of bonds and the obligations of a debtor by limiting repayment to the principal, interest and costs.<sup>58</sup> However, these regulations did not prevent the promisee from claiming damages in excess of the amount owed from the promisor, either upon suit or as provided in the bond. Further, the common law courts were constrained by the remedies they could offer to alleviate such excessive claims. For example, the common law courts' 'power to grant injunctions . . . was limited to restraining the repetition or continuation of breaches of contract in respect of which the plaintiff was entitled to bring an action for damages.'<sup>59</sup> Thus, the penalty doctrine was the only means of relief against excessive and unsubstantiated claims based upon contract. Therefore, in conclusion to their discussion on the separate natures of assumpsit and the penalty doctrine, the High Court stated that: '[i]t should be emphasised that, in any event, under the Judicature legislation it is equity not the law that is to prevail. In *Interstar* the Court of Appeal thus had no basis for the proposition that the penalty doctrine is a rule of law not of equity.'<sup>60</sup>

#### IV ANDREWS AND THE FUSION FALLACY

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<sup>55</sup> Ibid [62].

<sup>56</sup> Ibid [51].

<sup>57</sup> Ibid [52].

<sup>58</sup> For a detailed discussion of the history of statutory control of the enforcement of bonds see *ibid* [53]-[61].

<sup>59</sup> Ibid [59].

<sup>60</sup> Ibid [63].

The *Interstar* decision and the unquestioning acceptance at first instance by Gordon J in *Andrews* of the NSW Court of Appeal's pronouncement that the penalty doctrine had become part of the common law are disturbing examples of the persistence of the pernicious and, apparently immortal, 'fusion fallacy.' The fusion fallacy arose in the wake of the *Judicature Act* in the nineteenth century and is the mistaken belief that, as a result of the Act, there was a 'fusion' of the common law and equity into a single system of substantive law. Whilst the Act enabled common law courts to apply equitable remedies, such as injunctions, specific performance, and restitution for money had and received, the enactment was solely procedural in nature. It did not 'fuse' equitable doctrines and remedies with those of the common law and therefore was not substantive.<sup>61</sup> Equity always was and always will be, one hopes, a system of doctrines and remedies which exists independently from the common law.

It is therefore interesting to note that throughout *Andrews* the High Court is at pains to stress the independence of equity from the common law. Further, it is 'consummation devoutly to be wished' that the contemporary perpetrators of the fallacy take note and that the High Court's ratio in *Andrews* proves to be the final word necessary on this topic.

## V CONCLUSION

As noted in the Introduction, above, the significance of the decision in *Andrews* cannot be understated. In purely legal terms, the High Court has clarified the principles relating to the application and scope of the penalty doctrine. It is now clear that the doctrine may be invoked in any instance where:

- fees are charged by an institution which are unrelated to a breach of contract; or
- there was no obligation or responsibility on the part of the customer to avoid an occurrence upon which the fees were charged.

The key is whether the fee exceeds the damage suffered by the institution. If so, the fee may be characterised as a penalty. Thus, it is a matter of substance and not form.

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<sup>61</sup> For a discussion of the fusion fallacy, see Meagher, Heydon and Leeming, above n 22, 52-54, [2-100]-[2-110]

On that basis, it is arguable that the scope of the penalty doctrine is not limited to finance or banking agreements, but could be extrapolated to any agreement in which a fee (or forfeit in the nature of a fee) is charged by one of the parties for an obligation imposed upon the other. For example, clauses in leases which require the tenant to pay a fee, or forfeit their bond, if, in the opinion of the landlord or agent, the leased premises require some form of rectification on termination of the lease. If the fee or bond exceeds the cost of rectification, it is arguable that the requirement is a penalty and therefore void. Also, by analogy, the principles could apply to the sale of commodities and services, such as electricity and gas.<sup>62</sup>

It is also arguable that, in practical terms and especially if the Full Court of the Federal Court find in favour of the Appellants, the financial consequences for all banks and financial institutions in regard to customer contracts could be incalculable. Not only would there need to be a reimbursement to all customers of all fees charged upon the same terms as those charged by ANZ, but those banking and finance contracts couched in the same terms as the Andrews/ANZ agreements would need to be rectified in accordance with the decision. Moreover, all such future contracts would need to be reviewed and rewritten, so as to avoid the characterisation as penalties.

Irrespective of the eventual decision of the Full Court of the Federal Court in regard to the matters remitted to it by the High Court, *Andrews* has, at the very least, provided possibly unpalatable food for thought for Australia's financial institutions in regard to the fees charged to customers and the hallowed concept of the 'bottom line' of profitability, which is most frequently pursued at the considerable expense of their customers.

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<sup>62</sup> See the High Court's discussion of *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, *Andrews* [2012] HCA 30 (6 September 2012), [69]-[77].

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