

PANDORA'S BOX



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Always hold it high
Look the world straight in the eye*

Annual Academic Journal
Women and the Law Society
The University of Queensland
2007



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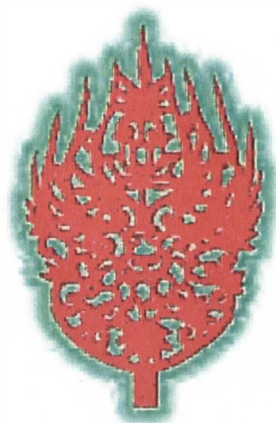
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“Never bend your head. Always hold it high. Look the world straight in the eye.”

- Helen Keller

Editors

Thy Nguyen & Nina Valentine

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EDITORS' NOTE

Thy Nguyen and Nina Valentine

We are pleased to present *Pandora's Box* 2007. The theme for this year's edition was inspired by the following quote:

"Never bend your head. Always hold it high. Look in the world straight in the eye."

Helen Keller (1880-1968)

It has been our vision to breathe new life and meaning into these remarkable words by featuring articles which raise awareness of various significant challenges faced in the current legal and social environment. Continuing the tradition of *Pandora's Box*, we hope our readers come away with some fresh perspectives and a greater understanding of what can be achieved and what remains to be done.

We would like to thank our contributors for devoting their time, effort and expertise, which have enabled us to produce a quality publication. We would also like to thank Her Honour Justice Debra Mullins for writing our foreword this year, and for her guidance and attention as WATL's Patron. Special thanks must go to Ms Clare Cappa for adjudicating the Magistrates' Work Experience Program Essay Competition. Finally, to the WATL members, the Executive Committee, Judy Shum (President) and Maja Doma (Vice-President), many thanks for your encouragement and support throughout the year.

We hope you enjoy the collection of articles as much as we have!

Thy Nguyen and Nina Valentine

Pandora's Box Editors 2007

18 September 2007

Whilst the Editors have checked references for authenticity, any mistakes belong to the authors.

FOREWORD

The Honourable Justice Debra Mullins

Women and the Law Society Patron

As Patron of the Women and the Law Society, I am delighted to introduce this year's *Pandora's Box*.

WATL was established in 1993 because of the concern of students about a number of current issues that impacted on women, the legal system and the community. The fervour and enthusiasm with which WATL was launched has not abated. Each year brings to WATL students with energy, ideas and ideals.

The early publications of *Pandora's Box* were offered by WATL in the hope that *Pandora's Box* would be a tradition of WATL. More important than the tradition of publication itself is the high quality of the content of the publications – a variety of well written articles that usually inform or educate, may challenge, may address issues that are not popular, but make for interesting reading and stimulating debate. This edition of *Pandora's Box* continues the tradition and the standard.

The value of the experiences and debates promoted by WATL in its publications and activities should not be underestimated. Involvement in an organisation like WATL is good preparation for serving the wider community through the legal profession or other chosen professions.

What we do today will make a difference to what we can do tomorrow.

DRUG COURTS: OFFERING A HELPING HAND

Clare Cappa

Lecturer, TC Beirne School of Law, The University of Queensland

Clare lectures in Torts and Criminology in the undergraduate curriculum and teaches Introduction to Australian Law and Introduction to Legal Systems in the Masters of Applied Law program. Clare is currently pursuing her PhD on Australian Drug Courts, focussing on the impact of alternative forms of adjudication on the future criminal justice system.

Introduction

The facts and figures on drug addiction show that the harm caused by both legal and illicit drugs has an impact at every level of society. Specifically, crime associated with illicit drug use catches the imagination of many, with research in Australia and internationally showing that a significant proportion of those apprehended for a range of criminal offences are frequent drug users¹. Criminal behaviour and drug use are both complex phenomena, neither of which is susceptible to simple analysis - and the intersection of the two phenomena is more complex still. However, amidst all the hype and the media attention, the plight of the individual drug addict caught up in the complexities of the criminal justice system is largely ignored. What facilities are in place to encourage such people, already struggling with a life-threatening addiction, to hold their head up, and “look the world straight in the eye”? The answer is drug courts, which, using diversionary strategies and principles of therapeutic jurisprudence, offer court-supervised treatment as an alternative to incarceration for low-level drug offenders.

This article explores the dynamics and implications of the drug court diversion programme for drug-affected offenders in Australia jurisdictions. The analysis includes an examination of the socio-legal forces that have shaped the implementation of drug courts in Australia over the last decade, and traces the ambiguous nature of the programme's objectives by contrasting its widely promoted ‘therapeutic’ and ‘diversionary’ aims with the more oppressive qualities that emerge in practice. Drawing from the critical literature on informal justice and diversion, there are indications that such programmes disproportionately focus on a small group of drug-affected offenders². However, the article ends on a positive note, arguing that

¹ Australian Institute of Criminology, *Illicit Drugs and Alcohol* (2006) <<http://www.aic.gov.au/research/drugs/crime/>> at 6 July 2007.

² Melissa Bull, ‘Just Treatment: A Review of International Programs for the Diversion of Drug Related Offenders from the Criminal Justice System’ (Queensland. Department of Premier and Cabinet, 2003), 15. Bull reports that ‘some groups - white men of about 30 years of age - fare better than others in these programs’.

whatever their perceived anomalies, drug courts promote the best solution to the ongoing problems which underlie much criminal behaviour.³

In recent years, drug courts have become a popular, widely praised, and rapidly expanding alternative form of specialised court that deal with people charged with non-violent crimes who are substantial drug users. The popularity of drug courts stems from the fact that they strike a chord with a number of sections of society. The theoretical basis for drug courts comes from the proponents of therapeutic jurisprudence,⁴ the legal impetus from those who believe that drug addiction represents something less than the necessary criminal intent required to charge other property offences, and the economic utility from the knowledge that a rehabilitation place is cheaper in the long run than a prison cell.

Concealed among the enthusiastic and well-intentioned praise for drug courts are a few voices which question the trend towards problem-solving justice. Such voices warn that the popularity of the drug court phenomenon has been:

...driven by politics, judicial pop-psychopharmacology, fuzzy-headed notions about "restorative justice" and "therapeutic jurisprudence," and by the bureaucrats' universal fear of being the last on the block to have the latest administrative gimmick.⁵

They see the drug court as a panacea, which masks the hard questions which need to be asked - what is the purpose of drug courts? Do drug courts work? Are the costs of drug courts, including their costs in de-individualised justice, worth their benefits?⁶ Should the perceived (but as yet unsubstantiated) benefits to individual drug court participants outweigh any compromises made to the traditional safeguards thought to protect individuals within the criminal justice system? These are fundamental questions which have far-reaching repercussions for the future of drug courts in Australia. However, definitive answers are beyond the purpose of this paper, which is to explore the benefits of drug courts for the individual drug court participant.

The first part of this paper presents a short overview of the Australian drug court phenomenon. For the most part, my observations will be based on Queensland Drug Courts, with which I am the most familiar, but will also draw from general characteristics of drug courts both throughout other Australian jurisdictions, and in America. The second part of the paper will situate the Australian drug court

³ Michael King, 'What Can Mainstream Courts Learn from Problem-Solving Courts?' (2007) 32(2) *Alternative Law Journal* 91, 91.

⁴ See, eg, David B Wexler and Bruce J Winick, 'Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research' (1991) 45 *University of Miami Law Review* 979; David B Wexler and Bruce J Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (1996); and Dennis P Stolle, David B Wexler and Bruce J Winick, *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (2000).

⁵ Morris B. Hoffman, 'Commentary: The Drug Court Scandal' (2000) 78 *North Carolina Law Review* 1437, 1440.

⁶ *Ibid.*

experience within the political, legal and social framework of Australian society. The final part of the paper addresses the perennial question of “do they work?” from the perspective of the drug court participant, focussing on the dichotomies between rehabilitation and punishment and equity versus targeted justice as they manifest themselves in the drug court experience. Finally, the paper proposes that, although as yet largely unproven⁷, the drug court experience is for the most part a positive one for the participants, and is assuredly better than the revolving door model of criminal justice previously prevalent.

Australian Drug Courts – An Overview

A drug court is a specialised criminal court that streamlines drug affected offenders away from traditional processing and punishment into an intensive drug treatment programme. It involves cooperation between the courts and drug treatment programmes and ‘combines the *care* elements of the health system and the *control* mechanisms of the criminal justice system’⁸ in an attempt to intervene in the cycle of re-offending which characterises low-level, drug-motivated crime. Drug courts utilise a collaborative style of case management that promotes the welfare of the offender and community by acknowledging that there are alternatives to the mainstream criminal justice system. They combine retributive justice with rehabilitative/therapeutic ideals. One commentator has described them as ‘an ambitious initiative designed to “coerce” drug dependent offenders out of crime, by using the threat of gaol as both an incentive to seek treatment and a reason to stay away from prohibited drugs.’⁹ Instead of the traditional trial in which the state takes an adversarial role by prosecuting defendants, the drug court represents a situation in which the state function is a therapeutic intervention and the focus is on the individual and his or her needs.

There are currently nine Australian drug courts in operation - 5 in Queensland (at Ipswich; Beenleigh; Southport; Townsville and Cairns); 1 in NSW (at Parramatta); 1 in Victoria (at Dandenong); 1 in South Australia (Adelaide) and one in Western Australia (Perth). The Northern Territory operates a “MERIT” based programme¹⁰ which has the effect of diverting low-level offenders from the criminal justice system, but without the formal programme involved in a drug court. In the United States of America, as of April 2007, there were 1699 drug courts operating with 349 more in the planning phases¹¹, while Canada supports five, each in various provinces. The United Kingdom has chosen a slightly different path, which has been termed ‘quasi-compulsory drug treatment’¹² and takes the form of Drug Treatment and Testing orders (DTTOs). In Australia, drug courts form part of the lowest hierarchy of

⁷ The first major study of recidivism rates for the Queensland Drug Court is currently being conducted.

⁸ John Costanzo, *Final Report on the South-East Queensland Drug Court Pilot* (2003) 2 (emphasis in original).

⁹ Peter Homel and Bruce Flaherty, 'Drug Crime Diversion: Reconciling Criminal Justice and Health/Welfare Goals' (Paper presented at the 19th Biennial Australian Crime Prevention Council Conference, Melbourne, 18 October 1999).

¹⁰ Magistrates' Early Referral into Treatment

¹¹ United States. Office of National Drug Control Policy *Drug Courts* <<http://www.whitehousedrugpolicy.gov/enforce/drugcourt.html>> at 6 July 2007.

¹² McSweeney, Tim et al 'Twisting Arms or Helping Hand?: Assessing the Impact of 'Coerced' and Comparable 'Voluntary' Drug Treatment Options' (2007) 47 *British Journal of Criminology* 470, 470.

courts¹³, and are designed to deal with individuals who have committed an offence because of, or directly related to, their drug addiction. These individuals, who would ordinarily face a prison sentence, are presented with an option for long-term treatment and rehabilitation programmes within the community, under the supervision of the court. The aim is a rehabilitated individual, who has overcome his or her drug addiction, and who no longer commits the criminal offences driven by that addiction.

The drug court process begins before adjudication, once participants are identified as eligible. To be eligible for drug court a person must be:

- An adult (although some jurisdictions, such as NSW, have juvenile drug courts);
- Drug dependent, as opposed to merely having a drug problem, and that dependency contributed to the commission of the offence;
- Likely to be sentenced to imprisonment if convicted, not have pending ‘disqualifying’ offences (a ‘disqualifying offence’ is an offence of a sexual or violent nature)
- Willing to plead guilty (post-adjudicative programmes, such as those operating in Queensland, mean that applicants must plead guilty and are given an initial sentence of imprisonment which is suspended for the duration of the rehabilitation order); and
- Residing within the specified area.¹⁴

Committal courts in the defined catchment area refer offenders, who appear to meet the eligibility criteria, to the drug court. At the defendant’s first appearance before the drug court, drug dependency and other eligibility issues are considered by the Drug Court Team. If it is decided that the applicant is eligible, he/she is refused bail and remanded for detoxification and assessment. After assessment, the offender appears before the drug court where he/she enters a guilty plea, receives a suspended sentence, and undertakes to abide by the programme conditions. The participant then undertakes an extended treatment programme, which is coupled with a monitoring regime consisting of frequent drug testing and appearances before the drug court Magistrate. The participant’s progress and general wellbeing are reviewed at each court appearance, with the possibility of rewards or sanctions for non-compliance being awarded.

The Drug Court Team is an integral component of the drug court experiment, and the high level of planned collaboration between the various agencies and service providers is one of the unique identifiers of this sort of justice. The drug court uses a case management, problem-solving approach to meet the needs of the participant and focus on his or her addiction rather than simply adjudicating and sanctioning the

¹³ With the exception of New South Wales, where they form part of the District Court hierarchy.

¹⁴ These elements are taken from the eligibility criteria under s 6 of the *Drug Court Act 2000* (Qld) which are similar to the criteria for a number of Australian drug courts.

offender. Fundamental aspects of the programme include supervised rehabilitation programmes, regular appearances and reports to the drug court, regular urinalysis and the provision of social support and the development of living skills. The programme is structured in three phases, designed to encourage the participant to reclaim his or her place as a functioning member of society. The first phase concentrates on eliminating illicit drug use, and requires 12 consecutive weeks of clean drug tests. The second phase is stabilisation, in which the participant is required to complete courses as well as attend their rehabilitation programme and continued court appearances. The final phase emphasises reintegration, whereby it is expected that participants will be living independently and either studying, training or working. The average time taken to complete an Intensive Drug Rehabilitation Order (IDRO) is 15 months¹⁵. The programme is designed to be rigorous and intensive, and is definitely not a soft option for drug offenders. As one observer has commented, any such accusation is an unwarranted and unfounded proposition which ignores both the complexity of drug addiction and the true nature and purpose of the drug court.¹⁶ Nevertheless, for many onlookers, the existence of drug courts is an anomaly in a system which otherwise displays an uncompromising attitude to drug use and drug induced anti-social behaviour.

Political, Legal and Social Frameworks

Australia has historically exercised leniency in the treatment of minor drug offences, reserving the imposition of heavy incarceration penalties as a deterrent to drug trafficking and more serious drug crimes. Neither of these methods has resulted in reduced rates of drug use or drug related crime within contemporary society.¹⁷ Drug court initiatives are part of a growing response to increased drug use, high rates of recidivism among drug users, and the overloading of prisons and courts. There is a 'growing recognition that the traditional adversarial justice system, on its own, cannot effectively deal with causes of recidivism...in cases where intractable social and personal issues are involved.'¹⁸ For many, the philosophy underpinning the drug court model represents a much needed transformation of the criminal justice system. However, the intentional integration of treatment and criminal justice system services is a novel, and therefore somewhat problematic approach. One commentator has said:

The underlying conceptual framework of the drug treatment court model is that treatment and criminal justice services are integrated in such a way that an obvious delineation among the systems does not exist. The systems function interdependently, both supporting the goals of

¹⁵ Peter Kent, 'Problem Solving Courts' (Speech delivered at the Crime Statistics Network Seminar, Brisbane, 6 June 2007).

¹⁶ Judy Alcock, 'Supporting Secondary Victims (Family) and Enhancing Drug Court Participant Outcomes through the Role of Parent Drug Information Services in the Perth Drug Court', (Paper presented at the 3rd International Conference on Therapeutic Jurisprudence. Perth, 7-9 June 2006).

¹⁷ Makkai, Toni (1998), "Drug Courts: Issues and Prospects", Australian Institute of Criminology, *Trends and Issues*, No 95, Australian Institute of Criminology, Canberra.

¹⁸ Sherry L Van De Veen, 'Some Canadian Problem Solving Court Processes' (Paper presented at the 3rd International Conference on Therapeutic Jurisprudence. Perth, 7-9 June 2006) 5.

recovery as a means to reduce recidivism, and promoting recovery as a key goal.¹⁹

The reality may be that such a seamless integration is not possible – that the drug court experiment is attempting to do too much. Integrating drug user treatment into the operating philosophy of a criminal court, burdened as it is with the vestiges of due process and adversarial principles, leaves the experiment open to disapproval. There is tension between the traditional adversarial system and its concern with the protection of a defendant's liberty, and the drug court's primary aim of restoring the participant's health and well being. However, criticism of the drug court's reduction of traditional safeguards, designed to protect individuals within the legal system, ignores the pervasive nature of discrimination in traditional judicial institutions. The notion of 'equality before the law' and the 'objective person' is an elusive concept for most members of society. Drug courts can therefore be seen as taking a form of affirmative action in addressing systematic discrimination faced by already disadvantaged or marginalised groups.

In spite of the potential, none of the current drug courts in operation would claim to be the ideal model. This is largely because although the practice is derived from the theory, implementation and operation is affected by political and resource constraints. These restraints can influence the number of eligible offenders who are taken by the programmes, the efficacy and effectiveness of the screening and assessment procedures, as well as the availability of treatment interventions. It is an unfortunate reality that the number of substance involved defenders needing drug court intervention exceeds the capacity of the criminal justice system to provide quality services and most drug courts place a cap on the number of offenders who can be admitted to the programme. Although the drug court programme funds additional places for participants in an environment where there are ordinarily insufficient places available for voluntary rehabilitation, it appears that lack of funding and political inertia is such that the gap between need and provision will remain.

Criticism by those who see drug courts as an ill-informed reaction to a social crisis and an inappropriate compromise of the impartial judicial adjudication function²⁰ fails to acknowledge that the drug court model represents a fundamental paradigm shift in justice – away from a predominantly punitive orientation towards an approach that looks at drug-related crime in a holistic way. The drug court process deals with the causes of the crime which has been committed, instead of accepting the traditional compartmentalisation of justice which renders the underlying causes of crime somebody else's responsibility.

There are a huge number of questions which can be asked about the drug court phenomena, ranging from the overreaching question of whether they work, to the

¹⁹ Faye S Taxman and Jeffrey Bouffard, 'Treatment Inside the Drug Treatment Court: The Who, What, Where and How of Treatment Services' in Lana D Harrison et al (eds), *Drug Courts: Current Issues and Future Perspectives* (2002) 193.

²⁰ Hoffman, above n 5.

more mundane but seminal question of whether they are cost-effective. These are questions which require an analysis of political will, economic rationalism and public opinion driving policy – all issues which are too wide and far reaching for this forum. The question which *can* be addressed is whether drug courts satisfactorily realise the needs of the low-level drug affected offender.

The Participants' Perspective

The main premise on which the operation of drug courts relies is that the threat of incarceration serves as a stimulant to engage and retain participants in treatment. Because treatment completion means that any prison sentence is cancelled but failing to complete the programme means that the participant is 'terminated' and the sentence is re-activated, this is a fairly understandable motivation. It has been shown that diversion is more effective if those involved are motivated to make the change rather than coerced into doing so. This is supported by evidence which suggests that when people perceive themselves as having choice, control, and self-determination over their behaviour, they perform better, are more persistent, and feel more motivated and interested to engage in the activity than people who feel controlled by their environment.²¹ Thus, motivation of drug court participants is a key factor in the success of the programme.

Drug court judicial officers monitor the progress of the participants and respond to compliance or non-compliance with incentives or sanctions. The Drug Court Team strives to be empathetic to the participants' underlying problems and to capitalise on the strengths of each participant. Although individual drug courts differ in the content of their programming, they share several common goals which are aimed at the individual participant. These goals are to:

- Provide immediate intervention, treatment, and structure in the lives of participants through the ongoing, active oversight and monitoring by the drug court judicial officer;
- Improve the level of functioning in the participant's environment, addressing problems that may be contributing to the use of drugs, and developing or strengthening his or her ability to lead crime and drug-free lives;
- Provide participants with skills that will aid him or her in leading productive substance-free and crime-free lives, including skills relating to their educational development, sense of self-worth, and capacity to develop positive relationships in the community; and
- Strengthen the families of participants by improving the capacity of families to provide structure and guidance.

The fact that drug court judicial officers are more directly involved in supervising and monitoring the lives, treatment, and recovery of the participants highlights the fact that certain kinds of defendants are unsuitable for participation in the programme. In

²¹ T Cameron Wild, Brenda Newton-Taylor and Rosalia Alletto, 'Perceived Coercion Among Clients Entering Substance Abuse Treatment: Structural and Psychological Determinants' (1998) 23(1) *Addictive Behaviors* 81, 83.

an article that considers the behaviour of participants in California drug treatment courts and considers the differences between drug courts and more traditional criminal courts²², the authors argue that, while drug courts provide participants the chance to avoid imprisonment and permanent stigmatisation by taking part in the discourse of aid and treatment, 'offenders' in drug court also submit to a combination of penal and therapeutic aims. In practice, this means that judicial officers are likely to exercise enhanced supervision, monitoring, and control over the lives of programme participants because they are being rehabilitated. There are valid concerns that the 'best interests of the client according to the court' may impart undue arbitrariness, albeit well intentioned, that threatens procedural fairness for participants and may result in the imposition of sanctions disproportionate to crimes committed for the professed 'good' of the participant.²³ The composition of rehabilitation orders and judicial discretion to terminate and impose sentence constitutes a double enforcement mechanism which can potentially result in the imposition of heavier penalties than would be experienced in the traditional system. Procedural conditions required to complete a drug court order can also disadvantage participants whom have difficulty complying with technical or procedural matters due to reduced mental/learning capacity common to long term drug users.²⁴

Discussions about whether the interests of participants are protected, and 'the extent to which their autonomous rights of choice are respected in these environments'²⁵ will inevitably be on-going in any environment where practices and procedures deviate from those which have been traditionally accepted as providing the most complete protection of individual rights. In relation to Australian drug courts, such debate is healthy and helpful, and will inform the future development of similar problem-solving courts.

Conclusion

For their most ardent proponents, drug courts have been hailed as a 'fundamental paradigm shift in justice away from a predominantly punitive orientation (aka 'justice as usual')'²⁶ and the implication is that different is necessarily better. There is no question as to the extent to which the drug court movement represents a significant change in the way courts deliver justice, but there is understandable doubt as to whether the 'different' can be guaranteed to be 'better'. This article has posited that, although there are a myriad of intersecting perspectives from which they can be viewed, for the drug court participant, there is only one perspective. Referral to a drug court is the beginning of a process which, after a lot of hard work, self

²² Stacey L Burns and Mark Peyrot, 'Tough Love: Nurturing and Coercing Responsibility and Recovery in California Drug Courts' (2003) 50(3) *Social Problems* 416, 424.

²³ Daniel McGlone, 'Drug Courts: A Departure from Adversarial Justice' (2003) 28(3) *Alternative Law Journal* 136, 138.

²⁴ *Ibid*, 140.

²⁵ Terry Carney, 'New Configurations of Justice and Services for the Vulnerable: Panacea or Panegyric?' (2000) 33(3) *Australian and New Zealand Journal of Criminology* 318, 328.

²⁶ John S Goldkamp, 'The Drug Court Response: Issues and Implications for Justice Change' (2000) 63(3) *Albany Law Review* 923, 924.

motivation and soul searching, will allow that individual to break the crime cycle, and begin to hold their head up and look the world in the eye.

THIS JACKET DOES NOT FIT AND IT NEVER WILL

Dr Rachel Baird

Lecturer, TC Beirne School Of Law, The University of Queensland

Rachel lectures in Environmental Law and Property Law in the undergraduate curriculum and has published extensively on environmental law and international fisheries law. She also advises the Australian Defence Force on border protection and fisheries enforcement in her role as a specialist Air Force Legal Officer. Rachel is a consultant in the Planning and Environment section at Clayton Utz.

One Size Does Not Fit All

When I joined the Royal Australian Air Force in 1988 as a fresh faced undergraduate cadet, I was informed by the uniform outfitters that I was an irregular fit and would need a jacket custom made for my long arms. Truth be told, my arms had not previously (and have not since) presented me with any wardrobe problems. Nevertheless I spent subsequent years furtively comparing my arms to those of friends and workmates reassuring myself that I fitted in. It took some time for me to realise that the 'one size fits all' approach by society failed to accommodate individual differences - be they limbs, gender, race or creed. By sometimes marginalising those that don't fit the mould, society fails to embrace the value in differences.

I have been challenged by ill-fitting 'jackets' on a number of occasions throughout my working and personal life. More often than not it was gender stereotypes being imposed upon me and they rankled as I set about my daily life. You know them well. Successful men are bold, daring and aggressive. Such attributes in women hang like the sword of Damocles above your head. Too ambitious and you are dubbed the 'perfumed steam roller'. Too passive and you are seen as uninterested in your work, perhaps even distracted by home duties.

Yes, the work place is a much better place than it was 40 years ago. We no longer have to resign when we get married (as my mother did) and then re-apply for our jobs. At least on paper we are entitled to be paid as much as men,¹ although working women are not seen to 'need the pay' as much as their male counterparts who are cast as 'breadwinners.' I recall one workplace where a male colleague received a pay rise simply because he had become a father and hence had more 'mouths to feed'. There was no such offer made to the female worker upon the birth of her child, after all, she had a partner to provide for her.

¹ In 1951 female workers at Rheem went on strike in Brisbane because management wished to cut pay to 75% of the male wage. After a three month dispute the workers settled on 87.5%. During World War II female workers in traditionally male jobs received 60-100% of the set wage. After the War female wages dropped back to 54-60-% of their male counterparts.

Some women still think it is necessary to assume masculine traits to succeed in the workplace. In a world where women quickly return any unsatisfactory item of clothing to the retail outlet at which it was purchased, why do we continue to accept the ill fitting jacket of masculinity?

It reminds me of a story my Grade nine science teacher once told my class of a man who had a very expensive suit made (and I admit this had very little to do with science). When he went to collect the suit one of the arms was too long. When he expressed some dissatisfaction, the tailor suggested the man shrug one shoulder up to even the length out. The man then pointed out that the trouser crotch was too baggy. The tailor disinterestedly advised him to place one arm between his legs to hold the crotch up. The man left the shop with his left shoulder raised high, thus forcing his right shoulder to hunch down, and his right arm held firmly between his legs. He soon passed two men talking just outside the tailors, one of whom remarked to the other: "Look at that poor fellow he's in a bad way but hey, his suits fits well".

So, do we change ourselves to fit the jacket or discard the jacket (no matter how attractive it appears with its offers of pay rises and promotions) in favour of something that actually fits?

Throwing Off the Stereotype

The question I often ask myself is when will women (myself included) be brave enough to voice our dissatisfaction with the masculine straight-jackets which dominate workplace relations? When will we speak as a collective and suggest that there are alternative ways of managing people and workplaces. These masculine jackets tell us to be aggressive in personal interactions and that the only way to success is through long (though often unproductive) contact hours at the workplace. Many workplaces still value materiality and economic output more highly than relationships and cooperative outcomes.

I am not aiming here to strike a blow for the sisterhood or to fell men at the knees (well, perhaps some could do with a jab). Indeed I happen to love dearly two young boys who will one day grow to be men. What I am aiming to do is to highlight the differences between masculine and feminine approaches and to ask does one necessarily have to be better? Or to turn the question on its head- why is it that some women wear themselves out trying to fit into a man's world whilst many men remain oblivious to the fact that there is another way of doing business? Why does Condaleeza Rice, arguably one of the most powerful women in the world, adopt a rather masculine façade from her structured suits to her speaking style?

Why is it acceptable for successful men to be childless or divorced? Why are successful unmarried women derided because they have not fulfilled society's expectations that they breed and be dutiful wives?² This issue is a real dilemma for women. Children slow your career down, there's no avoiding that fact. However, another fact is that married fathers can usually continue to work, pace unabated,

² Recently liberal Senator Bill Heffernan revealed his true colours when he slammed Deputy Opposition Leader Julia Gillard for being 'deliberately barren'. Yet it was not the first time he had uttered such comments. See, *The Good Weekend*, 'Hard Man on the Hill', 27 May 2006. *The Bulletin*, 1 May 2007.

because they are not the primary carer of the children. Women who employ 'help' so that they can focus on their careers are 'unfeeling automatons who don't deserve children'. Women who don't have children are deliberately barren'.³ Women who do have children and take time off to care for them have 'lost interest in their careers'.

There is no easy answer for this age-old dilemma. Some women seem to 'have it all'- great job, well adjusted children and even a husband. Yet this reveals yet another stereotype- the 'turbo charged happy homemaker'. Society still subscribes to the view that women are best suited to homemaking skills and raising tomorrow leaders. If they can keep their 'hubby' happy and manage to hold down a good job, then that's a bonus. Is society happy for women to have a career as long as they meet their domestic obligations?

Stereotyping Affects Us All

Lest you think I am driving a feminist resurgence, let's place the impact of gender stereotyping in a wider context. It's not just women who are harmed by the ill fitting jacket of masculinity which shapes the way decisions are made. The world's citizens are endangered through the adoption of traditional conflict resolution models.

Consider for example the decision to invade Iraq in March 2003. I remember the day well, as students in my International Law tutorial could talk about nothing else. The authority of UN Resolutions, the defiance of Saddam and the need to *make* him comply with UN sanctions were paramount in the students' minds. The plight of the Iraqi people was less so. Even the declarations of intent to take action against terrorists after the events of September 11, 2001, which lead inexorably to the fateful day the 'coalition of the willing' entered Iraq; were masculine.⁴ George W. Bush famously declared: 'You are either with us or against us.' Tony Blair chimed in with: 'We must do something or do nothing'- presumably implying that further talk was useless.

Over four years later the war is still not won. The score card reads thus: Saddam is dead; the Museum of Bagdad has been looted and irreplaceable antiquities have been lost forever; countless civilians have been maimed or killed; the weapons of mass destruction have not been found; millions of dollars have been spent by occupying Defence Forces; there remains no stable system of governance in Iraq. Perhaps a little more negotiation with the recalcitrant Saddam was worth pursuing to avoid the current quagmire the 'coalition of the willing' finds itself in.

In justifying the aggressive stance taken with respect to the evil posed by the Iraqi dictator, comparisons were drawn with the famous apologist Neville Chamberlain. Anxious to avoid war at all costs, Chamberlain looked the other way when Hitler muscled in on Czechoslovakia and Austria and instead sought to bind Hitler to agreements that he would curb his expansionist ambitions. When Churchill was appointed Prime Minister in May 1940 he delivered his now famous 'Blood, Toil, Tears and Sweat' speech in the House of Commons. Churchill stated:

³ Ibid.

⁴ For a critique of the war in Iraq and the role of women's voices see. H.Charlesworth, 'The Missing Voice: Women and the War in Iraq' (2005) 7 *Oregon Review of International Law* 5-25.

[Y]ou might ask, what is our policy? I can say: It is to wage war, by sea, land and air, with all our might and with all the strength that God can give us; to wage war against a monstrous tyranny.⁵

In this one speech Churchill managed to save a nation. The masculine approach is not always wrong. But it's not always right.

Trying a Different Jacket

Professor Hilary Charlesworth made a telling comment about the success of gender mainstreaming⁶ when she observed that:

Women so often on the margins of the international arena, are more likely to drown in, than wave from, the mainstream, unless they swim with the current.⁷

She continued to conclude that:

Changing the course of the mainstream requires radical and difficult interventions....It must mean more than allowing women into international institutions; it must require transforming the structures and assumptions of the international order. It would involve working to change men's behaviour as much as women's.⁸

I would venture that the changes are needed at the grass roots level as well. I'm not suggesting that women face these challenges every day or even at every workplace. However the jacket of masculinity is still lurking in the workplace. It colours meeting agendas, decisions and relationships with the same inescapable grey. Women however bring subtle hues to their approach to any problem and because they are subtle they are often dismissed as unlikely to produce results.

Andrew Jackson, the seventh President of the US remarked in relation to his mother (who died when he was 14 years old) that:

There was never a woman like her. She was gentle as a dove and brave as a lioness...The memory of my mother and her teachings were, after all, the only capital I had to start life with, and on that capital I have made my way.⁹

Conclusion

The genesis of this piece was my belief in respecting differences in others without making them feel like they are an irregular fit in their own world. Is an ill fitting jacket better than no jacket at all? I would argue not. You have no idea of what you

⁵ The Churchill Centre, <<http://www.winstonchurchill.org/i4a/pages/index.cfm?pageid=391>>.

⁶ H.Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations' (2005) 18 *Harvard Human Rights Journal*.

⁷ Ibid, 18.

⁸ Ibid.

⁹ President 1829-1837.< http://byrd.senate.gov/speeches/2006_may/mothers_day.html> (17 April 2007).

are capable of if your thinking and actions are constrained by stereotypical constraints dictating how you should respond and in what manner. You might surprise yourself if you go with your instinct. You might even influence other women and men in their thinking and introduce options for operating in the workplace and beyond.

WOMEN ARE NOT JUST MEN WHO WEAR SKIRTS

Magistrate Di Fingleton

This speech was delivered at the Regional Woman Lawyer of the Year Awards, hosted by the Queensland Women Lawyers Association on the 24 August 2007.

Introduction

If male criticism of eligible, talented and worthwhile women being appointed to the bench at any level is not challenged, the profession, the judiciary and the community may well think that such unwarranted and impolite statements are implicitly accepted by women lawyers. We must be constantly watchful of such attacks upon our competence and we must immediately respond publicly when they occur.

I came across a recent photo of the current Supreme Court of Canada, on which there is a 4 to 9 balance of female versus male judges on the bench. This is around the proportion of women versus men in the legal profession in Australia. In Australia, we meet at a time when one of only three women ever appointed to the High Court is a Queenslander. Bravo to Her Honour, Justice Susan Kiefel.

There has been a fascinating debate about Ms Kiefel's appointment. I found the clearest commentary to be that of Professor Ross Buckley from the University of New South Wales.¹ He commented on the fact that many people, including the Federal Attorney-General, had been attempting to avoid the issue of Ms Kiefel's gender in the appointment. Not to put too fine a point on it, he said: '...what bollocks. Of course her gender was a factor. Just as the fact that she has a reputation for being a sensible and balanced person, was a factor.'²

Ms Kiefel has received quite of a lot of advice on how to behave once she gets there: we are advised to watch her, as she is still quite young and - should she choose to act as some previous Judges and Chief Justices have done - she could have 'enormous influence in Australia'.³

I don't intend to put any further pressure on Ms Kiefel but, entirely independently, I wish to address the unmet need for women who achieve positions of power to work towards furthering the interests of women when they get to their lofty positions. I believe that when women are appointed to positions of power, they should do their best to use the power inherent in these positions to help other women. They should not think: 'I got this position on merit, I deserve it, and the best thing I can do is be competent and show that they were right to appoint me.' I call it the 'don't make any waves approach'. That is one way to approach one's career. But I quote His Honour,

¹ Ross Buckley, 'Gender Lie is Bad Judgment', *The Courier Mail* (Brisbane), 15 August 2007, 30.

² Buckley, above n 1, 30.

³ Amanda Watt, 'Lavarch: Silk Will Raise Bar', *The Courier Mail* (Brisbane), 5 August 2007, 10.

Justice Michael Kirby, who has said: ‘women are not just men who wear skirts’.⁴ I say, if we are feminists we do not hide it; if we have had a hard struggle, we mentor young women to make their path through the system easier, if we wear pants to work we must remember that we will always be seen as women, so we may as well stick together.

I make it clear I make no personal references or criticisms of any particular woman in a position of power and my views are strictly my own and not the views of the Magistracy as a whole, or of women lawyers necessarily.

Women lawyers need to be particularly resilient to survive and to succeed in the legal profession, especially if they are to serve in rural and remote areas. In due course, I will share a little of my journey through the unhappiest years of my life and the way in which resilience got me through, if I may.

The State of Women in the Profession at Present

I recently learned a new term, which describes some of the difficulties for women in the legal profession. I had heard of, and indeed bear the scars of, breaking through the ‘glass ceiling’ but not about the ‘sticky steps’ on the career ladder for some women. It means that: ‘instead of progressing upwards, women lawyers remain clustered at the entry and associate levels and are generally leaving law firms without becoming partners’.⁵ There is anecdotal evidence that women are often confined to less interesting work and even where female partners are to be found ‘their authority is often more ostensible than real’.⁶ Fortunately, it appears that professional firms are realising that losing women is costly. The cost of replacing a fourth year lawyer is \$145,000.⁷ When dollars are involved, smart people start putting on their thinking caps.

As I understand it now, some of the big firms are actually competing to attract the best women law students – who are often the best in the market – by offering progressive policies that aim to keep women at work at the time they wish to start having families. The realisation that ‘so long as a lawyer is meeting the clients’ needs and the firm’s financial imperatives, it does not matter when, how and where they work. This is particularly so when the Internet, remote access email and call diversion means that clients can be serviced to a large extent from home.’⁸

In Queensland, women make up 35 to 40 per cent of the legal profession. Young women predominate over young men by a margin of 24 per cent but decrease steadily after age 30. In 2003, a membership survey by the Law Society’s Equalising Opportunities in the Law Committee was carried out. The results of the survey showed that at the time, only 12 per cent of women were earning more than \$100,000 as against 39 per cent of men.

⁴ Justice Michael Kirby, ‘Women Justices for the High Court’, (Speech delivered at the High Court Dinner hosted by the Western Australia Law Society, 27 October 2004).

⁵ Jennifer Batrouney, ‘Return to Gender’, (2005) Summer *Australian Law Management Journal* 20.

⁶ Jennifer Batrouney, ‘Gender Issues in Law Firms’, (2004) 30 *Portia* 10-11.

⁷ Bratourney, above n 5.

⁸ Bratourney, above n 6.

More alarming is that 15 per cent of the 2,536 practitioners surveyed had experienced some form of discrimination during their legal career, with 8 per cent reporting more than one type of discrimination. The highest level of discrimination was on the basis of gender, although family responsibilities rated highly. Not surprisingly, it was younger women - especially those in the 25-29 year old age group - who were most likely to report discrimination of this type. Again, those in private profession would best be able to inform us if things had improved at all.

For those women at the Bar, there may be some hope of addressing the under-representation of women who work as Queensland Barristers. A recent survey by the Bar Association of Queensland (hereafter referred to 'the BAQ') was aimed at beginning to address problems encountered by women at the Queensland Bar by reason of their gender. Family responsibilities was listed as the major reason why the percentage of women at the Queensland Bar is so much lower than that of women graduating from Law School and why women stay a shorter period of time at the Bar.

By a factor of three to one, women Barristers and Judicial Officers who responded to the survey believed that women at the Bar encounter difficulties practicing, which men do not encounter. Again, the issue of family responsibilities was a major reason but the reluctance by solicitors to brief women or attempt to change the mind of a client who does not want a woman counsel or to brief a woman for trials, combative court work or highly paid work, also rated high. 'Sexist (patronising, aggressive and disrespectful) attitudes from other members of the profession' were also reported, but fortunately not towards the top of the list.

The BAQ came in for some criticism in the way they assist women to firstly, become and remain involved in the association itself, and to engage with women members. Specific mention was made of statements made by the BAQ on appointment of women judges.

To be fair, the concern over the last several years about the promotion of women Barristers to the bench at the expense of their male counterparts was based on the concerns about the traditions of seniority. This is at odds with the difficulty some very experienced women barristers suffer when applying for silk and in obtaining the sort of work, which will provide them with the experience to be deemed suitable for appointment. Without this connection clearly being made by representatives of the male-dominated BAQ, their bleating at the appointment of competent women to judicial positions who are not senior counsel is even more unforgivable. I look forward to a woman President of the Bar Association one day, or - as exists in Victoria - a Women's Bar Association hopefully, then such travesties of etiquette and solidarity would become a thing of the past.

Women in Positions of Power - Not Just Men Who Wear Skirts?

Let's cut to the chase. We know women can do key jobs and do them very well. I am suggesting that their real challenge is to use the position to further the aims and needs of women, through the way they support other women aspiring to, or assuming positions of power. Then there is the issue of appropriate public comment on issues of importance to women and children. Of all sections of society, children have the least voice in public affairs. Therefore, women leaders will more easily see areas of

discrimination against women and in turn, women leaders with shared experiences of the work/family balance will be more open to progressive policies in these areas.

As Chief Magistrate of Queensland, I was responsible for introducing one administrative reform and laying the groundwork for another, which were primarily aimed at improving the working conditions of female Magistrates. Firstly, there was the introduction of the '48 for 52' scheme, which allowed Magistrates (men and women) to take a further four weeks leave a year but to lose the pay for that period. The salary is paid on a 'pro rata' basis for 52 weeks of the year. While some Magistrates took and still take advantage of it, it was initiated and is largely enjoyed by those women Magistrates with school age children, so that they can spend more time with them in holiday periods.

I was also able to lay the groundwork for the later introduction of a scheme for the appointment of part-time Magistrates, whereby women who are not able to, or not prepared to work as full time Magistrates, can work part-time. This has been taken up by at least two Brisbane Magistrates, both of whom are women with school age children.

Forgive me a little reference to my performance as Chief Magistrate – there has been precious reference to my success as Chief in comments over the last few years! But having been in a position of power, I think it is relevant to speak about my experiences.

Walking in Front – The Traps

Perhaps I should be the last person to encourage courage in leadership! As Chief Magistrate of Queensland, I believed that female Magistrates who are mothers should also serve at regional centres throughout the State. This policy, based on a sense of fairness to all Magistrates - many of whom had served long periods of time away from their home bases - and the fact that regional centres provide all essential services necessary for family life was deemed to be inappropriate by some and I paid the price.

This leads me to another point. Women who are appointed to positions of power within the legal profession are sometimes also progressive on social justice issues. This combination is considered particularly dangerous, I think and it may well be why some appointees prefer a 'softly-softly' approach. In my case, I was happy to be remembered for (among other matters) the improvement in the democratisation of the administration of the Magistracy as a whole and of a more productive interface of the Magistracy with the Indigenous community, exemplified by the establishment of Murri courts. I also strove to ensure that victims of domestic violence received courtesy and an educated approach to the issue by Magistrates, when they appeared in our courts.

Professor Rosemary Hunter, former Professor of Law and Dean of the Faculty of Law at the Griffith University Law School, wrote an excellent article, 'Fear and Loathing in the Sunshine State',⁹ which should be read by all women lawyers. It is, at one

⁹ Rosemary Hunter, 'Fear and Loathing in the Sunshine State' (2004) 19 *Australian Feminist Studies* 145.

level, a well-researched analysis of the case of *R v Fingleton*¹⁰ (I knew the Queen would one day hear that I am a republican). But for the purposes of tonight's address, I refer to Professor Hunter's observation of the consequences of my ordeal. She refers to the

...terrorising effect on other women in senior positions in the legal profession in Queensland. No one in any position of prominence dared to speak out about her treatment. Senior women kept their heads well down and tried to avoid becoming the next sacrificial victim. This kind of intimidation and disciplining is a very powerful way of ensuring that women in a position to do so do not actually make a difference, and of reinforcing the view that women are not really up to it – they cannot manage, they create problems, they make a mess of it and therefore are better suited in the end to stick to the traditional male incumbents.¹¹

In conclusion, the article argues that obviously we want women to get into positions of power. We have a good understanding of the various barriers women face in attempting to do so. But what we have not developed, Professor Hunter argues, is much analysis of what to do when we get there. Two models of behaviour appear to have developed. One is to keep quiet and try to establish credentials by conforming to masculine norms. The other is to crash through or to crash, to try to make a difference and risk losing all in the attempt.¹² There's no need to ask which was my approach! Professor Hunter refers particularly to feminists networking to 'foster greater dialogue between feminist academics, judges and practitioners'¹³ to 'forge solidarity, explore further the question of what it means to be a feminist in a position of seniority and leadership in the profession and more generally strategise around power'.¹⁴

We should not be surprised when women become professors or judges, she says, that 'we tend not to be accorded the same prestige and respect as are men who attain those positions'¹⁵ and indeed, I think so much is made of our gender in relation to our appointments as I have pointed out above.

We should no longer find this surprising or individually confronting. Instead, 'we should be able to expect and know how to deal with backlash and opposition, to find and mobilise support and to work out where the spaces are for us to pursue feminist agendas.'¹⁶ Unfortunately, Professor Hunter has left our shores to be professor of Law at Kent University in England, so we miss her leadership and support. However, she leaves us with some worthwhile suggestions as to how to survive and even prosper in positions of leadership, if only we stick together!

For those women who do not proclaim themselves 'feminists', unfortunately you will suffer from the same prejudices as are handed out to women who outwardly proclaim

¹⁰ [2003] QCA 266.

¹¹ Ibid 154.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

their desire to change the experiences of women before our courts or, by extension, in society as a whole. What will not work, I suggest, is for a woman who justifiably believes she has worked herself into a position of power (even in an era of affirmative action policies, such as existed under the former Attorney – Generalship of Matthew Foley), to eschew a role that will enable her to work for women.

It is significant to note that there has been a decline in the number of women appointed to the Supreme and District Courts in Queensland since 2001 - and fewer women Magistrates have been appointed than under Foley. At the moment it seems that such appointments have come to a total standstill! If after the next round appointments the trend continues, I suggest that the Executive of the QLAQ would be making an appointment to talk to the new Attorney - General.

Resilience and Hope in the Face of Adversity – Keep Your Eyes on the Stars

It is ironic, I know, that I should be making all of these suggestions to inspire other women to possibly put their heads on the block as I did. But out of every experience there comes inspiration. Of all the many messages of support I received - 100 letters and cards during the six months of my imprisonment – the ones I was least interested in were those which said: ‘this has happened for a reason’ or ‘there is a lesson for you all of this.’ Of no help at all were the ones that read (although I respected the feelings with which they were offered) ‘God has a plan for you in all of this’. ‘If so’, I would mutter under my breath, ‘She did not consult me on it and I’m not happy!’ The most comforting messages were from those women and men who themselves had suffered some soul-destroying, life-threatening or career-eradicating event and told me how they surmounted the tragedy.

And I read the inspiring stories of such heroes as Nelson Mandela, surely the champion of resilience and hope, and of Christopher Reeve (‘Superman’ to so many of us), struggling to survive a devastating accident which brought him to earth so definitively, and Hilary Clinton – a woman mortified by her brilliant husband’s infidelities - now poised to be President of the greatest super power on earth!

In a speech to women at the annual Janet Irwin Dinner in October 2005 at Parliament House entitled ‘Resilience - Keep Looking at the Stars’, I spoke of the intense loneliness I felt in the evening in my cell at the Wacol Women’s Prison, where I spent the first two months of my six month sentence, the other four months having been spent at the Helena Jones Community Correction Centre at Albion. As a prisoner in the Protection Unit at Wacol (I was there for security reasons), I was ‘locked down’ (by a door about 9 inches thick) at 6.30pm at night until 7.00am. The nights were the worst – one’s daily calls to loved ones were over, one’s simple evening meal was over. All that awaited was the cell, a book, the television and the ubiquitous ‘Tim-Tams’!

On a fine night, I would look out of my window up at the sky and see the stars and that would give me some joy. It is hard to maintain a sense of self-centred misery for long when one can look up at the sky and realise one’s small part in the universe. Those stars, at night, were often my companions. When, during the day, I would look out the same window, I could see the wallabies congregated on the hill outside the prison wire. They would also give me comfort. It was when I started to give those

wallabies the names of my husband, my brothers and other members of my family and good friends that I thought I should find some other interest!!

So, I began to write a book about my experiences. Blissfully, when I moved to the Helena Jones Centre, my husband bought me my own laptop. Then I could record the experiences of a good and law-abiding woman who had lived in and through the law for many years, going through a system usually reserved for people with scant regard for the law.

I had the opportunity, through meeting many women who had sometimes done some brutal and horrible things to other people and sometimes to children, to think about the nature of 'good' and 'evil'. I had an excellent opportunity which couldn't be bought as a writer, to experience the prison system in Queensland. I had the chance to reflect on my career to date and my performance as Chief Magistrate and to analyse just what had happened to me in a job I once claimed I would do for nothing!

I continued to write my book after I left prison, as I tried to come to terms with a shattered legal career - equivalent to a great personal loss, as I had nurtured that career over a number of years. The greatest battle with oneself is to constantly resist the tendency towards bitterness, which is always lurking over one's shoulder. During my long wait for justice - after my appeal had been lodged with the High Court in late 2003, through the grant of leave to appear and the suggestion from the Court that there may be a point of law which would assist my appeal, through the appeal itself - I began to find a way to cope.

I read more inspirational stories, I taught law students at Griffith University Law School (which I loved), I worked as a consultant to community groups, I played golf, I gardened, I was a loving wife. A belief in my own goodness and ethics (which so many others involved in my prosecutions appeared to have ignored) and the wonderful support I received from my husband, family, friends and colleagues, got me through.

Finally, the day arrived and the blissful decision was handed down by the High Court. I am often asked how long it took for my faith in the justice system to be restored by that decision and my reply has always been 'about 20 seconds'. I had never actually given up hope that the brightest legal minds in Australia would be able to see clearly through the mire that was my prosecution, conviction and imprisonment. A close friend from within the legal profession told me that I would have to leave Queensland to gain justice and she was correct. This made it particularly difficult when, after the celebrations which followed the decision, I had to decide whether or not to return to the bench. I was fortunate enough to listen to those who pointed me in the direction of reappointment as a Magistrate at Caloundra.

Now that I am back on the bench, I feel vindicated and once again fulfilled in my career. I enjoy the job of local Magistrate - I am told that I am good at it, and I enjoy the respect of those I work with in the profession and from the prosecution. I regularly meet with local stakeholders, consistent with my belief that courts - especially the Magistrates courts, those in the most constant touch with the most people - belong to the people, not the Judges or Magistrates. We discuss innovative programs constantly being developed to best deal with offenders and generally

exchange ideas on the access to and the administration of justice in the local community.

In response to an approach from the local Indigenous community and a touching public 'welcome to the country' from the local elders, I am thrilled to have just recently sat in the first Youth Murri Court in Caloundra. That alone was worth returning to the bench for. I am pleased to now be a practitioner of what I came to know as 'therapeutic jurisprudence', which I supported in the establishment of the Drug Courts during my time as Chief Magistrate, and the subsequent Murri Court, throughout the state: both forms of therapeutic courts. These courts are now firmly entrenched in and funded by the state justice system in Queensland.

Throughout this concept, court can be used with the participation of a 'team' of experts in the court process, importantly the Judge/Magistrate, to heal and rehabilitate certain offenders rather than commit them to the hopelessness of the prison system. It involves a transition in thinking for all members of the team, from a formalistic and legalistic approach to sentencing - the 'square' of imposed authority - to the softer embrace of 'circle' sentencing.

The Resilience of Regional Women Lawyers

As I have suggested, women lawyers all need to be resilient. We may not get the jobs we want, we may be passed over for promotion, and we may suffer from sexual harassment (note the ordeal of the woman partner in Sydney at the moment, still fighting her way through the courts). How much worse it must be for regional women lawyers, who have less support 'out in the bush' or 'further up the line'. I imagine one of the worst issues they have to deal with is that of isolation - from support systems, like-minded women struggling with the same issues - and discrimination perhaps more able to be perpetrated further away from large urban centres.

It is little wonder that women often start up sole practices or go into practices with other women – so as to enjoy practices built around mutual appreciation of family responsibilities. It is good to see that the new President of the Queensland Law Society, Megan Mahon, intends to travel throughout the state to meet members. I am sure they will have much to tell her.

Women have the opportunity for exciting careers in the bush. I read recently of a Barrister from Western Australia, Judy Seif, who regularly flies to remote communities in Western Australia (no – she was not on 'The Circuit'!) to participate in 'circle sentencing'. Several women solicitors have recently been appointed as Magistrates, who were previously practising in rural areas. Their practices in country areas often see women lawyers appearing in the Magistrates' courts and it seems a natural progression onto the bench. It would be great to think that this pattern could continue.

In the meantime, you alone know of the heartbreaks, and of the joys of practice in rural areas. However, be assured of the support of your city slicker sisters in the law!

INSTRUCTION OR PARTICIPATION? MAXIMISING OPPORTUNITIES TO LEARN IN A NEW LAW SCHOOL

Rohan Price

**Senior Lecturer, School of Law and Justice, Edith Cowan University and
Managing Editor, Australian Journal of Employment Law & Policy**

Rohan lectures in Contract Law, Alternative Dispute Resolution and Employment Law at Edith Cowan University (ECU). He also consults for the New South Wales Parliament on employment discrimination and criminal procedure issues for Indigenous peoples. Rohan's research interests include employment and social security law, operational requirements and redundancy and minimum wage regimes.

I want to begin by asking what it is that makes a person sparkle? What is it that gives a person – any person – a sense of wit and presence when they walk into a room? The answer, of course, is confidence. The aim of legal education, to my mind, is to produce students who possess confidence and self-assurance and have true reasons to feel that way. If you don't know the answer, you will know where to find it, if you are in a situation of conflict, they you will know how to defuse it, if you need to speak a new language to achieve a goal, you will master it and use it to good effect.

Now, where does this confidence come from? How does a law student develop a genuine and thorough-going sense of their ability to do what a professional situation requires of him or her? Certainly, this sense does not simply materialise – it is based on hard work and reflection, a process of measured feedback and modification until a point where the student can stand in a court room and advocate, can sit in an office with a client and advise, can write an email or make a telephone call that alters the course of events.

In the course of setting up a Year 1 Law Program at ECU, I have had cause to ask how is it that a course of study can be designed so that the people who emerge are self-aware and capable, or, in a word, confident of who they are and what they can do. The surest way to achieve this is an educational model based on participation. First, we must ask why is participation important in legal education? We live in a world of reality TV and big screen movies and play station games – we live in a world that places so much emphasis on being passive and vicarious.

Little of an individual is brought to the watching of a movie, no effort is required, it is a one-way process. If it is a good film, you sit and enjoy sublime emersion. A law lecture does not, by way of contrast, involve sublime emersion. For many students it is a confusing and boring and unfruitful monolog. Lecturers may enjoy greater or lesser levels of intellectual engagement with their students in their lectures – but no matter how good the lecturer the lecture it is still a one-way process that often promotes passivity because the very substance of law can seem to a student to be an impenetrable thicket. Just watch students switch off one by one when I start talking

about perpetuities and future interests in land and you will see what I mean about disengagement.

So what do we do about the problems of the lecture? Perhaps it is more useful to think about what we don't do to the lecture. We don't try to compete with TV, we don't consciously try to make ourselves more entertaining and we don't 'dumb down' the content of our units. Rather, we take every opportunity to teach through interaction and participation.

I believe that the role of a modern educator, in law, or any field, is to encourage action in their students. To get them to try things, do things and above all, to bring the student out of themselves.

At ECU we require our law students to conduct mini-moots and to do alternative dispute resolution role-plays on a weekly basis. They are required to look at a set of facts from both a litigious and a mediative point-of-view. These are Year 1 law students. At first, there was some trepidation about sitting in front of the class and playing a role. When it became clear that doing a role play was an opportunity for personal growth and for the development of professional skills that it was enjoyable and on occasions quite funny, students warmed to it and threw themselves enthusiastically into preparation and performance of their moot or role play. We have also organised in-house negotiation and mooting competitions and are fielding teams in both competitions here at ALSA. Students in my units can opt to do a moot or they can do a major written assignment, in other law units they can do a paper presentation or do a major written assignment.

Why then do we have such an emphasis on participation and engagement in our law program?

It is based in large part on my view that students who have highly developed skills of advocacy and negotiation will not only become enviable lawyers, but in fact will be enviable and sought after employees in a wide variety of fields.

It is almost trite to observe that the law degree is now viewed the most desirable generalist qualification in the way that Arts was in the 60s and Economics was in the 80s. In the medieval sense that it was desirable to have a child who inherited the family estate, one who was a knight and one who was a clergyman – in that very sense – the law degree has come to be regarded in many quarters as some kind of middle class birthright. This means too that we will continue in the trend of there being too many law graduands and too few jobs as solicitors.

On national trends, at least half of our students will not become practitioners. ECU's emphasis on advocacy and ADR training will make our graduates better lawyers as well as job ready for the multitude of other career streams that will open to them.

The proposition I make here today is that in pursuing specialisation in the way we teach and the skills we expect students to acquire, we are preparing them for life after university, whether it is as a legal practitioner or as a government sector employee, media worker, trade unionist, community activist or non-government worker etc the list goes on.

This is far from a radical agenda for legal education; in fact, it takes its cues from the very earliest form of tuition, namely the Inns of Court, where observation and participation and interaction with one's peers were what qualified one as a lawyer. A pupil took the required number of meals at Lincoln's Inn – the pupil was socialised into the ways of lawyers by sitting down and eating with them.

Our Law Program delivers to students a quite traditional black letter exposition of law. We are however different in that we actively provide opportunities for role play, advocacy, ADRs and encourage students to look at a set of facts from both mediative and adversarial perspectives, and to consider if the law needs to be reformed.

As mentioned we have also moved actively in many of our units toward assessment methods that offer scope to students who opt for participation in a moot, a negotiation or a presentation to class in lieu of a written coursework requirement.

As I have said I am an academic who teaches a curriculum in Contract Law that is about a black letter and case-based as it gets, and much the same can be said for my colleagues. This means that to me the notion of assessing a student's performance in an ADR role-play exercise, in the past would not have been my first inclination. Why? Because when you adopt a participative model of legal education you have to stop trying to 'be the lecturer', you have to refrain from the idea that unless the students are listening to me talk about the law and taking notes then, somehow, they can't really be learning something of value.

Students can't after all, very well teach themselves, can they? Well the answer to that question is actually yes. If you confine your role as an academic confine to setting the facts, setting the parameters and objectives of the role play or problem question – then you let the student find their own way, you let the student use the tools laid out in front of them. In essence you sit and observe your student's capacity to create a solution to a problem. The future of legal education is going to be in the creating and managing contexts through and by which students acquire a direct experience of the world. This will mean that words like 'tutorial' and 'lecture', 'online' and 'offline' will hold less and less meaning, as we combine the experiential and curricular objectives into new educational forms.

I will give you an example that I experienced when I was a student. I studied Advanced Administrative Law at the University of Tasmania. One of our assessment tasks was to lodge an FOI request with a government department, another was to research and update the legislative basis of a chosen statutory authority, I chose the Grains Elevator Board of Tasmania – a topic that I found it is possible to know a little too much about. Another assessment item was to give a short, spoken critique of a federal tribunal. In this course there was little or no such thing as 'a lecture': it was a series of weekly opportunities for students to practice, contribute, formulate, articulate. It was based on the idea that we all need to be active in the careful dissemination of knowledge, that it wasn't the lecturer's responsibility to hold the floor. Another formative experience I had at UTas came when I later became a tutor in the law school there. A lecturer there, who remains a good friend, said to me: 'Look, if the students have the tutorial problem, show up to the tute and don't want to talk, then that is their problem. It doesn't matter whether the tute goes for 10 minutes

or one hour.’ This, although it seemed a rather ‘bolshy’ perspective at the time, has come to stand me in good stead as a lecturer of law. If we start with the expectation of participation it must emanate from the students themselves – they must see some use and advantage in expressing themselves. If the problem question posed to them is relevant and challenging, and their teacher is motivated and encouraging, then there is no excuse for them to fail to get involved.

I take some faith that a student who in Year 1 at ECU who can solve a problem with a variety of interpretive approaches will become an employee in Year 5 with a mature and sophisticated view of the world and celebrated ability to put it at the disposal of colleagues and clients. We are actively investing in the ability of our students at ECU to do this.

**DEVELOPMENTS IN ANTI-DISCRIMINATION LAW:
*QUEENSLAND v MOHAMMED & VIRGIN BLUE AIRLINES PTY
LTD v HOPPER***

Yasmin Gunn

Solicitor, Legal Aid Queensland

In two recent high-profile cases, the Supreme Court of Queensland has affirmed decisions in favour of Queensland's *Anti-Discrimination Act 1991* (hereafter referred to 'the Act') complainants.¹

Queensland v Mahommed

In *Queensland v Mahommed*,² the Supreme Court affirmed on appeal the findings of the Queensland Anti-Discrimination Tribunal that a prisoner had been discriminated against both directly and indirectly.

Mr Mohammed - a Muslim prisoner - complained that he had been discriminated against, as the Department of Corrective Services had not provided him with fresh Halal meat as part of his prison diet. Instead, prison officials had given him a vegetarian diet with supplements and tinned Halal meat for a period of time.

The Anti-Discrimination Tribunal determined that the prisoner had been directly discriminated against because non-Muslim, non-vegetarian prisoners were given fresh meat as part of their diets. Evidence was presented to the tribunal about the unpalatable nature of the tinned Halal meat provided.

In addition, the tribunal found indirect discrimination, as the complainant had been required to eat a standard prison diet following his transfer to another prison. This situation was found to be indirectly discriminatory because most non-Muslims would have been able to eat the standard diet, but Mr Mohammed could not because of his faith.

On appeal to the Supreme Court, it was argued that providing Mr Mohammed with the general prison diet was reasonable and that Mr Mohammed had not raised the issue of direct discrimination. Lyons J ruled against these grounds and affirmed the Tribunal's decision.

¹ *Anti-Discrimination Act 1991* (Qld).

² [2007] QSC 018; (2007) EOC 93 – 452.

Virgin Blue Airlines Pty Ltd v Hopper

In *Virgin Blue Airlines Pty Ltd v Hopper*,³ Virgin Blue Airlines was also unsuccessful in appealing an Anti-Discrimination Tribunal decision, which found the Airline had discriminated against job applicants because of their age.

In October 2005, the Tribunal found Virgin Blue had breached the Act by discriminating against a group of women, aged 36 to 56 at the time, who had unsuccessfully applied for cabin crew positions.

The Anti-Discrimination Tribunal held that Virgin Blue's assessors had unconsciously discriminated on the basis of age when selecting employees. He considered there was:

...inevitably a danger of employing the behavioural competencies system, especially as it required an assessment of 'Virgin Flair' was to identify with persons of the same age and experience as the assessors, or what the assessors regarded as, if not of the same age, a 'fun' person. That person was I think likely to be a person of the same age, social class and life experience as the assessor...⁴

Virgin Blue appealed the decision of the Tribunal, on the bases that the Tribunal erred in law in holding that direct discrimination could be unintentional or unconscious and that it had not been accorded procedural fairness, as it had not been given adequate notice of the case, which succeeded before the tribunal.

Moynihan J upheld the finding that direct discrimination could be unintentional or unconscious, referring to the Act provisions which state that it is not necessary for the person who discriminates to consider the treatment less favourable, and that the motive for discrimination is irrelevant.

Moynihan J was not persuaded that Virgin Blue had been given inadequate notice about the case. He stated the tribunal was not bound by the rigor of formal court proceedings and took a "commonsense approach not constrained by technical or procedural considerations"⁵ as to whether the appellant had "sufficient knowledge of the case that was ultimately made out against it so as to be afforded an opportunity to meet that case."⁶

³ [2007] QSC 075.

⁴ *Hopper & Others v Virgin Blue* Final [2005] QADT 28 (10 October 2005).

⁵ Above n 3, at 80.

⁶ *Ibid* 80.

HUMAN EMBRYO RESEARCH AND THE INTERESTS OF WOMEN

Loane Skene
Professor of Law, The University of Melbourne

Loane is a renowned lawyer, ethicist and academic. Her research interests include the legal regulation of genetic testing, assisted reproductive technology and euthanasia. She has served on many Federal and State policy committees, especially in relation to the legal regulation of genetic testing. She is currently the Deputy Chair of the Lockhart Committee, a group of eminent Australians who reported to the federal government on the regulations governing stem cell research.

Introduction

In 2006, the Australian federal parliament enacted legislation to implement the recommendations of the Lockhart Committee¹ on human embryo and stem cell research.² When the amending legislation is fully effective, Australian scientists will be able to do research that their counterparts have been doing in the United Kingdom, some European and Asian countries and in privately funded laboratories in the United States: see box below.

Much of this research involves women's bodies, especially obtaining eggs for research on the process of fertilisation and early embryo development, and creating embryos by somatic cell nuclear transfer³ to obtain embryonic stem cells for research. There has been widespread reporting of the concerns of women's groups about the potential risks of drugs given to women to stimulate egg formation and the collection of eggs from women's ovaries, which is necessarily an invasive procedure. Commentators have also raised issues about the pressure that women may face to donate their eggs - either when they are undergoing fertility treatment, or to assist research into a disease that affects their family or the broader community. These concerns are all legitimate and have been met at least in part by the guidelines that the National Health and Medical Research Council (NHMRC) has prepared on the

¹ Legislation Review Committee for the Review of the Prohibition of Human Cloning Act 2002 and the Research Involving Human Embryos Act 2002: see <http://www.lockhartreview.com.au/> (at 1 June 2007).

² Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo research Amendment Act 2006 (Cth). Similar legislation is being passed in the states; see for example, the Infertility Treatment Amendment Act 2007 (Vic).

³ This is the so-called 'Dolly technique', in which the nucleus of a human body cell is inserted into a donated human egg from which the nucleus is removed. This is then stimulated to develop like a naturally formed embryo with a view to using it in research, subject to a licence. The legislation prohibits the development of such an embryo for more than 14 days and it must not be implanted into a woman's body. There are severe criminal penalties for attempting to do those things.

procedures for egg donation.⁴ This paper is concerned, however, to explain why many women want to donate their eggs for this research and the benefits that may arise from it.

Fertilising Human Eggs Until Fertilisation is Complete

Until the former legislation⁵ was amended, it was not lawful for scientists to fertilise a human egg with human sperm for research purposes until the process of fertilisation was complete.⁶ That has now been changed by inserting a new definition of a 'human embryo', so that where an embryo is formed *by fertilisation*, the entity that is called an embryo starts from '*first mitotic division*'. Research can therefore be done up to that time, provided that the researcher obtains a licence from the federal licensing authority.

There are several reasons for scientists wanting to undertake this research. It will improve the clinical practice of reproductive technology programs, particularly by assisting the training of the medical staff who undertakes fertility treatment and enabling new techniques to be developed. Indeed, contrary to what many people believe, many of the embryo research projects undertaken to date in Australia, have been to improve fertility treatment.⁷ In time, this research will help infertile couples to have babies.

Women in fertility programs may also benefit from research into oocyte (egg) maturation. Current practice in fertility programs involves the use of drugs to stimulate egg production and the removal of 'mature' eggs from the woman's ovaries at the appropriate time in her menstrual cycle. The eggs are then fertilised and frozen for use in a later menstrual cycle (because experience has shown that there is a greater chance of pregnancy by later implantation). The possible impact of such drugs on the woman's health, especially in the long term, is not known. Even if the risks are not great, it would be less invasive for the women if eggs could be obtained at any time of the cycle without the need for ovarian stimulation and then artificially 'matured' so that they can be fertilised and used later. Although the earlier legislation did not prevent research on maturing eggs, it was not possible to test whether the maturation process had been successful because it was unlawful to attempt to fertilise the eggs until fertilisation was complete.

The possibility of artificial maturation of eggs also raises the possibility of other sources of eggs for research. Eggs may be obtained from women whose ovaries are surgically removed, such as ovaries that have developed tumours. Furthermore, eggs

⁴ Draft guidelines on the use of assisted reproductive technology in clinical practice and research, 2004 (as updated in 2007):

http://www.nhmrc.gov.au/consult/_files/art_guidelines_consultation_draft_final.pdf (at 1 June 2007).

⁵ The Prohibition of Human Cloning Act 2002 (Cth) and the Research Involving Human Embryos Act 2002 (Cth) and similar legislation in the states and territories.

⁶ Prohibition of Human Cloning Act 2002 (Cth) s 12: Offence to create a human embryo by fertilising egg with sperm outside woman's body except to achieve pregnancy.

⁷ Until recently, as explained later in the paper, it has been possible to do research only on embryos created for fertility programs but later not needed by the couple for their treatment. Research can only be done if the couple consent and the researcher obtains a licence from the federal licensing authority. To date, ten licences have been issued to date: five for the derivation of human embryonic stem cells; four for improvements in reproductive technology procedures; and one for biopsy training.

may be donated from corpses where women have died, or they may be obtained from aborted fetuses (since female fetuses have all the eggs that the girl or woman will have in her life). Eggs from these sources will need to be artificially matured before they can be fertilised by sperm and there may be a 'yuk' response to some aspects of this research. However, that was once the case with the use of tissue from cadavers in transplantation, which is now a common practice. Community attitudes change. If it is possible to find alternative sources of human eggs for use in research and treatment, that will reduce the need to use hyper-stimulating drugs for women in fertility programs and to ask women to donate their eggs for research and treatment.

Research on 'Impaired' Embryos Formed in Fertility Programs That Were Previously Discarded.

Another type of research that will be possible after the 2006 amendments is research on 'impaired' embryos that were previously discarded in fertility programs. It should be remembered that there are two reasons why couples enter fertility programs. The first is infertility - they are having difficulty in conceiving a child. The second is that there is a risk they will pass on a serious hereditary condition to their child. For couples in the second category, it is common to form embryos in fertility programs and to test them before implantation for the particular condition (such as cystic fibrosis). If the embryos are not affected, they are frozen with a view for later implantation. On the other hand, if they are affected, they are discarded. Because they were not frozen, they could in practice not be used in research because the consent procedures required a 14-day 'cooling off' period that would not allow the use of 'fresh' embryos.

However, much could be gained from research on impaired embryos. A UK geneticist, Professor Dian Donnai, said at the 11th International Congress of Human Genetics in Brisbane last year⁸ that parents often ask her: 'What's wrong with our baby? Why did it happen? Will it happen again?' Studying the early development of impaired embryos may help scientists to start answering some of these pressing and heart-wrenching questions.

Research That Involves Creating Embryos for Research

A third type of research that is open to scientists subject to licence after the recent legislative amendments is the creation of human embryos for research by the process of somatic cell nuclear transfer (SCNT, the 'Dolly technique'). This involves removing the nucleus from a person's body cell (such as a skin cell) and inserting it into a donated human egg from which the nucleus has been removed. The resultant entity is artificially stimulated to develop into an embryo from which embryonic stem cells can be removed for use in research. However, nearly all the genetic material in this type of embryo comes from the person whose body cell was used. It is quite different from a human embryo created by fertilisation of an egg by sperm where half of the genetic material in the embryo comes from each parent.

⁸ 11th International Congress of Human Genetics Brisbane, Convention & Exhibition Centre, Brisbane, 6 - 10 August 2006.

The capacity to create SCNT embryos for research opens up new possibilities for scientists. Since 2002, scientists have been permitted to use for research, embryos that are not needed by couples in fertility programs, subject to licence and obtaining consent from the donors. Many of the couples whose gametes (sperm and ova) were used to create those embryos have been eager for them to be used in research, as the only alternatives for embryos that they do not need are to donate them to another couple to have a baby, or to have them removed from storage (which means, of course, that they die). It is not possible to have them stored indefinitely.⁹

However, embryos that have been formed in fertility programs are not 'matched' to a specific person, like SCNT embryos. They have the genetic material from both of their parents. With SCNT embryos, on the other hand, it will be possible to create embryos that carry the DNA of one person so that, if they were implanted back into that person for treatment for a medical condition, they would not be rejected like tissue that is transplanted after being donated by another person. Also, scientists will be able to create SCNT embryos that have cells carrying the genes for particular medical conditions they want to study, both for pure science (to understand the reasons for the condition and its progress) and also for developing new drugs and other interventions to prevent or treat the condition.

A major issue for women as this new technology proceeds is where the eggs will come from.¹⁰ There are several alternatives. As noted earlier, women in fertility programs may donate eggs (and the NHMRC guidelines mentioned above will help protect the women donors from pressure to donate). Eggs may also come from donation of tissue removed during surgery and from corpses. In future, eggs may be derived from stem cells or animal eggs could be used for research, but only for the purpose of hosting a human nucleus (though that is not lawful in Australia). One day, it may be possible to create embryos without the need for eggs at all as researchers have recently been able in animal experiments to derive stem cells with the properties of embryonic stem cells by applying a mix of proteins to adult cells and then stimulating them to develop.

Meanwhile, we must be conscious of the need to protect the women from whom the eggs will be obtained for the research, as least in the next few years. Women have been willing to donate their excess frozen embryos for research and they will no doubt be at least as willing to donate impaired embryos from whom so much personal information may be gained to help them and their families in their medical and reproductive decision making. Also, there is no reason to believe that women will not want to donate eggs that they do not need for fertility treatment. Moreover, some women, who are not in fertility programs will offer to have their ovaries stimulated to produce eggs for donation to research to help members of their families with genetic conditions – or in an act of even greater altruism, to assist the community as a whole.

Provided that these decisions are made freely after an opportunity to read and consider information that sets out potential risks as clearly as possible (including the fact that some risks may not yet be known), there seems to be no reason to prevent egg donation in all cases. I am reminded of a question put to me at a briefing of

⁹ The legislation requires that stored embryos must be removed from storage after a certain time.

¹⁰ See Sushi Das, 'Let the egg hunt begin', *The Age*, 9 June 2007, p 5.

federal politicians in Canberra shortly before the Commonwealth legislation was amended last year: 'Would you allow your daughter to donate her eggs for research?' In fact, I have a daughter in her 20s so the question was particularly pertinent for me. I replied that it would depend on whether she was undergoing fertility treatment at the time. If so, and she produced more eggs than needed for the program, I would have no hesitation in saying that she should donate eggs if she chose to do so and that this would be a good action that might help someone else. If, on the other hand, she wanted to donate her eggs before she had had children, I would advise her not to do that. Even if the risks appear to be minimal, we do not yet know what the risks might be, particularly in the longer term. After the meeting, two women came up and challenged me, saying that I had been unduly paternalistic towards women. Why shouldn't competent adults, properly informed women, make an altruistic decision to donate their eggs, even if there is some possible risk to themselves? We do not prevent competent adults (including women) donating bone marrow and even kidneys, where the risk of harm is much greater.¹¹

During its deliberations, the Lockhart Committee listened closely to the views of the women who appeared before it and made submissions. One 'voice' that had particular resonance was that of women in fertility programs who spoke about the special feelings they had for their own embryos. Having tried for some time to have a baby and to endure the emotional, invasive and stressful process of fertility treatments, the creation of an embryo formed at last from the gametes of a particular couple, combining their genetic material, is profoundly significant. For this reason, the Committee ultimately recommended that embryos should not be formed for research by fertilisation, but only by SCNT. Some people who later read our report considered this distinction odd and illogical, since research is permitted on embryos that are not needed in fertility treatment, subject to licence and consent from the couple. However, for the Lockhart Committee, the recommendation was a fair compromise and one that can be defended even when one is asked (as I was recently) whether the objection to creating 'sperm-egg embryos' for research would hold if the eggs and sperm were donated separately for research, rather than an embryo being formed for research from the gametes of a couple in a fertility treatment. One might say that people who donate their gametes for research in those circumstances do not attach the same significance to embryos formed from their embryos as couples in fertility programs.

The special moral status of early human embryos was recognised by members of the Lockhart Committee as it is by many other people. This status makes early human embryos more worthy of respect than other types of bodily material. This is accepted by regulators and the members of the federal licensing committee for embryo research, from whom scientists must obtain a licence to do research on embryos. To get a licence, they have to justify the use of human embryos and use the minimum number, disposing of them later with 'respect'. They also have to report on the outcome of their research, so that the process of human embryo research is transparent and accountable. This will not answer entirely the belief of some people that even a mass of cells the size of a full stop has the same 'right to life' as a person but they

¹¹ With non-regenerative tissue like kidneys, donation is permitted only for medical treatment but generative tissue like blood and bone marrow may be donated for research as well as treatment.

should know that the embryologists who do research on early embryos also regard them as 'special'.

Some people have asked why scientists should not do their experiments on animals, rather than on human embryos. The answer, of course, is that scientists should do genetic research on animal models and they do. But that research cannot provide all the answers because the results cannot always be extrapolated to people. Similar arguments apply to research using adult stem cells, which have been used successfully in treatment for many years (such as bone marrow cells, which are adult stem cells, in the treatment of leukaemia). Many types of research should be done contemporaneously until we see which types of stem cells are most likely to be effective in treating particular conditions.

Other people have questioned whether women's health should be put at risk by egg donation to do research when there have been no cures found to date from embryonic stem cell research. However, it is not for scientists to prove that their research has therapeutic promise before they are permitted to do it. Rather, the onus is on those who object to the research because of their moral or other beliefs to show why the research should not be done. All medical research moves slowly and there are many steps between the first findings and the development and testing of new drugs and other treatments. As the Lockhart Committee recommended, we should move slowly but carefully, listening continually to the concerns of everyone involved.

Finally, embryonic stem research has been permitted for some time in the UK, in privately funded projects in the US and in some other countries. We do not know where it will lead but it will inevitably be many years before treatments are available for genetic conditions. If the research is prohibited in Australia, local scientists will leave to do research in other countries. That will give scientists in other countries an advantage and involve immediate and long-term economic costs as well as a 'brain drain'. Australian scientists will take with them their funding from international sources like the US National Institutes of Health, which could be used in funding Australian laboratories and training the next generation of Australian scientists if the funds remained in Australia. There is also the future cost of paying for imported treatments and procedures that could have been developed here. As the Honourable Anna Bligh, Premier of Queensland, said in opening the Brisbane Congress of Human Genetics: if treatments are found from such research, it is inconceivable that Australians would not want to use them.¹² Another Queenslander, Professor John Mattick, made the same point at another Brisbane conference, saying that health will always trump ethics.¹³ If a patient with spinal injuries could walk after treatment with a product from embryonic stem cells, that person's health interests would surely override objections from those who oppose the research,

¹² See note 8 above.

¹³ Professor John Mattick, Foundation Director, Institute of Molecular Bioscience University of Queensland, 'Ethics and Ideologies in Biology and Medicine', 11th Conference of the Australasian Bioethics Association incorporating the 10th Annual Conference of the Australian and New Zealand Institute of Health, Law & Ethics, Brisbane, 5 July 2006.

Conclusion

In summary, women and their families have much to gain from research on human eggs and embryos and from embryonic stem cell research. Many of them have been eager to donate their surplus embryos from fertility treatment for research and they may be equally willing to donate their eggs for research. Provided that there are clear processes to protect women from pressure and exploitation in the process of donation, there is no reason why this important research should not be allowed to proceed.

Research allowed after implementation of Lockhart recommendations

1. *Fertilising human eggs until fertilisation is complete.* This will help scientists understand factors that impair early embryonic development and lead to genetic diseases.
2. *Research on 'impaired' embryos formed in fertility programs that were previously discarded.* Scientists need to study impaired embryos as well as healthy ones, to learn more about genetic disease and the way that drugs might help alleviate the symptoms.
3. *Creating embryos that are 'matched' to particular people by somatic cell nuclear transfer.* This will enable scientists to develop disease-specific stem cells to study the cause, progression, diagnosis and treatment of disease. In the future, it may be possible to treat genetic diseases like diabetes and Parkinson's disease, or spinal injuries, by implanting stem cells developed from a person's own tissue and the transplanted cells are less likely to be rejected than cells donated by another person.

SEEKING JUSTICE FOR VICTIMS OF FAMILY VIOLENCE IN THE NEW AUSTRALIAN FAMILY LAW SYSTEM

Rachael Field*

Senior Lecturer, Queensland University of Technology

Rachel has worked in a number of different legal contexts including the Alternative Dispute Resolution Branch of the Department of Justice and Attorney-General, the Ombudsman Office of Queensland and the Litigation Reform Commission. She is currently a PhD candidate in the Faculty of Law at The University of Sydney. Her thesis explores the notion of neutrality in mediation and offers an alternative paradigm based on professional mediator ethics.

Introduction

Australia now has a new Family Law System that, since 1 July 2007, requires parties to attend family dispute resolution (mediation) before they are able to file proceedings in the court relating to children's matters. This article explores issues for women arising out of these reforms. In particular, the article focuses on the policy decision of government to make family dispute resolution services offered through the new Family Relationships Centres exclusive of lawyers. The article considers how mediation can be considered a positive process for women, but argues that for many women the risk of unjust outcomes resulting from mediation is high where lawyers are absent from the process. This is argued to be particularly the case for victims of family violence who are participants in mediation. The article suggests a distinct model of family law mediation for matters where there is a history of family violence, a model in which lawyers play a central role as legal advocate for the victim.

The New Australian Family Law System: Mandatory Pre-Filing Mediation for Children's Matters

In 2006 the Australian Federal Government passed the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) which amended the *Family Law Act 1975* (Cth) (hereafter referred to 'the Act'). The Attorney-General Phillip Ruddock described the amendments as 'the most significant reforms to the family law system

* BA/LLB(Hons)(ANU) LLM(Hons)(QUT) Grad Cert in Education (Higher Education) (QUT) Barrister and Solicitor (ACT) Solicitor (Qld) Senior Lecturer, School of Law, Faculty of Law, Queensland University of Technology. This material draws on some of my previously published work as follows: 'A Feminist Model Of Mediation That Centralises The Role Of Lawyers As Advocates For Participants Who Are Victims Of Family violence' (2004) 20 *The Australian Feminist Law Journal* 65; 'Using Lawyers As Advocates For Participants Who Are Victims Of Family violence In A Feminist Model Of Mediation' (2005) Autumn Edition, *Newsletter for the Family violence and Incest Resource Centre, Victoria* 3; and 'Using the Feminist Critique of Mediation to Explore 'The Good, The Bad and The Ugly' Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia' (2006) 20(5) *Australian Journal of Family Law* 45-78.

in 30 years.’¹ This is an ambitious statement given the significant reforms made to children’s matters in 1995, but justified because one of the effects of the amendments is to introduce mandatory pre-filing family dispute resolution. Section 60I of the Act now provides for compulsory attendance at family dispute resolution before an application relating to children’s matters can be filed with the court.²

The amending Act’s explanatory memorandum asserts that the new requirement for pre-filing family dispute resolution ‘is a key change to encourage a culture of agreement making and avoidance of an adversarial court system.’³ The initial push to encourage such a culture came from the 2003 House of Representatives Standing Committee on Family and Community Affairs’ inquiry into child custody arrangements in the event of family separation.⁴ That committee’s report recommended that separating parents should be required to ‘undertake mediation or other forms of dispute resolution before they are able to make an application to a court or tribunal for a parenting order, except when issues of entrenched conflict, family violence, substance abuse or serious child abuse, including sexual abuse, require direct access to courts or tribunals.’⁵ The recommendation reflected the Committee’s concern about ‘the animosity that adversarial legal proceedings create between separated parents.’⁶

Section 60I effectively prevents the Family Court from hearing an application for an order under Part VII (that is relating to children) unless a certificate from a family dispute resolution practitioner is also filed. This certificate must state one of four things.⁷ Either that the person did not attend a family dispute resolution, but it was due to the refusal or failure of the other party to attend; that the person did not attend because the practitioner considered that it would not be appropriate; that the person did attend and all attendees made a genuine effort to resolve the issues; or that the person did attend but they or the other party did not make a genuine effort to resolve the issues. A certificate will not be required in circumstances where a history or threat of family violence or child abuse is established,⁸ although the court must still consider making an order that a person attend a session where such an exception applies.⁹

¹ Philip Ruddock ‘Bill Marks ‘Cultural Shift’ in Dealing with Family Breakdown’, News Release 232/2005 issued on 8 December 2005 at 1 available at www.law.gov.au/ag (accessed 13 February 2006). See also, Donna Cooper ‘Family Law Changes: How Will They Affect Your Practice?’ CCH Online Family Law Feature Story, available at http://www.cch.com.au/feature_story.asp?document_id=71146&topic_code=7&category_code=34 (accessed 31 March 2006).

² See in particular subsection 60I(7).

³ Explanatory Memorandum (accessible via a link at <http://www.ag.gov.au>) at 19.

⁴ House of Representative Standing Committee on Family and Community Affairs Report, ‘Every Picture Tells A Story’ Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation, December 2003, Canberra, available at <http://www.aph.gov.au/house/committee/fca/childcustody/report.htm> (accessed 4 July 2007).

⁵ Ibid at xxiii referring to para 3.73.

⁶ Ibid at para 4.36 at 75.

⁷ See subsection 60I(8).

⁸ See subsection 60I(9).

⁹ See subsection 60I(10).

The end result is that it is now clear that family dispute resolution is the dispute resolution process of first resort for the majority of children's disputes. That is, it will be very difficult, despite the exceptions, for a party seeking a parenting order, other than by consent,¹⁰ to avoid family dispute resolution.

The key concern for this article is that the increased demand for dispute resolution services that will result from the reforms will, in large part, be managed by the new Family Relationships Centres,¹¹ and these centres will be 'lawyer-free' environments, in that parties will not be permitted to have a legal representative with them in the process. I will consider some of the positive aspects of the new system's requirements, but argue that removing lawyers from the family dispute resolution environment creates significant potential for unjust outcomes for women, particularly for those who are victims of family violence. Therefore, I propose a specific model of mediation to be used for victims of family violence as a part of the new system. This model includes a lawyer who acts as a coach and (where necessary) an advocate for a party who is a victim of family violence.

Family Dispute Resolution (Mediation): A Good Dispute Resolution Process for Women?

The term 'family dispute resolution' is defined in section 10F of the Act as 'a process (other than a judicial process): (a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and (b) in which the practitioner is independent of all the parties involved in the process.'¹² The emphasis in the definition is clearly on a process that is both 'helping' and not adjudicative, which could infer any one of many informal approaches to dispute resolution. However, as mediation is the key form (apart perhaps from counselling) of informal dispute resolution used for family disputes in Australia, and internationally, the focus for the analysis in this article is on mediation.¹³ This focus is also justified by government information relating to the new Family Relationship Centres which refers to 'family dispute resolution (mediation and similar services).'¹⁴

Mediation can be defined as 'the intervention into a dispute or negotiation by an acceptable, impartial and neutral third-party who has no authoritative decision-making

¹⁰ See subsection 60I(9)(i).

¹¹ For further detail regarding Family Relationships Centres and other services associated with mandatory dispute resolution see <http://www.ag.gov.au/www/agd/familyreloonline> (accessed 4 July 2007).

¹² A family dispute resolution practitioner is defined as someone who is accredited under the Accreditation Rules or authorised to act on behalf of an approved organisation, or authorised to act by the Family Court or other provisions of the *Family Law Act* or the *Federal Magistrates Act, 1999*: section 10G.

¹³ The Standing Committee's Report also envisaged when making its recommendations that 'the available processes of primary dispute resolution, such as mediation' would be central to the reforms: House of Representative Standing Committee on Family and Community Affairs, above note 4 at para 4.44 at 77.

¹⁴ The website states that the Family Relationship Centres will provide 'family dispute resolution (mediation and similar services) to assist families sort out their separation issues rather than going to court and to help identify unresolved conflict before going to court.' See <http://www.ag.gov.au/family> (accessed 4 July 2007).

power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.’¹⁵ This traditional, facilitative model of mediation offers a direct contradiction to some of the elements of the formal legal system that work to isolate and exclude women, and with its emphasis on party control and empowerment can be said to reflect feminist values and beliefs.

Mediation can also be said to validate women’s emotions, their voices and narratives; and to recognise the agency and competency of women in making their own decisions. Mediation contradicts the ostracization women can experience from the abstract nature of formal public legal processes that focus on linear reasoning, and the application of abstract principles. It can be seen as minimizing the divide between public and private life because the values of the individual and their personal context are integrated into the dispute resolution environment in a way that accords them priority and relevance.

Further, mediation can potentially save women from enduring the heavy individual costs (both financial and emotional) that almost inevitably result from bringing traditional rights-based claims in court; and the integrated approach offered by mediation offers the possibility of avoiding or overcoming ‘the legal system’s historical tendency to classify women as a homogeneous class without recognition of their cultural, racial, ethnic, and economic diversity.’¹⁶ For many reasons, mediation can arguably be seen as ‘an ally of feminism.’¹⁷

However, the limitations of mediation, particularly in disputes where there is a history of family violence, are widely acknowledged, and there is a strong feminist concern about the participation of victims of family violence in the mediation process. This concern challenges mediation’s value, particularly for victims of violence in family law disputes, and is explored further in the following section.

Family Dispute Resolution (Mediation): Problems Arising Where There is a History of Family Violence¹⁸

Before the 2006 reforms it was widely acknowledged that mediation was generally not an appropriate process for disputes where there is a history of family violence.¹⁹ This acknowledgement was found not only in the feminist literature on mediation, but also in statements of proponents of mediation, and was included in the practice

¹⁵ C Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* Jossey Bass San Francisco 1986 at 14.

¹⁶ B Herrnstein, ‘Women and Mediation: A Chance to Speak and Be Heard’ (1996) 13(3) *Mediation Quarterly* 229 at 231.

¹⁷ Marsha Lichtenstein, ‘Mediation and Feminism: Common Values and Challenges’ (2000) 18(1) *Mediation Quarterly* 19 at 30.

¹⁸ The term ‘family violence’ is used here to refer to all forms of violence perpetrated against women in domestic relationships; for example, physical, emotional, financial, psychological, and social violence. The *Family Law Act 1975* (Cth) defines family violence as ‘conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person’s family that causes that or any other member of the person’s family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety’: see section 4.

¹⁹ Of particular importance in gaining this acknowledgment was Hilary Astor’s paper for the National Committee on Violence Against Women: H Astor for the National Committee on Violence Against Women, *Position Paper on Mediation* AGPS Canberra 1991.

directions of the Family Court of Australia in 1991. The Australian Law Reform Commission Reports on Equality Before the Law also discussed the pervasive nature of violence against women and acknowledged that a history of family violence makes participation for women in alternative dispute resolution processes problematic.

It is important to acknowledge, before embarking on a discussion of family violence in the context of mediation, that violence against women manifests itself in many different ways and women's experiences of, and reactions to, family violence are diverse. The intention of this article is not to homogenise women's experience of family violence or their experience of mediation, but to identify issues of common experience, or perspective, that may compromise the effectiveness of mediation as an appropriate dispute resolution process for relationships where there is a history of family violence.

The key concern that arises in terms of mediations that take place when there is a history of family violence is that the positive claims about the process relating to self-determination, party empowerment and party control are all significantly undermined in relation to the victim's participation. As a result, mediation can be a process that entrenches and exacerbates the patriarchal control and domination of women rather than providing any emancipation from it. It is exactly the party-oriented nature of the process that provides perpetrators with an opportunity to continue to exercise power over their victims and to extend that control, through their influence over the outcome of mediation, to future interactions between them. In this way, mediation places victims at grave risk of suffering injustice in terms of the process itself and its outcomes. Mediation, as a result, cannot be seen as contributing positively to the common feminist commitment to ending the perpetration of violence against women.

Therefore, notwithstanding some of the possible theoretical consistencies between mediation and feminist principles that were identified above, mediation can in fact be argued as a very dangerous place for women who are victims of family violence. It is the nature and dynamics of a violent relationship that make this the case, and there is a significant amount of literature that identifies the process and outcome dangers for victims of family violence in mediation. Some of these issues, illustrate how the theoretical rhetoric of mediation becomes potentially inaccurate when applied to disputes where there is a history of family violence, and in fact can result in the endangerment of victims and the possibility of unsafe and unjust mediated outcomes.

First, in wanting to create a level playing field for all parties through party empowerment and self-determination, the mediation process 'ignores the power differences between men and women that put women at a disadvantage in negotiating with men.'²⁰ When the dynamic of family violence exacerbates this imbalance, a level playing field is possible in rhetoric only. Further, mediation is a process that focuses emphatically on cooperative and consensual dispute resolution. A history of violence, however, will make such approaches inherently impossible. Not only is it almost impossible for a victim to confidently represent her own interests against her abuser, but genuine consensuality is an approach that is diametrically opposed to patterns of dispute resolution used by

²⁰ Lichtenstein above note 17 at 20 referring to M Fineman, 'Dominant Discourse Professional Language and Legal Change in Child Custody Decision Making' (1987-1988) 101(4) *Harvard Law Review* 727.

perpetrators of family violence. As Hart has said, the idea of cooperative bargaining with a perpetrator of family violence is an oxymoron.²¹ Perpetrators of family violence do not cooperate with their victims; they impose their interests over them, they coerce, intimidate, monitor and threaten, they devalue their victims and deny their own violence.²²

Moreover, mediator assertions about being able to create a fair negotiating environment for victims of family violence are unconvincing. This is not only because claims of neutrality are mythical, but also because they are problematically based on an assumption that a victim's violence-induced fearfulness can be addressed through simple process interventions such as allowing her a fair opportunity to speak. The reality is that these interventions, whilst not inappropriate, cannot reverse what might be years of dominance and control. This is because the impact and effects of violence, whilst perhaps at their worst close to the time of separation, can continue in terms of the victim's interaction with the perpetrator for a significant time after that event.

(It is an important consideration that many family separation mediations take place relatively close to the time of separation. This will be exacerbated in the Family Relationship's Centres which promote the informal resolution of disputes as soon as possible after separation. Separation is a time when the victim could well still be experiencing strongly the impact of the perpetrator's violence and may be in increased danger of violence. Hart in fact has noted that many mediators erroneously believe that victims of family violence are safe once they have separated from the perpetrator.²³)

Also problematic for victims of violence is the private nature of the process, which results in its having little accountability in terms of how victims are treated during the process and in relation to the outcome reached. The dangers for victims in terms of their participation in mediation are exacerbated by the fact that the process occurs behind closed doors, with no public record of what was said, or of the outcome, and no real way to address any injustices suffered, for example via appeal. Not only does the private nature of mediation preclude the process being held properly accountable for its participants' experiences of it, but it also removes the handling of important public issues, such as justice for victims of family violence, into the private sphere. Furthermore, not only is the political nature of family violence essentially lost in the privacy of the mediation session, but mediation's focus on promoting equality and cooperation between the parties can result in the reframing of the politics of power as 'individualised instances of miscommunication or misunderstanding.'²⁴

Added to these concerns is the fact that mediator training is not yet sufficient to allow for the safe participation of victims of family violence in mediation. Mediators may often be unaware that there is any history of family violence. As Gribben confirms, 'It can be difficult to identify a relationship with a history of violence, because the man can be frightened that disclosure will threaten his control, and the woman can be frightened of

²¹ B Hart, 'Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation' (1990) 7 *Mediation Quarterly* 317 at 320.

²² *Ibid.*

²³ *Ibid* at 324.

²⁴ Lichtenstein above note 17 at 20.

what he will do if this happens, and they may both have become expert at rationalising, minimising, and hiding the violence and its destructive consequences.’²⁵

These are significant concerns. However, they are discussed with a pragmatic acknowledgment that the new system is now in place, and that this new system creates an important imperative to find ways in which to protect women in mediation, as victims of family violence. In the next section, therefore, I argue for a model of mediation that will offer such protection, and perhaps limit the number of unjust outcomes for victims of violence resulting from the new system.

A Mediation Model for Victims of Family Violence That Centralises a Role for Lawyers

A Lawyer’s Pre-Mediation Role

In the proposed model, the role of the victim’s lawyer prior to the commencement of the mediation is focussed on ensuring that the victim is not a participant in mediation if the risks are too great for her personal and emotional safety. If considered appropriate to proceed, the lawyer then takes on the role of coaching her about the process and strategies for taking part. Therefore, the lawyer would assess the risk mediation poses for the client, prepares the client with information about the mediation process, provides her with some skills for her participation, and begins a process of generating satisfactory options for the resolution of dispute.

The lawyer’s risk assessment for the victim is central to her effective participation in the process and involves weighing the victim’s capacity to engage in a face-to-face informal negotiating environment with the perpetrator, against the reality of the availability of other options to her.²⁶ This involves ‘balancing the client’s strengths and weaknesses against those of the other spouse’,²⁷ because, even though under this model where the victim will have advocacy support in the mediation itself, she must still have some capacity to speak on her own behalf and to pursue her own interests.²⁸

Sordo suggests that ‘the most important aspect of preparing clients who have agreed to mediation is giving them sufficient information about the process and in particular its potential to settle their dispute.’²⁹ This sort of advice and information is particularly crucial to any fair participation in the mediation process by victims of family violence, and has inevitable consequences for a fair and just outcome. Preparatory information should also include an explanation of mediation’s philosophy, and an emphasis on the elements of that philosophy that might empower her. For example, that she should feel it is appropriate to seek to terminate the mediation if she feels unsafe, and that she should

²⁵ S Gribben, ‘Violence and Family Mediation: Practice’ (1994) 8 *Australian Journal of Family Law* 22 at 25.

²⁶ To make a sound decision ‘clients who consent to mediation should do so only after being briefed of all other options available to them.’: B Sordo, ‘The Lawyer’s Role in Mediation’ (1996) 7(1) *Australian Dispute Resolution Journal* 20 at 22.

²⁷ P Bryan, ‘Reclaiming Professionalism: The Lawyer’s Role in Divorce Mediation’ (1994) 28 *Family Law Quarterly* 177 at 207.

²⁸ See MD Samuels and J Shawn, ‘The Role of the Lawyers Outside the Mediation Process’ (1983) 2 *Mediation Quarterly* 13 at 14 on this aspect of a lawyer’s role for general clients also.

²⁹ Sordo above note 26 at 22.

feel confident of having significant input, with the assistance of her lawyer to support her, in determining the final outcome of the negotiations. Also relevant here is the more practical level of assistance in terms of identifying the sort of information that she will need during the mediation process; for example, after school care opening times, or details of sport commitments for the children.

Coaching the victim about participation skills requires lawyers to have a good understanding of these skills themselves, as well as of issues relating to family violence, their impact on victims and their impact on a victim's capacity to engage in negotiations with the perpetrator. Susan Gribben has written of the benefit women can derive from mediation coaches, especially where there is a history of family violence, and believes that this coaching task is one for which lawyers are particularly appropriate.³⁰ She writes that 'a really good coach can be teaching assertiveness skills, increasing self-esteem, and also addressing safety issues',³¹ for example, helping the client to adopt protective behaviours.

The coaching process should also explore 'the likely reaction of the other party and ways of overcoming any objections.'³² The victim's intimate knowledge of the perpetrator, when combined with the lawyer's knowledge of negotiation strategies, can allow for some specific preparations to be made about how to direct discussions towards the victim's preferred or best outcome. Another key aspect of coaching in this context is to assist the victim of violence to prepare her opening statement in her own words,³³ and in the best possible light.³⁴ The opening statement is important in terms of enabling her to take control of her own role in the process, and providing an opportunity for her to outline her needs and concerns and to describe the issues in dispute from her own point of view.³⁵ Even a brief statement can be a critical step in empowering the victim and in establishing an appropriate dynamic for the communications between the parties.³⁶

Victims of family violence can further benefit if their lawyer has assisted them to identify 'a firm sense of what result they must obtain through mediation: a benchmark against which to compare an emerging settlement,'³⁷ as well as a flexible spectrum of satisfactory options. In fact, 'the lawyer and the client carefully should develop and set firm bottom lines on each anticipated issue prior to mediation,'³⁸ and develop some strategies for dealing with what might be the perpetrator's 'last gap' in negotiations.³⁹ This involves a process of 'assisting clients to identify their needs, interests and issues and exploring with

³⁰ Gribben above note 25 at 34.

³¹ Ibid at 34-35.

³² Sordo above note 26 at 23.

³³ Ibid.

³⁴ Ibid at 25.

³⁵ Ibid at 25: 'Helping to prepare but not giving the opening statement also helps to ensure that the lawyers fall into their correct role in the mediation early in the process and to dissuade those lawyers who are inclined to use the adversarial approach.'

³⁶ Ibid.

³⁷ Bryan above note 27 at 217-218.

³⁸ Ibid at 218.

³⁹ Sordo above note 26 at 23 referring to J Wade, 'The Last Gap in Negotiations – Why is it Important? How can it be Crossed?' (1995) 6 *Australian Dispute Resolution Journal* 190.

them what could be the worst, best and possible outcomes; exploring ways of achieving clients' desired outcomes and priorities.'⁴⁰

Samuels and Shawn refer to the pre-mediation interaction between the lawyer and the client as 'the beginning of a relationship of trust and confidence.'⁴¹ This trust and confidence is the important foundation to the lawyer's next role in the model; namely as the victim's representative in the mediation itself.

The Lawyer's Role as Victim's Representative in Mediation

As the victim's representative in the mediation process the lawyer has a number of significant contributions to make, all of which focus on the protection of the victim's interests in the dispute and ensuring her safety and comfort in the process itself. Of course, the lawyer is there to be able to provide advice and clarification throughout the process, and also to redress inequalities in bargaining power by taking control of the content when necessary, or contributing to the way the process is managed, so as to ensure that the victim's perspective is not subordinated to the perpetrator's. They can also assist the victim by ensuring that options generated in the process are thoroughly tested and 'reality checked'. Prior to the conclusion of an agreement, the lawyer can provide immediate legal advice and counsel. These tasks are explored further in the paragraphs below.

Essentially the key role of the lawyer in the mediation process itself is to assist the victim during the course of the mediation.⁴² This assistance will take various forms depending on the skills of the victim and her capacity in the mediation context to be confident about expressing herself and articulating her own position under pressure. Where the victim feels she lacks confidence, the lawyer may need to help with the expression of her position and her response to the perpetrators' communications. Where she feels able to contribute herself, the lawyer can act as a supportive presence only.⁴³ During the mediation, the victim can call on the lawyer to clarify issues with the other party or with the mediator, suggest alternatives to proposals made by the other disputant, and help with the further development of her own proposals.⁴⁴ In addition, the lawyer is able to advise the victim, in an ongoing way throughout the process, as to the legal implications and realities of statements made or proposals put forward by the perpetrator. Being able to effectively use the lawyer's legal knowledge and expertise to 'bargain in the shadow of the law'⁴⁵ throughout the mediation allows the victim to develop appropriate responses to the perpetrator's proposals and trade-offs on issues subject to negotiation.⁴⁶ This

⁴⁰ Sordo above note 26 at 23.

⁴¹ Samuels and Shawn above note 28 at 15.

⁴² Sordo above note 26 at 24.

⁴³ 'Participation may involve: presenting their client's position and negotiating on their behalf while the client sits passively beside them ... or adding to what their client expressed when necessary but otherwise acting as legal advisers to their clients whenever required to do so.': Ibid.

⁴⁴ Samuels and Shawn above note 28 at 15.

⁴⁵ On the issue of bargaining in the shadow of the law see R Mnookin and L Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950.

⁴⁶ Samuels and Shawn above note 28 at 15.

knowledge allows the victim to firmly contradict any inaccurate assertions on the part of the perpetrator about his legal rights and entitlements.⁴⁷

It may be that at different times throughout the mediation sessions, the victim moves through various feelings about her participation in the process. It is the role of the lawyer to remain flexible and constant in providing the sort of support the victim needs at those different times, both in joint and private sessions. That is, depending on the particular circumstances and developments throughout the process, the participation of the lawyer will vary from active involvement to relatively minimal involvement; and depending on the energy levels of the victim, different levels of involvement may occur at different stages of the mediation.

One of the most important aspects of the lawyer's presence is to contradict the dominant position of the perpetrator and redress some aspects of the inequalities in bargaining power that exist. The lawyer achieves this by bringing the law and legal protections into the mediation environment. This role for the lawyer can be contrasted with the limitations on the mediator's role in redressing imbalances, discussed briefly above, that result from mediator 'neutrality' and from restrictions on the sorts of interventions that are viable and realistically effective in redressing imbalances of power that are created by family violence. Altobelli has commented that, generally, lawyers have particular skills in 'providing for participation on an equal basis,'⁴⁸ and that 'because of their experience in negotiation, (lawyers) are sensitive to issues of both power and rights.'⁴⁹ Importantly for victims of family violence, it can be argued that 'the legal profession has a history of accepting the responsibility for protecting the rights of traditionally disempowered members of society.'⁵⁰

Another aspect of the lawyer's role in maintaining a fair negotiating environment is their involvement in controlling aspects of the mediation's content and process. Lawyers have been noted as having particular skills in 'ensuring the discussions stay on track',⁵¹ and this is important if the perpetrator attempts to dominate discussions with tangential issues or with a focus on his own interests and perspectives. The lawyer can also act as a 'second pair of ears',⁵² and help the victim by remaining alert to attempts on the part of the perpetrator to pursue, for example, information fishing expeditions.

Specific tactics that can be employed by the lawyer to ensure that the process is not manipulated to the victim's disadvantage include: overtly naming and contradicting inappropriate behaviour from the perpetrator, detecting when pressure from the perpetrator is resulting in the victim losing energy for the negotiations and calling for a break or 'time-out', insisting where necessary that several short sessions take place rather than one exhausting and lengthy one, providing motivational encouragement to the victim

⁴⁷ Murayama comments on the empowering aspect of the knowledge of legal rules and principles that lawyers can bring to the mediation process which provides at least a sound and objective baseline for negotiations: M Murayama, 'Does a Lawyer Make a Difference? Effects of a Lawyer on Mediation Outcomes in Japan' (1999) 13 *International Journal of Law Policy and the Family* 52 at 73.

⁴⁸ T Altobelli, 'Family Lawyers as Mediators' (1995) 9 *Australian Journal of Family Law* 222 at 229.

⁴⁹ *Ibid* at 230.

⁵⁰ *Ibid*.

⁵¹ *Ibid* at 229.

⁵² Sordo above note 26 at 25.

and helping reorient her if the discussions become difficult, and taking responsibility for advising if it is time to withdraw from or terminate the mediation process.⁵³

The final key role of the lawyer during the mediation is that of protecting and promoting the victim's interests in relation to advising on the detail of any final agreement.⁵⁴ The balance here is to assist the victim in terms of pursuing what is equitable,⁵⁵ whilst also acting on her instructions.⁵⁶ It would be appropriate for a lawyer to use a private session (or sessions) with the victim to discuss any offers for agreement and to determine whether they are acceptable or not.⁵⁷ The lawyer can also act as an 'agent of reality' by testing the strengths and weaknesses of agreement options in general, more practical, terms.⁵⁸ Altobelli believes that lawyers have particular skills in terms of 'turning decisions into workable plans.'⁵⁹ These skills allow the lawyer to provide assistance in the process of drawing up the agreement⁶⁰ to ensure that it accurately represents what the victim has agreed to.

It is important however, that in bringing their expertise and assistance into the mediation room as the victim's legal representative, and in working to protect the victim's interests, the lawyer does not allow the environment to become a courtroom-style contest with the perpetrator.⁶¹ Not only would this impede the mediation process and counteract any of the benefits of the process for the victim, but it may also endanger the victim's post-mediation safety by exacerbating the conflict between the victim and the perpetrator. Important also is the need for the lawyer to remain sensitive to the victim's need for as much autonomy in the process as possible.⁶² They must be able to allow the victim to pursue options that may not sit with legal authority but are consistent with the victim's own notion of what is safe and fair.

The Lawyer's Post-Mediation Role

Where the mediation has resulted in an agreement between the parties it is a clear role for the lawyer to provide assistance in ensuring that the agreement becomes enforceable through filing it, for example, as a consent order. This provides the victim with security in relation to what has been agreed and ensures that she has breach actions available to her in the event that the perpetrator does not comply with the agreement.

Where the mediation has been unsuccessful or no agreement has been reached, the lawyer also has a role in terms of ensuring that the victim's post-mediation safety is assured. Even walking to the car, having terminated a mediation, for example, might be a

⁵³ Ibid at 26 referring to G Sammon, 'The Ethical Duties of Lawyers Who Act for Parties to a Mediation' (1993) *Australian Dispute Resolution Journal* 190 at 193.

⁵⁴ Note 'Lawyer Mediation in Family Disputes' (1985) 59 (11) *Law Institute Journal* 1163.

⁵⁵ Altobelli above note 48 at 229.

⁵⁶ Sordo above note 26 at 26 referring to T Bishop, 'Mediation Standards: An Ethical Safety Net' (1984) *Mediation Quarterly* 5 at 8 and Sammon above note 53 at 196.

⁵⁷ Sordo above note 26 at 26

⁵⁸ Altobelli above note 48 at 229. See also Sordo above note 26 on the issue of reality checking at 26.

⁵⁹ Altobelli, *ibid*.

⁶⁰ Sordo above note 26 at 27.

⁶¹ *Ibid* at 23.

⁶² Samuels and Shawn above note 28 at 15.

dangerous process for a victim. It is also the role of the lawyer to support the victim by providing a realistic re-assessment of other processes that might potentially be available.⁶³

Conclusion

It is certainly true that mediation can be seen as offering potential benefits to women seeking assistance to resolve family disputes. These benefits centre on the empowerment of women in the negotiation environment, and contradict the way the formal legal system works to isolate and disengage women and their issues. For women who are victims of family violence however, these benefits are less relevant, and in some cases not applicable at all. Rather, for victims of family violence, mediation can be argued as providing a dangerous environment through which unfair and unjust outcomes are possibly reached.

This article argues that one way of making mediation a more equitable process for victims of family violence is to ensure that victims have a lawyer to help them prepare for mediation, to help represent and protect their interests during the mediation, and also to assist them with the terms and enforcement of a final agreement. This proposal sits well with mediation's concern to uphold self-determination, to empower its participants and to ensure that fair and appropriate outcomes are reached through the process.

A lawyer's involvement in family mediation as an advocate for victims of family violence presents far greater opportunities for making the process more equitable than it does threats. However, the costs associated with involving lawyers more extensively may prohibit these benefits from becoming a reality for many victims. Hence, this requires a review of legal aid funding policies to make funding for appropriate legal representation in mediation available to all victims of family violence.

As Kathy Mack has said 'the real long term goal must be to attack the sources of women's vulnerability directly, by limiting violence against women, especially within the family and by providing real opportunities for economic independence and full participation in public life.'⁶⁴ In the meantime, we must strive to work within the constraints of the existing system with the overriding aim of supporting women who are victims of violence in the post-separation context, and ensuring their safety.

⁶³ It has been said that 'when attorneys see clients who have previously been to mediation it is generally because mediation failed to generate a settlement or produced an outcome that both the client and attorney now perceive as grossly unfair.': G Blumberg, 'Who Should Do the Work of Family Law?' (1993) 27 *Family Law Quarterly* 213 at 217.

⁶⁴ K Mack, 'Alternative Dispute Resolution and Access to Justice for Women' (1995) 17 *Adelaide Law Review* 123 at 146.

UNIVERSAL HUMAN RIGHTS vs CULTURAL RELATIVISM: WHAT'S CULTURE GOT TO DO WITH IT?¹

Irene Watson

Post Doctoral Research Fellow, The University of Sydney

Irene Watson is from the Tanganeald Meintangk peoples, the traditional owners of the Coorong and South-East region of South Australia. She has had a long affiliation with the Aboriginal Legal Rights Movement, serving as the director, chairperson and also solicitor. She has written and spoken extensively both in Australia and abroad on Indigenous issues, and presented the following paper at a Rob Riley Memorial Lecture in October 2006.

Introduction

In this paper I will examine the shifts in Australian government policy and laws in respect of Aboriginal peoples and will argue they are shifts which have created obstacles to moves moving towards realizing and developing a more just and humane society. The question I pose in this paper is: how is it possible to achieve human rights when those who hold power to effect change are committed to a universal world order - one which is at the expense of diversity of peoples and cultures?²

In recent public debate known as the history wars, Aboriginal people and our communities were advised by the Howard Federal Government to move on from the 'blaming game', that is, blaming white Australia for colonialism and all of its social and economic outcomes. We are expected to simply move on with our lives, get a job and try to forget that racism is endemic in the Australian workplace as it is in the schools and the hospitals and the housing market. Windshuttle, among others, argued that the blame was not based on truth but fabrication. White guilt took a sigh of relief and overnight Aboriginal people became liars and fabricators of a 'black arm-band' view of history.

Further to that call to move on, we saw the birth of policies of shared responsibility and began to hear over and over again a mantra about taking responsibility. The problem for us in moving on is that the legacy of colonialism and the continued colonial relationship between Aboriginal people and the state has not been addressed. Many Australians deny the reality of colonialism. How can we go on?

¹ This paper was presented in October 2006 to the Curtin University as the, *Rob Riley Memorial* lecture. I would like to acknowledge Pat Dudgeon for her commitment to this lecture series and kind invitation to participate as a presenter. I am grateful to the support of Nyoongar elders while attending Curtin University and in particular Joan Winch.

² For discussion on the displacement of Aboriginal laws and sovereignty and the failure of the state to accommodate see Watson Irene "Internationalising, Humanising and Diversifying: The One Nation State", in Offord Baden and Porter Elisabeth (Eds), *Activating Human Rights*, Peter Lang European Academic Publishers Bern, 2006 p 257.

But now the blaming game has switched. The Aboriginal problem is now being blamed upon Aboriginal peoples and in particular blame is focused on what has been deemed their 'inherent cultures'. For instance, Aboriginal culture has been characterized as being permissive of violent sexual assaults against Aboriginal women and children; this is even though Aboriginal peoples have repeatedly stated that violence against women is not a part of their culture.³ There is an injustice in these 'history wars' and other debates. Aboriginal people and culture are much misrepresented - how is it possible to take responsibility when we lack the tools and resources to do so? Many Aboriginal peoples are victims of inter-generational traumas sourced in our experiences of colonialism. It has been said that comments like mine, which blame colonialism for all of our problems, are a hindrance to Aboriginal community development, and the better approach is to stop the welfare cheques that purchase 'the grog' and 'just get up and go and get a job'. However, it is not that simple. In this paper I explore the tension between cultural relativism and universalism, and how these tensions have been manipulated by the federal government to support their recent initiatives in Aboriginal affairs, including their proposed amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (hereafter referred to 'the Act').

Violence against Aboriginal women has been presented by the Australian media as being inherent in Aboriginal culture and law. In May 2006, Tony Jones interviewed Northern Territory Crown Prosecutor Nannette Rogers, on ABC Lateline, who spoke of the rape of small Aboriginal children in the Northern Territory. What followed was a month awash with media stories on 'dysfunctional' Aboriginal communities. Now, prior to these stories of violence and rape the Howard government had been promoting freehold land, as opposed to communal land ownership. A rhetoric of one law for all Australians grew during the media avalanche of reports of rape and violence.⁴ With that also came the call for the privatization of collectively-held Aboriginal lands. In his second reading speech for the *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*, Mal Brough, Minister for Families, Community Services and Indigenous Affairs, showed his support for the idea that collective land ownership contributes to the vulnerability of Aboriginal women and that private ownership of land provides greater protection for women and children. It is a very tenuous linkage and although there is no evidence to support this position it is a position which Howard espoused over 20 years ago, along with his intention to dismantle the Act. Subsequently, I am left to wonder what culture has to do with it. However, it is more likely that it concerns the interests of powerful industry groups. Why blame Aboriginal culture? Why demonise Aboriginal culture and law? Does this process of demonisation serve to better allow for regressive shifts in Aboriginal Affairs policy?

³ Betty Pierce, speaking to Jean Kennedy 'Customary Law Blamed for the Low Reporting Rates of Aboriginal Crime' *PM*, 16 May <http://www.abc.net.au/pm/content/2006/sl1640091.htm> spoke out against the references made to Aboriginal law and culture as being permissive of violence.

⁴ See, 'Howard Pans Indigenous Law', *News.Com.Au*, 28 May 2006, <<http://www.news.com.au/story/0,10117,19283530-421,00.html>>; Mischa Schubert, 'PM Blasts Custom of Promised Brides', *Age*, 29 May 2006 <http://www.theage.com.au/news/national/pm-blasts-custom-of-promised>; Patricia Karvelas, 'One Law for All: Howard', *Australian*, 29 May 2006, <http://www.theaustralian.news.com.au/printpage/0,5942,19288622,00.html>

Sites of the Debate on Cultural Relativism

Most evident sites in the debate on cultural relativism are in relation to violence perpetrated against Aboriginal women. Spivak has called these public campaigns, 'white men rescuing brown women from brown men'; also referred to as 'the white crusader complex'.⁵ But as argued earlier, the reality of the crusader-like intervention is more one of entrapment; that is, Aboriginal people are hunted into confined spaces, or removed from collectivity to the isolation of individualized spaces. An example would be the replacement of collective land ownership with that of individualized land ownership.⁶ However, privatization of land as a remedy for violence towards women and children appears elusive. There is no evidence that supports the notion that collective land ownership creates a less safe community.

In this critically important debate on the possibility of building safe communities, why is the focus put upon Aboriginal culture? People continue to abstract culture from the power relations between Aboriginal peoples and the dominant culture which has been in existence in Australia for more than 200 years. But any analysis based upon that simple abstraction of culture is flawed. The real picture is more complex and should hear the voices of inter-generational trauma and the processes of internalized colonialism. While Aboriginal culture is centrally located and demonised as being blamed, white guilt of colonialism is enabled to disappear.

In a recent publication⁷ I have argued that the recent 'history wars' debate⁸ is looking like a relative of the current critique on Australian Aboriginal cultures. As the history wars attacked the 'black armband' or Aboriginal views of history, the current attack against cultural relativism⁹ is similarly an attack on Aboriginal peoples' cultural right not to have values imposed from outsiders. Cultural relativism challenges the application of universal human rights laws that would displace cultural particularity. Blaming culture for violent and dysfunctional behaviour inevitably leads to the demonisation and undermining of the right of peoples to cultural self-determination. The demonisation of Aboriginal culture and law occurs when the focus shifts from the social, political and economic disempowerment of Aboriginal communities. To focus entirely on questions of culture, and then to measure civility by the standards represented by the dominant culture (one that is responsible for our colonised and subjugated non-status), gives a distorted view. It emanates from a position of comparative power, an outsiders view. What is wrong in this measuring of standards of Aboriginal peoples' culture is that the culture picture is abstracted from questions of power, and the destruction that that power has wrought on the social, political and

⁵ Spivak Gayatri Chakravorty *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* Harvard University Press Cambridge 1999, 284.

⁶ For a critique of the federal government position on remote communities and their future prospects, see, Watson, Irene "Illusionists and Hunters: Being Aboriginal in this Occupied Space" (2005) 22 *Australian Feminist Law Journal*, 15.

⁷ Ibid.

⁸ The 'wars' were perhaps kicked off by the revisionist historical writings of Keith Windschuttle, *The Fabrication of Aboriginal History: Volume One Van Diemen's Land 1803-1847* (2002), where he questioned the validity of recordings which documented a violent colonial history of massacres, cultural genocide and the overall violence of the colonial frontier, instead preferring a more 'sanitised' view of colonial 'settlement'.

⁹ Perhaps it could be said was kick started by Peter Sutton at fn 7 above I discuss his influence on this debate.

economic position of Aboriginal peoples over 200 years. As always with this 'measured civility' approach we are seen, as we were at the time of the 1788 invasion and first contact, as the barbarians of our past.

The Culture Defence

In the making of the 'barbarian,' attention has recently been paid to what is known as the 'culture defence' which has sometimes been used by defence lawyers when defending Aboriginal offenders. The courts sometimes show 'sensitivity' towards Aboriginal men in matters of rape where 'culture' is taken as a mitigating factor, but it 'is often about the culturalization of rape: how cultural and historical specificities explain and excuse the violence men direct at women.'¹⁰ In taking what they perceive to be Aboriginal law into consideration, the courts contribute to 'making invisible the harm that is done to Aboriginal women' while constructing or deeming Aboriginal men as inherently violent, thus confirming the 'superiority of white men.'¹¹

On this issue Benhabib has argued:

The cultural defence strategy imprisons the individual in a cage of univocal cultural interpretations and psychological motivations; individuals' intentions are reduced to cultural stereotypes; moral agency is reduced to cultural puppetry.¹²

Benhabib goes on to suggest:

...encounters between diverse cultural practices take the form in these cases of totalizations that eliminate the space for renegotiations, re-signification, and cultural boundary shifting. White liberal guilt is pitted against the "crimes of passion" committed by Third World individuals. In all of these cases, the judges could have upheld stricter sentencing of the defendant, thus protecting the equal rights of women and children under the Constitution. This would have signalled to the rest of the communities involved that they were confronted with cultural negotiations through which they would need to learn to maintain their cultural integrity without engaging in discrimination against and subordination of their women and children.¹³

But instead of entering into negotiations the Commonwealth government has proposed the shutting down of any such processes.

Working on Unmasking the Myths of Equality

Both state and federal Australian governments are not telling the true story when they assert that Aboriginal people have equality of recognition. Evidence proves gross continuing inequalities are suffered by most Aboriginal people. The High Court in

¹⁰ Sherene Razack, 'What is to be Gained by Looking White People in the Eye? Culture, Race, and Gender in Cases of Sexual Violence', (1994) 19 (4) *Signs* 899.

¹¹ *Ibid.*, 899-900.

¹² Benhabib Seyla, *The Claims of Culture: Equality and Diversity in the Global Era*, Princeton University Press Princeton 2002 p89.

¹³ *Ibid.*

Mabo's case had the opportunity to correct the inequality of land dispossession, but we need to ask how far the court went in providing a framework for recognition. The answer is they did not go very far at all. The recognition amounted to the right to a beneficial use of the land for the purposes of hunting and gathering. The question of our status as sovereign peoples in international law was negated by the *Mabo* decision. In the *Mabo (No 2)* litigation the question of sovereignty was not pleaded yet it was a question that was critical to the outcome of the case. The plaintiffs in *Mabo (No 2)* did not claim sovereignty over the Murray Islands; the issue between the parties was one of entitlement to property. However, the question of sovereignty was inextricably linked to it, and of concern to the High Court. Hence, the problem for the court was to recognize a form of property entitlement while not 'fracturing the skeletal frame of the law'. Ultimately, the *Mabo* decision confirmed colonial foundation, and its supremacy and capacity to extinguish Aboriginal law and culture. But the question remains: How can Australian law erase Aboriginal law when Aboriginal law sits outside of its proclaimed legal foundation? There are two ways in Australia; that is, two different frameworks; one that refuses to recognize the existence of the other, stating that to 'give recognition' would be to fracture the state's very foundation.¹⁴

Australian law has had to assume that it has had the legitimacy to extinguish the laws of the other, but where does it draw its legitimacy from? Is it simply because it can as it has the force and power to do so? The High Court in *Mabo (No 2)* answered this question; confirming that Australia was lawfully settled in an act of state, when at the same time it rejected terra nullius as the foundational principle of Australian law. In the High Court's rejection of terra nullius, many thought that there would appear an opening for an Aboriginal presence; instead, it was just a recognition of the limits of Australian law, and a measuring of the 'native's' remaining connection to land in a contemporary colonial context. The court decided it would not give recognition to an Aboriginal presence that held any possibility of damaging the skeletal framework of the body of an imposed Australian law. The fiction of settlement under international law prevailed in the *Mabo (No 2)* decision. The skeleton of Australian law remained intact and the question of its legitimacy did not arise as the court found no need to address it, its own legitimacy. The High Court's attempt to shift the 'darkest aspects' of Australian history in *Mabo (No 2)*, did nothing but re-invent and re-legitimise the fiction of Australia as a 'settled colony', thereby perpetuating the contradictions within Australian law and its conflict with principles of international law. The paradoxes created in the imposed spaces of domestic law over the rights and obligations of Aboriginal people continue post *Mabo*, as opposed to having lies in Australian legal history corrected. We are left with the decision in *Mabo (No 2)*, and the court's failure to provide a remedy beyond the possibility of meagre acknowledgment of a lesser right to land, or one which falls outside the common law of man, and now by the good grace of the common law has been brought inside for recognition.¹⁵

What does bringing Aboriginal law into the body of the common law mean to the future survival of Aboriginal law and culture? Benhabib commenting on John Locke's Second Treatise of Government and the concept 'state of nature' argues:

¹⁴ *Mabo v The State of Queensland (No 2)* [1992] 175 CLR 1, at pp 29, 30, 43, 45.

¹⁵ In reference to John Locke in the Second Treatise on Civil Government on the 'state of nature' refers to the condition of men and how it would be if not governed by common laws.

Psychologically, the state of nature metaphor is an affirmation of individualism, autonomy, independence, and self-reliance. The male is seen as one who owes nothing to others for the rights to which he is entitled; it is not his historical community of birth and entitlement which endows him with these rights; rather, it is his "Maker" and the law of nature, which all men of sound reason and good will can consult in order to discover this radical message of equality and autonomy.¹⁶

The universal centre becomes 'man' as community is displaced. The universal is mans' becoming and community's demise. For Locke, Aboriginal governance is under-developed and Aboriginal relationships to land are not seen as a legitimate form of ownership. It was one of the positions used to justify colonization.

We are yet to see how Aboriginal title might translate in the mouth of modernity, or upon the more settled lands of Australia. We could assume that it might include right of access to un-alienated Crown Lands. However, following the recent response of the government of Western Australia (WA) to appeal the Nyoongar Native Title decision in Perth, we may be left only to dream the possibility of even that event.

So what are the possibilities of equality when Australia's colonial foundation makes imperative the Australian government's stake in maintaining inequality and its oppression of Aboriginal peoples? Extending 'protection' of the law to protect the 'human rights' of Aboriginal people under Anglo Australian law creates the illusion that 'equality' for Aboriginal people is possible. But under colonialism, it is never a possibility. Our land was parceled out to British merchants and squatters, and maintaining privilege is the natural position of colonialism. Universal principles of equality remain abstract, disembodied and meaningless in practical terms, and the maintenance of privilege ensures that universal principles remain abstract, disembodied, and not realised in practice. In maintaining the illusion of equality the state retains the reality of inequality. For Aboriginal peoples, reality is a space in which our laws have no space to develop healthy communities. Instead, they have become disembodied laws. The oppression of Aboriginal people is further guaranteed by the state's failure to deliver basic human services, such as adequate housing and health care. Our lack of privilege remains guaranteed. In Australia, the divide between Aboriginal and non-Aboriginal peoples is well revealed by all social and economic indices. With the weight of the West bearing down in its extraction of our lands and natural resources, how will alliances with universally-dreamed standards help us survive, let alone prosper? The WA government's appeal of the *Nyoongar* decision is an example of the continuing colonial regime's embedded interests.

The state is excused and allowed to disengage from the onuses of equality and the recognition of Aboriginal laws. Culture is deployed to explain the rape of small children,¹⁷ and the focus is thus shifted from the social, economic and political environment of those being raped. On the ground, at home, reality is more complex. Blaming culture as though culture is fixed and able to determine all there is to know

¹⁶ Locke, as above n 15, 43.

¹⁷ In a South Australian court decision Justice Gordon Barrett, referred to 'culture sickness' when referring to the impact of Aboriginal people disconnected from country as an explanation for the rape of a woman. See 'Rapist's "Cultural Sickness"', *Advertiser*, South Australia, 10 June 2006, 21.

about an individual 'is itself a racist proposition.'¹⁸ Angela Davis argued that the United States deployment of culture to explain the tortures at Abu Ghraib or Guantanamo Bay is based on the assumption of an inferior 'Islamic culture.' However, these situations of torture say more about US strategies than they do about the cultural response of the torture victims.¹⁹ The violence in Aboriginal communities is also more a comment on the Australian government's management²⁰ of the colonial project, than it is about the culture of the perpetrators of violence. As Aboriginal communities across Australia continue to decline, the gaze shifts away from the poverty and dispossession of Aboriginal Australia to cultural profiling of it as 'barbarian'. We are delineated 'friend and enemy.' So we return to the same old racial discourse we know so well, the one which nourishes the ideology which underlies the colonial foundations of the Australian state.

Douzinis suggests that, 'perhaps we have taken cultural relativism too simply; that is, to see culture as embedded is unhelpful and negates the effects of history on how culture is constructed.'²¹

In particular, on the history of colonialism and its impact upon Aboriginal culture, Douzinis writes:

...both positions can become aggressive and dangerous. When their respective apologists become convinced about their truth and the immorality of their demonised opponents, they can easily move from moral dispute to killing. At that point, all differences disappear. One could only add that the name of the common poison is self-satisfied essentialism: whether communal, state or universal it suffers from the same heterophobia, the extreme fear and demonisation of the other.²²

Cultural Differences and the Australian State

Such a critique should consider the impact of the colonial project upon the lives of the colonized. Benhabib's critique of the recognition of culture and the United States fails to examine the colonial project and the way in which Aboriginal aspirations and knowledge could function where they might otherwise collide with the colonial order of things. For example, within Australia, the Aboriginal quest to protect cultural sites frequently loses out to natural resource development deemed in the national interest. There are few possibilities ever invoked or successful when it comes to the recognition of Aboriginal culture and law. Clearly, we are negotiating within a horizon that does not allow for the equality of the colonial subject. The assimilation agenda within this horizon will prevail. The possibility of having both recognition of

¹⁸ Angela Davis, *Abolition Democracy Beyond Empire, Prisons, and Torture*, (2005) 58-59. Here Davis is referring to culture being used to frame an understanding of the torture of Muslim men; she asks the question: "why do we think a Muslim man would act differently?" suggesting assumptions about culture are themselves racist.

¹⁹ Ibid.

²⁰ The Howard Government's Practical Reconciliation project has been hailed a failure, Lowitja O'Donoghue, Third Annual Human Rights Orator, *Age*, Victoria, 11 December 2003.

²¹ Further discussion see Douzinis Costas *The End of Human Rights : Critical Legal Thought at the Turn of the Century* Oxford Portland 2000 at p 137.

²² Ibid 139.

cultural difference and the assimilation agenda of the state working together is a contradiction.

Native Title, Misrepresentations, and Universalizing the Nation State

Native title claims have required us to jump mountainous hurdles of proof to establish a 'native title' right to land. In those rare instances where native title is deemed to have survived there is still a requirement that the community is able to stand against the power of the state to extinguish it. The Federal Court decision of Justice Wilcox²³ is, from the states' perspective, the more controversial of the native title decisions. It is seen as contentious in the claim to large 'chunks of urban, suburban Australia,'²⁴ because most had thought the previous native title decisions in the *Larrakia* and *Yorta Yorta* decisions had rendered white Australian back yards and public spaces safe from native title claimants. Now no one feels safe, but we look at an appeal by the WA government's attempt to regain that feeling of security, that certainty - but certainty of what?

So far however, all native title claims have failed to give recognition that will survive the threat of extinguishment. Also, there is a growing advocacy against collective rights, as reported by the media:

But there is increasing understanding, not least among Aboriginal communities themselves that the real problem lies with the nature of the title obtained. Title is communal; title is inalienable. The property rights it contains are more or less useless.

As with Locke, the dominant thinking is of an Aboriginal culture not yet developed. The problem is seen to be inherent in Aboriginal culture and our methods of holding land, and not in the Australian legal system's inability to give greater recognition to Aboriginal sovereignty claims.

From *Mabo* onwards, mis-representation surrounding the nature of native title abounds. In an interview with the ABC, Justice Wilcox commented on the misunderstanding in the community as to what constituted a native title right and its benefits to Aboriginal people. He was reported as thus:

There has been I think, a lot of misunderstanding, and sadly there has been some politicisation over the years. I think more and more people now are recognising the reality that native title isn't a threat to people's backyards, doesn't take away free hold land or in fact the rights of most lease holders.²⁵

²³ *Moran v Minister for Land and Water Conservation for the State of New South Wales* [1999] FCA 1637.

²⁴ The Western Australian, "Native Title Hostility Pointless" 18th October, 2006, Tony Rutherford reporting; <http://www.thewest.com.au/default.aspx?MenuID=77&ContentID=10238>.

²⁵ "Wilcox speaks out on Noongar ruling" October 3, 2006, 10.34 am, <http://www.theage.com.au/news/NATIONAL/Wilcox-speaks-out-on-Noongar-ruling/2006/10/03/1159641300742.html>

Can We Navigate a Peaceful Settlement?

I am not convinced that there can be a peaceful settlement when we are locked into protecting positions and where the positions being protected are based upon fear, ignorance and misrepresentation. We also need to critically examine who is locking whom into position. To what extent do Aboriginal people have voice over the representation of our culture and the call for recognition of our humanity? Who holds the keys to the castle? Clearly not the Aboriginal peoples. How much further can we, as an Australian society, evolve towards a place where all spaces are filled with empathy for both the collective and individual belonging?

WOMEN AT WORK: EQUAL OPPORTUNITY AND DISCRIMINATION

Neroli Holmes

Deputy Commissioner, Anti Discrimination Commission Queensland

Neroli is a solicitor of the Supreme Court of Queensland and has practised law in the United Kingdom where she worked as legal advisor and solicitor in a number of statutory authorities. Prior to working with the Anti-Discrimination Commission, she worked in Government in the Office of Premier and in Aboriginal and Islander Affairs. She delivered the following speech during The University of Queensland Office of Women celebrations for International Women's Day on 8 March 2007.

Introduction

The University of Queensland Office Of Women's theme in celebrating International Women's Day this year is –'Women at Work - Know your Rights - it's your future.'

This theme will be covered in my speech today, but before doing so I will reflect back on the issues that have confronted the female workforce in recent generations – to reflect where we have come from, where we are now and to try to look at where we still have to go to achieve full equality for female workers.

Where We Started

The women's movement has been with us for a much longer period than the legislation prohibiting sex discrimination. However, many of your mothers and grandmothers will remember back to the 1980s when the federal *Sex Discrimination Act 1984* (Cth) was passed in 1984. Just seven years later, Queensland passed its *Anti-Discrimination Act 1991* (hereafter referred to 'the ADA').

More mature-aged women will be able to reflect back on the days prior to the passing of the federal *Sex Discrimination Act 1984* (Cth). Here are a couple of reminders of those days.

- Up until the 1960s women in some sectors had to resign from their jobs when they married (Commonwealth Public Service/Rockhampton City Council).
- Also in the 1960's, women were not allowed to drink in the public bar at hotels, but were confined to the 'Ladies' Lounge' or the car park. In protest to this rule, the feisty Merle Thornton (Sigrid Thornton's mother) chained herself to the public bar of the RE Hotel in Brisbane.
- The Deborah Wardley case, a landmark sex discrimination case of the 1970s¹ -

¹ *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 28 ALR 449.

Deborah applied for a job as a pilot at Ansett Airlines and was refused employment because she was a female. She fought her case all the way to the High Court and won. It was one of the first major sex discrimination cases to be determined. That was way back in 1979, just over 28 years ago. She was the first female pilot in a large commercial airline in Australia.

Twenty-eight years after winning her case, Deborah Wardley is still working as a pilot with Lufthansa and no doubt there are many female pilots working across Australia and the globe at this moment who have followed Deborah Wardley's footsteps.

- It was only in the 1970s that the term 'sexual harassment' was coined and the fight began to gain a legal right to protect women from this behaviour. It was accepted by many female workers that this conduct could occur without a right to complain.

We have moved on a great distance since those early days when sex discrimination and sexual harassment were first mentioned in legislation.

Where Are We Today?

It is very important that all workers understand that the passing of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) has not impacted upon a workers right to make discrimination, sexual harassment, or victimisation or vilification complaints. Unfortunately, many workers are misinformed and believe they no longer have any right to complain about decisions of their employers. While it is true there is a much more limited right to complain to the State Industrial Commission than there used to be prior to Work Choices, all workers retain the right to complain about discrimination or sexual harassment, vilification or victimisation occurring in the workplace. They can do this under the ADA, and the various federal discrimination laws, which include the *Sex Discrimination Act 1984* (Cth).

Today, there are 16 grounds of discrimination prohibited by the ADA. These include impairment, age, race, religious and political belief, trade union activity, sexuality and gender identity discrimination. The five types of discrimination that have particular relevance to women in the workplace are:

- Sex discrimination
- Pregnancy discrimination
- Breastfeeding discrimination
- Family responsibilities discrimination and
- Parental status discrimination

Sexual harassment is also prohibited and in the vast majority of cases, the victims of sexual harassment are women. It is defined as unwelcome conduct of a sexual nature in relation to the victim. It happens when a reasonable person would expect that you would feel offended, humiliated or intimidated by the conduct. Sexual harassment

remains as a major issue in the workplace, particularly for young women. It is consistently the second or third highest ground of complaint to the Anti Discrimination Commission.

It is interesting to look at the stage of life that a woman is at, to see what discrimination issues will arise for her. A recent study conducted by the South Australian Equal Opportunity Commission shows how discrimination complaints vary according to age and gender. When you think about it, this is logical and something we would expect.

The South Australian study showed that teenage women lodge sexual harassment complaints, and then also lodge pregnancy complaints in their 20s, which are joined marital status complaints in their 30s. In their 40s, they lodge race and sex discrimination complaints. Teenage men lodge race complaints, age and sexuality complaints in their 20s; sexuality, race and sexual harassment complaints in their 30s, and race and disability complaints in their 40s. The gender difference seems to end from the 50s onwards, with both sexes lodging disability and age complaints in their 50s and age based complaints after that.

It is highly likely that if we carried out a similar analysis in Queensland, similar results would be obtained – although there may be some differences as the South Australian legislation to date does not have the family responsibility ground.

Under the ADA, there are two types of discrimination:

Discrimination complaints can be either direct discrimination or indirect discrimination and it is important to understand this difference.

Direct discrimination is straightforward – an employer decides to not offer a long term casual worker who has announced her pregnancy any more shifts because ‘pregnant women cause us problems in the workplace.’ This is direct discrimination on the basis of pregnancy.

Indirect discrimination is a little more complex. Indirect discrimination can occur if there is a rule or practice that impacts in a discriminatory way on a particular group of people covered by discrimination legislation more than others, and which is not reasonable. An example might be that the workplace has a strict rule that requires all workers to be at work at 6.30 am. Consequently, this rule may have a greater impact on workers who have young children. This practice could be unlawful discrimination against women who are mothers who generally have a greater responsibility for organizing the care of young children than men, if the employer cannot show that the requirement is reasonable. So the term applies to everyone but it has a greater impact on women.

Most discrimination cases dealing with lack of flexible work practices and many sex discrimination cases are indirect discrimination cases.

Let us look in some detail at examples that illustrate women’s rights not to be subjected to unlawful discrimination at work.

Sex Discrimination

Direct sex discrimination is where you are treated less favourably than another person on the basis of your sex, in circumstances that are the same or not materially different.

An example would be a male and a female worker in the same workplace, receiving different remuneration for performing the same work. Moreover, the substantial reason for the difference in pay rate is the sex of the employee.

An interesting case proceeding through the Federal Court at the moment is a sex discrimination claim by a female ex senior partner of Price Waterhouse Coopers (PWC), an accounting firm. She claims that PWC had a 'boys culture' that had obstructed her career. She is seeking \$10 million against the firm (*Rich v PriceWaterhouseCoopers*), and also has a victimization case running, claiming she was denied access to her clients after lodging the Human Rights and Equal Opportunity Commission (HREOC) claim.

If women are **breastfeeding** their child, they have the right not to be discriminated against. This type of discrimination will rarely involve direct discrimination, as very few workplaces in Australia are set up to have a child-care arrangement at work. It will most often involve indirect discrimination. For example, if an employer refuses to provide facilities to a woman to be able to privately and hygienically express milk in order to breastfeed, and where the provision of such facilities would reasonably be able to be accommodated in the workplace in question.

In relation to **pregnancy discrimination**, pregnant women have the right not to be dismissed or treated less favourably at work because you are pregnant, or because you intend to or have accessed maternity leave. Pregnancy discrimination is still a major source of complaints to the Anti-Discrimination Commission (ADC).

Family Responsibilities Discrimination

'Family responsibilities' has a broad meaning. It refers to the person's responsibilities to care for or support a dependent child or any other member of the person's immediate family who is in need of care and support.

Immediate family includes your spouse or former spouse; your child or your spouse's child including step and foster children; parent, grandparent, grandchild or your own siblings, or the siblings of your spouse or former spouse.

Therefore, it includes much more than the care of young children.

Since the late 1990s there have been a range of both discrimination and Industrial Relations Commission cases across Australia where workers have used these grounds of complaint to try and achieve workplaces that accommodate the needs of workers with caring responsibilities. The cases have dealt with a range of workplace issues. Some cases have succeeded in proving discrimination, while others have failed. Issues considered in certain cases include:

1. Working hours – such as the commencement and finishing times, taking into account child care arrangements.²
2. Work breaks or flexible work times to deal with family issues such as childcare arrangements, moving children from pre-school to day care centers.³
3. Unexpected time off work to deal with caring for a sick family member.⁴
4. Weekend work – whether being required to work unexpectedly on the weekend is a reasonable condition of work for a mother with a young child or a man caring for his brother who had suffered a brain injury.⁵
5. Job sharing – the right to implement job-sharing in certain circumstances.⁶
6. The right to move from full time to part time work when returning to work from maternity leave.⁷
7. The entitlement to access carer’s leave and not be penalized.⁸
8. Not being offered work because a potential employee is the parent of young children, or is pregnant.⁹
9. Pregnancy discrimination resulting in dismissal or a return to a lesser position in the workplace when returning to work from maternity leave.¹⁰

While nearly all the above cases have involved women making complaints and taking them through to final hearing, it is also heartening to know that family responsibilities are not the sole domain of women. From 2003 (the date the family responsibilities ground was inserted into the ADA) to 2005, a total of 65 complaints were made to the ADC in Queensland alleging discrimination on the ground of family responsibilities. Of these, 45 were made by female complainants and 20 by male complainants.

The Process of Making a Discrimination Complaint

The framework of the legislation provides a two-tiered complaints process. The first tier allows for complaints to be made by individuals and by organizations to the ADC. If the complaint is not resolved, it may be referred for public hearing to the Anti-Discrimination Tribunal.

² *Wood v Steggles* (1999) NSW IRC.

³ *Song v Ainsworth* (2002) FMC A3.

⁴ *Johnson v Kew Aged Care* (1999) AIRC.

⁵ *Porter v Matson and Locomotive International Pty Ltd* (1997) QADT 2.

⁶ *Bogle v Metropolitan Health Services Board* (2000) WA Equal Opportunity Tribunal.

⁷ *Escobar v Rainbow Printing Pty Ltd* (2002) FMCA 122; *Mayer v Australian Nuclear Science and Technology Organisation* (2003) FMCA 209; *Kelly v TPG Internet Pty Ltd* (2003) FMCA 584; *Howe v Qantas Airways Ltd* (2004) FMCA 242.

⁸ *Commonwealth of Australia v Evans* (2004) FCA 654.

⁹ *Everett v Copperart* (1997) QADT 14.

¹⁰ *Rispoli v Merck, Sharpe and Dohme* (2003) FMCA 160; *Johnson v Gloria Marshall Figure Salons* (1999) QADT 6.

The Commission complaint process is very straightforward:

- once a complaint is accepted as being under the ADA;
- the respondent is notified;
- the aim is to have a conciliation conference within six weeks of notification;
- the conciliation conference is a confidential process and gives those involved the opportunity to negotiate a settlement of the dispute in an informal meeting. There are no costs associated with accessing the Commission;
- the majority of cases are resolved through the conciliation process. Conciliation can result in a range of outcomes; a change of workplace conditions or practices so discrimination or sexual harassment does not continue; an apology; and or payment of financial compensation for damages.
- If it is not resolved by conciliation it can be referred to the Tribunal for a public hearing.
- The Tribunal is a more formal setting. Evidence is presented in a court room situation, and the Tribunal member will make a determination on the information presented. Cases are sometimes reported in the public media. Costs are an issue in the Tribunal, and in some circumstances costs may be awarded against a losing party.

Other Issues

Some 'big picture' issues continue to impact upon equality for women in the workplace. These are rights that many women still do not have in the workplace.

Pay Equity

Pay equity has been a huge issue for many decades. Pru Goward (former Sex Discrimination Commissioner and Commissioner Responsible for Age Discrimination) has pointed out that women continue to experience sex discrimination in this area. The latest figures show women earn 83.6 cents in the male dollar when the average weekly earnings of full time ordinary time work is compared.

When part-timers and casuals are involved, this gap widens to 65.3 cents in the male dollar.

Women account for the majority of casual and part-time workers. In 2000 they made up 73 per cent of all part-time employees. This in itself is not a bad thing. However, we know these positions are less secure, less well paid and preclude these employees from having access to training and career progression.

The latest average weekly earnings figures are bad news for Australians wanting to juggle their paid work and family responsibilities. They show a decline of 1.4 per cent in the gender pay gap over the last two years. Subsequently, there is a widening inequality between men and women in the private sector. We need to put a bigger effort into progressing pay equity.

Lack of Universal Paid Maternity for Women Workers

While some women working in the public service or for large corporate employers enjoy a right to paid maternity leave, the vast majority of women giving birth in Australia have no rights to paid maternity leave. This contrasts with countries such as Sweden, Austria, Germany and Finland which all allow a significant period of paid maternity leave. There are significant social and equality benefits, as well as benefits to the economy and employers in having a universal scheme of paid maternity leave.

This is an issue that has been the subject of considerable discussion and research since 2002, but at this point in time the Federal government has failed to progress this important issue.

The Ageing Workforce

Currently, there is a shortage in labour and skills being experienced across Australia. This is expected to get worse with the ageing workforce. By the year 2040, there will be double the number of dependents per taxpayer. The Federal and State Governments have recognized this problem and are actually encouraging older workers to remain in the workforce. This is where it becomes imperative to foster a more flexible, family friendly workforce.

The responsibility for caring for children and other elderly or ill family members remains primarily with women. If the government sees the need for workers to stay in the workforce, it must create the flexible family friendly conditions that allow family members with caring responsibilities to stay in the workforce as well as care for their family members. This is going to be a critical issue in the next couple of decades.

For more information, a report by the Human Rights and Equal Opportunity Commission provides a further insight into this particular area. The report is the culmination of two years research and consultation on work life balance.

COMMUNITY LITIGANTS IN THE QUEENSLAND PLANNING AND ENVIRONMENTAL LEGAL SYSTEM

Jo-Anne Bragg
Principal Solicitor, Environmental Defenders Office (Qld) Inc.

Jo worked as a corporate lawyer in Sydney before moving to Brisbane in 1992 to take up the position of Solicitor at the Environmental Defenders Office (Qld) Inc., making her the longest serving EDO solicitor in Australia. She delivered the following paper at the 2006 Queensland Environmental Law Association Conference 'Making it Better'. The paper was first published in the National Environmental Law Review in Autumn 2006.

Who are Community Litigants and Why Are They Important?

Community litigants are parties to court proceedings who are motivated to protect environmental values or to advocate for a feature of value to the community. Examples of environmental community litigants include the Karawatha Forest Protection Society and the Community for Coastal and Cassowary Conservation. They may be individuals or groups. They are not there to gain financially from development or to fulfil a statutory obligation.

Community litigants are amongst the users of the Queensland Planning and Environment Court (hereafter referred to 'the Court'). Community litigants most frequently use the Court to defend or challenge a local government's decision to approve an impact assessable development application. The perspectives and issues of community litigants in relation to the Court are often overlooked or at least overshadowed by the views of more frequent users¹ of the Court such as councils and developers.

This article seeks to reduce that imbalance and will:

1. give examples of the outcomes community litigants achieve;
2. look at impediments to community litigants launching appeals/applications in Court and issues pertaining to the Court process; and
3. propose improvements to the Court processes that might benefit community litigants.

¹I have endeavoured to estimate the number of community litigants appealing to the Queensland Planning and Environment Court during 2005. Of those 661 appeals/applications filed in Court during 2005 and notified to the Chief Executive of the Department of Local Government and Planning, a search reveals 142 submitter appeals/applications of which I identified 95 as "non commercial submitters". Not all that 95 would fit the definition of community litigants. However the figure of 95 does not include co-respondents.

Outcomes for Community Litigants

Development Application is Modified or Conditions Improved

The community litigant rarely defeats the development application in Court; however, it often achieves changes to the development application or improvements to conditions². This was the case in *Friends of Springbrook Alliance Inc. and Ors v Gold Coast City Council & Anor.*³ This matter concerned a 14 hectare parcel of land on Springbrook plateau which was mostly covered with rainforest. The site already contained 4 tourist cabins in that part of the forest nearest the road and a nursery on cleared ground. Springbrook is widely recognised by ecologists as having biodiversity values equivalent to the natural values of the nearby World Heritage Areas.

After Friends of Springbrook Alliance (FOSA), launched the appeal, their ecologist Dr Mike Olsen inspected the site and identified thousands of rare plants which would have been destroyed by the construction of the proposed additional cabins and road extension. In consequence, the developers changed the development application so as to move the location of the tourist cabins out of the forest and into already cleared land, preventing the destruction of thousands of rare plants. The application was further modified after the community litigants' experts noticed, during a site inspection, that part of the wastewater system for existing cabins was malfunctioning. The wastewater system was then proposed to be improved and relocated.

At the hearing, Judge Newton considered the modified application and heard arguments on behalf of FOSA based on provisions in the local structure plan that expressed the importance of natural values in that Springbrook locality. His Honour dismissed the appeal by FOSA. The developer then changed the development application again, including proposing to roof the proposed recreation facility. A number of the original conditions were varied, including insertion of a new condition that the proposed ancillary recreational facility for the site could only be used by a maximum of 12 guests staying at the cabins. The result was disappointing for FOSA. While the extra tourist cabins and recreation facility might seem to have a small footprint, the decision gave further encouragement to other similar ventures on the narrow plateau. Cumulatively those developments were eroding the natural values of the area and altering the type of tourism.

² On Wednesday 3 May 2006 law student volunteers at EDO Qld Emily Dux, Cecelia Mehl and Claire Bookless, later helped by Nancy Alexander, looked at every Planning and Environment Court decision listed for 2005-6 on the Queensland Court's website to identify the results for submitter appellants. There were a total of 122 decisions in 2005 and 35 so far in 2006. Amongst those 157 decisions they identified 48 appeals on impact assessable development applications. Of the 7 cases which were finalised "non-commercial submitter appeals", in 5 cases the development was approved with changed conditions and in 2 cases the development was approved with conditions unchanged.

³ *Friends of Springbrook Alliance Inc. & Ors v Council of the City of Gold Coast & Anor.* [2005] QPELR. 148. Judgement delivered by Judge Newton at Southport on 19 December 2003. There were three appellants also including Ken and Jeanette O'Shea and the Gold Coast and Hinterland Environment Council Inc. The appellants were represented by EDO Qld, barrister Paul Howorth, town planner Chris Buckley and ecologist Dr. Mike Olsen.

General Benefits of Submitter Appeals

Well-run submitter appeals have other more general benefits to community litigants as a whole. Councils and developers are reminded that it may be worthwhile to meet the valid concerns of submitters to avoid appeal rather than doing a quick job. An experienced planner who is employed by a local government in development assessment wrote to Environmental Defenders Office (Qld) (hereafter referred to 'EDO Qld') in April 2006. The planner stated that submitters' views were routinely overlooked by planners during the development assessment process as submitters generally lacked the resources to back up their submission in Court. The planner opined that the whole development assessment process was heavily biased towards the developers and those with the biggest financial backing.

Occasional Wins

Some of the most prominent wins by Queensland community litigants in recent years on environmental matters have been in the Federal Court⁴; however, community litigants occasionally successfully defeat development proposals in the Queensland Planning and Environment Court. For example, in Northern Queensland in 2004, the Yorkey's Knob Residents Association successfully appealed against the approval of a coastal development as the site was in a constrained development area under the planning scheme and the height and bulk was held to be against residents' reasonable expectations⁵. Also in 2000, a community group, Save Our Riverfront Bushland,⁶ was instrumental in defeating a major development application approved by the Brisbane City Council which included unsightly development on a prominent ridgeline. Additionally, in 2002, Stradbroke Island Management Organisation⁷ successfully opposed an application to develop a tourist resort on the site of the Point Lookout Hotel on North Stradbroke Island, though only after going to the Court of Appeal. The proposal failed to comply with development standards in the Development Control Plan regarding vegetation retention, building height, building length, boundary clearance and site coverage.

Co-responding to Support and Check Local Government

Occasionally, a community litigant elects to become a co-respondent when the local government has rejected an application and the developer appeals. This occurs often to not only support the local government, but also to ensure that the community view point is still represented if the local government decides for political or financial reasons to settle the appeal with the developer. As an example, the Karawatha Forest Protection Society joined as co-respondent to a developer appeal after the Brisbane

⁴ *Booth v Bosworth* [2001] FCA 1453.

Queensland Conservation Council Inc v Minister for the Environment and Heritage [2003] FCA 1. *Minister for the Environment and Heritage v Queensland Conservation Council Inc* [2004] FCAFC 190.

⁵ Yorkey's Knob Residents Association was represented by solicitor Kirsty Ruddock of EDO of Northern Queensland. Judgement was delivered by Judge White 1 April 2005.

⁶ *Wingate Properties Pty Ltd v Brisbane City Council & Ors* [2001] QPELR 272. The group was represented by barrister Stephen Keliher with solicitor Robert Stevenson of EDO Qld.

⁷ *Stradbroke Island Management Organisation Inc & Ors v Redland Shire Council & Ors* [2002] QCA 277. Counsel for SIMO was Mr Tom Quinn. Some years later the Hotel site is however being redeveloped.

City Council rejected a residential development in land subject to environmental constraints over the road from the 900 ha Karawatha Forest.

Outcomes Helped by Costs Rules and Legal Standing Provisions

Community litigants would rarely venture into Court if there were not legislative provisions to the effect that each party pays his or her own costs, rather than the general rule in other jurisdictions that costs follow the event. These favourable costs provisions⁸ are essential for community participation in a public interest jurisdiction. None of the above outcomes could be achieved if there were not favourable legal standing rules (recognition by the Court as an appropriate party) under the *Integrated Planning Act 1997* (Qld) pertaining to submitter appeals⁹ and enforcement¹⁰ in the Planning and Environment jurisdiction. However, impediments to community litigants using the Queensland Planning and Environment Court include the overwhelming number of development applications and the lack of legal and expert resources.

Impediments to Court and Issues with Court Process

Number of Development Applications

The rate of development in Queensland is overwhelming with South East Queensland the fastest growing region in Australia¹¹. During March 2005, a total of 591 development applications (all categories) were lodged with local governments in Queensland alone, of which 279 were in South East Queensland¹². The environmental impacts include: increasing degradation of Moreton Bay¹³; unsustainable demands on our water resources evident in current public discussion of the water crisis; and koalas approaching extinction in our region. The number of development applications means that many volunteer community groups are unable to fully respond to even major development proposals; even though once built, the developments are effectively permanent. To give an example, in 2003 the Gold Coast and Hinterland Environment Council (GECKO) lodged more than one planning appeal, but only had the resources to pursue one appeal to a major hearing and that was jointly with FOSA in the Springbrook case as described earlier. GECKO cannot handle many major projects at the one time as they also make submissions on numerous development applications, prepare detailed responses to draft planning documents, engage in public debate on environmental issues, and recently, lodge submissions with the Crime and Misconduct Commission. The Wildlife Preservation Society of Queensland Bayside Branch (Qld) Inc. (WPSQ Bayside) is equally overworked.

In 2005/6 the WPSQ Bayside lodged two planning appeals and considered declaration proceedings in a third matter. Mr Simon Baltais of the WPSQ Bayside said:

⁸ s4.1.23 *Integrated Planning Act 1997* (“IPA”).

⁹ s4.1.28 IPA.

¹⁰ s4.3.22 IPA.

¹¹ South East Queensland Regional Plan 30 June 2005, page 1.

¹² Local Government Association of Queensland, “Survey of Development Application Process” March 2006, page 1.

¹³ Tarte D. and Greenfield P., “Developing the SEQ Healthy Waterways Strategy” 2006.

The pace of development is too fast and disenfranchises our community. While our group has a lot of experience in the planning process we are a volunteer organisation and it is a great difficulty to go to Court opposing even a fraction of the developments.

The South East Queensland Regional Plan redirected population growth but made no effort to ensure it is ecologically sustainable or to slow it down so a continuation of the rate of development applications is expected. EDO Qld has requested for that Plan to be amended to reflect reduced population increase. The EDOs have also made a number of suggestions for amendment to the *Integrated Planning Act 1997* (Qld) ('IPA') to increase the accountability of applicants for development approval in the development assessment process and reduce the demands on both council staff and community group time¹⁴. Local and State governments alike are lacking resources to deal effectively with the rate of development and would benefit from less rapid development. Another major impediment to community litigants' participation is the lack of legal and expert resources to assist them.

No Legal Aid for any Planning or Environmental Matters in Queensland

WPSQ Bayside and GECKO as mentioned above, cannot afford to brief a legal team and bevy of experts in relation to all major development applications of concern to the community. Instead, they rely on pro bono and reduced price assistance in order to run even a few cases. The funds they raise are from after-tax dollars donated by family supporters. The developers on the other hand can claim legal fees as a tax deductible business expense and often have a full team of lawyers and experts engaged prior to the lodgement of the development application. Lack of resources is a barrier to many cases being initiated or run to a hearing by community litigants in the Planning and Environment Court.

Queensland, in effect, does not grant legal aid in environmental or planning cases, even for important public interest cases. The last legally aided planning appeal dates back to 1992 and concerned a concrete batching plant at Maleny. A community group or individual seeking legal aid for a public interest planning case has next to no chance of aid. This is partly because other areas of law are given priority but also because the applicant for aid must pass not merely a test of the *merits* of the case but also a *means* test of income and assets with a very low threshold. For a group to pass the means test, Legal Aid adds up all the resources of members of the group and checks to determine if the total is below the means test. To determine whether Legal Aid might grant aid for a very important test case concerning nature conservation laws, EDO Qld assisted client Dr Carol Booth to lodge an application to Legal Aid Queensland. The application was for funds for an appeal to the Court of Appeal relating to a decision of the Planning and Environment Court on the first third party enforcement action under the *Queensland Nature Conservation Act 1992*. The merits of the case were not an issue as we had the opinion of the Senior Counsel; however, aid was refused on the means test. Although that case, heard before the Court of

¹⁴ Environmental Defenders Office (Qld) Inc, Environmental Defenders Office of Northern Queensland Inc. and Queensland Conservation "The review of the *Integrated Planning Act 1997*: Making the System Fairer and Achieving Ecological Sustainability", March 2006.

Appeal¹⁵ was successful, other similar cases are not run at all due to the absence of legal aid.

By contrast, New South Wales does offer legal aid for environmental matters. To a certain extent, this explains why community litigants in New South Wales over time, have been able to effectively run a large number of important test cases in the Land and Environment Court. Legal Aid Queensland in 2005 conducted a review of its Civil Law Services and the EDOs lodged a submission calling for public funding for public interest environmental test cases. The Queensland Public Interest Law Clearing House (QPILCH) lodged a submission calling for a more general public interest test case fund.

So now it is established that where community groups do reach the Planning and Environmental Court, they usually lack the resources required to engage experts on all relevant issues.

Cost of Experts and Link Between Client and Expert

Some of the gravest problems with the Planning and Environment Court from the perspective of community litigants relate to expert evidence. As mentioned before, affording to pay for experts is a barrier to participation in the Court by community litigants. Often, the only way that experts are retained is by obtaining a vastly reduced price or free assistance which is available usually only from a small number of generous experts or if possible, client contacts. Many community litigants come to Court with either no experts or with far fewer than their well resourced opponent. So for example, in the FOSA case mentioned above, the Appellants' experts accepted significantly-reduced fees. Waste disposal was a major issue in that case, but the Appellants could not afford a waste water quality expert to debate with the developers' expert, or a traffic expert.

The adversarial way in which expert evidence is adduced in the Court has been strongly criticised by Justice Davies, who considers that the current system encourages expert witnesses to express opinions biased in favour of their client. Justice Davies has spoken out in favour of Court appointed experts on a number of occasions¹⁶, giving opinions that the financial link between client and expert is a powerful one and that the duty to the Court by the witnesses is not a sufficient counter balance.

Community litigants often complain to EDO Qld of bias by opposing experts and makes references to particular developers routinely using the same experts. This issue of bias by experts is also problematic in the development application process that precedes court and the EDOs have proposed a few ideas to reduce the problem¹⁷. The idea of a Court appointed expert is attractive so that the Court does in fact obtain independent advice. Due to the financial constraints on community groups it is, however, important that in public interest cases community litigants are not forced to contribute a share of those witness costs. Another issue is the lack of easily understood information for community litigants using the Court.

¹⁵ *Booth v Frippery P/L & Ors* [2006] QCA 074.

¹⁶ For example of some of his views see *Reservilt v Maroochy* [2002] QCA 367 at [9].

¹⁷ Above n 14.

Lack of Information for Self-represented Litigants

Community litigants are often uncertain of and alarmed by the Court processes and have insufficient information. The problems are particularly acute when they are not legally represented. Self-represented litigants, in a small but unacceptable number of cases, are threatened with adverse costs by opposing solicitors when they have done nothing to risk a costs order or sometimes are misleadingly treated. In November 2004, I received a copy of a five page letter to a self-represented litigant sent by a well-known Brisbane firm seeking further and better particulars of the submission the self-represented litigant group lodged with council *before* the development application was decided. The letter stated the request was made pursuant to the directions order of the Court. However, that was a most unusual interpretation of the directions order to the extent it was misleading. The letter from the solicitors was generally worded in such a way that the self-represented litigant thought compliance was required under the directions order. To comply with this type of request would have taken the self-represented litigants at least eight to twelve hours of work.

It is very important that the Court produce easy to understand information about Court procedure and the operations of the registry; including an outline of when the Court has the power to award costs against a party. It is acknowledged that such information is in an advanced state of preparation, largely courtesy of Judge Alan Wilson's efforts. As well as putting this on the (Court) website such information needs to be given to every party without legal representation when the appeal or application or notice of election is lodged so it can be read before any directions hearing is held. It would be useful to change the Notice of Appeal to refer to the availability of such an information paper or for the paper to be supplied with the Notice of Appeal to ensure that submitters receiving that Appeal and trying to decide what course of action to take, have the basic information.

The Environmental Defenders Offices have prepared a Community Litigants Handbook¹⁸ with detailed advice and guidance for litigants, and includes example forms. This will be available on our website and for purchase in hard copy format for a modest fee.

Tension Between Speed and Justice

Developers and their lawyers frequently argue for fast directions timetables and early hearings, often producing affidavits about how much interest their finance is costing them while the appeal proceeds.

Developers often try to create a sense of urgency about their appeal to hurry along the other parties. Self-represented litigants are in many cases badgered with ominous letters warning them not to be late with the Court direction timetable. However, the developers will in many cases be late and breach the Court timetable when it suits

¹⁸ The Community Litigants' Handbook Using the Planning Law to Protect Our Environment has been prepared by Anita O'Hart, Project Officer and Solicitor on behalf of Environmental Defenders Office (Qld) Inc, and Environmental Defenders Office of Northern Queensland Inc. It is expected to be available in early June 2006.

them¹⁹ or leave an appeal unpursued for years²⁰. Similarly, developers complain that local governments are slow in development assessment, but yet fail to promptly supply information requested by council, some taking more than ten months.

My observations are that Courts on occasions give too much credence to developers' demands for a fast timetable. This is partly because the Courts are laudably endeavouring to run the Court efficiently and deal with cases in a timely manner. However, this may lead to injustice for the community litigant who does not understand court procedure or forms and who may still be trying to find an expert at a reasonable fee. It is also worth remembering that community litigants, unlike developers and their lawyers, may have to work on their case in the evenings after work or on weekends. For instance, if the timetable allows for two weeks responding to a request for further and better particulars, a self-represented litigant will not only take many times longer than an experienced professional in the legal field, the response will need to be done on the weekend. Two weeks is really four days for such a litigant. There are also provisions in the IPA pertaining to appeals that are too fast for submitter appellants, such as two business days to serve the Notice of Appeal.

There have also been a number of costs decisions that are harsh against submitters. For example, costs were awarded against a submitter who applied to respond to a developer appeal five weeks after the allowable time when it appeared that the council was going to settle with the developer²¹. Community people want to keep out of court if council is doing its job; hence, that decision is harsh.

Decisions Made Out of Step With Community Values

Community litigants are frequently gravely disappointed by the Court's decisions. In most cases, the community litigant (though not every submitter) has made detailed submissions on the planning scheme and seeks to uphold parts of the planning scheme. Sometimes, the reasons for these disappointing decisions are the strength of the expert evidence, or flexibility in the planning scheme skilfully argued by the developer. However, in other cases, disappointing results can be traced back to a lack of strong State policy on environmental issues where the system is lagging behind community values. For example of deficits in State policy, there is no State Planning Policy on climate change or on biodiversity in general. There is however legislative scope for Judges considering impact assessable development applications in the Court to consider and give weight to issues such as climate change that may not have been addressed in the relevant planning instruments or even in the list of issues by parties. I base that comment on the purpose of the *Integrated Planning Act* 1997 which aims

¹⁹ *Land Far Pty Ltd v Brisbane City Council and Karawatha Forest Protection Society* No. BD 3534 of 2004.

²⁰ *Jimbelung Pty Ltd v Beaudesert Shire Council & Ors* [2005] QPEC 032. The Appeal was filed on 17 April 1998 then notices of election lodged. The next step in the litigation by the Appellant was taken on 25 February 2005 when the developer's lawyers lodged an application for directions. By that time some members of the multiple respondents by election had died, a number of members of the Friend of Mount Tambourine Mountains Association Inc. had expended considerable energy on other major planning projects relating to the Mountain and the regulatory regime had changed. However Judge Alan Wilson granted the Appellant leave to proceed with the appeal under r389 Uniform Civil Procedure Rules.

²¹ *King v Charters Towers City Council* [2003] QPEC 036.

to achieve ecological sustainability²², the definition of “impact assessment”²³ which requires a broad consideration of the impacts of development by the decision maker and on the role of the Court in making a fresh decision in relation to the development application before the Court.

Improvements to the Court Process to Benefit Community Litigants

In conclusion, here are some proposals for making things better for community litigants in the Planning and Environment Court:

Getting to Court

- Reduce the number of development applications in the system so the community has a more realistic chance to consider and if necessary appeal on development applications²⁴.
- Restore Legal Aid and increase resources for Queensland public interest environmental and planning cases.

Court Process

- Proceed with Court appointed experts but ensure community litigants are not priced out of Court.
- Improve the Court website to include an information paper on the Court for self-represented litigants, including information on costs.
- Provide each self-represented litigant with a copy of the information paper and require Appellants to give a copy of the information paper to each submitter when serving the Notice of Appeal.
- Keep updated a Community Litigants Handbook²⁵ containing detailed advice.
- Continue with and strengthen active public interest community legal services - Environmental Defenders Offices.
- Set timeframes pertaining to court processes, such as directions timetables or time to serve the Notice of Appeal under the IPA, so as to relate to valid needs of submitters, not just developers’ insistence on a speedy process.
- Courts to take a hard line against harassment and intimidation of self-represented litigants by solicitors.

Decision-making and Outcomes

- Invite the Court to consider the purpose of the IPA, the definition of impact assessment and the nature of the merit hearing where appropriate in impact assessable development applications on appeal. This is so the Court may explore and give weight to issues such as climate change that may not be dealt with in the planning documents or even the issues of the parties.

²² s1.2.1 IPA.

²³ Dictionary IPA:

impact assessment means the assessment (other than code assessment) of—

(a) the environmental effects of proposed development; and

(b) the ways of dealing with the effects.

²⁴ Above n 14.

²⁵ Above n 18.

- Urge the State government to produce strong State policies on important issues such as biodiversity and climate change.

MURRI COURTS – AN EMPOWERING PROCESS?

Neha Chhatbar
Student, The University of Queensland

Neha is studying a combined Arts/Laws degree, majoring in Political Science. She participated in the Magistrates Work Experience Program in 2006 and is currently WATL Secretary.

In this essay, I argue that an Indigenous political critique of some of the experiences of Aboriginal peoples in relation to restorative justice and the Murri Courts is encapsulated by the following words of Goldberg:

The more ideologically hegemonic liberal values seem and the more open to difference liberal modernity declares itself, the more dismissive of difference it becomes and the more closed it seeks to make the circle of acceptability.¹

Although liberalism has declared itself open to Aboriginal difference through the Murri Courts and restorative justice, in reality, both are a form of co-optation and an invitation to Aboriginal peoples to enter the liberal circle of acceptability, without opening the circle to a different circle of acceptability. This occurs in three ways. Firstly, superficial changes are made to the mainstream court system, in a declaration of openness to and accommodation of Aboriginality, yet the fundamental nature of the mainstream legal and criminal justice² systems do not change, as Aboriginal law remains unrecognized by European law. This is a continuation of the colonisation process of non-recognition of the worth of Aboriginal values and laws, through an inclusionary, rather than exclusionary, racist practice. Thus, I argue that proponents and opponents of Murri Courts share the same objectives and their proposed processes achieve the same outcomes. Secondly, liberalism, through its claim that restorative justice constitutes a pre-modern and Indigenous form of justice, is an appropriation of Indigenous cultures through the essentialisation of actual Aboriginal cultures and laws. This ‘essence’ of so-called Indigenous forms of justice is appropriated so that liberalism can declare itself open to Aboriginal difference, whilst avoiding the need to actually open the liberal circle of acceptability to Aboriginal values, paradigms and laws. Finally, in order to complete its masking of the falsity of its declaration of openness, liberalism denies the historical and systemic causes of disproportionately high rates of Aboriginal imprisonment, blaming individuals instead. Before arguing these three points, I will briefly explain what restorative justice and the Murri Courts are, as well as mainstream Australia’s perspectives of the two.

¹ David Goldberg, *Racist Culture: Philosophy and the Politics of Meaning* (1993) 6-7.

² Note that the term ‘criminal justice’ is ironic, as the criminal justice system is deployed as a tool of oppression by the colonial state. Furthermore, the term ‘justice’ is not value neutral. Rather, it is commonly understood in the context of the values of liberalism - such as autonomy, rights and individualism - and can differ significantly from the notion of ‘justice’ in Aboriginal philosophies.

It has been argued that restorative justice is a pre-modern form of justice. As a pre-modern form of justice, it is associated with Indigenous people – who are regarded as possessing civilisations and cultures which pre-date modernity.³ Another primary feature of restorative justice, which is said to make restorative justice effective in reducing re-offending, is ‘reintegrative shaming’ - the term used by Braithwaite to describe the positive effects of shaming criminal offenders in the context of a society which is communitarian in nature.⁴ Restorative justice is thus said to be an apt form of justice for Indigenous communities, because authority and decision-making in Indigenous communities is thought to be communitarian and cooperative in nature, rather than individualistic and adversarial.⁵ Restorative justice practices have therefore been adopted specifically to apply to Indigenous peoples in Australia, New Zealand and Canada.

In Queensland, restorative justice commenced in 2002 in the form of the Murri Courts.⁶ Murri Courts are sentencing courts for Aboriginal peoples and for Torres Strait Islanders who have pleaded guilty to an offence which can be tried summarily in the Magistrates Courts, and who have a reasonable likelihood of receiving a prison term for their offences.⁷ Murri Courts for adults are held in Brisbane, Rockhampton, Mt Isa and Townsville, and a Murri Court sits in the Childrens Court in Brisbane, Caboolture, Townsville and Rockhampton.⁸

Restorative justice involves the participation and exchange of information between those most directly affected by the offender’s behavior.⁹ Three core elements are present: victim reparation; offender responsibility and rehabilitation; and community support.¹⁰ Murri Courts are not full restorative justice practices, according to McCold’s conception of what restorative justice entails, as the victim of the criminal offence does not participate in the sentencing process. Nevertheless, Murri Courts are a form of restorative justice because the Aboriginal community is drawn into the process through the involvement of Elders and Aboriginal Justice Advisory Groups. Murri Courts also embody the notion of restorative justice because of their objective of increasing the participation and presence of Aboriginal offenders¹¹ in the sentencing process. This is said to be achieved by making the Aboriginal person feel more comfortable at the hearing through the use of less formal English, the presence of a support member for the Aboriginal offender, the non-wearing of the robe by the Magistrate, and the seating of the Magistrate and Elders with the Aboriginal offender at an oval table, rather than separately and at a height.¹²

³ Kathleen Daly, ‘Resorative Justice: The Real Story’ (2002) 4 *Punishment and Society* 55, 61-62.

⁴ John Braithwaite, *Crime, Shame and Reintegration* (1989) 4, 14.

⁵ Daly, above n 3.

⁶ Department of Justice and Attorney-General, ‘*Review of the Murri Court: Have Your Say*’, (2005) Department of Justice and Attorney-General <www.justice.qld.gov.au/courts/pdfs/MurriCourtReview.pdf> at 1 May 2007.

⁷ Queensland Courts, ‘Magistrates Court Annual Report 2002-2003’, (2003) Queensland Courts <<http://www.courts.qld.gov.au/publications/annual/mag2002-2003.pdf>>, at 1 May 2007.

⁸ Department of Justice and Attorney-General, ‘The Murri Court’, (2006) Department of Justice and Attorney-General <www.justice.qld.gov.au/courts/pdfs/C11MurriCourt.pdf> at 1 May 2007.

⁹ Daly, above n 3.

¹⁰ Ibid.

¹¹ People who have offended against the law of the state of Queensland will be referred to as ‘Aboriginal offenders’ in this essay, with an acknowledgment that they are being punished for offending against a system and set of laws brought to the Australian continent by British colonisers.

¹² DJAG, above n 6.

A right-wing, exclusionary racist perspective of restorative justice and Murri Courts is that there should be no accommodation of the cultural differences between Aboriginal peoples and non-Aboriginal peoples whatsoever. Murri Courts, according to this view, constitute more favorable treatment of Aboriginal peoples than of non-Aboriginal peoples.¹³ Other grounds on which Murri Courts are opposed is that they supposedly provide a softer option for Indigenous offenders and sentencing options are ill-defined.¹⁴

The contrary perspective is that cultural accommodation by the mainstream criminal justice system is a means of reducing disproportionately high rates of Aboriginal imprisonment.¹⁵ For instance, reconnecting offenders to their communities and formalising the authority of Elders are regarded as important means of ensuring that social control is exercised over offenders.¹⁶ Consequently, by supposedly enabling 'reintegrative shaming' to take place, Murri Courts are regarded as effective in reducing re-offending.¹⁷ Murri Courts are also considered an effective way in which to reduce high rates of Aboriginal imprisonment because Magistrates hand down alternate sentences to imprisonment, and because re-offending, breaches of court orders, and failures to attend court hearings are supposedly reduced.¹⁸

Additionally, due to the involvement of Aboriginal Elders and Aboriginal Justice Advisory Groups, Murri Courts are regarded as an implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC'). This is because RCIADIC recommended greater involvement of Aboriginal peoples in the criminal justice system, as a means of empowering Aboriginal peoples and allowing¹⁹ them self-determination.²⁰ Cunneen also argues that increasing negotiation and consultation with Aboriginal peoples in the development of restorative justice schemes is in accordance with the principle of self-determination.²¹ Blagg similarly assumes that empowerment of Aboriginal peoples can be achieved by increasing the control and power of Aboriginal peoples over the

¹³ Daniel Briggs and Kate Aunty, 'Koori Court Victoria – Magistrates' Court (Koori Court) Act 2002', (Paper presented at the Australian and New Zealand Society of Criminology Conference, Sydney), 1.

¹⁴ Ibid; DJAG, above n 6; Luke McNamara, 'Indigenous Community Participation in the Sentencing of Criminal Offenders: Circle Sentencing' (2000) 5 *Indigenous Law Bulletin* 9.

¹⁵ DJAG, above n 6; Natalie Parker and Mark Pathe, 'Report on the Review of the Murray Court', Department of Justice and Attorney-General

<<http://www.courts.qld.gov.au/publications/articles/magistrates/ANZSOC%20conference%202006.pdf>> at 30 May 2007, 23.

¹⁶ Tom Calma, 'Customary Law in Sentencing and Changes to Tenure Arrangements on Communally Owned Land' (Presented at the Indigenous Legal Issues Forum 35th Annual Legal Convention, Canberra, 2007); Annette Hennessy, 'Indigenous Sentencing Practices in Australia' (Presented at International Society for Reform of the Criminal Law Conference: Justice For All – Victims, Defendants, Prisoners and Community, Brisbane, 2006) 5-6.

¹⁷ Ibid; Parker and Pathe, Above n 15, 23; Helena Wright, 'Hand in Hand to a Safer Future: Indigenous Family Violence and Community Justice Groups' (2004) 26 *Indigenous Law Bulletin* 17-18.

¹⁸ DJAG, above n 6.

¹⁹ The very idea that Aboriginal people must be 'allowed' self-determination is a reflection of the skewed balance of power, whereby non-Aboriginal systems dominate and are imposed upon Aboriginal ones.

²⁰ DJAG, above n 6.

²¹ Chris Cunneen, 'Community Conferencing and the Fiction of Indigenous Control' (1997) 30 *Australian and New Zealand Journal of Criminology* 293, 295.

criminal justice processes which affect them.²² In this paper I argue that these views in favor of restorative justice and the Murri Courts constitute inclusionary racism. I also argue that the views of proponents and opponents carry the same objectives and achieve the same outcomes.

Both proponents and opponents of restorative justice and the Murri Courts speak from within liberal philosophical thought. They recognize Aboriginal peoples only in so far as they are within the liberal circle of acceptability or are capable of being incorporated into the circle. As Brigg and Murphy state, the only difference between the left and the right is 'process'.²³ Proponents favor Murri Courts for Aboriginal offenders, while opponents are against a different sentencing process for Aboriginal peoples. However, the objective of both groups is the same – maintenance of the fundamental values underlying the legal and criminal justice systems. The outcome of the different processes favoured by proponents and opponents is also the same – non-recognition of Aboriginal peoples as Aboriginal peoples.

Murri Courts are a declaration by the mainstream of the openness of liberalism to difference, but in reality, the liberal circle of acceptability remains closed to Aboriginal difference. Murri Courts are proudly regarded by governments and by Aboriginal peoples and non-Aboriginal peoples within the mainstream as displaying cultural sensitivity, openness and flexibility to Indigenous cultures through the accommodation of Indigenous differences.²⁴ It is true that at a surface level, a token level of openness is displayed though some acknowledgement of Aboriginal difference - through the inclusion of Elders at the table, the preparation of a pre-sentence report by Aboriginal Justice Advisory Groups, and the use of less formal language for the benefit of the Indigenous offenders. However, the liberal circle of acceptability remains closed to Aboriginal values and ways of thinking: it 'shies away from any fundamental philosophical or structural change, opting instead for a mechanism that is able to absorb new ideas and new ways of approaching certain issues within the already existing structure'.²⁵ In Murri Courts, Aboriginal peoples are still sentenced under the laws of a white system, by an authority figure who is placed there by the white system, and in a court room established under the white system. Murri Courts do nothing to overturn the imposition of a European system of law on pre-existing Aboriginal systems, but rather, are a perpetuation of the existing system. Thus, while Murri Courts provide Aboriginal peoples with slightly more room to move within the mainstream system, they are 'still bound to another power's order'.²⁶ Consequently, contrary to common views that Murri Courts are a means of empowerment for Aboriginal peoples, Murri Courts are a continuation of the process of disempowerment which commenced from the arrival of European colonisers.

The history of colonization in Australia from 1788 onwards is characterized by non-recognition of the value and worth of Aboriginal cultures, belief systems and legal

²² Harry Blagg, 'A Just Measure of Shame: Aboriginal Youth and Conferencing in Australia' (1997) 37 *The British Journal of Criminology* 481, 483.

²³ Morgan Brigg and Lyndon Murphy, 'Whitegoods: Despite All the Rhetoric There Has Been Little Recognition of the Way in Which Different Cultural Frameworks Should Set Political Goals and Aspirations' (2003) 67 *Arena Magazine* 30.

²⁴ Daly, above n 3; Calma, above n 16.

²⁵ Lyndon Murphy, *Who's Afraid of the Dark? Australia's Administration in Aboriginal Affairs* (Masters Thesis, The University of Queensland, 2000) 8-9.

²⁶ Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (1999) xiii.

jurisdiction.²⁷ From the outset of colonisation, the coloniser's law was imposed on Aboriginal peoples, to the exclusion of Aboriginal laws. Even so, 'there are many indications that Aboriginal customary laws and traditions continue as a real controlling force in the lives of many Aborigines'.²⁸ Although Aboriginal law continues to be enforced in Aboriginal societies - an example being the jurisdiction of the Yolngu clans of northeastern Arnhem land over certain disputes - the formal existence of Aboriginal laws and jurisdiction remain unrecognized by the mainstream legal system. Murri Courts are a continuation of the colonisation tool of non-recognition, as the laws which are enforced in the Murri Courts are the laws of the coloniser society. Aboriginal peoples are not recognized as Aboriginal peoples through participation in the Murri Courts because their values, beliefs and laws are excluded.

Non-recognition of Aboriginal peoples has occurred in Australia's history through both inclusionary and exclusionary racist practices. Inclusionary racism performs non-recognition through the inclusion of Indigenous people in the criminal justice system and other mainstream Australian systems, while exclusionary racists engage in non-recognition through the exclusion of Aboriginal peoples. Murri Courts, promoted as a means of Aboriginal empowerment to be contrasted with previous practices of exclusionary racism, are an example of inclusionary racism. Inclusionary racism is characterized by cultural or internal assimilation, and institutional assimilation. Cultural or internal assimilation is the adoption of a mindset by Aboriginal peoples whereby they reject Aboriginal culture, values and ideas to adopt those of the coloniser, in the belief that the latter are superior – in other words, the 'colonisation of the mind'.²⁹ 'Institutional assimilation refers to the incorporation of the minority group into the institutions and organizations of the dominant society' – the Indigenisation of service delivery.³⁰ By *appearing* to be open to Aboriginal difference, Murri Courts invite Aboriginal peoples to participate in mainstream institutions, which are informed by the values and philosophy of liberalism, rather than Aboriginal values and ideas. As Murphy and Brigg observe, the encouragement by the left of Aboriginal self-determination is a more successful tool of assimilation because Indigenous people are co-opted to enter the liberal circle of acceptability.³¹

Another means by which Aboriginal peoples are incorporated into the liberal circle of acceptability, while the circle itself remains closed to difference, is through liberal modernity's essentialisation and appropriation of Indigenous culture. Restorative justice is a means by which liberal modernity essentialises Indigenous culture, in order to remake it recognizable to the mainstream. By imposing a recognizable structure and order upon Indigenous culture, Indigenous differences can be incorporated into the mainstream structure without requiring fundamental changes to this structure. This process is named 'Orientalism' by Blagg. As stated by Blagg, 'Orientalist discourses are, primarily, powerful acts of representation that permit Western/European cultures to contain, homogenise and consume "other" cultures'.³² By the transplantation of restorative justice from Canada and New Zealand to

²⁷ Murphy, above n 25, 5-6.

²⁸ Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* (1986) 30.

²⁹ Murphy, above n 25, 9, 54.

³⁰ *Ibid.*

³¹ Murphy and Brigg, above n 23, 31.

³² Blagg, above n 22, 483.

Australia - on the ground that it is an Indigenous model of dispute resolution - Indigenous cultures are essentialised and differences between Indigenous groups are not recognized.³³ Consequently, the application of restorative justice to all Aboriginal groups in Australia may not be compatible with the values and culture of some or all groups.

For instance, a primary feature of restorative justice is communication between the offender and victim. However, some Aboriginal groups in Australia isolate the offender and attempt to ensure that the victim and offender do not meet.³⁴ Furthermore, proponents of restorative justice contrast it with retributive justice. However, spearing and other forms of physical punishment are used in Indigenous cultures – punishments which are associated with a retributive model of justice.³⁵ Proponents of Murri Courts and restorative justice also argue that both these processes use ‘reintegrative shaming’ to reduce reoffending. The assumption underlying the encouragement of the use of ‘reintegrative shaming’ by Aboriginal communities is that the communities should take responsibility for the enforcement of whitefella’s law. But as Murphy has pointed out, the ‘Two Laws’ technique used in some Aboriginal communities means that these Aboriginal communities may not agree with the mainstream that they share responsibility for the enforcement of law and order in relation to issues such as alcohol abuse and petrol sniffing.³⁶ This is another way in which the concept of restorative justice fails to take into consideration Aboriginal laws, cultures and beliefs. The concept that restorative justice is universally applicable to Indigenous communities is also consistent with liberalism’s concern to conceptualise in terms of homogenous universals, rather than to deal with difference and specificity.³⁷ Thus, the claim that restorative justice is an Indigenous form of justice, which can be contrasted with liberal modernity’s practice of retributive justice, masks the fact that the concept of restorative justice is also a creation of the western liberal system.³⁸ This claim is a means by which liberalism can declare itself open to difference without actually needing to open the liberal circle of acceptability to a different circle.

The final way in which liberalism ensures that it need not open the circle of acceptability to Aboriginal difference is through the non-recognition of historical and structural causes of high rates of Aboriginal imprisonment. For liberalism, history is an irrelevant context.³⁹ The social issues which Aboriginal peoples face are understood to be the result of non-Aboriginal irrationality or Aboriginal deficiency, rather than a history of non-recognition and colonialism and a continuation of the two in the present-day power structure. Murphy identifies the policy of non-recognition of ‘Aboriginal peoples as Aboriginal peoples’ as the ultimate cause of the symptoms present in Aboriginal communities today.⁴⁰ Similarly, Alfred states that the symptoms present in Indigenous communities in Canada ‘can all be traced to this

³³ Daly, above n 3, 63-65; McNamara, above n 14, 5-6.

³⁴ Cuneen, above n 21, 301.

³⁵ Daly, above n 3.

³⁶ Lyndon Murphy, ‘Restorative Justice: Is It a New Strategy For Old Ideas?’, (Paper Presented at the Caxton Legal Centre Conference on Restorative Justice, Brisbane, 1999) 10.

³⁷ Blagg, above n 22; Goldberg, above n 1, 4.

³⁸ Ibid; Daly, above n 3.

³⁹ Goldberg, above n 1.

⁴⁰ Murphy, above n 25.

power relationship, to the control of Native lives by a foreign power'.⁴¹ However, for liberalism to identify non-recognition and colonialism as the causes of the high rates of Indigenous imprisonment would be for it to fundamentally critique itself.

In order to avoid a fundamental re-examination of its hegemonic values, liberalism attributes blame to Aboriginal peoples for symptoms such as high rates of incarceration. The assumption behind the Murri Courts is that the defect or problem lies inherently in Indigenous people, but that mainstream society will patronizingly *tolerate* these 'defects' by 'generously' making accommodation for them in order to facilitate their assimilation. For example, because the English of Aboriginal peoples may be 'Aboriginal English', the use of legal jargon in the Murri Courts is avoided. Because there is no fundamental change to the legal system itself, what is suggested to Aboriginal and non-Aboriginal peoples is that the problem lies with Aboriginal peoples, rather than the system, the philosophy of liberalism which informs the system, or the policy of non-recognition practiced from the time of colonization.⁴² An alternative to blaming the Aboriginal individual is to blame high rates of incarceration on the irrationality of non-Aboriginal individuals; for instance, through police officers targeting Aboriginal peoples to a greater extent than non-Aboriginal peoples.⁴³ As stated by Goldberg, for liberalism, 'racist expressions are generally reduced to personal prejudices of individuals, to irrational appeals to irrelevant categories'.⁴⁴ By ignoring systemic and historical causes of high rates of Aboriginal imprisonment, and by blaming the individual, liberalism negates the need to open itself to an Aboriginal circle of acceptability.

Through the Murri Courts and restorative justice, Aboriginal peoples are invited to step inside the liberal circle of acceptability. However, the liberal circle never allows itself to intersect with another circle, as this would mean opening its boundaries to difference and to the questioning of its own hegemonic values. This paper has discussed three ways in which Murri Courts and restorative justice ensure that the liberal circle of acceptability remains closed to a different circle. Firstly, Aboriginal law remains unrecognized by European law. Secondly, Aboriginal cultures and laws are essentialised and appropriated for incorporation into the mainstream criminal justice system. Finally, historical and systemic causes of disproportionately high rates of Aboriginal imprisonment are disregarded. Until liberalism loosens its hegemonic control and opens the circle of acceptability to intersection with a different circle, 'initiatives' such as the Murri Courts and restorative justice will continue to disempower, rather than empower, Aboriginal peoples.

⁴¹ Alfred, above n 26.

⁴² Murphy, above n 25, 51-52.

⁴³ Blagg, above n 22, 494; Cunneen, above n 21, 483.

⁴⁴ Goldberg, above n 1, 7.

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MAGISTRATES' WORK EXPERIENCE PROGRAM

Each year, WATL offers their members the opportunity to participate in the Magistrates' Work Experience Program. In 2007, WATL received a vast number of applications with the following students selected to participate in the Program:

- Louise Bell
- Yii Fen Tan
- Kavita Paw
- Rhian Ward
- Karen Dodds
- Wylie Nunn

The participants spent one day a week for 10 weeks with a Magistrate, assisting with administrative and research tasks and sitting in on court sessions. WATL would like to thank the following Magistrates for offering their time to support the Magistrates' Work Experience Program in 2007:

- Mr Michael Halliday
- Ms Barbara Tynan
- Ms Joan White
- Ms Wendy Cull
- Mr John Lock
- Ms Anne Thacker

We would also like to thank Chief Magistrate Marshall Irwin and Narelle Kendall for their ongoing support of the Program.

A requirement of the Work Experience Program is that participants submit an essay that focuses on an issue that arose as part of their experience. The Editors would like to thank Clare Cappa from the TC Beirne School of Law for her continuing support in assisting with the adjudication of the essays.

The following pages contain the essays submitted by this year's winner and runner-up.

PRIORITISING THE PURPOSES OF SENTENCING

Yii Fen Tan

Student, The University of Queensland

Yii Fen is studying a combined Arts/Laws degree majoring in Psychology and International Relations. She participated in this year's Magistrates' Work Experience Program, and was awarded first place in the Essay Competition. The following paper was delivered at the APB 2007 by Thy Nguyen, Co-Editor of Pandora's Box 2007.

Introduction

The laws and practices relating to the sentencing of offenders is unquestionably one aspect of the judicial system that receives much consideration. Indeed, entire legal journals¹ and conferences² have been dedicated to the study of sentencing. This claim to attention is justified, for sentencing is an area of the law that raises a multitude of complex and often controversial issues. By those vested with the responsibility and power to impose sentences, sentencing has been described as highly difficult and often unpleasant work.³ One issue which contributes to many of the difficulties faced by those involved in sentencing is that of the purpose – or perhaps more accurately, the purposes – of sentencing. Although it is generally accepted that several purposes of sentencing exist,⁴ there is no consensus as to whether all of them are achievable or equally worth pursuing. This, by extension, raises the question of whether the purposes of sentencing should be prioritised, and it is this issue which forms the basis of this commentary. In considering whether prioritisation of sentencing purposes should be encouraged either legislatively or as a matter of sentencing policy, both the benefits and difficulties involved in prioritising sentencing purposes will be reviewed. This will be followed by an attempt to suggest a potential alternative to prioritising the purposes of sentencing.

The Purposes of Sentencing

With the exception of sentencing for Commonwealth offences, Australian jurisdictions have consolidated sentencing regimes, most of which explicitly list the purposes for which a sentence may be imposed.⁵ Whilst there are differences in

¹ See, eg, the International Journal of Punishment and Sentencing.

² See, eg, the Conference on Sentencing: Principles, Perspectives and Possibilities, Canberra, 10-12 February 2006.

³ The Hon Sir Gerard Brennan, 'The High Court and the Sentencing Environment' (Paper presented at the Conference on Sentencing: Principles, Perspectives and Possibilities, Canberra, 10-12 February 2006); Geraldine Mackenzie, 'The Art of Balancing: Queensland Judges and the Sentencing Process' (2003) 28 *Alternative Law Journal* 288, 289.

⁴ See, eg, Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999).

⁵ See, eg, *Crimes (Sentencing) Act 2005* (ACT) s 7; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1995* (NT) s 5; *Penalties and Sentences Act 1992* (Qld) s 9; *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Sentencing Act 1991* (Vic) s 5.

terms of wording and order within these lists, as well as with more purposes in some of the regimes than others, there are five common sentencing purposes that can be discerned. They are: punishment, rehabilitation, deterrence, denunciation and protection of the community.

The first of these common purposes, punishment, refers to the idea that an offender should receive a sentence that causes some kind of loss to the offender because he or she deserves to suffer for the wrongdoing.⁶ The rehabilitation purpose, on the other hand, is about the offender receiving a sentence that will attempt to address and correct the reasons behind the offending, in hopes of facilitating a pro-social change in the offender that will ultimately discourage the commission of future offences.⁷ As for the sentencing purpose of deterrence, there is a two-fold rationale. Firstly, there is general deterrence, which views sentencing as a means of discouraging other people from offending. This is based on the theory that people will be less inclined to commit offences by learning from examples of past offenders that negative consequences follow offending. Secondly, there is specific deterrence, which refers to the idea that sentenced offenders will themselves be discouraged from re-offending, as they will have learned first-hand that negative consequences will follow.⁸ The fourth common sentencing purpose of denunciation is the purpose by which the sentence acts as a way of communicating both to the offenders and the public that the unlawful behaviour is unacceptable to society and will not be tolerated.⁹ Finally, the purpose of protection of the community refers to the notion of imposing a sentence that will have the effect of shielding society from harm.¹⁰

Underlying these sentencing purposes are two broader sentencing theories, generally referred to as the utilitarian theory and the retributive theory.¹¹ In brief, the utilitarian theory proposes that the preferable sentencing options are those which will lead to the most beneficial outcomes for the greatest number of people, and it is this which justifies the sentencing option exercised. Rehabilitation and deterrence closely align to this theory, as the beneficial outcomes of decreased offending and reformed offenders are the intended results of sentences implemented for these purposes.¹² In contrast, the retributive theory suggests that the basis for the sentencing option exercised is that the wrongdoing itself justifies censure and punitive action, irrespective of whether any beneficial outcomes will be produced.¹³ The sentencing purpose of punishment is the one most consistent with this theory. There is, of course, some overlap of purposes between these two theories. Deterrence, for example, falls within the utilitarian theory but is also linked to the retributive theory, given that a sentence that seeks to punish offenders is likely to have the effect of showing others that there are negative consequences to offending, thereby discouraging such behaviour.

⁶ 'Sentencing' (2005) 55 *Hot Topics* 1, 6; Mirko Bagaric, 'Sentencing: The Road to Nowhere' (1999) 21 *Sydney Law Review* 597; Fox and Freiberg, above n 4, 204.

⁷ 'Sentencing', above n 6, 9; Mirko Bagaric, 'Strategic (and Popular) Sentencing' (2006) 2 *International Journal of Punishment and Sentencing*, 134; Fox and Freiberg, above n 4, 212.

⁸ 'Sentencing', above n 6, 8; Bagaric, above n 7, 136; Fox and Freiberg, above n 4, 207.

⁹ 'Sentencing', above n 6, 9; Fox and Freiberg, above n 4, 215.

¹⁰ Fox and Freiberg, above n 4, 216.

¹¹ See, eg, Bagaric, above n 6.

¹² *Ibid.*

¹³ *Ibid.*; Fox and Freiberg, above n 4, 204.

The Benefits of Prioritising the Purposes of Sentencing

It is noted that there are some sentencing regimes where the protection of the community is explicitly treated as a ‘paramount consideration’, such as s 3(b) of the *Penalties and Sentences Act 1992* (Qld). However, beyond such statements, the purposes of sentencing are not specifically prioritised. Similarly, there are no stipulations within the sentencing regimes that require all of the purposes of sentencing to be considered when a sentence is given. This means that the judicial officers who impose sentences may consider (or refrain from considering) any of the sentencing purposes that they deem appropriate. The lack of prioritisation has drawn some criticism from commentators such as Bagaric¹⁴ and Fox and Freiberg.¹⁵ One significant line of reasoning advanced by such critics is that the very nature of some of these purposes places them at odds with one another and that prioritisation is, as such, needed for clarity.

Another reason cited for the prioritisation of sentencing purposes is that doing so would give more structure to what is, at this point in time, largely unfettered judicial discretion. Whilst judicial discretion is strongly defended¹⁶ and is considered to be essential in the task of imposing sentences, the argument nevertheless exists that more structured judicial discretion could lead to greater transparency and perhaps greater consistency in sentencing. Furthermore, if people know exactly what to expect and are assured that approaches to sentencing are consistent, it is possible that confidence in, and understanding about, the judicial system and its officers will also increase. This benefit is important to mention, given that one aim of most consolidated sentencing regimes is to promote better understanding by the public of how and why sentences are imposed.¹⁷ Prioritising sentencing purposes would therefore be one step further in this direction, particularly given that the purposes of sentencing may be interpreted as conflicting in nature.

It has also been suggested that sentencing itself as an area of law could benefit from prioritisation of sentencing purposes. By promoting greater transparency and consistency in sentencing, and thus a better understanding of sentencing practices, faster and more systematic progress in the development of sentencing laws, policies and practices would be facilitated.¹⁸ For all of these reasons then, it would appear that prioritising the purposes of sentencing would – at least theoretically – be advantageous. However, this inference needs to be balanced with consideration of the practical difficulties involved in attempting any such prioritisation.

The Difficulties in Prioritising Sentencing Purposes

It is safe to say that the biggest obstacle in attempting to prioritise the purposes of sentencing is identifying exactly how the purposes should be prioritised. Sentencing affects so many different types of offenders and follows the commission of all manner

¹⁴ Bagaric, Above n 6.

¹⁵ Fox and Freiberg, above n 4, 203.

¹⁶ See, eg, Margaret McMurdo, ‘Why the Sentencing Discretion Must be Maintained’ (Speech delivered at the Australian Lawyers Conference, Aspen Colorado, 13 January 2000).

¹⁷ See, eg, *Penalties and Sentences Act 1992* (Qld) s 3(g), *Sentencing Act 1997* (Tas) s 3(f), *Sentencing Act 1991* (Vic) s 1(v).

¹⁸ Bagaric, above n 6.

of offences. Therefore, given the range of circumstances that might exist in any given case, it is difficult to say unequivocally that any one view is more qualified than any other.

The inability to settle decisively on any one particular purpose as *the* purpose to pursue is evident in many ways. Over the last several decades, different sentencing purposes have influenced sentencing laws and practices in varying degrees. It has been noted, for example, that the decade through the 1960s saw a turn away from rehabilitation models of sentencing in favour of more punitive approaches, only to swing back to increasing support of rehabilitative sentencing options.¹⁹ Such shifts in attitude have also been accompanied by other developments that have had an impact on sentencing, such as the growing importance of victims' views within the legal system. With sentencing practices continually evolving like this, it is extremely difficult to expect that any prioritisation of sentencing purposes will be effectively implemented or endorsed for the long-term. This difficulty is further illustrated by the fact that even amongst the most learned legal minds, there is no agreement as to which sentencing purpose deserves elevation to the status of being the *most* important. At least this much is evident through a variety of Australian cases, each of which have cited different purposes (including some not discussed here) as being the most important in sentencing.²⁰

Another aspect of this issue that merits discussion is that there are both positive points and negative points about each of the sentencing purposes, and it is unclear if, for any one of these purposes, the positive points outweigh the negative points to a degree sufficient to warrant prioritisation. The sentencing purpose of rehabilitation is one instructive example of this. For its positive points, rehabilitation is a utilitarian purpose that is more forward-looking in proactively trying to make constructive changes which, if effective, will result in decreased offending. One of its negative points, however, is that it is still unclear whether rehabilitative sentencing options are in fact effective.²¹ It might also seem rather counter-intuitive – and perhaps politically unpalatable – to prioritise rehabilitation as a sentencing option. This assertion has two bases: firstly, that the public has tended to view the legal system as being too soft on offenders;²² and secondly, the fact that rehabilitative sentencing options are likely to be perceived as costing valuable taxpayer dollars that could be better spent elsewhere. With other pros and cons attached to the other sentencing purposes as well, it is difficult to evaluate whether there is any purpose for which the positive points outweigh the negative points enough to justify priority in any sentencing purpose hierarchy. That some of the sentencing purposes necessarily overlap only further complicates such evaluations.

There are also some practical issues that could potentially arise if a policy of prioritised sentencing purposes were to be introduced. The way in which the

¹⁹ Arie Freiberg, 'Sentencing: Trends and Issues' (2005) 86 *Reform* 7; Arie Freiberg, 'Twenty Years of Changes in the Sentencing Environment and Courts' Responses' (Paper presented at the Conference on Sentencing: Principles, Perspectives and Possibilities, Canberra, 10-12 February 2006).

²⁰ See, eg, Bagaric, above n 6.

²¹ See, eg, Bagaric, above n 7, 134; Andrew von Hirsch and Lisa Maher, 'Should Penal Rehabilitationism Be Revived?' in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (1998) 26, 27.

²² Judge J M Robertson, 'A Short Sentence: Public Opinion and Criminal Sentencing' (Speech delivered at a public lecture, Brisbane, 31 August 2005).

sentencing purposes are prioritised might raise questions about the sentencing options available within existing sentencing regimes in terms of whether there are sufficient options that are geared towards achieving the purposes prioritised. That is, to ensure that prioritised purposes are achievable at a practical level, thought must be given to whether the means to carry out those purposes exist. If they do not, then there could also be implications for the financial support and resources allocated to sentencing options, or even for the introduction of more innovative sentencing options. Prioritising the purposes of sentencing might, therefore, be the catalyst for other sentencing practice changes. Although the legal community should not shy away from change where it is necessary or beneficial, neither should it engage in change without an adequate appreciation of all of the repercussions that could follow.

Overall, with so many complexities involved in attempting to prioritise the purposes of sentencing, it is submitted that the utility of any such scheme must be overwhelming to justify the effort. As an alternative to this, however, it is suggested that one possible approach could be to implement and communicate a sentencing policy whereby judicial officers consider *all* of the sentencing purposes in the aggregate. This alternative will now be discussed.

An Alternative to Prioritisation: Consideration of All of the Purposes of Sentencing

The sentencing regimes generally list various factors that *must* be considered when imposing a sentence on an offender.²³ While many of these factors are in some way related to the purposes of sentencing, it remains the case that they should not be seen to constitute an exhaustive account of the only matters relevant to the purposes of sentencing. This, combined with the fact that it is not strictly necessary for judicial officers to consider all of the sentencing purposes discussed here, means that there is some scope for disparity in approaching the task of sentencing. Such disparity is likely to result as a function of judicial discretion. It is not the intention here to criticise judicial discretion. However, it is suggested that by mandating consideration of *all* of the purposes of sentencing collectively, a more structured approach to sentencing might emerge.

As part of this proposal of considering all sentencing purposes, judicial officers would be required (either legislatively or as a matter of policy) to turn their minds to every sentencing purpose, as well to the sentencing purposes in the aggregate, when imposing a sentence on an offender. This is not to say that the sentencing option ultimately exercised would have to be justified with reference to every purpose. Indeed, judicial discretion would be maintained for the matter of deciding in each individual case how much weight to apportion to each purpose. However, in ensuring that every purpose is at least considered, there is a likelihood that there will be (even if only marginally) more clarity in sentencing practices than exists with the current approach of a list of purposes that lacks any meaningful guide as to its use.

It is conceded that this proposal is far from perfect and, in fact, a number of issues need to be addressed. The first issue concerns whether this suggestion of considering all sentencing purposes would, in practice, be useful. The vast majority of judicial

²³ See, eg, *Penalties and Sentences Act 1992* (Qld) s 9(2).

officers probably already consider all the purposes when they impose sentences. Additionally, Mackenzie²⁴ noted from her time interviewing Queensland judges on their sentencing views that judges did not consider a list of sentencing purposes to be particularly useful. This therefore begs the question of whether encouraging consideration of all the sentencing purposes would even be helpful to those whose job it is to sentence. Despite this, however, it is contended that the clarification afforded by specifying that all sentencing purposes must be considered would be a benefit to the public in terms of greater transparency and a clearer understanding of why judicial officers sentence as they do. For instance, if people understand that rehabilitation is viewed to be as legitimate a purpose as the punishment purpose, then it might go some way to mitigating the impression that the legal system is too soft on offenders. Encouraging consideration of all the purposes would also circumvent the difficulty in trying to determine which sentencing purpose – if any – is superior.

Another potential problem with this suggestion of considering all sentencing purposes is whether it is possible to sufficiently reconcile purposes that are interpreted to conflict with each other. Much more detailed discussion would be required to determine if such reconciliation is viable. However, as a starting point, it is instructive to note that some commentators have made suggestions which support this. Hudson,²⁵ for example, has noted the possibility of sentencing options that comprise rehabilitative methods in the *content* of a sentence, but that also punish offenders in terms of the *quantity* of a sentence. The challenge, though, remains in exploring whether there are (or can be) sufficient sentencing options that utilise the best aspects of such conflicting purposes.

At the present time, what is clear is that the purposes of sentencing are not only varied, but also accompanied with many complexities as to whether they should be prioritised. It has been suggested in the latter half of this commentary that encouraging all purposes of sentencing to be considered collectively may be an alternative approach to take, although this proposal too is burdened with its own complexities. Perhaps further developments will be made in the future as initiatives such as Sentencing Advisory Councils have a greater role to play in the landscape of Australian sentencing.

²⁴ Mackenzie, Above n 3, 290.

²⁵ Barbara Hudson, 'Beyond Proportionate Punishment: Difficult Cases and the 1991 Criminal Justice Act' (1995) 22 *Crime, Law and Social Change* 74, as cited in Sue Rex, 'A New Form of Rehabilitation?' in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (1998) 34, 39.

QUEENSLAND DRUG COURTS: A CONTEMPORARY AND INNOVATIVE RESPONSE TO DRUG-RELATED CRIME

Wylie Nunn
Student, The University of Queensland

Wylie is currently studying a combined Arts/Laws degree with an Arts major in History and International Relations, and has an interest in International Law and Human Rights. Wylie participated in this year's Magistrates' Work Experience Program, and was awarded runner-up in the Essay Competition.

Introduction

Drug Courts initiate a process of social change through providing participants with an avenue to access a drug and crime free existence. Drug Courts look to the relationship between drug dependency and crime and seek to provide long-term solutions to the problem of drug dependency through rehabilitation rather than pursuing conventional forms of punishment such as imprisonment. The program has developed as a response to the ineffectiveness of mainstream sentencing options to address the escalating and recurring problem of drug related crime. As a result, Drug Courts represent an innovative and contemporary approach to criminal justice in this field through their holistic approach towards the rehabilitation of Drug Court participants. This paper will analyse the theoretical underpinnings of Drug Court and look to the effectiveness of the Court in addressing link between drug dependency and crime.

Procedural Position of the Court

'Holistic treatment of the person as well as the problem.'

Clare Cappa¹

The Drug Court Program in Queensland was established in 2000 and is governed by the rules and procedures outlined in the *Drug Court Act 2000* (Qld) (hereafter referred to 'the Act'). Pursuant to the Act, Queensland Drug Courts (operating out of Southport, Beenleigh, Ipswich, Townsville and Cairns) aim to reduce the level of drug related crime through promoting the rehabilitation of participants rather than pursuing punishment through mainstream sentencing options such as imprisonment. This allows participants to break away from what Magistrate Costanzo describes as the 'drug-crime-jail cycle'.² Through the promotion of rehabilitation, the Court aims to reduce the level of criminal activity and the health risks associated with drug

¹ Clare Cappa, 'The Social, Political and Theoretical Context of Drug Courts' (2006) 32(1) *Monash University Law Review* 145 at 157.

² Magistrate John Costanzo, *Final Report on the South-east Queensland Drug Court Pilot*, (2003) Queensland Courts 2.

dependency, aid in the re-integration of Drug Court participants into the community, and alleviate pressure on the court and prison systems.³

While participating in the Drug Court program, participants undertake an intensive drug rehabilitation order (IDRO). The original sentence imposed (a term of imprisonment), is suspended while participants undertake the IDRO.⁴ In order to be eligible to undertake an IDRO, participants must, pursuant to the Act, be classified as drug dependent and such dependency must have contributed to the commission of the offence/s.⁵ The offender needs to plead guilty to the relevant offence and the relevant offence cannot be of a violent or sexual nature as classified under the Act.⁶ The IDRO imposes numerous conditions on the offender's rehabilitation⁷ and is completed within three phases.

On the success or failure to complete the IDRO, the magistrate reassesses the original sentence imposed upon the participant and evaluates the level of their participation in the Drug Court program. The magistrate must then vacate the IDRO and impose a final sentence.⁸ For successful participants who graduate from the Drug Court program, the final sentence will generally be less than the original sentence and will not involve a term of imprisonment. It will usually involve a period of probation, viewed by the Drug Court team as added support for the participant.

The progress of the participant is monitored by the Drug Court team throughout the term of the IDRO. The Drug Court team is multi-disciplinary consisting of representatives from Queensland Police, the Department of Corrective Services, Queensland Health and Legal Aid.⁹ At the Southport Drug Court, representatives from the residential treatment facilities usually attend Drug Court meetings. These meetings are held every morning to discuss the progress and rehabilitation of the individual participants. The team advises the magistrate on the progress of each participant and they discuss the appropriate course of action to take in furthering each participant's rehabilitation.¹⁰ This allows the court to maintain a close and coordinated focus on each participant. These team meetings distinguish Drug Courts from traditional criminal courts as the prosecution and defence generally work together in assessing the rehabilitation needs of each individual participant.

The appropriate findings of the Drug Court team meetings are subsequently repeated in open court. Participants are required to attend regular court reviews where they are expected to converse with the Magistrate about their progress and learning.¹¹ These court reviews are more frequent within the earlier phases of the program (usually weekly) and become less frequent as participants progress through the Drug Court program. This close and individual monitoring by the court is supplemented by participants being subject to frequent and random drug tests in the form of supervised

³ *Drug Court Act 2000* (Qld) s3.

⁴ *Ibid* s20.

⁵ *Ibid* s6.

⁶ *Ibid* s7.

⁷ *Ibid* s22 for core conditions within the IDRO and s23 for additional requirements that can also be imposed.

⁸ *Ibid* s36.

⁹ *Ibid* s36A (3) defines 'Drug Court team'.

¹⁰ *Ibid* s36A – The Drug court magistrate must consider the views of the Drug Court team.

¹¹ Magistrate John Costanzo, above n 2, 55-56.

urine analysis administered through the Department of Corrective Services and Queensland Health.¹²

Throughout the term of the IDRO, there are numerous mechanisms used by the Drug Court to encourage compliance with the order. The use of rewards and sanctions is the primary way in which the Drug Court compels its participants to comply with the conditions of the IDRO.¹³ Formal rewards are outlined by the Act.¹⁴ Rewards may include but are not limited to a decrease in the level of supervision of the offender by the court, a decrease in the amount of community service or monetary penalty owed under the IDRO, and a change in the educational or treatment programs the participant is undertaking.¹⁵ Other less formal rewards that have become apart of the drug court process include applause, allowing a participant to be reviewed early for phase graduation, and subsequent graduation between phases.¹⁶ These rewards encourage participants to continue with their rehabilitation efforts, and through positive reinforcement, aid in developing self esteem and a healthier self-image.¹⁷

Sanctions are also imposed to recognise a breach of any condition of the IDRO. Formal sanctions are outlined by the Act.¹⁸ Sanctions can include but are not limited to an increase in supervision by the Drug Court team or any other person, a term of imprisonment and an increase in the level of monetary penalty or community service owed under the IDRO.¹⁹ Less formal sanctions have also become useful tools of the Drug Court to highlight to a participant that their behaviour on the program has been unsatisfactory or needs refocussing. The use of essay writing is frequently employed. Participants are asked by the Magistrate to a write an essay on a topic determined by the Drug Court team depending on the needs of the participant. The Magistrate will then read the essay and may request it to be read allowed in open court asking the participant to reflect upon the meaning of the essay topic.²⁰

Theoretical Underpinnings of The Drug Court

'It is the spirit and not the form of the law that keeps justice alive.'

Earl Warren

U.S. Supreme Court Justice, 1953-1969 ²¹

The Drug Court, through its processes and procedures, represents a contemporary and innovative approach to addressing the problem of drug related crime. Drug Courts operate within the theoretical paradigm of 'therapeutic jurisprudence'. This involves

¹² See above n 3.

¹³ Ibid s30.

¹⁴ Ibid s31.

¹⁵ Ibid s31.

¹⁶ Magistrate John Costanzo, above n 2, 28-29.

¹⁷ Ibid (For further analysis of the role of rewards in the Drug Court program and their effect on Drug Court Participants).

¹⁸ See above, n 3, s32.

¹⁹ Ibid s32

²⁰ Magistrate John Costanzo, above n 2, 29-32 (For a further analysis of the role essay writing and other sanctions play in the Drug Court program and their effect upon participants in the Drug Court program).

²¹ Earl Warren cited at http://www.washingtonmonthly.com/archives/individual/2006_05/008875.php at 28 August 2007.

'an approach to criminal justice which seeks to use the court process to enhance and support the possibilities for the treatment of offenders'.²² Drug Courts therefore, unlike traditional criminal courts, recognise the link between drug dependency and crime and seek to provide alternative long-term solutions to the problem of drug dependency. These long-term solutions include court driven rehabilitation rather than pursuing punishment through mainstream sentencing options such as imprisonment.

This therapeutic approach towards drug related crime is evidence of the emergence of broader attitudes towards the concepts and causes of 'drug use' and 'drug related crime'. Cappa notes society's approach towards the problem of 'drug use' has changed.²³ 'Drug use' is no longer simply viewed as an act that is wrong and deserves punishment.²⁴ It is now accepted that 'Drug users are a danger to both themselves and to the community, and it is therefore in the interests of all that the addiction be treated'.²⁵ It is this wider conceptualisation of 'drug use' that has given rise to the development and support for Drug Courts.

The changing attitudes towards the problem of 'drug use' has also been coupled with the realisation that imprisonment is largely ineffective in addressing the recurring and escalating problem of drug related crime. As Indermaur and Roberts note:

While an interest in justice/retribution will maintain the popularity of imprisonment for violent and persistent offenders, there is an opportunity to present potentially more effective responses for those offenders who are not violent and who appear to have 'personal problems'.²⁶

These changing perceptions of 'drug use', 'drug related crime' and the realisation that mainstream sentencing options do not effectively address the problem of drug related crime, and it has been the impetus to find new and effective alternative forms of justice to address such contemporary issues. This has given rise to the development of 'problem orientated courts'.²⁷ Problem-orientated courts, as Freiberg explains, represent a move 'away from a focus on individuals and their criminal conduct to focus on examination of offenders' problems and solutions to them'.²⁸ Drug Courts are therefore problem-orientated courts as they seek to rehabilitate offenders and address the causes of their drug addiction and subsequent criminal offending, rather than simply punishing offenders through mainstream sentencing options such as imprisonment. As Cappa contends:

The Drug Court process deals with the causes of the crime which has been committed instead of accepting the traditional compartmentalisation of justice

²² David Indermaur and Lynne Roberts, 'Drug Courts in Australia: The First Generation' (2003) *Current Issues in Criminal Justice* 136 at 137.

²³ Claire Cappa, 'The Social, Political and Theoretical Context of Drug Courts' (2006) 32(1) *Monash University Law Review* 145 at 149.

²⁴ *Ibid* 149.

²⁵ *Ibid* 149.

²⁶ David Indermaur and Lynne Roberts, 'Drug Courts in Australia: The First Generation' (2003) *Current Issues in Criminal Justice* 136 at 137.

²⁷ See above, n 23, 163-164; Arie Freiberg, 'Drug Courts: Sentencing responses to drug use and drug-related crime' (2002) 27(6) *Alternative Law Journal* 262.

²⁸ Arie Freiberg, 'Problem-orientated courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 9.

which renders the underlying causes of the crime someone else's responsibility.²⁹

McGlone, like Cappa, views the emergence of Drug Courts as evidence of broader changes within the attitudes towards the administration of criminal justice in Queensland. McGlone notes that:

There has been an increased interest in the rehabilitation of offenders, a search for alternative forms of justice, an acceptance by judges and magistrates of their managerial role and the development of a 'problem solving' orientation by police, courts and other agencies.³⁰

As a result, Drug Courts reflect a contemporary and innovative approach to criminal justice in this field. Through promoting rehabilitation over incarceration, the Drug Court is a problem-orientated court looking to solve the causes of drug dependency and subsequent criminal offending within participants. The administration of justice in a therapeutic way reflects contemporary attitudes and beliefs towards 'drug use' and 'drug related crime' and its wider contextual relationship to society as a whole.

Rehabilitation: The Individualisation of Justice

'Knowledge is power.'

Sir Francis Bacon³¹

English author, courtier, & philosopher (1561 - 1626)

The Drug Courts, as discussed above, are problem-orientated therapeutic courts that seek to rehabilitate drug dependant participants rather than simply punishing them through mainstream sentencing options. Rehabilitation of participants is achieved through an individually focussed court process. This individualisation of justice focuses on the needs of the individual and seeks to equip individual participants with the knowledge and resources to access a drug and crime free existence.

Throughout the course of the Drug Court program, participants receive individualised court supervision, unprecedented in traditional punitive justice. This individualised attention allows the rehabilitation process to be 'participant specific'; that is, the Drug Court rehabilitation program which is tailored to meet the needs of the individual participants themselves. This allows the problems of individual participants to be dealt with in a forum of professionals (Drug Court team) who will be responsive to their needs.

A variety of rehabilitative programs are on offer to Drug Court participants that seek to equip participants with tools to develop new coping mechanisms and healthy behavioural patterns that are independent of drugs and crime. Such programs include substance abuse relapse prevention programs, cognitive skills development programs,

²⁹ Cappa, above n 23, 146.

³⁰ Daniel McGlone, 'Drug Courts – A departure from adversarial justice' (2003) 28(3) *Alternative Law Journal* 136.

³¹ Sir Francis Bacon, *Religious Meditations, Of Heresies, 1597* cited at <http://www.luminarium.org/sevenlit/bacon/> at 28 August 2007.

anger management programs and ending offending and life skills programs.³² These programs are coupled with less formal requirements such as the submission of diary entries to the Magistrate on court review dates. These diary entries force participants to communicate with themselves providing participants vital insight into their own recovery. As participants progress into the later phases of the Drug Court program, they are encouraged to gain employment or undertake courses to further their education. This encourages participants to continue their self-development in various areas of their life and successfully reintegrate themselves back into the community in a meaningful way.

Through providing such rehabilitation programs and close support, participants are equipped with the knowledge of where to get help when they are considering relapse or feel that their personal circumstances are spiralling out of control. One of the major findings outlined by Magistrate Costanzo in the *Final Report on the South-East Queensland Drug Court Pilot* was that unsuccessful participants whose programs had been terminated were voluntarily returning to treatment services attended whilst on the Drug Court program.³³ Furthermore, many participants who did not complete the program noted that despite failing to graduate they had made positive gains from their participation and now had the knowledge of treatment services available to them should they wish to access help.³⁴

Drug Courts as a result, initiates a process of social change by providing participants the knowledge of and access to the resources to commit to a drug and crime free existence. Through the individualised court process the Drug Court is able to be responsive to rehabilitation needs of each individual participant and provide them with the appropriate resources to further their personal development. As a result, participants are provided with the knowledge and the subsequent power to build new lives independent of drugs and crime.

Success of The Drug Court

*'To your Honour I owe my life. You have made me feel like a person again.
I respect you and the Drug Courts greatly.'*
Former Drug Court Graduate³⁵

Despite the relatively short existence of Drug Courts in Queensland there have been numerous quantitative studies analysing the success of the drug court program in addressing the link between drug dependency and crime.³⁶ To date, studies generally indicate that Drug Courts have been successful in addressing the problem of drug related crime.³⁷ Magistrate Costanzo noted that through participating in the Drug Court program, participants gained more knowledge and skills than they would have

³² Magistrate John Costanzo, above n 2, 81-82.

³³ Ibid ix.

³⁴ Ibid.

³⁵ Magistrate John Costanzo, above n 2, 137.

³⁶ A quantitative analysis of the statistical success of Drug Court is beyond the scope of this article for further information see Toni Makai and Keenan Veraar, *Final Report on the South East Queensland Drug Court* (2003) Australian Institute of Criminology; David Indermaur and Lynne Roberts, 'Drug Courts in Australia: The First Generation' (2003) *Current Issues in Criminal Justice* 136.

³⁷ Magistrate John Costanzo, above n 2, vii- xi (For a description of the benefits noted by Magistrate Costanzo).

had they been imprisoned³⁸. An obvious consequence is that the participants would be more likely to access rehabilitation services in the future.³⁹ Other significant benefits to both the participants themselves and society as a whole included, the birth of drug free babies as a result of participation in the Drug Court program, reduction in the likelihood that children would follow the same drug dependent lifestyle of their parents and increased self esteem and motivation for further education and employment amongst Drug Court participants.⁴⁰

Despite the success of the Drug Court in addressing the link between drug dependency and crime, the Drug Court has attracted criticism.⁴¹ Critics of the Drug Court program challenge the procedures and processes of the Drug Court and ask whether procedural fairness can be achieved within the Drug Court framework.⁴² Fox, for example, questions the quality of consent given by a defendant in choosing to undertake the Drug Court program.⁴³ He argues that no real choice is given to a defendant who is in the situation of deciding between imprisonment and the program.⁴⁴ Furthermore, it is arguable that the likelihood of imprisonment, should an offender choose to plead not guilty to the relevant offence (thus disqualifying them from the Drug Court program) is a burden on the accused's right to trial and an unwarranted inducement upon an accused's decision to plead guilty. The function of the Drug Court team has also been criticised.⁴⁵ It is argued that the defence is in a position of tension between the wishes of the participant and the rehabilitation goals of the Drug Court team. As McGlone notes, 'One wonders at the position of defendant in this process and questions whether the defendant's position is adequately represented when it runs contrary to professional assessments'.⁴⁶

Such criticisms are useful in highlighting that drug courts have, as McGlone notes, 'an inbuilt tension that is not easily resolved'.⁴⁷ This tension exists between the strict procedural rights of the accused and the substantive benefits conferred upon the accused by having access to the Drug Court program. Although the criticisms are procedurally justified, the Drug Court, through its eligibility requirements, seeks to help and rehabilitate the 'hard-end' offenders whose 'last chance' may be the Drug Court program itself. It in itself confers upon participants a unique opportunity to commit to change in a forum which will be responsive to the needs of the individual participant's themselves. As indicated to date the Drug Court program has been successful in rehabilitating participants and has contributed to society at large through effectively addressing the link between drug dependency and crime. Such substantive benefits outweigh strict procedural tensions outlined by commentators such as McGlone.

³⁸ Ibid x.

³⁹ Ibid

⁴⁰ Ibid

⁴¹ Cappa, above n 23, 174-175; Morris Hoffman, 'Commentary: The Drug Court Scandal' (2000) 78 *North Carolina Law Review* 1437.

⁴² McGlone, above n 30, 139.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid 138.

⁴⁶ Ibid 139.

⁴⁷ Ibid 140.

Conclusion

The Drug Court program represents a contemporary and innovative approach towards addressing the link between drug dependency and crime. Drug Courts operate within the theoretical paradigm of therapeutic jurisprudence and seek to provide long-term solutions to the problem of drug related crime through court driven rehabilitation rather than seeking punishment through mainstream sentencing options such as imprisonment. The program through its individualised court focus is 'participant specific' and is therefore responsive to the individual rehabilitation needs of each participant. The program successfully addresses the link between drug dependency and crime through its holistic treatment of Drug Court participants and has, as a result, provided an effective alternative sentencing option for drug dependant offenders.

