Dissent.

Equality in Australia

Sydney University Law Society Social Justice Journal

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Social Equality

Editor's Foreword

Each year, the Editor-in-Chief decides upon a theme for Dissent. Upholding its mantle as a social justice journal, Dissent in the past has canvassed a wide variety of legal, political and social issues both domestic and international. In 2010, I chose the theme 'Equality in Australia' in order to highlight the plight of Australians in need. After the global financial crisis, and in light of the serious problems facing Australians in education, healthcare and the workplace, I felt that Sydney University law students should take the time to focus on problems at home. This was not to malign the tremendous problems suffered by those overseas, but rather to highlight that the inequalities suffered in our own backyard are sobering and deserve scrutiny. Furthermore, there are practical avenues of redress available to us as law students in solving domestic problems. In alignment with the identified social justice goals of the Sydney University Law Society for 2010, Dissent has focussed on illuminating issues facing indigenous Australians, female Australians, new Australians and Australians struggling to get by on a day-to-day basis. Through this illumination, the Editorial Board hopes to light a spark under Sydney Law students; to encourage every student to find what he or she is passionate about, and to work for social justice in that area.

The meeting at which the Editorial Board discussed the received proposals was a highlight of the process for me. When the Board was initially considering which experiences of equality might be explored under this broad theme, we underestimated the creativity and zeal with which the authors would approach the topic. We received articles that dealt with attempts to legislate equality, articles that dealt with experiencing equality, and articles that focussed on how we conceive of equality for our newest Australians. The diversity of articles and the passion with which the authors addressed their areas of interest made editing Dissent in 2010 a real pleasure.

Thanks must go to Gilbert + Tobin for their generous support without which we would not have been able to produce Dissent. This journal allows law students who are passionate about improving the welfare of others to share this interest with their peers, their faculty and the broader community. Learning from one another is fundamental to the student experience, and Dissent provides a valuable forum for students to share their social justice interests unhindered by year groups or course limitations. As law students we are privileged by education, and taking time to think about how we can best use our skills for the benefit of other Australians is good practice for the rest of our careers. From each article, I learned something new about equality in Australia. By dint of this editorial experience, I feel inspired by my peers, impressed by the challenge of rising to the aid of those in need, and hopeful that we can and will do better by our fellow citizens.

Anna Bennett B.A.(Hons)/LL.B. IV
Editor-in-Chief 2010

Dean's Foreword

I congratulate the Editor-in-Chief and the Editorial Board of Dissent for taking up the theme of 'Equality in Australia'.

There is little doubt that while Australia remains 'the lucky country' and has emerged from the Global Financial Crisis in a relatively strong position, many within our society continue to face poverty, discrimination at work, poor educational opportunities and a lack of access to health care and adequate housing. This edition considers contemporary aspects of inequality such as the treatment of women in the workplace, problems of social housing, prosecuting 'people smugglers' and access to education for refugee children. The authors have addressed the concerns of a number of groups who struggle to achieve equality in Australian society, such as immigrants and their children, indigenous groups, and the rights and interests of animals. The authors have also considered the legal validity and policy value of some of the solutions that have been adopted by governments. The Northern Territory Intervention is perhaps the most notable example of government problem-solving that raises more legal issues of inequality than it solves.

There is one aspect of equality that we, at the University of Sydney, can help to address. We can do something about the opportunities for students from disadvantaged social and economic backgrounds. As you will be well aware, selection into the Sydney Law School is highly competitive. While, as Dean, I value the high academic standards of our students, it is probable that many applicants with significantly lower ATAR scores will also make first class lawyers and valuable contributors to society. With the leadership and support of our Vice-Chancellor, Dr Michael Spence, the Law School will make available some places each year to a wider socio-economic cross-section of students. The Sydney University Law Society is also planning to encourage applicants from rural schools to consider law as a career. Your suggestions for building pathways for admission to the law school will be most welcome.

It is an important aspect of legal education at the Sydney Law School that we develop a commitment to social justice as part of our professional lives. Pro bono legal advice work is not just an 'add on' when we have some spare time, but an integral part of our working week. I believe that Dissent plays an inspiring role in keeping the social justice flame alive and I encourage you all to read the articles that it features.

Best wishes,

Professor Gillian Triggs
Dean of Sydney Law School

A Stacked Bench

The Judicial Appointments Process

Dennis Mak
(BCOM/LL.B.II)

The Australian judicial appointments process is a complex and controversial issue that continues to raise questions of equality and transparency. Although recent reforms undertaken by the Labor government have been a positive step in improving the previous process of informal consultation and pure executive discretion, there are signs that these reforms do not go far enough. Not only are these reforms limited to federal judicial appointments, they also fail to fully address issues of diversity and public accountability in judicial appointments. The inclusion of a diversity criterion and the establishment of an independent Judicial Appointments Commission are two viable solutions to these limitations. The federal government must build upon the relative success of recent reforms if a fair, transparent judicial appointments process is ever to be fully realised.

What about the High Court?

The Rudd government introduced a number of reforms to the judicial appointments process in 2008 that have 'rendered untenable the continuation of pure executive discretion as the means by which judges are appointed'.[1] These changes provide four main areas of reform: first, wider consultation with interested bodies; second, the placement of public notices to seek expressions of interest by way of application/nomination; third, the notification of selection criteria; and fourth, the appointment of Advisory

Panels to interview and short-list suitable candidates.[2]

The reforms apply to judicial appointments within the Federal Court, Federal Magistrates Court and Family Court but do not extend to appointments made to the High Court. This means that High Court Justices are appointed with a process that has been in place since its first judges were appointed in 1903. In her 2008 article on the Attorney-General's plan for judicial appointments, Laura MacIntyre points out that it is the same clandestine system of discretionary 'consultation' that saw Attorney-General, Robert McClelland, promising greater transparency and broader consultation in respect of the appointment of senior public servants.[3] In High Court appointments, there is no formal process of statutory consultation other than the general requirement to consult with State Attorneys-General in accordance with s 6 of the *High Court of Australia Act 1979* (Cth). Excluding the applicability of these reforms to the High Court seems 'entirely illogical given the meritorious justifications for a more transparent and formalised approach to appointments in other federal courts'.[4] The federal government must extend these reforms to the High Court, or otherwise risk undermining public confidence and exposing the appointments process to inequality and political influence.

The need for greater diversity

Despite broadening the consultative process and advertising judicial positions, recent reforms do not provide any formal recognition of diversification as criteria to be used by the Attorney-General's Department.[5] It is no secret that judges often fit into a very specific archetype that is male, appointed in their early fifties and products of a private education system. A recent national survey of Australian judges verified mainstream perceptions of the Australian judiciary. It was found that 96.4 per cent of all Australian judges come from an Anglo-Saxon or Celtic background and that 59.3 per cent identified themselves as Christian.[6] Women, despite accounting for around 50 per cent of admissions to the legal profession in New South Wales,[7] only represented 21.63 per cent of appointed judges.[8] This raises a serious question as to whether candidates are provided with equal opportunity to seek judicial appointment. Former Attorney-General Michael Lavard

argues that this 'indicates some bias in the selection process, or at least a failure of the process to identify suitable females and persons of different ethnic backgrounds as candidates for judicial appointment'.[9] Australia's Solicitor-General, Stephen Gageler, acknowledges that 'at any time there would be fifty people in Australia quite capable of performing the role of a High Court justice'. But beyond meeting the essential attributes, 'considerations of geography, gender and ethnicity all can, and should, legitimately weigh in the balance'.[10] Traditionally, the judiciary has been predominately selected from leading members of the Bar, raising questions as to whether the selection process overlooks non-barristers as suitable candidates. Professional experience as an advocate has generally been regarded as the primary qualification for judicial office. However, as Justice Ronald Sackville argues, this does not consider the fact that 'many judicial officers with little or no forensic experience prior to appointment have proven to be excellent judges at both trial and appellate levels'.[11] Chief Justice Gleeson has acknowledged that, even with forensic experience, the increasing specialisation of legal practice means that many barristers find, upon judicial appointment, that much of the work they are required to do is outside their experience'.[12] The insistence on forensic experience also disregards the effectiveness of judicial education programs. Gleeson notes the disparity of interest between judicial appointments and progress in judicial education which has been a 'notable, if largely unrecognised, achievement'.[13] It is a little known fact that, since 2002, Australia has had a dedicated National Judicial College. Although the recent judicial reforms have widened the consultative process and advertised positions, it certainly has not widened the 'gene pool' to include non-barristers, who would undoubtedly enhance the quality of the bench with a varied legal perspective. All nine appointees to the Federal Court since 2008 have been members of the Bar.

To address these issues, a diversity criterion would need to be introduced. Critics argue that consideration of diversity would compromise tests of merit. But, as Gleeson stipulates, diversity is not inconsistent with merit. In the United Kingdom, the Judicial Appointments Commission has a statutory

duty to make appointments 'solely on merit' whilst also 'hav[ing] regard to the need to encourage diversity in the range of persons suitable for selection for appointments' (*Constitutional Reform Act* (c.4), s 64(1)).[14] In his 2006 speech titled simply, 'Why We Should Have a Judicial Appointments Commission', Geoffrey Davies argues that the failure to introduce a diversity criterion will continue to reinforce homogeneity in the judiciary and inherent bias within the appointments process.[15] A diversity criterion is needed not just to improve the equality of judicial selection, but also to broaden the perspective of the Bench.

A Judicial Appointments Commission

Transparency and political accountability are also necessary to ensure the appointments process is fair and equitable. Recent reforms by the Labor government have markedly improved the secretive and informal processes that previously determined federal judicial appointments. However, these new processes need to be secured through creation of a Judicial Appointments Commission (JAC), independent of the Attorney-General's Department.[16] Justice Sackville notes that significant differences between the constitutions of Australia and the United Kingdom – s 72 of the Australian Constitution, for example, states that the Executive alone makes judicial appointments – render the English reforms (*Constitutional Reform Act 2005* (UK)) untenable in Australia.[17] Unlike the United Kingdom, an Australian JAC should have an advisory role only.

The importance of establishing a JAC should not be underestimated even if it is to have an advisory role. Under the current system, the Attorney-General's Department remains tight-lipped about the composition of Advisory Panels, the extent of consultation or the specific criteria used to select federal judicial appointees.[18] As Davies points out, a fully independent JAC would at least require the government to publicly explain why it has not accepted the recommendations of the Commission.[19] In addition to its practical value, an independent commission would have high symbolic value and restore public confidence in a system once notorious for appointing judicial officers as instances of political patronage. There is broad consensus that a JAC is a logical progression from recent judicial reforms, necessary to protect the

accountability and independence of judicial appointments.

Conclusion

Recent reforms under the Labor government have helped improve the equality of the judicial appointments process. However, reform should not stop here. Current reforms do not apply to High Court appointments and do not provide any formal recognition of the need to increase the diversity of the Australian judiciary. This undermines public confidence in a judiciary that is unrepresentative of the Australian public and a judicial selection process that continues to limit equality of opportunity. The failure to establish a Judicial Appointments Commission means the appointments process is comparatively less transparent and less independent that systems in the United Kingdom and Canada. Although recent reforms have improved the previous system of pure Executive discretion, more needs to be done to improve the equality of the judicial appointments process. □

Better Than A Bill Of Rights

Christine Ernst
(B.E.S.S./LL.B.V)

'The committee recommends that Australia adopt a federal Human Rights Act.'

National Human Rights Consultation Committee (Sept 2009) [1]

'A legislative charter of rights is not included in the Framework.'

Commonwealth Attorney-General Robert McClelland, announcing the Australian Government's Human Rights Framework (Apr 2010) [2]

For many people the launch of a new Human Rights Framework (the Framework) for Australia was tinged with disappointment. The Framework was not of itself objectionable. It introduced a range of laudable measures to protect and promote human rights in Australia. Many of these measures had been recommended by the National Human Rights Consultation Committee. The disappointment was not rooted in what the Framework encompassed, but rather, what it omitted. The Australian Government had unequivocally rejected the mechanism long championed by human rights advocates: a Bill of Rights.

A Bill of Rights had been the key talking point of the National Human Rights Consul-

tation.[3] Approximately 95 per cent of submissions to the Consultation addressed this issue.[4] It was unsurprising, then, that since the government announced that a Bill of Rights was off the table, subsequent initiatives to advance human rights have failed to ignite the public's interest.

It is in this context that an unassuming piece of proposed legislation has quietly slipped into the parliamentary arena. The Human Rights (Parliamentary Scrutiny) Bill is no more than ten sections long. Its impact, however, is potentially far-reaching. The Bill introduces two important mechanisms: first, a 'statement of compatibility' to accompany every new piece of legislation;[5] and second, a Joint Committee on Human Rights to monitor proposed and existing legislation for compatibility with human rights.[6]

Considering human rights from the start

The statement of compatibility has the capacity to shape legislation at its earliest stages of its development. Whenever a new piece of legislation is introduced, the parliamentarian responsible (usually a Minister) will be required to present Parliament with a statement declaring whether or not the proposed legislation is compatible with human rights.

The rationale behind this requirement is simple. Ministers are reluctant to flatly admit that a Bill falls short of human rights standards. The statement of compatibility gives Ministers and departmental officials a strong incentive to consider human rights from the earliest stages of legislative drafting so as to avoid the political fallout associated with explicitly rejecting human rights norms.

The experience of other jurisdictions in respect of similar provisions is cause for optimism. Section 19 of the *Human Rights Act 1998* (UK) requires a Minister to declare whether or not proposed legislation is compatible with human rights. Parliamentarian and acclaimed human rights lawyer Lord Lester QC has observed:

[F]ew, if anyone, in Whitehall or Westminster appreciated just how significant the practical impact of s 19 procedure would be upon the preparation and interpretation of proposed legislation.[7]

As a review of the UK legislation found, statements of compatibility have the important effect of formalising the process by which human rights are taken into account.[8] It encourages departmental officials to consider human rights as a matter of course.

Improving Parliament's literacy in human rights

In addition to the statement of compatibility, the Human Rights (Parliamentary Scrutiny) Bill introduces an important institutional device: a parliamentary Joint Committee on Human Rights (JCHR). The JCHR's mandate will be threefold: to examine Bills and proposed legislative instruments for their compatibility with human rights; to examine existing legislation for compatibility with human rights; and to inquire into any matters relating to human rights referred to it by the Attorney-General.[9]

The justification for parliamentary scrutiny committees is both philosophical and practical. On a philosophical level, oversight by parliamentary scrutiny committees is fundamentally democratic. As the current Legal Adviser to the UK Joint Committee on Human Rights has explained, parliamentary scrutiny provides 'opportunities to enhance the role of politicians and political representatives and democratic institutions'.[10] It thereby helps to ensure that primary responsibility for human rights compliance rests squarely with elected representatives. This addresses the concern frequently raised by opponents, that a Bill of Rights is fundamentally undemocratic because it places too much power in the hands of the judiciary.[11]

On a practical level, the establishment of a JCHR recognises that, without a committee dedicated to monitoring compliance with human rights, Parliament lacks the time and expertise to assess the human rights implications of every piece of legislation.[12] Parliamentary scrutiny committees are also less driven by the political point-scoring that occurs in the Parliament at large; committee members are drawn from the backbenches and often have a particular interest in the subject matter which overrides partisan allegiances.[13]

The experience of the UK Joint Committee on Human Rights suggests that such a committee has the potential to affect meaning-

ful change. An illustrative example is the impact of the UK committee's scrutiny of the Anti-Terrorism, Crime and Security Bill 2001. Shortly after the Bill's introduction, the committee put probing questions to the relevant Minister and issued a report which concluded that the Bill unduly compromised human rights.[14] The Bill was amended to take these concerns into account.[15] The efficacy of this process stands in stark contrast to the passage of similar anti-terrorism legislation in Australia. In the absence of effective human rights scrutiny, the Anti-Terrorism Bill (No. 2) 2005 was rushed through Parliament with minimal debate.[16]

Protecting human rights in the courts

Notwithstanding the advantages outlined above, the Human Rights (Parliamentary Scrutiny) Bill has one obvious limitation. It does not provide a legal remedy for a person whose rights have been violated. The absence of effective remedies for breaches of human rights is of real concern. It is one of the reasons many people advocate a Bill of Rights, which would expressly set out a series of rights that could be enforced by the courts.[17]

Nonetheless, the Human Rights (Parliamentary Scrutiny) Bill does have the potential to strengthen the protection of human rights in the courtroom, albeit in a subtler way than a Bill of Rights. Where legislation is unclear, the *Acts Interpretation Act 1901* (Cth) permits courts to look to certain extrinsic material in interpreting its meaning.[18] If the Human Rights (Parliamentary Scrutiny) Bill were to be passed, this material would include statements of compatibility and reports of the JCHR.[19] In interpreting a piece of legislation that had human rights implications, a court could, for example, take into account a Minister's declaration that the legislation complied with human rights. By doing so, a court would be able to adopt a reading of the legislation that was compatible with human rights standards.

Considering the full range of human rights

The significance of the measures in the Human Rights (Parliamentary Scrutiny) Bill is all the more evident when we consider how broadly the Bill defines 'human rights'. Human rights are defined as encompassing all the rights and freedoms protected in no fewer than seven human rights treaties.[20]

By comparative standards, this definition is far-reaching. UK legislation requires a Minister to assess a Bill's compatibility with only a limited range of expressly enumerated rights (mainly civil and political ones).[21] Similarly, the ACT and Victoria's Bills of Rights contain exhaustive lists of the specific rights that fall within their respective ambits.[22] These lists fall far short of the full range of rights and freedoms recognised by the core international human rights treaties.

Conclusion

Human rights are best protected and promoted when they are an integral part of governmental decision-making. The Human Rights (Parliamentary Scrutiny) Bill is a commendable means of pursuing this goal. It requires Parliament and the Executive take human rights into account in the course of their everyday deliberations.

A corollary of the Bill's democratic credentials is that its success rests upon political will. Our elected politicians must be willing not only to pass the legislation, but also to give it its fullest effect once enacted. Members of the public should encourage their elected representatives to elevate human rights to the top of the parliamentary agenda. By this approach, we can help to realise a vision of a fairer, and more equal, Australia. □

Whose Law?

The Suspension of Customary Law in the Northern Territory

Katherine Tu
(B.A./LL.B. III)

The *Northern Territory Emergency Response Act 2007* (Cth) (the Act) has been subject to much scrutiny since its inception. It was instigated as an attempt to address the problems such as child sex abuse and violence against women that have continually plagued indigenous communities. However, a closer inspection of the Act shows that it has far-reaching consequences that seek to seize the management and control of these communities out of the hands of indigenous Australians and into the hands of the government. Of particular concern is Part 6 of the Act, which prevents the consideration of any form of customary law or cultural practice in matters concerning bail applications or sentences, as per ss 90 and 91.

Of course, the breadth of the Act must be recognised, as it has had other significant provisions such as welfare quarantining that have severely impacted the indigenous communities in the Northern Territory. Indeed the suspended use of customary law is not the only measure that evokes questions of equality and disadvantage with respect to indigenous Australians. However, I will focus solely on the impact of ss 90 and 91 and how this particular Act does nothing to address the issues that prompted the NT Intervention, and more importantly, the effects that the Act has on indigenous Australians and their relationship with the law.

What is customary law?

It is difficult to define customary law. The

2000 New South Wales Law Reform Commission Report entitled 'Sentencing: Aboriginal Offenders', acknowledging that there is no accepted definition of customary law, broadly defines it as constituting a 'body of rules, values and traditions which are accepted as establishing standards or procedures to be followed or upheld.'[1] This difficulty of defining customary law is also compounded by the fact that indigenous law is neither formalised nor codified, as it is reliant on oral traditions.[2] The breadth of customary law is shown through its ability to regulate relationships of kinship, land management and social and economic rights.[3] As a generalisation, the main difference between indigenous customary law and Australian law is that the former is focused on group or community rights and operation, whereas the latter is built on the individual.[4]

One must also note the diversity of indigenous communities within societies and the different laws of each. Modern discourse and commentary about indigenous communities tend to see customary law as uniform when this is certainly not the case.

What does 'equality before the law' mean?

The most prominent objection to the use of customary law is the argument that one law should apply to all people within Australia. It is said that customary law violates fundamental principles of law, which is that everyone should be equal before the law and the law should ensure equal protection of all citizens.[5]

Indeed, the aforementioned principles are cardinal to the operation of law within the democratic liberal society that is Australia. However, this argument suggests a very superficial understanding of what actually constitutes 'equality before the law'. The argument is very much focused on 'formal equality', that is, equal treatment of individuals before institutions such as the law.

The argument evidently has no consideration of substantive, deeper issues of equality. This means looking at the particular position of individuals and not assuming that all individuals are on an equal platform.[6] One does not need a thorough knowledge of Australian history to be aware of the dispossession and mistreatment of indigenous Australians as a result of European colo-

nialism. The imposition of European law is largely responsible for the disadvantage that Aborigines face today. Aborigines were denied recognition and basic political rights such as the right to vote.

As a part of policies of discrimination and assimilation, indigenous Australians were also stripped of their land and the control that they had over economic resources. To this day, many, if not all, existing indigenous communities are not equipped with the basic institutions that are necessary for the welfare of the people and the community's operation.

Indeed one cannot look past the history of extensive discrimination that indigenous Australians have faced, as this is instrumental to the social, political and economic disadvantage faced by these individuals and communities in the present day. Therefore, adhering to this 'equality before the law' principle requires more than assurance of formal equality. It requires the government and society to remedy the situation by installing measures that address this disadvantage.[7] Solely adhering to notions of formal equality means that states of inequality persist. If Australia is serious about addressing the issue, some sort of positive steps must be taken, or an advantage must be offered to indigenous Australians to give them the opportunities and the resources of which they have been deprived in the past.[8]

An initial reaction may be that advantage offered to anyone is unfair and contrary to the promotion of equality. However, differential treatment of individuals or communities is not novel, as it is often employed as a method to remedy past discrimination and mistreatment through measures such as affirmative action in workplaces.

International law also recognises that 'equality before the law' does not necessarily equate to absolute equality.[9] A former judge of the International Court of Justice, Justice Kotaro Tanaka, stated that the differing treatment given to those who are unequal is "not only permitted but required".[10] I argue then, that the only way to address inequality is to recognise disadvantage and to take positive steps to address it.

Although differential treatment is justified, common sense tells us that this con-

cept must be qualified. International law states that the differential treatment must be legitimate and proportionate to the disadvantage.[11] Therefore, the manifestations of differential treatment need to be closely analysed before they are accepted. This was certainly not the case with the Northern Territory Intervention, which was implemented without the necessary consultation of indigenous peoples.[12] These circumstances reinforce the political motivation behind the Intervention. Clearly, this is not a well-designed policy that works to protect these communities.

The suspension of the *Racial Discrimination Act 1975* (Cth) is an example of differential treatment that should not be permitted, and its suspension is now the subject of review. The United Nations Special Rapporteur noted that this policy was and is clearly discriminatory.[13] He also drew attention to the illogical nature of the policy, in that addressing discrimination usually takes the form of 'preferential treatment' rather than the circumscription of the rights of people who have in the past been denied basic human rights.[14] Attempts to eradicate inequality and disadvantage should not involve the stripping of fundamental rights and freedoms, as this is antithetical to the goal.[15]

Customary law and equality

Reinstating the use of customary law is a means by which the value and competency of Aboriginal law can be recognised.[16] Even though this tends to focus on the symbolic importance of recognising customary law, this reason is valid because of the past non-recognition of the law and the fact that it was deemed to be an inadequate form of social organisation and governance. It is true that the suspension of customary law in the Intervention was limited to sentencing and bail applications, and may not have affected the way that indigenous Australians regulate their own social relationships. However, the dismissal of these laws brings to bear more far-reaching consequences for the greater Australian population's perception of the legitimacy of customary law.

Customary law is also a means by which self-determination is asserted.[17] It shows that these communities are capable of operating autonomously and regulating their own affairs according to their values and traditions.[18] This is again important because

of the misconceived view in the past that indigenous peoples were primitive.

More pertinently, the recognition of customary law shines light on the fact that application of the law by the formal, mainstream legal system is neither neutral nor value-free.[19] It reflects the values of its European heritage and the dominant groups within society today.[20] The concept of equality before the law, said to be fundamental to the operation of the law in Australian society, is an attempt to create a façade that the law is impartial in its treatment of all individuals, when this is obviously not the case.[21]

Indeed, the concepts of equality before the law and equal protection are not culturally neutral, and reflect certain beliefs on how the law should operate.[22] One must then ask whether equality is really being achieved when Aborigines are subject to a law that does not necessarily reflect their values and traditions. It is important to recognise here that indigenous Australians did not have the choice of whether they wanted to be subjected to English law, as it was imposed.[23] This makes the application of customary law very different from recognising aspects of a migrant's law in the Australian court system.[24]

Customary law becomes very relevant when one realises that indigenous communities do not have the same contact with the law

that the general population has, and they are often marginalised and detached from, as well as unaware of, legal instruments that may be able to protect their rights and enforce their responsibilities. It is often the case that aspects of customary law govern

communities' operation and therefore customs within indigenous law may mean more to some indigenous Australians.[25]

This is particularly relevant with respect to sentencing. Mainstream sentencing options may not conform to indigenous Australians' notions of punishment and justice. Having the option of customary law allows the courts to choose from a gamut of measures to ensure the delivery of justice. Methods such as circle sentencing (which has in the past been employed with indigenous offenders) have had greater meaning to some offenders, as they may better conform to indigenous notions of what actually constitutes punishment. This may better allow the individual to understand the wrongfulness of their actions and this may be in line with what the community and the victim view as the delivery of justice.

Of course, the obvious objection remains that if customary law is employed, there are instances where the use of customary law would not be seen as 'just'. However, there has never been a blanket application of customary law to indigenous offenders. The court must consider the nature of the offence, and the particular circumstances that surround it (including what is just for the victim/s) and then decide whether the application of customary law is appropriate. Ultimately, the decision is centred on notions of justice, and thus the concern of justice not being delivered is not a valid argument in preventing the operation of customary law.

Obstacles to recognition

The use of customary law has not been without challenge and this has been noted to above. It is important to address the concerns surrounding its application.

Claims labelling the Act as a policy of assimilation and paternalism are not entirely unfounded.[26] As the prevalence of sexual abuse and violence against women in communities prompted the Intervention and the suspension of customary law, it is evident that both the Liberal government responsible for implementing the policy and the following Labor government who have elected to maintain it both view customary law as inconsistent with Australian law.

Even though we now deem the indigenous

policies of the past to be racist and discriminatory, this policy is no different. The suspension of customary law effectively locates indigenous law, as well as indigenous culture, as factors that contribute towards the violence, sexual abuse and disadvantage that Aboriginal Australians face.[27] This seems to parallel the non-recognition of the law of indigenous peoples at the time of European 'settlement' (or 'invasion') in the 18th century, as such law was deemed to be inferior because of its different nature.

In the political domain little, if any, reference is made to the history of dispossession and discrimination against indigenous Australians that is responsible for their current and continuing disadvantage. Certainly, it is not constructive to dwell on the reasons for disadvantage, as it does not provide a practical solution to the problem. However, recognition of the source of disadvantage can conceivably give some sort of indication as to the appropriate steps to take to address the disadvantage and ensure that at least some sort of equality can be delivered to indigenous Australians as a starting point.

I contend that a population that has suffered gross discrimination in the past should not continue to be a victim of a discriminatory policy, which effectively stigmatises indigenous communities and denies them equal treatment before the law and society.[28] The Northern Territory Intervention appears to be a poorly conceived band-aid solution to the history of neglect and lack of basic support and services that have beset indigenous communities.

The rationale behind the Intervention is precisely the reason that the most recent Liberal and Labor governments have been able to gain political acceptance of the policy. As the issues of sexual abuse and violence are so emotive, the government has been able to paint objectors to the Intervention as ignorant of the gross mistreatment of women and children, and unwilling to take bold steps to address the issue.[29] It is only natural that the general population would support the tackling of the gross violation of human rights. However, that does not mean that the Intervention is the only, or indeed the best, way to address the issue.

Even the Report of the Board Of Inquiry Into The Protection Of Aboriginal Children From

Sexual Abuse, released on 30 April 2007, commonly known as 'Little Children Are Sacred', with its stark revelations (purportedly one of the factors that prompted the Northern Territory Intervention), did not recommend the suspension of customary law.[30] Indeed the Report illustrated an attempt to break the all too frequent association that is commonly made between indigenous law and culture and the high level of sexual abuse, as well as the fallacy that customary law is used and accepted as a justification for abuse and violence.[31] In addition, as Professor Larissa Behrendt elucidates, even where indigenous women have spoken out against the possible use of so-called 'customary' law defences that excuse violence and abuse, there has not been the call for the rejection of customary law altogether.[32]

Thus, the policy is poorly justified. This is particularly so in light of the repeated statements by prominent Aboriginal leaders and spokespersons. Mick Dodson, for example, dismisses the allegation that the problems prevalent in indigenous communities are part of indigenous culture.[33] Effectively, all the Intervention does is wrestle control of indigenous communities out of the hands of the people. Perhaps this could be seen as another form of dispossession.

Of course, an argument could be made that the statements of prominent indigenous leaders and spokespersons cannot represent all the indigenous communities in Australia. This is true, given the diversity of customary law. Although it seems very unlikely that abuse and violence are part of indigenous culture, disputes over this are not very constructive. What effectively constitutes a culture is difficult to prove, and this is especially the case with indigenous custom and practices, which are neither fluid nor codified. The difficulty of knowing the culture is also compounded by the fact that we do not often hear the voices and experiences of those who actually live indigenous communities. Those from the dominant groups within society may often be the ones informing the general population about Aboriginal culture, tradition and law.

There is an objection to debating the character of Aboriginal culture because it does not actually address the critics' concerns regarding customary law. Instead, arguments should be focused on the fact that ir-

respective of what one sees as the character of customary law, its application to Aboriginal people in the Australian legal system will be in conjunction with Australia's human rights obligations. Arguments for the rejection of customary law are centred on its operation through the forms of punishment methods such as spearing, and the sanctioning of 'promised marriages', which involve the marriage of minors without their consent.

Of course there have been cases where these issues have come to light, such as the 2003 case of *Hales v. Jamilmira*,[34] which concerned the issue of promised marriage. On appeal, Justice Riley stated that whilst claims of customary law should be recognised, protection of women and children should take precedence.[35]

Evidently, this case has created a stir in the recognition of customary law. Debate has intensified with respect to whether such a case is 'distorted' customary law, used as an excuse by men to evade or mitigate their criminal responsibility, or whether it actually is part of Aboriginal culture.[36]

It seems that the former is the case. Nevertheless, if the use of customary law is qualified to reflect contemporary human rights standards and expectations of the law, there is no persuasive argument against its use.[37] People do not expect punishment to involve the breach of human rights, and they also do not expect law to sanction human rights violations. Some may object to this qualified and piecemeal application of customary law, but this is a means by which the development of customary law can be permitted, as its development has been significantly stifled due to Australia's colonial past, which resulted in the non-recognition of indigenous law.[38]

Even though the above argument is preferred to advance the reinstatement of customary law in the Northern Territory, this does not mean that criticisms regarding the constitution of customary law should not be ignored. Those who have experience of indigenous law should continue to defend it, as it is important to prevent stigmatisation of customary law and promote a positive perception so that its use is generally accepted by society.

Clearly, the arguments advanced to prevent the use of customary law are weak. In fact, its suspension in sentencing and bail applications as a result of the Northern Territory Intervention is harmful. First and foremost, it locates indigenous culture as the source of the continuing problems and secondly, it removes the right of self-management. Government and society need to stop painting customary law as a mechanism that mitigates criminal responsibility.[39] It is instead a means by which the rights of indigenous Australians can and should be recognised.[40] If the problem is sexual abuse and violence within indigenous communities, it seems more apt to strengthen human rights frameworks,[41] provide more resources and work with the communities, rather than circumscribe the right of indigenous Australians to self-determination. It is unclear how customary law should be used and to what extent. However, this paper advocates a reinstatement of customary law in the Northern Territory, and greater debate as to the value of customary law and its relevance in contemporary Australian society. □

Catching The Tricky Fish

The Anti-People Smuggling Act

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The *Anti-People Smuggling and Other Measures Act 2010* (Cth) (*Anti-People Smuggling Act*) which commenced on 1 June 2010, is the latest attempt by the Australian government to take 'tough' action to prevent unauthorised boat arrivals. The Act follows the political rhetoric that people smugglers are 'the scum of the earth',[1] and the recent policy move to suspend processing of refugee claims made by Afghani and Sri Lankan asylum seekers.[2] It represents a significant extension of the government's controversial approach to border control. It is an approach guided by political imperative, that casts the net wide so that innocent and lawful actions may fall within its scope and that increases the risk of Australia's international obligations being contravened.

The stated aim of the *Anti-People Smuggling and Other Measures Act 2010* (Cth) is to strengthen the Commonwealth's anti-people smuggling legislative framework.[3] It does this by amending the *Migration Act 1958* and the *Criminal Code Act 1995* so as to create a new offence of providing 'material support or resources' that aid the commission of a people smuggling offence,[4] and by amending existing people smuggling offences. The Act also broadens the role of ASIO so that it can use its powers to investigate people smuggling activity.

The need to address people smuggling, without overreaching

There is strong recognition under interna-

tional law that people smuggling is a dangerous, criminal trade which states must work to address. The international *Protocol against the Smuggling of Migrants by Land, Sea and Air*[5] (*Smuggling Protocol*), which Australia has signed and ratified, defines people smuggling as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident'.[6] Article 6 of the *Smuggling Protocol* requires states to criminalise specific people smuggling activities when they are committed intentionally, and when the profit requirement is satisfied. The preamble to the *Smuggling Protocol* states that this requirement is motivated by 'concern that the smuggling of migrants can endanger the lives or security of the migrants involved.'[7]

As a large number of submissions to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Anti-People Smuggling and Other Measures Bill 2010 emphasised, the new legislation makes problematic departures from the profit and fault requirements outlined in the *Smuggling Protocol*.[8]

In the Explanatory Memorandum for the new legislation, the removal of the profit requirement is justified as necessary in order to harmonise the people smuggling offences in the *Criminal Code* with those in the *Migration Act* (where the profit element is not required to be proved).[9] In an oral submission given as part of the Senate Inquiry, an officer from the Attorney-General's Department went further in explaining why the profit element should be removed:

people-smugglers can have lots of different motivations, and the motivation will often be profit but it could potentially be something else. It could be that they are interested in settling criminals here.[10]

The issue with the removal of the profit requirement, through changes to s 73 of the *Criminal Code* and ss 232A-233C of the *Migration Act*, is that it broadens the primary people smuggling offence from what was agreed on by the international community in the *Smuggling Protocol*, and transforms its character so that the humanitarian actions of aid organisations and others may fall within its scope. As the Sydney Centre for

International Law stated in their submission to the Senate Inquiry:

Under the Protocol, the profit motive underlying people smuggling is essential in identifying what is regarded as harmful or wrongful about people smuggling: the commercial exploitation of often vulnerable people such as asylum seekers. In contrast, by dispensing with the profit motive, the proposed offence transforms the offence into a more general prohibition on helping anyone (including refugees or persons rescued at sea) to find safety, even for altruistic or humanitarian reasons.[11]

Such concerns were rejected in the Senate Committee's report, with the majority appearing to endorse Senator Parry's suggestion that 'you need a broad net to catch the tricky fish.'[12]

In another departure from the *Smuggling Protocol*, the *Anti-People Smuggling Act* requires only that a person be reckless as to whether their conduct will result in the commission of a people smuggling offence, whereas the *Smuggling Protocol* requires that people smuggling activity shall be established as a criminal offence 'when committed intentionally.'[13] The weakening of the fault requirement is problematic particularly in the case of s 233D of the *Migration Act*, and the equivalent para 73.3A of the *Criminal Code*, which make it a criminal offence, punishable by 10 years imprisonment, to provide 'material support or resources' that facilitate people-smuggling. The scope and likely operation of the offence is therefore difficult to ascertain, making it hard for persons to know in advance the legality (or otherwise) of their actions. In addition, the divergence between the fault requirements in the *Smuggling Protocol* and those outlined in the domestic legislation might be constitutionally problematic if the legislation relies upon the treaty implementation limb of the external affairs power for its validity. As the High Court noted in *Victoria v Commonwealth*:

Deficiency in implementation of a supporting Convention is not necessarily fatal to the validity of a law; but a law will be held invalid if the deficiency is so substantial as to deny the law the character of a measure implementing the Convention or it is a deficiency which, when coupled with other

provisions of the law, make it substantially inconsistent with the Convention.[14]

In the alternative, the government would need to rely upon (a combination of) other heads of power to support the legislation. The immigration power (including its implied incidental component) and the geographic externality limb of the external power would appear the most likely in this regard.

The need to ensure that Australia meets its protection obligations towards asylum seekers

The changes proposed in Part 2 of the Act dramatically strengthen the capacity of the Australian government to detect and monitor people smuggling ventures. In doing so, they give rise to serious questions about how increased surveillance and intelligence powers could affect the treatment of asylum seekers.

It is reasonable to assume that the detection of people smuggling activities will involve the use of interception techniques. It is thus important to stress that whilst intercepting people smuggling activities may be legal and even encouraged by the *Smuggling Protocol*, there are limits to what states can do in this regard. Of particular importance are the non-refoulement obligations that prohibit the return of genuine refugees as well as those who face torture or cruel, inhuman or degrading treatment or punishment' upon return.[15] Article 19(1) of the *Smuggling Protocol* reminds State signatories that they are bound by these international law obligations, even as they act extraterritorially to prevent and combat people smuggling. It reads:

Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

The need to work with, and not against, refugee communities

From a policy perspective the most troubling

aspect of the *Anti-People Smuggling Act* is the way it extends the punitive arm of the law beyond people smugglers to those who may provide assistance to vulnerable persons in need of protection. We see this in the new offences of 'supporting' people smuggling, which 'apply to persons in Australia who pay smugglers to bring their family or friends to Australia on a smuggling venture'.[16] It is unlikely that these new offences will have the desired deterrence effect. The more likely outcome is that they will cause financiers to transfer funds in obscure ways, and have a chilling effect on the very communities that the government should be working with to promote lawful alternatives to people smuggling. As Professor Mary Crock told the Senate Committee, '[t]his legislation will only be seen by the very vulnerable emergent communities in this country as a direct assault on them – a frontal attack.'[17]

Rather than acting in a punitive way towards refugee communities, the Australian government should work with those in Australia to identify communities in need abroad who may be considering the use of people smugglers, and leverage off strong governmental relations to establish more orderly departure programs. This was the approach of the Australian government in the late 1970s and 1980s, when it negotiated bilateral agreements that allowed large numbers of Vietnamese people to be processed abroad and then resettled in Australia in the aftermath of the Vietnam War.[18] Due in large part to the government's international diplomacy, no asylum seeker arrived by boat in the period between 1981 and 1987.[19] With the right set-up, the East Timor-based 'regional processing centre' currently under discussion could achieve the same successful results. The use of extra-territorial processing schemes in 'push' countries should also be explored – particularly in connection with the Sri Lankan government, with which Australia has a strong relationship.

Conclusion

The introduction of the *Anti-People Smuggling Act* has come at a time of significant political pressure on the government to 'crack down' on unauthorised boat arrivals. This context is strongly reflected in the content of the Act where we see an over-reaching of the criminal law, the adoption of a punitive stance towards refugee communities and new surveillance powers which create

greater scope for breaches of the international law obligations owed to those seeking asylum. It is difficult to avoid the conclusion that such broad-brush drafting is simply designed to create the illusion of tough action on border protection in the lead-up to a federal election. □

Educating Refugee Children

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In Australia, the asylum seeker debate is never far from the headlines. It is a polarising, multifaceted issue that is frequently manipulated and distorted for political gain. It is important to examine one of the more marginalised, underlying problems that emerge when newly arrived refugees enter a developed country like Australia: the challenges faced by refugee children in acquiring an Australian education.

Refugees and trauma

Refugees are defined by the United Nations as people unable to return to their home country for fear of being persecuted on the basis of religion, race, nationality or membership of a social group or political opinion. Worldwide, it is estimated that there are over 50 million refugees or internally displaced persons. Over 50 per cent of these refugees are children under the age of 15 years.

Many of these children have little or no experience of what developed countries consider a 'normal childhood'. According to a 1998 report of the Refugee Health Policy Advisory Committee, refugee children are often exposed to prolonged or multiple traumas. These traumas can include the death of family members, sexual abuse, extreme poverty, starvation, physical disfigurement or injury, severe illness, displacement, imprisonment, torture or forced combat and witnessing extreme violence. The trauma suffered by these children does not cease upon

leaving their home country. Time spent in refugee camps and partaking in treacherous journeys on the road and sea adds to these children's suffering.

The story of Moses, a refugee from Sudan, is particularly moving. [1] Moses' brother was taken by one of the many liberation armies, never to be heard from again. Moses' father was imprisoned and tortured on a number of occasions. Moses himself was beaten and tortured by soldiers, and witnessed his friend being shot and killed before he was 10 years old. Leaving his mother behind, Moses fled Sudan with his father to Australia. Even after resettlement, Moses struggled for years with separation from his mother, recurring nightmares about the shooting of his friend and the pain of being ripped from his home in Sudan.

What effect does trauma have on learning?

The effect of trauma on learning capacity, behaviour and overall well-being is a well established theory.[2] For refugees, the anxiety and fear resulting from their traumatic journeys can persist long after the process of resettlement in Australia. These symptoms often result in concentration difficulties, sleep disturbance and an inability to focus, all of which hinder the acquisition of new knowledge and skills.[3]

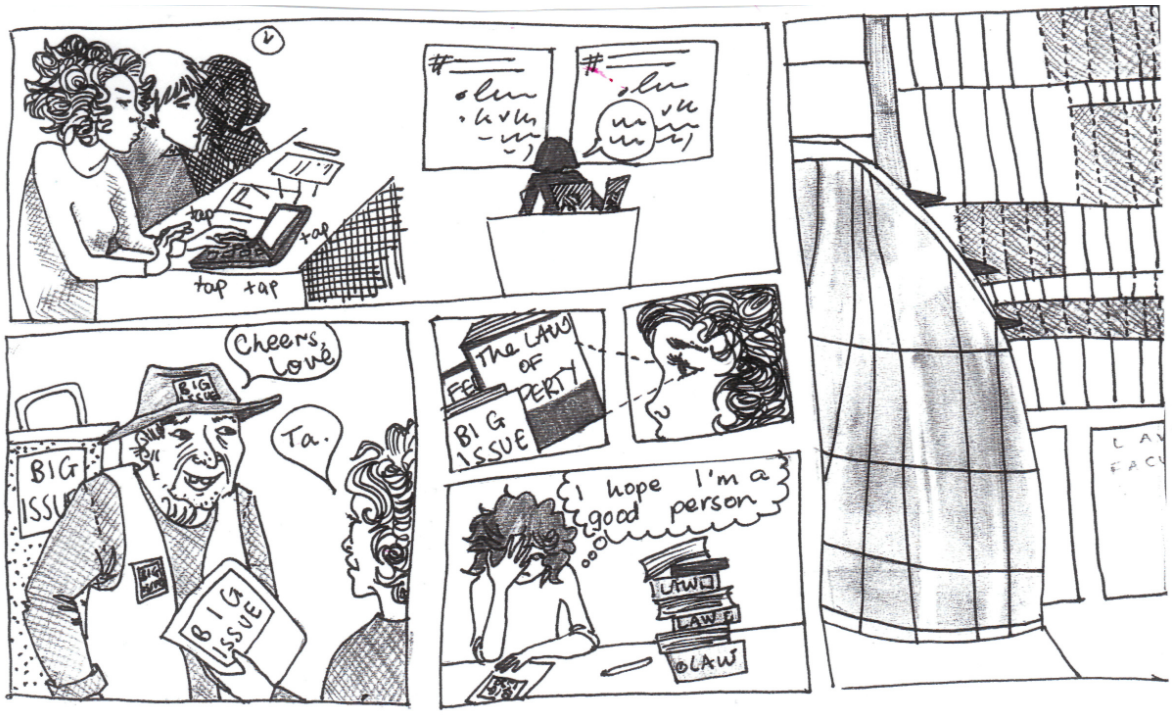
Yet a history of trauma does not necessarily imply that refugee and asylum seeker children need to restart the learning process. Their ability to learn is often intact, and providing they are taught appropriately and adequately supported, an effective education is certainly achievable.

The story of Radhia, a young Iraqi girl, is a fitting example. Radhia fled Iraq with her mother and sister after her father was tortured and executed under the Ba'athist Socialist Regime.[4] Even after having lived in Australia for a long time, teachers noted that she never smiled, was extremely shy and always appeared sad. It took several months of guidance from a woman in a homework support group to help Radhia adjust to the new surroundings. After a year, Radhia was encouraged to enter a mathematics competition, where she won a prize. This success encouraged Radhia, and she began to improve psychologically, socially and academically.

New obstacles

Most refugee children like Radhia, particularly girls, arrive in Australia with little or no education. These children are generally placed into intense English language programs with other refugees much like themselves, then later separated from their new companions and placed into mainstream schools. Even for students who have spent some time in school find this a considerable change. For Moses, the fact that girls and boys were treated as equal and educated together was a significant transition, as was the fact that his teacher asked for her students' opinions and encouraged them to speak out in class.

Further, most refugee students must overcome serious barriers to learning, such as a lack of English literacy. Most schools have well-equipped language programs, which develop English as a second language. However some refugees, particularly from developing nations, come from societies where written words and numbers are unknown concepts. Consequently, notions such as



numbered pages and alphabets are foreign to these children, thus learning English is not as simple as transferring the skills of one language to another. Teachers must address these most basic differences of understanding and this can often be a long and difficult process for them as well as the student.

Student-teacher relations

A common experience reported by young African refugees in high school is a lack of understanding from staff about their circumstances, which often results in strained student-teacher relations. At the core of this problem is a lack of appreciation of cultural differences. According to a study conducted by the Centre for International Health,[5] misunderstandings and cultural differences such as this can cause acculturative stress, which increases the risk of psychological illness for young refugees. Clearly, this deficiency in understanding between teaching staff and their refugee students needs to be remedied to reduce stress on these children.

Further strain on the student-teacher relationship when young refugees are involved results from poor classroom communication. Rushed spoken instructions at the end of class are often difficult for those who are struggling with English as a second language, and the assumption of prior knowledge often alienates refugees in the classroom. This alienation is problematic, as it makes students who are already facing significant learning barriers less inclined to seek assistance and support.

In order to reduce the strain on student-teacher relations, a school policy approach is necessary. Specialists must take on an oversight role so that the responsibility of refugees, who have had disrupted education or have experienced trauma, is not left to individual class teachers. Refugee children frequently experience a loss of trust in authority figures, stemming from feeling let down by adults who themselves have been disempowered by persecution or war.[6] Judith Herman recommends the creation of a safe environment and development of trust as the first stage in the rehabilitation of refugee children.[7] If these issues are to be effectively dealt with, this must become the ultimate aim of education institutions.

Alienation amongst peers

Beyond these aforementioned issues, the most persistent problem facing refugee students is alienation from their peers. According to an IEC report, Australian students generally lack cultural understanding of refugees and the extent to which racism persists is regrettable. The issue is not limited to older students. A recent study by the University of Adelaide discovered that refugee and migrant children only played with non-migrant children for a few minutes each day.[8] This data, collected from students from pre-school to Year Seven, is indicative of widespread exclusion in the playground.

One logical solution to end the problem of racism and exclusion may be to educate students on the experiences and trauma faced by their peers with refugee experiences. The alternative to this argument is that this education may trigger a different type of alienation: an alienation that makes refugees 'different' in a way that they do not want to be. Most refugees come to Australia with a strong desire to rebuild their lives and move on from the fear and uncertainty of their past. Their children are often highly motivated to learn in order to escape from poverty and insecurity. They want to integrate and be part of Australian society and not be distinguished by their traumatic history. It is in response to this sentiment that a report prepared by the South Australian Government on refugee children entitled 'Count Me In' encourages replacement of the term 'refugee child' with the expression 'a child with refugee experiences'.[9]

These conflicting considerations make this issue challenging for all involved. Perhaps it is best managed by promoting a culture of tolerance in schools across Australia. This tolerance does not currently exist. Ideally, such an approach would result in all children being accepted without prejudice or judgment, allowing them to integrate, irrespective of their background. As the Victorian Foundation for Survivors of Torture reported, 'when there is a comprehensive understanding of the background experiences of refugee children in the school and in the wider community, insensitive or racist treatment is diminished and the likelihood of children internalising simple and negative stereotypes is reduced.'[10]

The solution

Addressing the issues facing young refugees in acquiring an education will not be an easy task. A culture of racism and exclusion cannot be altered to one of widespread tolerance overnight. The first step is to recognise that the issues do exist, before establishing a cohesive plan to tackle the negative experiences that hinder the rehabilitation and happiness of young refugee children in Australia. □

Immigration Detention

The Case for More Wholesale Reform

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The detention of asylum seekers remains one of the most politically divisive issues of our time. Nations across the globe have struggled to balance their compassion for those fleeing violent and oppressive regimes with the need to tightly control their borders in an age of terrorism and heightened geopolitical tension. Australia in particular has created a detention regime that is not only in many ways fundamentally inconsistent with international law,[1] but also fundamentally inconsistent with the concept of equality before the law, providing very different treatment to asylum seekers depending on their mode of arrival.

While the Migration Amendment (Immigration Detention Reform) Bill 2009 sought to soften the impact of some of the harsher aspects of Australia's detention regime, it has largely fallen off the political radar in the lead up to the federal election. Notwithstanding recent pre-election posturing, there is significant scope for future governments to build upon the positive approach indicated in this bill by implementing more wholesale reform of Australia's immigration detention regime.

After providing a brief overview of Australia's international obligations in relation to the detention of asylum seekers, the article then turns to look at the policy justifications for detaining asylum seekers in order to assess whether they are justified and if so whether they

might still be accommodated within a detention framework that is consistent with international law.

Australia's international obligations regarding the detention of asylum seekers

The treatment of asylum seekers is governed by a number of international treaties to which Australia is party. Chief among these is the *Convention Relating to the Status of Refugees* (*Refugee Convention*). While the *Refugee Convention* recognises that restricting refugees' freedom of movement may sometimes be necessary,[2] it does not specify the reasons for which a refugee should be detained nor what the minimum conditions of that detention should be.[3] Article 31(1), which deals most directly with detention, states that:

Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened… enter or are present in their territory without authorization.[4]

Article 31(2) further requires that 'Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary'.[5] While Article 31 specifically refers to refugees arriving directly, an expert roundtable has concluded that it also extends to refugees transiting briefly through other countries on the way to the country of asylum, as well as refugees who have been unable to receive effective protection elsewhere.[6]

The more contentious issue is whether the detention of asylum seekers constitutes a 'penalty' under Article 31(1). The High Court in a series of cases starting from *Chu Kheng Lim*,[7] leading up to the decision in *Al-Kateb* held that immigration detention was not 'punitive', since its purpose is not to punish the individual but to make asylum-seekers available for removal from Australia and to prevent them entering the Australian community.[8] Furthermore, the High Court has held that the conditions of detention will not affect its legality.[9] This is somewhat at odds with the views of a number of international legal scholars. Goodwin-Gill and McAdam, for example, argue that detention will amount to a 'penalty' whenever procedural safeguards are lacking such as rights to review or time limitations on detention.[10]

Putting aside the question of whether immigration detention amounts to a 'penalty', it is undoubted that Australia's detention laws provide highly unequal treatment to asylum seekers according to their form of arrival. Those who arrive with a valid visa are not subject to detention whereas those who arrive without a valid visa are subject to mandatory detention throughout the entire processing period.[11] Those who arrive in an excised offshore area have even fewer legal rights. If after being processed on Christmas Island they are found to engage Australia's protection obligations they must then apply to the minister to exercise his or her discretion to allow them to apply for a visa.[12] Furthermore, since immigration detention is not applied to those with a valid visa it is clearly unnecessary (beyond initial identity and security checks as would be performed on all visa applicants), and is thus plainly contrary to Article 31(2) of the *Refugee Convention*.

While not strictly binding, the UNHCR Guidelines help illustrate the extent to which Australia's detention regime falls short of international best practice. The UNHCR Guidelines state that the detention of asylum seekers is only permissible if necessary to either verify identity, determine the elements on which a claim is based (not the merits of that claim), protect national security and public order or where travel or identity documents have been lost or destroyed.[13]

Arbitrary detention

The unequal treatment afforded to refugees arriving in Australia without a valid visa also has the potential to constitute arbitrary detention, which is prohibited under Article 9(1) of the *International Covenant on Civil and Political Rights* (*ICCPR*).[14] In *A v Australia* the Human Rights Committee (the Committee) found that Australia had breached Article 9(1) by detaining a Cambodian asylum seeker for a period of over four years.[15] The Committee noted that arbitrariness was not synonymous with 'against the law' but included notions of 'inappropriateness and injustice,'[16] and that a state must be able to point to individual circumstances 'such as the likelihood of absconding and lack of co-operation' to justify continued detention of an asylum seeker.'[18] Since Australia had not provided any individual justification for A's detention it was found to have breached

Article 9(1).[20]

In *A v Australia*, Australia was also found to have breached its obligations under Article 9(4) of the *ICCPR*. Article 9(4) entitles detainees to challenge the lawfulness of their detention before a court, which must be empowered to order their release if detention is not lawful.[23] The Committee noted that the assessment of lawfulness does not refer to lawfulness under domestic law but lawfulness under the *ICCPR*.[24] Since judicial review was limited to an assessment of whether A was a 'designated person' under the *Migration Act* and provided no real, effective right to review, Australia was also found to have breached Article 9(4).[25]

Australia's mandatory detention system has been the subject of censure in a number of subsequent cases before the Human Rights Committee.[26] Although present arrangements have improved and now require review of detention by senior departmental officers every three months and the Commonwealth Ombudsman every six months,[27] these arrangements still fall short of providing detainees with rights to judicial review.

Safeguards against arbitrary detention are also contained in Article 37(b) of the *Convention on the Rights of the Child* (*CRC*) which states that detention 'shall be used only as a measure of last resort and for the shortest appropriate period of time.'[28] While crucial legislative changes in 2005 ensured that the detention of minors could only be used as a matter of last resort,[30] section 4AA of the new Bill seeks to take this further by explicitly preventing children being placed in detention centres in line with current government policy.[31]

Australia's policy rationale for detention

The current Australian government, through the proposed Migration Amendment (Immigration Detention Reform) Bill 2009 initially sought to justify detention of asylum-seekers on two grounds. The first was to manage the risks to the Australian community of non-citizens entering or remaining in Australia.[32] Accordingly, the bill required the detention of all unauthorized arrivals for the management of health, security and identity risks as well as all unlawful non-citizens who have either repeatedly refused to comply with their visa

conditions or are judged an unacceptable risk to the community.[33] The second was to resolve a non-citizen's immigration status.[34]

However, in response to rising boat arrivals and a looming federal election it appears that the government has also implicitly endorsed a third justification for detention, namely the need to deter asylum seeker arrivals. This was reflected in the recent decision to freeze processing asylum claims from Afghanistan and Sri Lanka for a period of six and three months respectively,[36] pending a reassessment of security conditions in those countries. (The freeze on Sri Lanka was subsequently lifted after three months, partly because a UNHCR report indicated that security conditions were improving in Sri Lanka,[37] thereby reducing the likelihood that asylum seekers from Sri Lanka would be accepted in any event).

By effectively consigning asylum seekers from these two countries to prolonged detention, the freeze signalled a radical departure from the approach taken by the government in the 2009 Bill, which provided under section 4AAA that individuals should only be detained in detention centres as a matter of last resort.[38] The freeze was not only plainly contrary to Article 3 of the *Refugee Convention* which prevents States from discriminating against refugees on the basis of country of origin. It was fundamentally at odds with the definition of a refugee under the *Refugee Convention*.

Indeed the security situation in an asylum seeker's home country is not determinative of whether an individual will be classified as a refugee. Regardless of the security situation, as long as an individual can show that he or she has a well-founded fear of persecution on the grounds of race, religion, nationality, membership of a particular social group or political opinion he or she will meet the definition of a refugee.[39] Thus all the freeze succeeded in doing was to provide manifestly unequal treatment to a group of asylum seekers from Sri Lanka and Afghanistan who had the misfortune of arriving in Australia at the wrong time.

Managing the risks to the Australian community

One of the least contentious justifications for detaining asylum seekers is the need to perform identity and security checks

on them. Indeed this is one of the few exceptions for detaining asylum seekers included in the UNHCR Guidelines.[40] Nevertheless, the need to perform identity and security checks does not necessarily support a policy of mandatory detention. The identity of some arrivals may be easily ascertained and groups like children, women and the elderly are perhaps unlikely to pose a major security risk. Detaining those who may pose a potential security risk for short time frames seems reasonably justifiable. Provided those detained are given rights to judicial review, consistent with Article 9(4) of the *ICCPR*,[41] such a framework would also be unlikely to breach Australia's international obligations.

Another justification for detaining asylum seekers which is recognised under UNHCR Guidelines is to restrain individuals who pose an unacceptable risk to the community. However, such a category should not be defined too broadly. The proposed Bill deems all those whose visas were refused or cancelled on character grounds under sections 501, 501A and 501B of the *Migration Act 1958* (Cth) to be an unacceptable risk to the community.[43] This was contrary to the recommendation of the Joint Standing Committee on Migration which noted that any such assessments should be done on an individualised basis.[44] If such assessments were done on an individualised basis and those deemed an unacceptable risk were given clear rights to challenge their detention before a court, there is no reason why the policy objective of protecting the community from such individuals could not be achieved without breaching Australia's international obligations.

Resolving a non-citizen's immigration status

The second justification for detention under the Bill is to resolve a non-citizen's immigration status.[46] This purpose is difficult to justify since those arriving with a visa already have their refugee claims determined in the community. Moreover, despite an increase in unauthorised arrivals being managed in the community in recent years, the rate of compliance (including with departure) has remained constant at around 90 per cent.[47] Thus there does not appear to be any legitimate justification for detaining individuals purely to resolve their immigration status, especially given that

imposing such a requirement on a select group of refugee applicants would appear to contravene Article 31(2) of the *Refugee Convention*. M

Deterrence

The use of detention for the purpose of deterring asylum seeker arrivals is rarely acknowledged in official forums, since it is clearly inconsistent with Article 31 of the *Refugee Convention*.[49] However, the idea of using detention as a deterrent continues to underlie much of the rhetoric surrounding asylum seekers in Australia. The recent election campaign has seen the Coalition call for the return of the much criticised 'Pacific Solution' while the government has recently floated the idea of a regional processing centre in East Timor (discussed in further detail below).

The detention of asylum seekers has at best a very weak deterrent effect on asylum seeker arrivals. To see this, it is useful to divide asylum seekers into three groups. First, there are those who are able to obtain a visa to travel to Australia. Since these individuals are not detained unless they breach their visa conditions, detention will have no deterrent effect on them. Second, there are those who are fleeing from persecution but are unable to obtain a visa prior to arrival in Australia. Detention is also unlikely to have a deterrent effect on these individuals because as the Minister for Immigration put it, 'desperate people are not deterred by the threat of harsh detention – they are often fleeing much worse circumstances.'[52] This has also been freely acknowledged by asylum seekers themselves: 'We know we would be more comfortable waiting in detention in Australia. You are treated like humans over there.'[53]

The only group likely to be deterred by detention are those unable to obtain a visa who do not have an arguable claim to refugee status. Theoretically, such individuals may still travel to Australia in the hope of obtaining work rights, being misclassified as a refugee or benefiting from the ministerial discretion. However, this third group covers only a relatively small number of refugee applicants. The acceptance rate for 'onshore unauthorised arrivals' between mid 1999 and mid 2005 was 89 per cent,[55] which suggests that the vast majority of those arriving without a visa are genuine

refugees who are unlikely to be deterred by mandatory detention.

Empirical evidence confirms the weak deterrent effect of detention. In a recent survey of nineteen developed countries, Timothy Hatton shows that policies affecting access and the stringency of processing significantly reduce asylum applications (in Australia's case by close to a third), but that policies affecting the welfare of asylum seekers such as detention and access to employment and welfare benefits have no statistically significant effect on applications.[56]

Placing individuals in detention centres is very expensive, costing around $45,000 a year compared with $15,000 for individuals under the Community Care Pilot Program.[57] Given this exorbitant cost, the already weak deterrent effect of detention appears largely unjustified on policy grounds.

Regional processing

The Prime Minister recently floated the notion of a regional processing centre, potentially in East Timor, to coordinate asylum seeker flows in the region.[58] Although the details remain unclear, such an initiative would help deter dangerous sea voyages, since all unauthorised arrivals would simply be taken to the regional processing centre. It would also ensure a relatively orderly arrival of refugees in Australia.

While this proposal certainly merits further consideration (provided East Timor or another signatory to the *Refugee Convention* is willing to set up a facility), it also raises some significant issues. First, unless countries in the region make concerted efforts to expedite processing and provide timely resettlement to refugees, asylum seekers face the prospect of remaining in the regional processing centre indefinitely. Second, such a proposal could further entrench the differential treatment afforded to those arriving without a visa compared with those who are able to obtain a valid visa prior to arrival.

Conclusion

The Migration Amendment (Immigration Detention Reform) Bill 2009 contained a number of worthwhile proposals to improve the conditions of detention for asylum seekers in Australia. These included

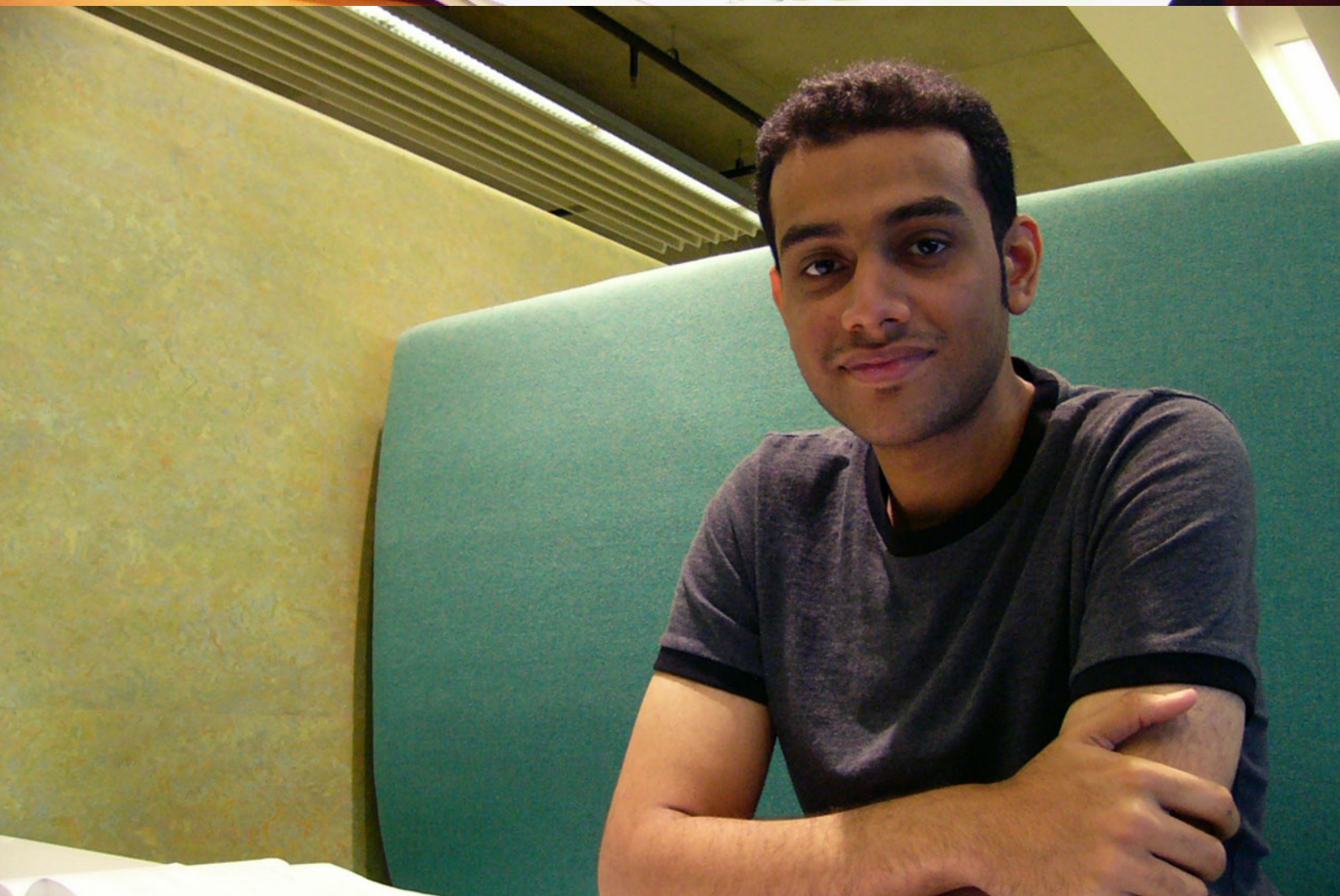
providing Temporary Community Access Permissions for detainees to attend events like family weddings and medical appointments and encouraging the use of community detention facilities wherever possible. While the Bill does not address some of the more contentious aspects of Australia's detention regime, such as the policy of mandatory detention for unauthorised arrivals and offshore processing, it nonetheless represents a step in the right direction. Unfortunately, recent decisions to freeze asylum seeker applications from Sri Lanka and Afghanistan, and initiatives to keep asylum seeker processing offshore, suggest that the Bill is not at the forefront of the government's agenda in an election year. Genuine reform of Australia's immigration detention regime remains a politically difficult proposition.

Nevertheless, the analysis in this article suggests that it is indeed possible to accommodate Australia's legitimate policy concerns while also providing greater equality of treatment to asylum seekers. By creating a regime that permits detention only for valid policy reasons as discussed earlier, there is no reason why Australia's legitimate policy objectives might not be sensibly accommodated alongside its international legal obligations. The compassionate approach indicated in the 2009 Bill indicated a political willingness to move forward on immigration detention reform. While recent policy announcements have shifted the agenda, one can only hope that after the election year posturing is over, the political willingness for more wholesale reform of Australia's immigration detention regime is rekindled. □

Dinah, Uganda
2 weeks in Australia

"Australia is a good country with welcoming people. Finding accommodation has been difficult because it's expensive compared to home and very competitive. It's been a struggle as a student because you don't know the area well."


SIMPLE
BOLD
UNI NEWS



ZiQing, China
1 year in Australia

"We are offered all types of services such as accommodation and a career centre. Of course, there is the language barrier. For the first couple of months, it's hard to follow the lecturer. You have to learn to study here and settle into the new environment. From time to time, I feel homesick."

Mohammed, Saudi Arabia
1.5 years in Australia

"Australia is a pretty good environment to study. It's multicultural and there's a lot of overseas students here. It was a big challenge using English and the education system between my home county and here is different. The services are good within and outside of university."

Sho, Japan
3 years in Australia

"It's a challenge making friends and getting used to the new style of classes. We never had discussion in Japan and there's a lot of readings. I hope to gain a decent level of English for work, and also friendships with international and local students."

Sujit & Mihir, India
1 year in Australia

"The attacks on Indian students haven't affected us. We live in a secure locality, so we're not scared but are concerned sometimes. Our parents in India are restless and we have friends who are scared to go out at night in the suburbs."


INDIANAPOLIS

Jenna & Justin
3 days in Australia

“The climate is great and Australians are very helpful. We want to find a good job after our degree and hopefully our connection with the Asia-Pacific will make us more employable.”

Reframing The Migration Debate

Jack Brady
(B.A./LL.B.III)

The Australian Government Department of Immigration and Citizenship proudly states:

'Australia's Migration Program does not discriminate on the basis of race or religion. This means that anyone from any country, can apply to migrate, regardless of their ethnic origin, gender or colour, provided that they meet the criteria set out in law.'[1]

This all seems very acceptable for a country which has overturned its historical roots which had traditionally kept the unliked out. The White Australia Policy, once notably referred to as the 'indispensible condition of every other policy',[2] has now been replaced with a policy far more open and equally accepting. Yet in the fine print, the 'criteria set out in law', stipulates that the criteria are a selective process: who do we want? The governing assumption being that we cannot let everyone in, we must pick and choose the best. This results in the interests of Australia being put before any other, greater, global concern.

A global phenomenon

Too often this is what we forget. Migration is a reality that faces the world. It is important, both in its ability to shape the map of world demography as much as it is in its scope. In 2005, three per cent of the population of the world, or 191 million people were international migrants.[3] As a result of the flow of capital, information and knowledge

networks of people are physically spreading throughout the world. Between 1990 and 2005, the world's international migrant population increased by 36 million, the bulk of whom were absorbed by developed countries.[4] Furthermore, we now know that this large scale migration is truly a global phenomenon, moving both between less developed nations to developed nations,[5] as well as increasingly between developed countries. Thus, this complex global dynamic brings with it interests and responsibilities that stretch beyond national borders and domestic jurisdictions.

In the age of globalisation, migration is a global governance issue that transcends Australia's borders and its responsibility to its citizens alone. Just as the problem of climate change is the great example of the 'tragedy of the commons', migration highlights the discord between individual action and collective gain. At its most basic migration involves two countries, likely many more. Significantly the result of the phenomenon is that migration has unleashed diasporas and networks of people that transcend state boundaries.

Australia: one country of many

Worldwide, immigration debates are centred on and determined by the perspectives and interests of developed nations like Australia.[6] Australia, like the rest of the developed world, accepts immigrants largely to fill the demographic deficit. An ageing population and a birth rate below that of replacement levels means younger immigrants in particular have the ability to stimulate the Australian economy. Subsequently 'migrants can be selected on the basis of such factors as their relationship to an Australian permanent resident or citizen, skills, age, qualifications, capital and business acumen.'[7] Australia evaluates who is let in, and who is not, according to who will bring the most (boost the economy) and is more likely to successfully settle (cost the least). We import people as statistics in the hope that largely they, and their skills, will be beneficial to the economy. Realpolitik would suggest that the interests of the rich will dominate for some time, however by doing so it only reinforces the discord that exists between the ideals within countries to those *between* countries and the world at large.

Discord in the debate

There is an artesian basin of ideas in this country. Peculiar in recent times, Immigration is back on the agenda with a federal election this year has unearthed a debate that has traversed our topic. We now find ourselves with a Federal Minister for Sustainable Population and a debate that has discussed the merits of population growth, immigration styles/levels, and refugee intakes and asylum seekers, focusing intensely those who arrive by boat. It is clear that what has been expressed has been done so in an effort to achieve economical and political expediency. This attempt to appeal to business (population growth) and the underlying anxieties of some in the electorate ('stop the boats') has resulted in a policy which has not been altogether coherent. Which makes it clear, that of the undercurrent of ideas, it is only the strong rather than the pertinent ideas that rise to the top.

Fortunately we have history on our side as what we deal with is not altogether unusual. Australia is a country founded on immigration, not simply that of British settlement and convict roots. More recently, large-scale migration has been taking place, notably since the end of World War II. Since 1945, seven million people have arrived to settle and call Australia home.[8] At the 2006 census it was determined that 22 per cent of Australia's population was born overseas making it clear that Australia remains a country populated by immigrants. Having become used to immigrants the flaw in our thinking now is that we forget what our actions may mean in a global context. If we import people as statistics we forget that people now represent the face of globalisation. Moreover, we rarely acknowledge the complex dynamic of 'brain drain' and 'gains', remittances, both economic and social, and global responsibilities to a wider citizenry, let alone take it a step further to act according to these issues. Ultimately within these issues and others like it, Australia must realise and accept its global stature as a country that does make a difference, and not shy away into believing it is a small Pacific pawn.

A small insight into the vast sphere of international migration

The ramifications of the well-educated and skilled leaving one country for another

has been a long held concern of developed nations. Yet the scale and effects of such developments are only acknowledged in passing. In 2006 for example recorded economic remittances totalled US$276 billion, and it is likely with informal remittances the total may be closer to US$400 billion.[9] To put this in perspective, about three-quarters went to developing countries, a number nearly as large as total foreign direct investment in developing countries.[10] This is to say nothing of any social remittances that may be passed on, such as knowledge, to the 'home' communities of the world's migrants. Nor does it say anything of the often immeasurable effect of the best and brightest moving to greener pastures. All of this is so complex - the costs and benefits to all involved – that it is considerably easier to understand the process as 'brain circulation'.[11]

Think, again

How does Australia understand its role in global 'brain circulation'? Most likely it does not, for Australia is governed by sovereign interests with only passing adherence to international charters and responsibilities that are limited at best. This results in the largest proportion of the migration phenomenon being seen with a view only to its domestic effects. Currently we are missing the true issues of migration.

On the domestic plane we need a reframing of the debate, and more broadly on the international setting a shift in the paradigm. As we discuss the pertinent issues we can lead the debate and see the same happening across other countries – our internal reframing can help shift the international paradigm to a new way of thinking, one centred around a global consciousness. This would allow Australia to deal more effectively with its international obligations, obligations that will become only increasingly more apparent over time.

It is clear that there are a host of related issues that swirl around, which are barely discussed or even conceptualised. The intricate relationship between migration and issues of development is not fully understood, nor is what this movement of people could mean for individual human rights, equality and fairness. Individual countries bear moral obligations and Australia, like other developed countries,

must take global leadership. There are so many questions to furnish the debate we should be having: What does it mean when we attract the highly skilled from poor countries? What does it mean when we reject an applicant? We need to at least ask the question and others like it: what would open borders mean? Similarly, discussion must turn to consider what all this means in the context of a shift toward a green economy. Here issues of sustainability and economic survival will remain central. Ultimately this shift in thinking is necessary if Australia is to understand its actual role, and for the countries of the world to realise the plethora of issues that are contemporaneous to a new global order that sees people as the moving face.

Globalisation both fuels the need for this to be so and, fortunately, it can also assist with making it a reality. As distance breaks down and people continue to move, the answers may become apparent so that Australia can fulfil her global obligations. Ultimately Australia must remember her global role, for in this case, pursuing equality within can only come from pursuing equality beyond. Yet it is exciting, for in doing so we have an opportunity here not only to reframe the debate locally and to shift the paradigm globally, but to educate and empower our own Australian citizens and those abroad. A healthy dose of democratic renewal can come from a global migration, understanding that attempts to eschew public opinion and academic and political posturing, and simply advocates an inclusive global consciousness on the back of a shared international understanding. □

A Lucky Country For Animals?

L u c y K i n g
(B.E.S.S/LL.B.V)

All animals are equal but some animals are more equal than others.

George Orwell, Animal Farm[1]

A strong commitment to equality is an underlying principle for all liberal democracies, and yet Australian law protects animals unequally and inconsistently. Legal protection of the interests of animals is determined on the basis of their utility to humans, leading to both political and economic discrimination.[2] For instance, the law treats a pet rabbit very differently to a rabbit used in scientific research, a rabbit raised for food or a rabbit deemed a 'pest' depending on factors such as public visibility, economic considerations and popularity.[3] I will demonstrate that orthodox liberal theory provides a persuasive case for applying the principle of equality between comparable animals only. In doing this, I will adopt and expand on the thesis of Australian political scientist Dr Siobhan O'Sullivan, as set out in the article, 'Advocating for animals equally from within a liberal paradigm'.[4] Equality between humans and animals is not considered feasible at this stage, because Australia's liberal democratic framework is predicated

on the inherent superiority of humans over animals, and entrenched in the law is the classification of animals as property. With former Australian Law Reform Commissioner David Weisbrot AM referring to animal protection as 'potentially the next great social justice movement' of the early twenty-first century,[5] a reconsideration of the relationship between animals and equality will be important to future discussion on the concept of equality.

Do animals deserve justice and equality?

How we approach equality for animals is a contentious issue with important consequences for their legal protection. While compassion is a subjective concept that is prone to fluctuation, justice and equality are objective concepts that can be more easily measured and enforced by the state.[6] Emmanuel Kant held that humans do not owe duties such as justice and equality to animals on the basis of their lack of rationality and free will. According to this perspective, humans should only act compassionately towards animals for the benefit of man because 'he who is cruel to animals becomes hard also in his dealings with men.'[7] This view is reflected today in the growing body of contemporary research documenting the correlation between human violence and animal violence.[8] More recently, contractarian philosopher John Rawls has conceded that animals do have some moral standing on the basis that they have the capacity to feel pleasure and pain, yet he maintains that animals cannot be owed justice because they are incapable of rationally entering into a social contract.[9] This view has been challenged over the past few decades as our scientific understanding of animals has evolved and new theories explaining our relationship with animals have emerged. In the 1970s Peter Singer extended the utilitarian ideas of Jeremy Bentham and John Stuart Mill to animals. Singer argued that justice requires the equal treatment of animals, in the sense that suffering is to be measured equally with comparable suffering of comparable animals.[10] More recently, American legal philosopher Martha Nussbaum has taken the position that denying animals a dignified existence ought to be an urgent issue of political justice.[11] The majority of captive animals now exist within the political and economic spheres, due to the rise of intensive farming practices and commercialisation of the pet industry. Current

animal welfare law would more effectively protect animals and comfortably sit within our liberal democratic political framework if it were based on the notion of extending equality to comparable animals. This is not presently the case.

The objective of animal welfare is to deter 'unnecessary, unreasonable or unjustifiable' harm inflicted on an animal. In seeking to do this, the human benefits are weighted up against harm caused to the animal. The animal welfare approach may be contrasted with the animal rights approach, which posits that the rights of all beings should be respected because they have inherent value and are the experiencing subjects of a life.[12] Australian animal protection law is firmly entrenched within the paradigm of animal welfare. Animal welfare is the responsibility of the States and Territories, with the exception of Commonwealth laws regulating aspects of the live export trade. The main animal welfare statute in NSW is the *Prevention of Cruelty to Animals Act 1979* (*POCTA Act*). Objects of this Act include preventing cruelty to animals and promoting the welfare of animals.[13] Industry codes of practice have been an integral component of the animal welfare regulatory regime for the past three decades, providing minimum standards and setting guidelines. Compliance with a code of practice is not mandatory. However, in NSW evidence of compliance may be admissible.[14] In conjunction with codes of practice, State and Territory animal welfare statutes provide animals with some level of protection from cruel and inhumane treatment. However these statutes achieve greater protection for some animals than others, as well as inconsistent protection over time. The level of this protection depends on what is considered necessary to achieve human ends, and this varies over time and between species. The irony of animal welfare is that its core principle of necessary suffering means that the law permits animals to be treated in ways that do not always protect their welfare. This is reflected in s 24 of the *POCTA Act*, which simultaneously prohibits a range of cruel practices against animals, but exempts certain animals from the application of provisions of the Act if they are deemed 'stock animals', animals used in research or animals raised for food production.

Case studies: Companion and agricultural

animals

Companion animals receive greater legal protection than any other category of animal. Companion animals are the main beneficiaries of protection under the *POCTA Act*. Furthermore, the overwhelming majority of RSPCA prosecutions and convictions for cruelty offences are in relation to companion animals.[15] Companion animals are defined in s 5 of the *Companion Animals Act 1998* (NSW) (*Companion Animals Act*) as including cats, dogs, and other animals referred to by regulations. Even if a dog or cat is not strictly used as a 'companion', for example a working dog or a police dog, all such animals are treated as companion animals under NSW law.[16] Ownership of such an animal confers upon the owner a pro-

prietary right to use, control, exclude others from and give away or dispose of the animal as they think fit.[17] The law recognises that the right of an owner to exploit their companion animal is not absolute, and ownership is subject to animal welfare legislation.[18] It is an offence in NSW to abandon an animal,[19] or to commit an act of cruelty upon an animal.[20] Animal welfare laws also impose positive duties upon owners to protect the welfare interests of their companion animals. These duties include providing adequate food, drink or shelter and providing confined animals with adequate exercise.[21]

Existing legal mechanisms such as the *POCTA Act* and the *Companion Animals Act* have limited effectiveness in protecting companion animals from suffering. The narrow definition of 'companion animal' excludes animals that are not dogs and cats but are still kept primarily as companion animals. Perhaps the greatest limitation is their status as property, reflected in the ability of owners to dispose of them.[22] In the 2007-2008 financial year approximately 162,000 companion animals were received by RSPCA shelters around Australia, comprising around 69,034 cats and 70,514 dogs.[23] In the same year the RSPCA euthanised 42,731 cats and 23,772 dogs.[24] A further concern relates to the position of companion animals within the private sphere of the family and the lack of public visibility. This means that companion animals are only protected by anti-cruelty legislation which requires that their suffering be reported, investigated and prosecuted.

Despite such limitations companion animals remain one of the most highly protected categories of animals. Siobhan O'Sullivan posits that companion animals are generally highly protected because they have popularity within the community and are non-economic animals.[25] That is, unlike agricultural animals, they are economic consumers and not producers.[26] To demonstrate this is the fact that in 2005 Australians spent $4.62 billion on pet care products.[27] The popularity of companion animals is reflected in the fact that four out of the 22 codes, standards and guidelines on animal welfare in NSW directly relate to dogs.[28] While companion animals are the subjects of their own *Companion Animals Act*, there is no corresponding act relating to agricultural animals. It has been suggested that the reason that the

overwhelming weight of legislative protection is afforded to companion animals lacks any rational basis. Rather, it is founded on a human emotional response to cases involving cruelty against animals commonly held by people to be cherished members of their family.[29]

In comparison, agricultural animals such as pigs, sheep, chickens and cows are physically and emotionally complex sentient beings with a similar capacity to suffer and feel pain as companion animals. However, the law clearly distinguishes agricultural animals on the basis of their high economic utility and lack of popularity relative to companion animals.[30] State and Territory statute fails to adequately protect the animals that sacrifice the most for humans and endure the most suffering.[31] Every year approximately half a billion animals are reared for food and food production,[32] compared with the 38 million companion animals presently owned by 63 per cent of Australian households.[33] In 2008-2009, farm animals killed for meat contributed $12.6 billion to the Australian economy and animal-derived products contributed an additional $8.3 billion.[34] Discrimination against agricultural animals has been exacerbated by the rise of intensive farming practices over the past six decades, bringing animals away from public visibility. Agricultural animals are largely excluded from otherwise stringent definitions of cruelty found in most animal welfare statutes.

Describing the state of animal welfare legislation, David Weisbrot AM states animal welfare laws are 'so riddled with loopholes that you could drive a factory farm truck through them.'[35] As discussed above, most States and Territories prohibit the 'unnecessary, unreasonable or unjustifiable' suffering of animals.[36] This provides a shield for factory farmers, and common practices that cause immense pain and suffering such as de-beaking, teeth clipping and tail docking without pain relief, as well as the use of sow stalls and farrowing crates for breeding female pigs, are thus permitted by the law. Furthermore, 'stock animals', defined as cattle, horses, sheep, goats, deer, pigs and poultry, are exempt from numerous acts that would constitute cruelty if committed against an animal defined otherwise. Stock animals are exempt from the requirement that confined animals must be provided with adequate exercise.[37] As a consequence the law

permits the practice of confining egg-laying hens to battery cages, even though it would constitute cruelty to birds kept as pets. As long as sentient living beings are classified as stock, their interests will remain subordinate to market forces.[38] The *POCTA Act* also contains defences to what would otherwise be animal cruelty offences against agricultural animals. Defences contained in s 24 of the Act include the castration of piglets and other young stock animals without pain relief,[39] the dehorning of calves,[40] and the performance of the mules operation on sheep under twelve months.[41] The fact that legislators created such defences recognises that such practices would ordinarily infringe upon the general standard of cruelty.[42]

A further concern for the equitable treatment of agricultural animals is the role and effectiveness of industry codes of practice. Since the 1980s, codes of practice have provided greater guidance as to what practices do not constitute cruelty, by setting minimum standards and guidelines. In all States except South Australia, compliance with such codes is not mandatory,[43] and in NSW compliance with a code, although not a defence to a cruelty prosecution, may be admissible in evidence.[44] In NSW, s 24 of the *Prevention of Cruelty to Animals (General) Regulation 2006* (NSW) adopts as guidelines model codes relating to domestic poultry, farmed buffalo, animals at saleyards, goats, sheep, farmed deer, cattle and beef cattle feedlots. Katrina Sharman argues that de-

spite the impression that such codes provide comprehensive protection for animals, in reality they 'provide industries with a shield to justify virtually every factory farming practice,' and they serve to entrench mini-

mum standards rather than best practice.[45] For example, the Model Code of Practice for the Welfare of Animals: Domestic Poultry sets the minimum standard space allowance for caged egg-laying hens at 550 square centimetres per bird in a cage of three or more birds, thus allowing for hens to be confined in battery cages so small that they cannot even stretch their wings.

A model of equitable animal protection

A model of equitable animal protection is most effectively implemented with three components: reforming existing legislation; passing new State and Commonwealth legislation; and governance reform. First, it requires a 'flattening out' of existing animal welfare laws. This would be equitable in the distribution of interest protection and would avoid treating any category of animal in an unjust manner.[46] It would mean, for example, that if the majority of the population did not consider it desirable to confine breeding dogs to stalls so small they cannot turn around, then the intensive farming practice of confining breeding female pigs to sow stalls would become unjustified. Many defences and exemptions contained in animal welfare legislation would need to be removed to ensure that animal welfare laws are more just. For example, s 9(3) of the *POCTA Act* would need to be amended to remove the specific exemption of stock animals from the requirement of giving confined animals a reasonable opportunity for adequate exercise. Further possibilities for law reform are to insert the principle of equality into the objects of animal welfare statutes, and to provide a more concrete definition of 'necessary' in the definitions section of animal welfare statutes. This would need to explicitly state that no treatment of an animal is necessary if it results in discrimination between different animals.

A second avenue of creating equitable animal welfare laws is enacting new legislation specifically aimed at creating equitable legal protection for animals. This may or may not have animal welfare as the central focus. New laws could focus on extending the principle of anti-discrimination to animals, or creating greater certainty in the prosecution and sentencing of animal cruelty offences. There remains much to be done in terms of enacting Commonwealth legislation to standardise and prevent inequality in legal protection between States and Ter-

ritories. An example of how this might work in practice is the national animal welfare regime proposed in the National Animal Welfare Bill, which was introduced and defeated in Australian parliament in both 2003 and 2005. In his Second Reading Speech, Senator Bartlett argued that national animal welfare legislation was critical to moving quickly to achieve equitable animal protection, and that reform of state and territory animal welfare legislation had moved at an 'almost glacial' pace.[47]

A third option is to embark on governmental reform. Put simply, equitable animal welfare laws would be more likely to be achieved if animal welfare were the responsibility of departments independent of animal use industries. This is not the case at present, since the majority of States and Territories include animal welfare within their respective departments of primary industries.

These non-exhaustive suggestions for reform raise numerous challenges. An equitable model of animal protection could entrench a lower standard of welfare resulting in even less legal protection for some animals.[48] While this is certainly possible, O'Sullivan argues that it would still be beneficial, because the standard of welfare protection is already so low for the vast majority of captive animals in Australia, that is, agricultural animals. Reform would bring greater public awareness of the overwhelming majority of harms carried out behind the closed doors of factory farms.[49] Even if a lower standard of welfare were entrenched as a result of reform, then at the very least that standard would be open to revision.[50] A further criticism is the existence of doubt about whether animals can express a desire to be treated equally and claim a right to equitable treatment. The inability to express such a desire is not a sufficient basis for denying rights to animals if one applies the 'argument from marginal cases'.[51] Infants and severely intellectually disabled people are unable to express a desire for equal treatment, but are nonetheless given this right. Furthermore, one could draw a comparison with corporations and argue that it is at least conceivable in law to extend some rights to certain non-human entities. Perhaps the greatest challenge of this model is the political and economic interests that are vested in animal use industries, perhaps preventing any meaningful shift towards equality

for comparable animals in the near future.

Conclusion

By comparing the regulation of companion and agricultural animals, I have skimmed the surface of the extent of inequality in the legal regulation of captive animals in Australia. There are many other categories of animals whose lives are affected by inequality, such as animals used in scientific experimentation, animals destined for live export, animals used in entertainment and zoos, and even wildlife killed for commercial purposes such as kangaroos. This sits uncomfortably within our liberal democratic political framework, because millions of animals have become ensnared within our political system, yet we deny them one of its core principles. Given the extent of political and economic interests vested in the institutionalised inequality of animals, it is unlikely that reform in this area will occur in the near future. However, it is possible that over time community values and expectations will change, and human compassion and justice will expand to encompass animals on the basis that they are sentient beings who feel pleasure and pain, and whose lives are affected by our political and legal systems. Recognising this possibility, David Weisbrot AM states:

> Just as we look back on the past 40 years with some bewilderment – and embarrassment – that we were slow to recognise the human rights of indigenous people, children, people with a disability, older people and others, it is intriguing to wonder whether our children will look back in 40 years and wonder how we possibly failed for so long to take animal rights seriously.[52]

Regardless of whether animals will enjoy equitable treatment in the future, the way in which we govern our relationship with animals must be considered. This relationship is likely to undergo significant reform in the coming decades with the rise of animal protection as a social justice movement. □

Access To Healthcare

Centralisation in India and Australia

Matthew Clarke
(B.A./LL.B.II)

In recent years, the role of government in the provision of healthcare has become a central issue in the political milieu of the developed world. While debate continues in the United States over the validity of President Obama's healthcare reforms, Australians await confirmation from the Prime Minister that the government will continue to pursue the proposed takeover of healthcare. Despite the delay and inefficiency often associated with the Australian healthcare system, it is beneficial to remember that entrenched in the structure of Australia's healthcare system are the values of equity and fairness. The advantages of the Australian system are perhaps best illustrated by a comparison with one of Australia's most important regional neighbours, India. A comparison between these two countries reveals the importance of centralised healthcare and structural reform in achieving the goals of universal healthcare and social equality.

Centralisation of health care

The primary hallmark of Australia's healthcare system is that power is centralised at the Commonwealth level, thereby encouraging efficiency and equity in the provision of healthcare services. Section 51 (xxiiiA) of the Constitution specifically outlines those areas with which the Commonwealth has the authority to legislate. Such powers include:

The provision of maternity allowances, widows' pensions, child endowment,

unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances.[1]

Ostensibly, section 51 vests in the Commonwealth the authority to legislate in specific areas of the healthcare system, while the states retain control of the remaining areas under their residual powers. In reality, the funding mechanisms of the Australian healthcare system have the practical effect of centralising almost all policy decisions at the Commonwealth level. For instance, due to a series of legislative reforms introduced in 1942,[2] the Commonwealth has become the sole collector of personal income tax in Australia, which is then redistributed to individual states to fund public services such as education and healthcare. However, as per section 96 of the Constitution, the Commonwealth may provide these funds to the states 'on such terms and conditions as the Parliament thinks fit.'[3] As a result, the government is able to influence, if not direct, state health policy by making the provision of healthcare finance conditional upon adherence to Commonwealth policy frameworks. As a result, the Commonwealth has the authority to directly manage those areas prescribed under section 51, and to indirectly influence the policies of individual states by utilising their power under section 96.

In contrast to Australia, the Constitution of India promotes a decentralised healthcare system, with power diluted between various federal, state and local authorities. In principle, healthcare is the responsibility of individual states.[4] However, this authority is in turn disseminated to individual local governments, each of which have varying degrees of authority depending on whether they are urban or rural-based governments. This overlap in authority between the state and local levels is further complicated by the ambiguous role of the federal government in the provision of healthcare. In particular, article 47 of the Constitution details the '[d]uty of the State to raise the level of nutrition and the standard of living and to improve public health,'[5] with further reference to the fact that:

The State shall regard the raising of the level of nutrition and the standard of living of

its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.[6]

The 'State' is defined in article 12 as the 'Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.'[7] Consequently, article 47 has been used by the central government to justify the development of various national health programmes that run concurrently with those of the states. As a result, healthcare policy in India is hopelessly tangled between the various levels of government, thereby limiting both efficiency and accountability.

Structural reform in health care

In Australia, centralised authority has encouraged structural reform designed to increase equitable access to medical treatment and pharmaceuticals. At a basic level, the phrasing of section 51 (xxiiiA) is significant. Implicit in the authority to provide a range of health benefits and services is the suggestion that the government should provide such benefits and services. Moreover, it is implied in the inclusion of specific services, to the exclusion of others, that those which have been included are necessary social services that the Commonwealth has a responsibility to provide. Accordingly, successive Commonwealth governments have used their constitutional powers to introduce structural reform consistent with these implied responsibilities under ss xxiiiA. Arguably the most important of these reforms came in the form of Medicare which was introduced by the Whitlam government in 1973[8] and then renamed and restructured under the Hawke government's *Health Legislation Amendment Act*.[9] Medicare is one of Australia's most important achievements in its pursuit of social equality. It is the cornerstone of the Australian healthcare system which ensures that access to medical treatment is determined not by financial capacity, but rather by the imperative of individual necessity. For instance, Stephen R Leeder, former National President of the Public Health Association of Australia, has

suggested that the benefit of Medicare is that it 'takes seriously the reality that…a humane and caring society wishes all its citizens to have the same access to the same standard of care, according to need, and unrelated to their financial status.'[10] Mr. Leeder is correct in saying that systems such as Medicare are equitable not solely because all people receive the same access to the same services, but also because people receive benefits according to their individual needs. It is a system that reflects the inherent physical diversity of the population, and serves to protect the vulnerable members of the community such as the disabled and sufferers of chronic illnesses.

A further example of the benefits of centralised healthcare can be seen in the form of Australia's Pharmaceutical Benefits Scheme (PBS), which aims to increase equitable access to essential medicines. As with Medicare, the PBS goes to the very core of social equality in Australia; approximately 80 per cent of prescriptions dispensed across the country are subsidised under the PBS,[11] meaning that access to essential medicines are provided irrespective of financial capacity. And yet the very existence of the PBS relies upon legislative authority regarding healthcare being centralised at the Commonwealth level. In 1944 the Commonwealth attempted to introduce a scheme similar to the modern day PBS in the form of the *Pharmaceutical Benefits Act*, but it was deemed by the High Court to be unconstitutional.[12] The basis for this was that the Commonwealth did not have a direct power to legislate for the provision of pharmaceuticals under section 51, nor did they have the ability to appropriate taxation revenue for such purposes under section 81. This subsequently led to a constitutional amendment in the 1946 referendum, giving the Commonwealth the power to legislate for the provision of pharmaceuticals. As a result, a new *Pharmaceutical Benefits Act* was passed in 1947[13] which was subsequently held by the High Court to be constitutional as a result of the 1946 amendment.[14] What this demonstrates is that in order to introduce wide-ranging structural reform to healthcare, power needs to be centralised at the federal level.

In contrast to Australia, India's decentralised healthcare system is characterised by severe inequalities, limiting access to primary healthcare for large portions of

the population. While centralisation in Australia has encouraged structural reform, decentralisation in India has encouraged policies based on increased funding and continual improvement of existing frameworks. Such attitudes are entrenched in the phrasing of article 47, but also arise from a general confusion of which levels of government hold which responsibilities, thereby limiting the willingness of any one level of government to introduce wide-ranging structural reform. Accordingly, a key element of India's policy development comes in the form of 'five year plans', with a total of eleven plans being issued since independence in 1947. A key problem with this system is that prime-ministerial and presidential terms are both five years in length, which ultimately means that policy is fragmented and inconsistent. Secondly, and perhaps most importantly, the five-year plan program is one that ignores the structural problems within the system. For instance, the eleventh five year plan which covers 2007-2012 sets various quantitative goals for the health of the Indian population, yet indicates that these objectives will be achieved not by introducing reforms to the way the system operates, but, rather, by increasing aggregate spending levels by the central and state governments.[15] Entrenched in attitudes such as this is the fallacious presumption that increased funding in and of itself has the capacity to radically alter equitable access to healthcare.

A primary example of how this attitude has limited access to healthcare for parts of the Indian population can be seen by reference to the organisation of India's rural healthcare system. The first level of the rural healthcare system is known as the sub-centre level, with each sub-centre servicing a population of between 3000 and 5000 people.[16] Each sub-centre has a maximum of two staff members, neither of whom are trained physicians.[17] It is not until the second-tier of the system, known as the Primary Health Centre (PHC), that the community gains access to a qualified physician. However, by the PHC stage, the population service area is between 20 000 and 30 000 people.[18] This in turn is exacerbated by the fact that the third and final tier of the system, known as the Community Health Centre, has a total of four doctors servicing a population of between 80 000 and 120 000 people.[19] While the Indian government

has attempted to combat the problems in the regional system by increasing funding, its attempts will always be constrained by their refusal to introduce structural reform requiring increased physicians or physical infrastructure at each level of the system.

Therefore, what the comparison between India and Australia seems to suggest is that the level of access to healthcare is intimately related to the degree to which the provision of healthcare is centralised. While centralised Commonwealth power in Australia has encouraged architectural changes designed to increase access to the provision of medical services, India's highly decentralised system has resulted in fragmented policy development that fails to address problems inherent in the system's organisational structure. As a result, while Australia has successfully limited disparities in accessing healthcare resources, India continues to struggle with regional and class-based inequalities. □

Quandaries Of The Social Housing Tribunal Process

Matthew Varley
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There are two very different forms of housing in New South Wales. The first, private housing, is characterised by contractual rights and individual responsibility. Tenants participate in the housing market and are said to make rational choices about their interests. The second, social or public housing, is provided as a form of social welfare and incorporates assumptions about public good and procedural fairness. There are significant reasons for these differences and a number of ways in which they have been legitimated. I shall chart the line between difference and inequality, and explore how the line has been drawn in the housing sector.

Private sector housing is provided by landlords who charge tenants market rent. The relationship between landlord and tenant is governed by a residential tenancy agreement, which is a statutory contract.[1] Social housing is dominated by the Land and Housing Corporation, which is a statutory corporation under the *Housing Act 2001* (NSW).[2] The Corporation owns properties which are managed by Housing NSW or smaller community housing providers.[3] Social tenants are entitled to a rebated rent if their income falls within their landlord's applicable policies.[4] This rent rebate is determined by an administrative decision, while the tenant's contractual obligation, as defined by their residential tenancy agreement, is to pay market rent. A social landlord's decisions, such as the decision to evict a tenant, are

administrative decisions and may be subject to administrative review. It is easy to see that the principles of good governance play an important role in determining social tenants' rights and obligations.

The differences between these two housing sectors are accepted because they have been legitimated in some way. There are two main sources of legitimation. First, there is a difference between private and public property. Private property owners are generally entitled to deal with their property as they see fit, subject to the principles of contract and property law. Public property, on the other hand, is to be managed efficiently and fairly. This gives social tenants certain rights, for example, a right to a degree of procedural fairness, but also imposes certain burdens. For example, community standards tend not to support social tenants, who enjoy rebated rent, using their premises for drug cultivation and supply. This distinction between public and private is a powerful source of legitimation, and creates benefits and burdens for social tenants.

Second, the provision of social services has become dominated by a discourse of contractualism, rather than welfare. As discussed in Adam Crawford's article, '"Contractual Governance" of Deviant Behaviour', contractualism is a label for the trend towards reliance on contractual obligation in the provision of social services.[5] Recipients of these services are expected to understand and fulfil their contractual obligations, rather than enjoying a right to social support.[6] The social housing sector has been particularly susceptible to this trend because the relationship between landlord and tenant is primarily a contractual one. Thus, breaches of the residential tenancy agreement, even ones founded on criminal conduct, are dealt with as breaches of contract. In NSW, these contractual disputes are heard in the Consumer, Trader and Tenancy Tribunal (the Tribunal). Because social tenants are seen as contracting parties, and their behaviour is addressed through contract law, they are expected to protect their own contractual interests.

Social housing and administrative review

Social landlords are also public bodies, and administrative law provides social housing tenants with opportunities to review their

landlord's decisions. This is very different to the situation for private tenants, who have very few opportunities to challenge the process by which their landlord makes decisions. While public property is expected to be managed fairly and efficiently, hence the burdens imposed by administrative law, the state is reluctant to restrict the rights of private property owners. The imposition of administrative burdens on private property owners makes no sense according to the public-private distinction in our legal system.

Social tenants may seek internal and external merits review of their landlord's decisions. Internal review requires a senior decision-maker to revise the decision, by considering the application of policy and the fairness of the original decision.[7] External review is provided by the Housing Appeals Committee (HAC), and can be pursued once the internal process is complete. HAC considers 'whether the original decision was made fairly, in accordance with policy and whether all information was taken into account.'[8] The HAC appeal results in a recommendation, which is generally accepted by the social housing provider. These opportunities for merits review are extremely important in cases where the Tribunal may be likely to order termination of the tenancy agreement, but the decision-making process within the social housing provider was defective. For example, when faced with a tenant in arrears because of the incorrect application of the rent rebate policy, the Tribunal is unlikely to consider the policy behind the problem.[9] If the Tribunal takes the rent ledger on face value, the tenancy agreement may be terminated. However, review of the decision to cancel the rent subsidy may resolve the situation and cancel the arrears. Merits review provides a relatively simple way to ensure that social landlords make their decisions correctly and fairly. Since social landlords make administrative decisions, a form of administrative review is required to ensure these decisions are made correctly. Contractual disputes between social landlord and tenant are still heard by the Tribunal.

A social tenant may also be able to pursue judicial review of his or her landlord's decisions. The threshold question will be whether the decision-maker is susceptible to judicial review. At common law, judicial

review is available when a body exercises statutory power, whether directly or indirectly. The nature of the power may also be relevant.[10] For example, decisions made by the NSW Land and Housing Corporation, under the auspices of Housing NSW, are decisions that attract judicial review.[11] Decisions of community housing providers, however, are more difficult to classify. Under Part 9A of the *Housing Act 2001* (NSW), community housing providers are non-profit organisations registered with Housing NSW. These providers are governed by a board drawn from the local community, which makes them responsive to the needs of that community.[12] As these community housing providers are providing a public service and manage publicly-owned properties, there is a strong argument that their decisions are subject to judicial review. This is consistent with English authority, which holds that similar housing organisations, when closely related to traditional social housing organisations, perform a public function for the purposes of the *Human Rights Act*.[13] However, the recent trend in NSW is for title in social housing stock to be transferred to these community housing providers. Previously, community housing providers merely managed properties owned by the Land and Housing Corporation.[14] As this process continues, and community housing providers are separated from the Corporation, it becomes more likely that social tenants seeking judicial review will need to rely on the public nature test, rather than considering the source of their landlord's powers.

Judicial review may allow a social tenant to argue that their landlord did not provide natural justice. In *Nicholson v NSW Land and Housing Corporation*, a tenant of the NSW Land and Housing Corporation sought judicial review of his landlord's decision to issue a notice of termination without grounds.[15] Justice Badgery-Parker accepted that the landlord's decision was reviewable.[16] However, this conclusion relied on a finding that the Tribunal was required to order termination of the agreement when a no-grounds notice of termination was validly issued.[17] While this is currently not the case,[18] s 85(3) of the *Residential Tenancies Act 2010*, which will commence on a day to be proclaimed, will require the Tribunal to order termination in these circumstances. Of course, judicial review is likely to be of limited use to social housing tenants with limited resources.


JAPANES
Solomon
SEA
Brisbane

The cost of an application to the Supreme Court and the complexity of the legal arguments involved means that very few tenants will be able to take this route.

Social tenants have these appeal rights because public resources are to be managed fairly. Government decision-makers must make their decisions according to law and the rules of natural justice. Social tenants do not enjoy these appeal rights due to any special vulnerability, but because their landlord performs a public function. Good governance of State resources is important because of the importance of these resources to the lives of the governed, the scarcity of such resources, and the dangers of unrestrained exercises of superior power. Private tenants have no equivalent rights, regardless of their resources, capacity or vulnerability. Instead, the difference between the two sectors is legitimated by the principle that private landowners are entitled to deal with their property as they see fit and without undue interference.

Contractualism and the Tribunal

The Tribunal hears termination proceedings and disputes regarding breaches of residential tenancy agreements. Despite the seriousness of the orders it can make, it applies the civil burden of proof and follows administrative procedures. It facilitates the quick, easy and informal resolution of disputes, and is under a duty to encourage parties to negotiate a settlement.[19] It is very different to a court of law. Social tenants are particularly vulnerable in the Tribunal. First, their tenancy agreements contain extra terms relating to the illegal use of the premises. These terms add a punitive element to an otherwise contractual relationship. Second, the Tribunal's procedure is designed to encourage the simple and efficient resolution of disputes. Social tenants are, almost by definition, the most vulnerable in society. Procedural fairness is particularly important for those who labour under special vulnerability, and these are therefore the people with the most to lose when procedural fairness is undermined.

The role of contractualism in social housing is most obvious in illegal use proceedings. Crawford argues that classical contractual assumptions such as freedom, autonomy and choice play an important role in the

shift towards using contract law for self-regulation.[20] These assumptions have been brought to bear on conduct which would once have been dealt with as a crime, but is now dealt with as a breach of contract. For example, under the *Residential Tenancies Act* in both its 1987 and 2010 forms, tenants must agree not to use the premises for an illegal purpose.[21] This means that illegal use of the premises can be dealt with as a breach of contract, rather than a crime. There are special provisions which apply only to social housing premises. For example, a social housing tenant is taken to have breached their residential tenancy agreement if any person occupying the premises with the consent of the tenant uses the property or an adjacent property for the manufacture or sale of a prohibited drug.[22] This provision does not appear in the *Residential Tenancies Act 2010*. However, the 2010 Act, like the 1987 Act, requires the Tribunal to consider adverse effects of the social tenancy on neighbouring tenants.[23] These special burdens go beyond the responsibility attributed to private tenants and increase the vulnerability of social tenants. The fact that criminal conduct is addressed through special contractual obligations indicates the emerging power of contractualism in the social housing sector.

As an administrative tribunal, the Tribunal applies a more relaxed procedure than a court of law and is under a duty to attempt to bring the parties to agreement in conciliation.[24] In conciliation, landlord and tenant attempt to negotiate a settlement of their dispute. If an agreement is made, the Tribunal gives legal effect to the settlement.[25] *NSW Land and Housing Corp v Thurlow* provides an example of the dangers of this procedure.[26] The tenant's daughter had been charged with possession and supply of cannabis. In the Tribunal, the tenant consented to termination, although it was unlikely that the landlord could prove a breach of the agreement.[27] Following the tenant's successful application for judicial review, Justice Young emphasised the seriousness of termination proceedings. He encouraged the members of the Tribunal to check that tenants understand conciliation and the effect of their agreements.[28] Conciliation is an important example of an informal procedure of the Tribunal. Negotiation can be wide-ranging and the Tribunal exercises little supervision. A concern arising from this

is that inexperienced or nervous tenants can be vulnerable to the skill and experience of real estate agents and the officers of social landlords.

When conciliation is unsuccessful, the matter will proceed to a hearing. Once again, being an administrative tribunal, the Tribunal's procedure is faster and more relaxed than curial procedure. In particular, it applies a civil standard of proof, even if the conduct under examination is potentially criminal. In *NSW Land and Housing v Fiti*, the Tribunal terminated the tenancy agreement in ex parte proceedings.[29] Although the Local Court had dismissed a possession charge on the basis of lack of evidence, the Tribunal was satisfied at the civil standard that the tenant had breached the agreement. When the matter was heard in Tribunal, the Tribunal accepted police testimony that the tenant was aware of drugs on the premises.[30] It held that the breach of the agreement justified termination. The decision is significant because, although the charges could not be proven in the Local Court, the Tribunal was satisfied that there had been a breach of the agreement. Since the landlord-tenant relationship is contractual, breaches of the contract are addressed with reference to the civil standard of proof. In this way criminal procedure and the criminal standard of proof provide greater protection for a defendant tenant. Contractualism has the effect of stripping such tenants of this protection and requiring them to defend themselves in a more informal setting.

The same factors which make a person eligible for social housing may also make them vulnerable in the Tribunal. A person may be eligible for priority assistance if they can demonstrate an inability to find housing in the private market, coupled with a medical condition, a disability, experience of domestic violence or another source of genuine need.[31] However, the very criteria which render individuals eligible for tenancy may prove their downfall in Tribunal proceedings. A tenant with an intellectual disability, for example, will also find it difficult to understand and engage with Tribunal proceedings. These are the parties most in need of procedural protection. They may not understand the claims made against them, or appreciate their rights to be heard or to appeal Tribunal decisions. Procedural protection is disproportionate, and therefore

its removal disadvantages them disproportionately.

A residential tenancy agreement is a contract. As a result, contractual remedies dominate the relationship between landlord and tenant. Even when a tenant commits a drug offence which constitutes illegal use of the premises, their action is treated as a breach of contract. The contractual paradigm has replaced an older discourse of welfare rights. Instead, social tenants are expected to understand the choices they make and fulfil their contractual obligations. That is, they are expected to conform with the neoliberal conceptualisation of the responsible, rational individual.[32] This ideal person is capable of defending their interests in the Tribunal without any special protection because they are rational and responsible. An administrative tribunal can hear such contractual disputes because there is no need for special protection. The Tribunal does so in a manner which encourages the parties to apply business sense and good judgment to reach an amicable settlement. Thus, contractualism legitimates a relaxed and informal administrative procedure.

Conclusion

There are two major differences between social and private housing. First, social tenants can review their landlord's decisions in the interests of good governance and natural justice. Second, social tenants are particularly vulnerable in the Tribunal, which emphasises negotiation and the speedy resolution of disputes. The line between difference and inequality is a difficult one to draw. Differences are legitimate, inequalities are illegitimate. For this reason it is important to identify whether the distinguishing features of social and private housing amount to differences or inequalities.

Social tenants can review their landlord's decisions because public bodies must make decisions according to law and natural justice. Social landlords make some decisions that have no equivalent for private landlords. The decision to rebate rent is one, while the decision to offer alternative housing is another. The special review processes that apply to these decisions are legitimate because they are unique to social landlords. However, there are also similarities between social and private landlords. Both may seek eviction for non-payment of rent or illegal

use of the premises. When social landlords make these decisions, their tenants can seek administrative review. When private landlords make the same decisions, their tenants have more limited review rights, and must rely on the Tribunal for protection. It seems bizarre to suggest that private landlords should observe natural law and procedural fairness. This peculiarity is a sign of the legitimating power of the private-public distinction.

Under the *Residential Tenancies Act*, the relationship between landlord and tenant is primarily contractual. Contract law makes certain assumptions about the relationship between the parties, including their relative capacity and ability to act in their own interests. Although social tenants are likely to have some special vulnerability which qualifies them for social housing, they are subject to the same Tribunal procedure as private tenants. However, they have the most to lose from the informal procedure that characterises administrative tribunals. Of course, many private tenants have language difficulties and disabilities which make them vulnerable to the same informal procedure. In some ways, drawing a distinction between social and private tenants is problematic. While social tenants are likely to be at a disadvantage in the Tribunal, they are not the only tenants to experience this problem. Moreover, both social and private tenants are contracting parties, and therefore subject to very similar responsibilities and obligations. If some tenants experience disadvantage in the Tribunal, the solution must be more rigorous procedure rather than special rules for social tenants.

These differences between social and private housing are examples of those that have been legitimated, rather than being addressed as inequalities. It is possible to imagine a legal system in which both private and social landlords must show that they have made their decisions fairly and given their tenants a hearing before making decisions. It is also possible to imagine a legal system in which social tenants are treated as vulnerable welfare recipients rather than contracting parties. However, in New South Wales, the differences between the social and private housing sectors are said to be legitimate, rather than unequal. □

Rethinking Equality For Women In The Workplace

M i m i Z o u
(B.E.S.S (Hons I)/LL.B.(Hons I))

Introduction

'Diversity management'. 'Be an Employer of Choice'. 'Good Practice, Good Business'. Such rhetoric is commonly used by policy-makers in selling the 'business case' of equal employment opportunity (EEO) to employers. This has been the dominant approach taken by the Equal Opportunity for Women in the Workplace Agency ('EOWA') to encourage compliance with the *Equal Opportunity for Women in the Workplace Act* 1999 (Cth) ('*EOWW Act*') which EOWA administers. Among the regulatory measures in Australia aimed at addressing gender inequality in employment, the *EOWW Act* is unique in that it imposes a positive duty on employers to assess their organisations, establish a workplace program to eliminate discrimination and promote gender equality, and report annually to EOWA.

Despite its potential to prompt, support and make accountable self-regulatory responses of corporations in addressing systemic discrimination embedded in organisational policies and practices,[1] the *EOWW Act* (along with the business case used to sell it) has been criticised for being 'toothless'. It applies only to large organisations (with 100 or more employees), imposes minimal procedural obligations on employers, gives EOWA little monitoring or enforcement powers, and provides limited sanctions for non-compliance. Legislative compliance is further contingent on meeting organisational needs. As Thornton argues, the Act is

a 'creature of deregulation', and embodies a liberal approach of achieving equality of treatment instead of equality of outcomes or opportunity for women.[2]

Drawing on recent scholarship on reflexive regulation, this paper explores the limitations of the *EOWW Act* and how it could be developed into a more 'proactive model, aiming at institutional change.'[3] Reflexive regulation involves establishing a 'superstructure that will support self-regulatory mechanisms'[4] to realise 'proactive measures for embedding the equality principle in organisational practice.'[5] This is apparent first through reference to the background of the *EOWW Act*, and the ascendancy of the business case discourse. This shall also explain what reflexive regulation is and analyse the *EOWW Act* through a 'reflexive lens'. It concludes by considering the UK's Gender Equality Duty (GED) as an example of reflexive regulatory innovation, which may provide some guidance for reforming Australia's EEO framework.

Background of the *EOWW Act* and the 'business case' approach

It is worth noting that there are other regulatory mechanisms available to advance gender equality in employment, such as the equal remuneration decisions of industrial tribunals, realigning pay structures and improving entitlements through collective bargaining, and statutory-based employment rights and protections. These mechanisms have demonstrated some potential in addressing the historic inequality in women's participation and rewards in employment.[6] However, their significance has been limited in the backdrop of decentralisation and de-regulation[7] of employment relations favouring individual workplace bargaining.

In the realm of anti-discrimination legislation, the *Sex Discrimination Act* 1984 (Cth) ('*SDA*') makes it unlawful to discriminate, directly or indirectly, on the grounds of sex, marital status or pregnancy and prohibits sexual harassment. The *SDA* implements an individual rights-based, complaints-led model. Employers are under a general proscriptive duty not to discriminate and, in the event of transgression, liable only if the victim enforces her/his rights and receives compensatory redress though legal action.[8] Employers are not required to

be proactive in eliminating discrimination or promoting substantive equality, with only a limited 'special measures' or 'positive discrimination' exemption.[9] Other than providing a baseline in guarding against overt discrimination, the *SDA* makes only 'desultory gestures'[10] in addressing systemic or structural discrimination.

An alternative approach to the individual rights-based model was the *Affirmative Action (Equal Opportunity for Women) Act* 1986 (Cth), predecessor of the *EOWW Act*. It attempted to introduce a limited positive duty on employers to eliminate discrimination and promote gender equality in organisational practices. Employers were required to audit their organisations, institute an affirmative action (AA) program that identified structural barriers to gender equality, and produce an annual report to the AA Agency on program implementation. Proponents argued that an effective AA/EEO program had the potential of changing power structures and challenging institutional arrangements that perpetuated gendered norms of women's place and capacities at work.[11] The legislation did not impose quotas of any kind, and neither of its reporting requirements nor sanctions for breach was particularly onerous. However, the concept of AA was controversial as it depicted as a threat to 'merit' and lost support in the ascendancy of neo-liberalism.[12] In 1998 a review of the legislation led to its repeal. The language of AA was completely removed in the succeeding *EOWW Act*.

The *EOWW Act* also weakened the minimal reporting requirements of its predecessor, such as deleting the step of specifying goals and targets, removing the evaluation of programs against a common standard and waiving the annual reporting requirement for employers who have been compliant for more than three years. With the compliance focus on report submission, the quality and effectiveness of workplace programs were irrelevant. Recent sampling of reports by Strachan and French[13] revealed that many organisations met the minimum legislative requirements and nothing more. Many programs either did not show a real understanding of EEO or addressed equity issues in a minimal fashion.

With a weak legislative underpinning, EOWA has pursued the business case to promote

voluntary self-regulation. Employers are encouraged to adopt an effective program because EEO 'boosts a company's profitability and makes incredibly savvy business sense.'[14] The business case assumes that employers' business interests are always compatible with equity goals, and any tension is rarely acknowledged.[15] Moreover the focus on an employer's 'capacity to comply' allows for greater management discretion in only adopting policies and practices that meet short-term cost-effectiveness and business needs. The research of Charlesworth et al. further suggest that the business case appeared to be largely rhetorical for many organisations, with little actual cost/benefit analysis or measurement of business outcomes undertaken.[16]

In effect, the *EOWW Act* is part of a policy context which emphasises individual organisation choice and enterprise responsibility as opposed to legislative and economy wide standards in order to achieve equality goals. Unfortunately it does little to ensure that 'equality even makes it onto the employer's agenda or that responses are genuine and effective.'[17] This is where an understanding of developments in regulatory thinking can assist us to re-assess our current equality laws.

What is 'reflexive regulation'?

Growing academic and policy interest in reflexive regulation has been driven by the desire to address regulatory weaknesses of, on the one hand, command-and-control approaches which are based on prescriptive, detailed controls supported by heavy sanctions for non-compliance; and on the other, deregulation of the kind which removes statutory controls in favour of individual freedom of contract or market-based governance.[18] The rationality behind reflexive regulation is recognising that organisations, such as corporations, operate as their own sub-systems within society, with their 'inner logic' of norms, processes and communications that are particular to that sub-system itself.[19] The legal system is constrained in bringing about change directly in other social sub-systems because of their 'limited openness to external normative interventions.'[20] Reflexive regulation seeks to increase the law's effectiveness in steering other sub-systems towards self-regulation that would internalise public policy objectives. It does

so by creating a set of 'procedural stimuli that lead to the targeted subsystem adapting itself.'[21] The law's function shifts from direct control to 'proceduralisation' by which the relevant norm can be modified within another sub-system.[22] For policymakers, the challenge is how to make legal interventions that 'provoke… a reconfiguration of self-regulation'[23] by those being regulated 'without falling into trap of old-fashioned command-and-control regulation, or the trap of de-regulation.'[24]

Effective reflexive regulation also combines different types of sanctions to enable the regulator to prompt the desired behaviour of regulated actors. Ayres and Braithwaite's 'pyramid of enforcement' model presupposes that hard sanctions (even penal ones) at the apex of the pyramid must be exercised if all else fails.[25] Hepple et al.[26] have extended this pyramid to discrimination law, with voluntary means at the base that gradually escalates to harder sanctions at the top such as loss of government contracts. The model assumes that the most severe sanctions will rarely be used but are present to maintain the stability of the overall structure. Besides an enforcement pyramid premised on a 'floor' of standards, Braithwaite suggests a 'strengths-based pyramid' for capacity-building is needed to 'move organisations above the floor.'[27] Strengths and successes of employer actions need to be identified, along with mechanisms developed to reward and expand upon best practices.[28] Both pyramids recognise the complex motivations of corporations. Profit maximisation is likely to be a major consideration, but not to the exclusion of other motivations such as good corporate citizenship.[29]

Another critical focus of reflexive regulation is on deliberative, participatory mechanisms to achieve social policy goals. Reflexive regulation supposedly encourages each organisation to engage in its own assessment of the problem, to deliberate with different stakeholders, and to create the best solution which stimulates consensus.[30] Reflexive regulation considers different potential solutions, while using benchmarking procedures and other deliberative strategies to test their relative success or failure.[31] Furthermore, it recognises the role of various potential participants in the regulatory process, particularly those directly affected such as interest groups that


aww.
my brother was telling me how a lady @ his firm had a baby, & now she gets no work!
what?!
gah gah
bah
goo
burble
goo
But they all say they're so women-friendly!
But when you have kids I guess it's hard to be at the office all the time.
That sucks.
aawwwww!

act as watchdogs, educators and advocates for individuals in enforcing their rights.[32]

Like any regulatory model, reflexive regulation has potential limitations. First, the model may insufficiently identify and recognise the role of conflicting interests and power relations between actors, thus appearing to de-politicise the area of regulation concerned.[33] Second, the model's enthusiasm for open-ended stakeholder deliberation to define the problem may undermine the core set of ethical values in the equality context that are 'thought to be central to our conception of appropriate behaviour, and not open to fundamental challenge.'[34]

Further, as McCrudden argues, effective reflexive regulation needs to identify three essential conditions under which a deliberative process may succeed: first, organisations are required to assess themselves based on objective and comparable evidence in their sectors; second, organisations are required to seriously consider alternative approaches that will shift entrenched patterns of inequality, capable of being monitored by an external authoritative body; and third, organisations are required to regularly engage with other stakeholders which will challenge organisations' own sets of assumptions.[35] These conditions 'must be affirmatively created, rather than taken for granted.'[36] The following section will examine whether the *EOWW Act* sets out or creates these pre-conditions for effective reflexive regulation.

The *EOWW Act* through reflexive lens

Drawing on McCrudden's pre-conditions for effective reflexive regulation, there are several limitations in respect of the *EOWW Act*. First, there is a lack of public disclosure obligations on employers, which undermines the law's capacity to support effective deliberations and reflections that requires the production and dissemination of reliable data. While the reports submitted to EOWA are 'public' documents, organisations are not required to produce objective or comparable data, or the findings of its audit or evaluation of its programs. Reports do not contain past EEO issues or actions of a workplace, but 'merely a snapshot taken during the reporting year.'[37] Organisations that have been waived

from reporting or named as non-compliant will not even have a report that is publicly available. EOWA has no authority to evaluate and grade workplace programs and publicly disclose these results. Since organisations do not need to report in a standardised form, EOWA's capacity to compare performance between and within organisations over time is further weakened. Furthermore, the lack of disclosure denies other stakeholders access to the information necessary to assess and compare organisations,[38] to identify leaders and laggards, and to set a normative benchmark for good practice. EOWA has sought to use various educational tools to disseminate information about innovative programs, and a certification exercise to encourage organisations to go beyond the reporting requirements. However, there is no means of auditing or verifying organisations' proclaimed actions, and no evidence of collation and diffusion of best practice standards emerging from these processes.[39]

Second, while the Act requires an organisation to assess itself and establish a plan, it is not compelled to execute or review the plan. The focus is on submitting the reports instead of auditing the outcomes. As such, there is no effective obligation on employers to change existing practices or consider alternative approaches. Furthermore, EOWA has virtually no monitoring or enforcement powers to ensure organisations actually implement and review their plans. Unlike a 'pyramid of enforcement', sanctions for non-compliance are limited: being named in parliament or excluded from government contracting. The minimal reporting requirements further undermine the responsiveness of these sanctions to promote desired behaviour. Without such powers, EOWA has little opportunity to 'enter into regulatory dialogue with non-compliant organisations'[40] to evaluate their practices and improve their performance.

Finally, the Act does not impose any specific duty on employers to consult with the potential range of stakeholders. It does not set up any mechanism for regular and meaningful engagement with stakeholders that is capable of challenging assumptions and practices that the organisations presently adopt.[41] While one of the Act's objectives is to foster workplace consultation between employers and employees, the business case

adopted by EOWA puts an almost exclusive focus on management.

Overall, the *EOWW Act* has a long way to go in fulfilling the pre-conditions for effective reflexive regulation. Its current model (premised primarily on the business case) is incapable of using 'procedural requirements as stimuli to get organisations to buy into equality' at the level which equality becomes an 'endogenous' value within the organisation.[42] To secure behavioral and cultural change within and across diverse organisations, the *EOWW Act* needs to have these pre-conditions in place to 'receive and translate reflexive legal norms in a way which makes their implementation effective.'[43] The next section considers a possible way forward in developing the Act into a more responsive regulatory instrument by considering the UK's GED.

Moving Forward – a Gender Equality Duty (GED)?

While Australia needs to develop its own responses to specific problems in our equality laws, the UK's GED may offer some guidance for a new approach to addressing gender inequality – particularly in view of its reference in several submissions to the recent Senate inquiry reviewing the *SDA*.[44] The GED was introduced in 2007 after a review of the UK's anti-discrimination laws,[45] and heralded as a 'new approach to equality – one which places more responsibility on service providers to think strategically about gender equality, rather than leaving it to individuals to challenge poor practice.'[46]

The GED imposes a general positive duty on public authorities[47] to have 'due regard' to the need to eliminate discrimination and to promote gender equality in employment, service provision, and policy-making. This general duty is supported by a list of specific duties requiring authorities to: publish a 'gender equality scheme', consider the need to include objectives to address any gender pay gap, gather and use information on how its policies and practices affect gender equality, consult stakeholders to determine objectives, assess the impact of current and proposed practices, implement the scheme within three years, report on the scheme annually and review it every three years.[48] These specific duties are a means of meeting the general duty, and enforceable by the Equality and Human Rights Commission

(EHRC).

Furthermore, the GED scheme includes a statutory Code of Practice, which set out detailed instructions on preparing a gender equality scheme, including selecting and prioritising objectives, who to consult, implementation, evaluation and monitoring. While the Code serves as a practical guide, an authority that fails to follow the provisions may be called upon to show how it has otherwise complied with the general and specific duties.[49] In effect, the Code presents an informal set of common standards to assess the extent of compliance. EHRC can issue compliance notices to authorities failing to meet their duties that are enforceable in the courts. Judicial review of non-compliance by a public authority can also be sought by a person or interest group, or by EHRC.

While it is too early to assess the GED's effectiveness, aspects of its regulatory design suggest that the pre-conditions for reflexive regulation are in place to some extent. However, McCrudden highlights several significant limitations: the absence of an obligation on authorities to monitor their workplaces' composition and produce objective, comparable data; the danger of slipping into deregulation without some compulsion on organisations to seriously consider alternatives; and the lack of active and informed civil society engagement.[50] These issues may prompt us to consider the challenges of (re)designing Australia's own regulatory framework.

In moving towards effective reflexive regulation, the *EOWW Act* could be reformed in several ways. First, for a deliberative and reflective process to succeed, objective, comparable information on workplace programs within and across organisations needs to be produced, compiled and disseminated publicly. The Act could revert back to a standardised reporting form, and extend disclosure requirements that are procedural and substantive in nature. This enables EOWA and other stakeholders to utilise reliable information for effective monitoring and lobbying, fostering and diffusing leading innovations across sectors, and help organisations build self-regulation capacity. Second, the Act could specifically require organisations to continually evaluate and review their practices against measurable goals, for


So, B, I've known you a while, but I still don't know what your JOB is...
I pretty much just help our rich clients avoid taxes.
Isn't that kind of depressing?
I guess so.
we do have a free gym at the office though!
well that is pretty awesome
The End

example, through conducting regular equal pay audits. Getting organisations to seriously consider alternative approaches will also require an external accountability mechanism.[51] EOWA should have available to it broader monitoring powers and a responsive enforcement pyramid as suggested by Hepple et al.[52] Finally, the Act could require organisations to consult a range of internal and external stakeholders (such as unions and/or civil society) and meaningfully involve them in developing, implementing and reviewing EEO programs.

Conclusion

Understanding reflexive regulation in theory and practice can help us to re-think how the *EOWW Act* can be more responsive to the diverse motivations and behaviours of corporations to proactively identify and alter existing practices and structures that perpetuate gender discrimination and inequality.[53] While recognising the need for a 'positive duty' model (a shift from the traditional individual complaints-based model), the EOWW Act is severely limited in its ability to prompt those employers with the capacity to bring about real change. Examining innovations in regulatory scholarship such as the pre-conditions for effective reflexive regulation as identified by McCrudden, and developments in regulatory efforts such as the UK's GED, may stimulate further thinking and debate on how policy-makers can develop a new approach to achieving equality for women in the workplace. □

Legal Equality

A Stacked Bench: The Judicial Appointments Process

1. Dr Andrew Lynch and Professor George Williams, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs: Inquiry into Australia's Judicial System, the Role of Judges and Access to Justice* (Sydney: Gilbert and Tobin Centre for Public Law: UNSW, 2009) at 1.
2. Attorney-General's Department, *Judicial Appointments: Ensuring a Strong and Independent Judiciary Through a Transparent Process* (Canberra: AGPS, 2010) at 2-5.
3. Laura MacIntyre, 'AG Outlines Plan for Judicial Appointments', (2008) 376 *Lawyers Weekly* 6.
4. Lynch and Williams, above n 1, 3.
5. Lynch and Williams, above n 1, 7.
6. Kathy Mack and Sharyn Road Anleu, 'The National Survey of Australian Judges: An Overview of Findings' (2008) 18 *Journal of Judicial Administration* 5, Figure 1-2.
7. The Hon Justice Michael Kirby AC CMG, 'Women – Making a Difference' (Speech delivered at the Women Lawyers' Association of New South Wales, Sydney, 18 June 1997).
8. Caroline Kirton, 'Has the System Failed Women?' (Speech delivered at the Australian Bar Association Judicial Appointments Forum, Sheraton on the Park Hotel, Sydney, 27 October 2006).
9. Michael Lavard, *Discussion Paper: Judicial Appointments – Procedures and Criteria* (1993) at 1.13-1.43.
10. Stephen Gageler, 'Judicial Appointment' (2008) 30 *Sydney Law Review* 159.
11. Justice Ronald Sackville, 'The Judicial Appointments Process in Australia: Towards Independence and Accountability' (2007) 16 *Journal of Judicial Administration* 129.
12. Chief Justice Murray Gleeson, 'Judicial Selection and Training: Two Sides of the One Coin' (2003) 77 *Australian Law Journal* 591.
13. Ibid 593.
14. Ibid 594.
15. Geoffrey Davies, 'Why We Should Have a Judicial Appointments Commission' (Speech delivered at the Australian Bar Association Judicial Appointments Forum, Sheraton on the Park Hotel, Sydney, 2006) at 8.
16. Lynch and Williams, above n 1, 7.
17. Sackville, above n 11, 136.
18. Lynch and Williams, above n 1, 7.
19. Davies, above n 15, 7.

Better than a Bill of Rights

The author is indebted to Professor David Kinley of the Sydney Law School for giving her the opportunity to research this issue in the course of co-authoring a submission to a Senate inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010. See David Kinley and Christine Ernst, Submission No 44 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010*, 9 July 2010 <http://www.aph.gov.au/Senate/committee/legcon_ctte/human_rights_bills/submissions.htm>.

1. See the National Human Rights Consultation Committee ('NHRCC'), *National Human Rights Consultation Report* (2009) 378.
2. See the Hon. Robert McClelland MP, 'Launch of Australia's Human Rights Framework' (Speech delivered at the National Press Club, Canberra, 21 April 2010)
3. See, for example, the Hon. Sylvia Hale MLC and the Hon. John Hatzistergos MP, 'A Human Rights Act for Australia: The Debate', *Dissent* (2009) 8-14.
4. Above n1, 5, 362.
5. Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth) cl 8.
6. Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth) cl 4.
7. Lord Lester of Herne Hill, cited in Janet Hiebert, 'Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?' (2006) 4(1) *International Journal of Constitutional Law* 1, 12.
8. Department for Constitutional Affairs, 'Review of the Implementation of the Human Rights Act' (Report, July 2006) 4.
9. Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth) cl 7.
10. Murray Hunt, 'The UK Human Rights Act as a "Parliamentary Model" of Rights Protection: Lessons for Australia' (Speech delivered at the Australian Human Rights Commission, Sydney, 17 February 2009).
11. See, for example, The Hon. Bob Carr, 'Lawyers are Already Drunk with Power', *The Australian*, 24 April 2008 <http://www.theaustralian.com.au/news/lawyers-are-already-drunk-with-power/story-e6frg73o-1111116145912> at 8 July 2010.
12. Carolyn Evans and Simon Evans, 'Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights' (2006) *Public Law* 785, 786.
13. David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' (2002) *Public Law* 323, 327.
14. David Kinley and Christine Ernst, Submission No 44 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010*, 9 July 2010, 5-6 <http://www.aph.gov.au/Senate/committee/legcon_ctte/human_rights_bills/submissions.htm> at 19 July 2010.
15. Above n 13, 346.
16. Jewel Topsfield, 'Anti-Terror Laws Rammed Through – Minus Debate', *The Age*, 7 December

2005.
17. See, for example, Christine Ernst, Submission to the National Human Rights Consultation, 11 May 2009.
18. *Acts Interpretation Act 1901* (Cth) s 15AB.
19. Above n 2.
20. Human Rights (Parliamentary Scrutiny) Bill 2010 cl 3. Those treaties are: the International Covenant on the Elimination of all Forms of Racial Discrimination; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on

Whose Law? The Suspension of Customary Law in the Northern Territory

1. New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report 96 (2000).
2. Tom Calma, 'The Integration of Customary Law into the Australian Legal System' (Speech delivered at National Indigenous Legal Conference, 2007), http://www.hreoc.gov.au/about/media/speeches/social_justice/integration_of_customary_law.html, at 22 July 2010.
3. Megan Davis and Hannah McGlade, *International Human Rights and the Recognition of Aboriginal Customary Law*, Background Paper 10 (2005) in Law Reform Commission of Western Australia, *Aboriginal customary laws: Background papers* (2006), 387.
4. Stanley Yeo, 'The Recognition of Aboriginality by Australian Criminal Law' in Greta Bird, Gary Martin & Jennifer Nielsen (eds), *MAJAH Indigneous Peoples & the Law* (1996) 230.
5. Above n 3, 402.
6. Ibid, 417.
7. James Anaya, 'Observations on the Northern Territory Emergency Response in Australia', *United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* (2010) 8.
8. Ibid.
9. Above n 3, 415.
10. Ibid.
11. Ibid 417.
12. Above n 7, 7.
13. Ibid 3.
14. Ibid 8.
15. Ibid.
16. Above n 2.
17. Ibid.
18. Ibid.
19. Heather Douglas, 'Justice Kriewaldt – Aboriginal Identity and the Criminal Law' (2002) 26(4) *Criminal Law Journal* 206.
20. Ibid.
21. Ibid.
22. Ibid.
23. Ibid 234.
24. Ibid.
25. Above n 2.
26. J.C. Altman, *The Howard Government's Northern Territory Intervention: Are Neo-Paternalism and Indigenous Development Compatible?* (2010) Centre for Aboriginal Economic Policy Research <http://caepr.anu.edu.au> at 22 July 2010.
27. Ibid 6.
28. Above n 7, 8.
29. Above n 26, 13.
30. *Chief Justice Brian R Martin, 'Customary Law – Northern Territory'* (Paper presented at *JCA Colloquium*, Sydney, *5 October 2007*) 32-33.
31. Ibid.
32. Ibid 3.
33. Peter Sutton, 'Customs Not In Common: Cultural Relativism and Customary Law Recognition in Australia' (2006) 6 *Macquarie Law Journal* 162.
34. [2003] NTCA 9.
35. Ibid.
36. Above n 3, 389.
37. Ibid 421.
38. Ibid.
39. William Jonas, 'The Recognition of Aboriginal Customary Law' (Speech delivered at Human Rights and Equal Opportunity Commission and International Lawyers Association (Australian Division) Workshop, Sydney, 20 November 2003).
40. Ibid.
41. Above n 7, 10.

Catching the Tricky Fish: The *Anti-People Smuggling Act*

1. Former Prime Minister Kevin Rudd quoted in Phillip Coorey, 'Boat people fight for their lives as Rudd slams people smugglers', *Sydney Morning Herald* (Sydney), April 17 2009.
2. Minister for Immigration and Citizenship, Minister for Foreign Affairs, Minister for Home Affairs, 'Changes to Australia's Immigration Processing System' (Press Release, 9 April 2010).
3. Explanatory Memorandum, Anti-People Smuggling and Other Measures Bill 2009 (Cth) 1.
4. See *Migration Act 1958* (Cth) s 233D and *Criminal Code Act 1995* (Cth) s 73.3A.
5. *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime* UNGA res 55/25. Annex III (adopted 15 November 2000; entered into force on 28 January 2004).
6. Ibid Article 3.
7. Ibid.
8. Legal and Constitutional Affairs Legislation Committee, Senate, *Report on the Anti-People Smuggling and Other Measures Bill* (2010).
9. Explanatory Memorandum, Anti-People Smuggling and Other Measures Bill 2009 (Cth).
10. Commonwealth, *Parliamentary Debates*, Senate, 16 April 2010, 59 (Geoffrey McDonald).
11. Sydney Centre for International Law, *Submission to the Inquiry into the Anti-People Smuggling and Other Measures Bill 2010* (2010) Sydney Centre for International Law <http://www.aph.

gov.au/Senate/committee/legcon_ctte/anti-peoplesmuggling/submissions.htm> at 18 June, 2010.
12. Above n 10.
13. Above n 5, Article 6.
14. (1996) 187 CLR 416 at 74.

15. See *Convention relating to the Status of Refugees* (adopted 29 July 1951, entered into force 22 April 1954) 189 UNTS 137, article 33(1); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, article 3; *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, articles 2(1), 7.
16. Above n 9, 8.
17. Above n 8, 3.
18. Mary Crock and Daniel Ghezelbash, 'Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals' (Unpublished paper, 2010).
19. Robert Manne and David Corlett, 'Sending them home: Refugees and the new politics of indifference' (2004) 13 *Quarterly Essay* 1, 2.

Equality in Immigration

Educating Refugee Children

1. Government of South Australia Department of Education and Children's Services, *Count me in! A resource to support ESL students with refugee experience in schools* (2004) 12.
2. Jaya Earnest, Tambri Housen and Sue Gillieatt, *A New Cohort of Refugee Students in Perth: Challenges for Students and Educators* (2007) Centre of International Health <http://lsn.curtin.edu.au/tlf/tlf2007/refereed/earnest.html> at 20 July 2010.
3. Steve Francis, 'School's In for Refugees' (Victorian Foundation for Survivors of Torture Incorporated, 2004) 29-33.

4. Government of South Australia Department of Education and Children's Services, above n 1, 14.
5. Earnest, Housen and Gillieatt, above n 2.
6. Terry Humphries, 'Asylum Seeker and Refugee Children: Guidance document' (2002).
7. Judith Herman, *Trauma and Recovery: The Aftermath of Violence from Domestic Abuse to Political Terror* (1992).

8. Miles Kemp, 'Refugee children excluded in the school yard', *Adelaide Now* (Adelaide), 3 April 2010.
9. Government of South Australia Department of Education and Children's Services, above n 1.
10. Steve Francis, above n 3, 31.

Immigration Detention Reform

1. Matthew Stubbs, 'Arbitrary Detention in Australia: Detention of Unlawful Non-Citizens under the Migration Act 1958 (Cth)' (2006) 25 *Australian Year Book of International Law* 273, 307-08.
2. *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137, art 31(2) (entered into force 22 April 1954).
3. Mary Crock, 'You have to be stronger than razor wire: Legal issues relating to the detention of Refugees and asylum seekers' (2002) 10 *Australian Journal of Administrative Law* 33 at 38.
4. *Refugee Convention*, above n 2, art 31(1).
5. Above n 2, art 31(2).
6. Expert Roundtable, 'Summary Conclusions: Article 31 of the 1951 Convention' in Erika Feller, Volker Turk and Frances Nicholson (eds), *Refugee Protection in International Law* (2003) 253 at 255.
7. *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 32.
8. *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584, 650, and 659.
9. *Behrooz v Secretary, Department of Immigration and Multicultural Affairs* (2004) 219 CLR 486, 507.
10. Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed, 2007) at 266.
11. *Migration Act* 1958 (Cth) s189(1).
12. *Migration Act* 1958 (Cth) s46A(2).
13. Office of the United Nations High Commissioner for Refugees (UNHCR), *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999, Guideline 3.
14. *International Covenant on Civil and Political Rights* (ICCPR), opened for signature 19 December 1966, 999 UNTS 171, art 9(1) (entered into force 23 March 1976).
15. *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (3 April 1997).
16. Ibid.
17. Id at 9.3.
18. Ibid.
19. Ibid.
20. Ibid.
21. See: *C v Australia*, UN Doc CCPR/C/76/D/900/1999 (28 October 2002); *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001 (6 August 2003); *D & E v Australia*, UN Doc CCPR/C/87/2D/1050/2002 (25 July 2006); *Shams et al v Australia*, UN Doc CCPR/C/90/D/1255 (11September 2007) and *Shafiq v Australia*, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006).

22. *v Australia*, UN Doc CCPR/C/76/D/900/1999 (28 October 2002); *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001 (6 August 2003) at [8.2].
23. *ICCPR*, above n 13, art 9(4).
24. *A v Australia* at [9.5].
25. Ibid.

26. See: *C v Australia*, UN Doc CCPR/C/76/D/900/1999 (28 October 2002); *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001 (6 August 2003); *D & E v Australia*, UN Doc CCPR/C/87/2D/1050/2002 (25 July 2006).

27. Andrew Metcalfe, *Department of Immigration and Citizenship Submission to the Senate Legal and Constitutional Affairs Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009*, (2009) <http://www.aph.gov.au/Senate/committee/legcon_ctte/migration_2009/submissions.htm> at 8 April 2010.
28. *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990).
29. Id, art 37(d).
30. *Migration Act* 1958 (Cth) s4AA.
31. Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth) sch 1(3).
32. Ibid sch 1(1).
33. Ibid sch 1(9).
34. Ibid sch 1(1), (9).
35. Phillip Coorey, 'Labor slams door on refugees', *Sydney Morning Herald* (Sydney), 10 April 2010 at 1.
36. Phillip Coorey, 'Labor slams door on refugees', *Sydney Morning Herald* (Sydney), 10 April 2010 at 1.
37. Julia Gillard, 'Moving Australia Forward' (Lowy Institute, Sydney, 6 July 2010).
38. Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth), sch 1(3).
39. *Refugee Convention*, above n 2, art 1A(2).
40. UNHCR Revised Guidelines, above n 11, Guideline 3.
41. Australian Lawyers for Human Rights, *Submission: Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009* (2009) <http://www.aph.gov.au/senate/committee/legcon_ctte/migration_2009/submissions.htm> at 29 April 2010.
42. See for example, Public Interest Law Clearing House, 'Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth)', (2009) at 13: <http://www.aph.gov.au/Senate/committee/legcon_ctte/migration_2009/submissions.htm> (11 April 2010); Refugee Council of Australia, 'Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009' (2009) at 5: <http://www.aph.gov.au/Senate/committee/legcon_ctte/migration_2009/submissions.htm> (11 April 2010).

43. Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth), sch 1(9).
44. Joint Standing Committee on Migration, Commonwealth Parliament, above n 46, 3.34.
45. Australian Lawyers for Human Rights, 'Submission: Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009' (2009) at 3-5: http://www.aph.gov.au/senate/committee/legcon_ctte/migration_2009/submissions.htm (29 April 2010).

46. Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth) sch 1(1).
47. Senator Chris Evans, 'Migration Amendment (Immigration Detention Reform) Bill 2009' (Second Reading Speech, Commonwealth Parliament, 25 June 2009) <http://www.minister.immi.gov.au/media/speeches/2009/ce090625.htm> at 13 April 2010.
48. Senator Chris Evans, 'Migration Amendment (Immigration Detention Reform) Bill 2009' (Second Reading Speech, Commonwealth Parliament, 25 June 2009) <http://www.minister.immi.gov.au/media/speeches/2009/ce090625.htm> (13 April 2010).
49. Savitri Taylor, 'Immigration Detention Reforms: A Small Gain in Human Rights' (2006) 13 *Agenda* 49, 50.
50. Savitri Taylor, 'Immigration Detention Reforms: A Small Gain in Human Rights' (2006) 13 *Agenda* 49 at 50.
51. Savitri Taylor, 'Immigration Detention Reforms: A Small Gain in Human Rights' (2006) 13 *Agenda* 49 at 49.
52. Senator Chris Evans, 'New Directions in Detention- Restoring Integrity to Australia's Immigration System' (Australian National University, Canberra, 29 July 2008) <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm> at 29 April 2010.
53. Tom Allard and Matt Wade, 'Seekers say they are undeterred by freeze', *Sydney Morning Herald* (Sydney), 10 April 2010, 7.
54. Migration Regulations 1994 (Cth), sch 2, reg 050.212(8), 050.613A(1).
55. Commonwealth, *Parliamentary Debates*, House of Representatives, 10 August 2006 at 43 (Andrew Robb, Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs).
56. Timothy Hatton, 'The Rise and Fall of Asylum: What Happened and Why?' (2009) 119 *The Economic Journal* 183, 207-13.
57. Grant Mitchell, 'Case management as an alternative to immigration detention: The Australian Experience' (2009) International Detention Coalition <http://idcoalition.org/wp-content/uploads/2010/02/a2daustraliabrief1feb2010.pdf> at 27 April 2010.

58. Gillard, above n 37.
59. Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth), sch 1(3).
60. Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth) sch 1(1).
61. Ibid.
62. Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth) sch 1(6). This inserts Note 1A into section 5(1) of the *Migration Act* 1958 (Cth) which defines immigration detention. Note 1A states that places approved by the minister under subparagraph (b)(v) may include 'immigration transit accommodation, immigration residential housing and other places that may be used to provide accommo-

dation.'

63. Senator Evans above n52.
64. Migration Amendment (Immigration Dention Reform) Bill 2009 (Cth) sch 1(3).
65. Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth) sch 1(9).
66. Ibid.
67. Ibid.
68. *Migration Act 1958* (Cth) s196; *Al-Kateb v Godwin* above n6.
69. Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth) sch 1(12).
70. Evans, above n52.
71. ICCPR, above n13, art 10(1).
72. Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth) sch 1 (13), (14).
73. Evans, above n52.

Reframing the Migration Debate

1. Australian Government Department of Immigration, *Factsheet 1: Background* (2010) Australian Government Institute of Immigration <http://www.immi.gov.au/media/fact-sheets/01backgd.htm> at 14 August 2010.
2. Keith Hancock, *Australia* (1930), 59.
3. United Nations, *International Migration Report 2006: A Global Assessment* (2006) United Nations <http://www.un.org/esa/population/publications/2006_MigrationRep/exec_sum.pdf>, xiv, at 14 August 2010.
4. Ibid.
5. Graeme Hugo, 'Globalization and changes in Australian International Migration' (2006) 23(2) *Journal of Population Research* 107-134, 108.
6. Ronaldo Munck, 'Globalisation, Governance and Migration: an introduction' (2008) 29(7) *Third World Quarterly* 1227-1246, 1228.
7. Australian Government Department of Immigration, above n 1.
8. Australian Government Department of Immigration, *Factsheet 2, Key Facts in Immigration* (2010) Australian Government Department of Immigration <http://www.immi.gov.au/media/fact-sheets/02key.htm> at 14 August 2010.
9. Michael Fullilove, 'World Wide Webs: Diasporas and the International System' (Lowy Institute Paper No 22, Longueville for Lowy Institute for International Policy, 2008), 5.
10. Ibid.
11. Rubin Patterson, 'Going Around the Drain-Gain Debate with Brain Circulation' in Rubin Patterson (ed), *African Brain Circulation* (2007), 1-13.

Social Equality

A Lucky Country for Animals?

1. George Orwell, *Animal Farm* (1946) 133.
2. Siobhan O'Sullivan, 'Australasian Animal Protection Laws and the Challenge of Equal Consideration' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia* (2009) 108.
3. Robert Garner, *Political Animals: Animal Protection Politics in Britain and the United States* (1998) 21.
4. Siobhan O'Sullivan, 'Advocating for Animals Equally from within a Liberal Paradigm' (2007) 16 *Environmental Politics* 1.
5. David Weisbrot, 'Comment' (2008) 19 *Reform* 2.
6. O'Sullivan, above n 4, 3.
7. Immanuel Kant, *Lectures on Ethics* (first published 1780-81, 1963), cited in Simon Brooman and Deborah Legge, *Law relating to animals* (1997) 100.
8. See for example Piers Beirne, *Confronting Animal Abuse: Law, Criminology, and Human-Animal Relationships* (2009).
9. Steven White, 'Exploring Different Philosophical Approaches to Animal Protection in Law' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia* (2009) 87.
10. Peter Singer, *Animal Liberation* (first published 1975, 1995).
11. Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (2006) 326, 336.
12. Tom Regan, *The Case for Animal Rights* (1988).
13. *Prevention of Cruelty to Animals Act 1979* (NSW) s 3.
14. *Prevention of Cruelty to Animals Act 1979* (NSW) s 31A.
15. RSPCA Australia, *RSPCA Australia National Statistics 2007-2008* (2008) RSPCA <http://www.rspca.org.au/assets/files/Resources/RSPCAAnnualStats2007-2008.pdf> at 29 July 2010.
16. *Companion Animals Act 1998* (NSW) s 5.
17. Lesley Petrie, 'Companion animals: valuation and treatment in human society' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia* (2009) 58.
18. Ibid 61.
19. *Prevention of Cruelty to Animals Act 1979* (NSW) s 11.
20. *Prevention of Cruelty to Animals Act 1979* (NSW) ss 5, 6. See sub-ss 4(2), 4(3) for definition of the terms 'cruelty' and 'aggravated cruelty'.
21. *Prevention of Cruelty to Animals Act 1979* (NSW) ss 8, 9.
22. Petrie, above n 17, 70.
23. RSPCA Australia, above n 15.
24. Ibid.
25. O'Sullivan, above n 2, 114.
26. Ibid.
27. Petrie, above n 17, 60.
28. O'Sullivan, above n 2, 120.
29. Deborah Cao, 'Regulation of the Treatment of Companion Animals' in Deborah Cao, Katrina Sharman and Steven White, *Animal Law in Australia and New Zealand* (2010) 175.
30. O'Sullivan, above n 2.
31. Ibid 112.
32. Katrina Sharman, 'Farm Animals and Welfare Law: An Unhappy Union' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia* (2009) 35.
33. Petrie, above n 17, 58.
34. Australian Bureau of Agriculture and Resource Economics, *Gross Value of Farm and Fisheries Production* (2008) Australian Com-

modities, <http://www.abareconomics.com/interactive/08ac_march/excel/table_2lb.xls> at 29 July 2010.
35. David Weisbrot, cited in Angela Priestly, 'Law Reform a Matter of all Creatures Great and Small', *Lawyers Weekly*, 21 May 2009.
36. See *Prevention of Cruelty to Animals Act 1979* (NSW) s 4(2).
37. *Prevention of Cruelty to Animals Act 1979* (NSW) s 1A(a).
38. Gary L. Francione, 'Animals: Property or Persons?' in Cass R. Sunstein and Martha C. Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) 116.
39. *Prevention of Cruelty to Animals Act 1979* (NSW) s 24(1)(a)(ii).
40. *Prevention of Cruelty to Animals Act 1979* (NSW) s 24(1)(a)(iii).
41. *Prevention of Cruelty to Animals Act 1979* (NSW) ss 24(1)(a)(iv), (v).
42. Sharman, above n 32, 50.
43. Geoff Neuman & Associates, *Model Codes of Practice for the Welfare of Animals* (2005) <http://www.daff.gov.au/_data/assets/pdf_file/0006/146751/Neumann_report.pdf> at 1 July 2010.
44. *Prevention of Cruelty to Animals Act 1979* (NSW) s 31A(3).
45. Sharman, above n 32, 51.
46. O'Sullivan, above n 2, 109.
47. Commonwealth, *Parliamentary Debates*, Senate, 20 June 2005 (Andrew Bartlett).
48. O'Sullivan, above n 2, 126.
49. Ibid.
50. O'Sullivan, above n 4, 12.
51. See Singer, above n 10.
52. Weisbrot, above n 5, 4.

Access to Healthcare: Centralisation in India and Australia

1. *Commonwealth of Australia Constitution Act* 1900 (Cth) s51(xxiiiA).
2. *Income Tax Act* 1942 (Cth); *Income Tax Assessment Act* 1942 (Cth); *States Grants (Income Tax Reimbursement) Act* 1942 (Cth); *Income Tax (War-Time Arrangements) Act* 1942 (Cth).
3. *Commonwealth of Australia Constitution Act* 1900 (Cth) s 96.
4. *Indian Constitution*, Schedule 7, s 6.
5. Ibid s 47.
6. Ibid.
7. Ibid, Article 12.
8. *Health Insurance Act* 1973 (Cth).
9. *Health Legislation Amendment Act* 1983 (Cth).
10. SR Leeder, 'Achieving Equity in the Australian Healthcare System' (2003) 9 *Medical Journal of Australia* 179.
11. Department of Health and Ageing, *About the PBS* (2010) Department of Health and Ageing <http://www.health.gov.au/internet/main/publishing.nsf/Content/health-pbs-general-aboutus.htm-copy2> at 24 June 2010.
12. *Ex rel Dale v Commonwealth* (1945) 71 CLR 237.
13. *Pharmaceutical Benefits Act* 1947 (Cth); the modern day PBS is covered by the *National Health Act* 1953 (Cth) together with the *National Health (Pharmaceutical Benefits) Regulations* 1960 (Cth).
14. *British Medical Association v Commonwealth* [1949] 79 CLR 201.
15. Planning Commission, *Eleventh Five Year Plan: Volume II* (2008) 58.
16. Ministry of Health and Family Welfare, *Bulletin on Rural Health Statistics in India* (2009) <http://mohfw.nic.in/Bulletin%20on%20RHS%20-%20March,%202008%20-%20PDF%20Version/Rural%20Health%20Care%20System%20in%20India.pdf> at 20 June 2010.
17. Ibid.
18. Ibid.
19. Ibid.

Quandaries of the Social Housing Tribunal Process

1. *Residential Tenancies Act 1987* (NSW) pt 2-3; *Residential Tenancies Act 2010* (NSW) pt 2-3.
2. *Housing Act 2001* (NSW).
3. Housing NSW, *Planning for the Future: New Directions in Community Housing in New South Wales 2007/08-2012/13* (2007) <http://www.housing.nsw.gov.au/NR/rdonlyres/EF5C1628-EB52-4DFE-9001-F4A31A5B6D61/0/PFTFCompleteDec2007.pdf> at 15 July 2010.
4. Housing NSW, *Charging Rent Policy* (2010) <http://www.housing.nsw.gov.au/Forms+Policies+and+Fact+Sheets/Policies/Charging+Rent+Policy.htm> at 18 July 2010.
5. Adam Crawford, '"Contractual Governance" of Deviant Behaviour' (2003) 30(4) *Journal of Law and Society* 479.
6. Ibid.
7. Housing NSW, *Clients Service Delivery and Appeals Policy* (2010) <http://www.housing.nsw.gov.au/forms%2Bpolicies%2Band%2Bfact%2Bsheets/policies/clients%2Bservice%2Bdelivery%2Band%2Bappeals%2Bpolicy.htm> at 1 July 2010.
8. Housing Appeals Committee, *How to Appeal* (2010) <http://www.hac.nsw.gov.au/How+to+Appeal/> at 1 July 2010.
9. See, for example, *NSW Department of Housing v Christodoulou* [1996] NSWRT 8 (Unreported, Cochrane M, 17 January 1996); *Department of Housing of NSW v Elkazzi* [2004] NSWCTTT 633 (Unreported, Balding M, 31 August 2004).
10. *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc* [1987] QB 815, 847 (Lloyd LJ).
11. *Nicholson v NSW Land and Housing Corporation* (Unreported, Supreme Court of NSW, Badgery-Parker J, 24 December 1991).
12. Housing NSW, above n 3, 4.
13. *Donoghue v Poplar Housing & Regeneration Community Association Ltd & Anor* [2001] 2 FLR 284, [65]-[66].
14. Housing NSW, *Community Housing eBulletin 1 (May 2010)* <http://www.housing.nsw.gov.au/NR/rdonlyres/E3BD5598-C247-4BEE-9DE2-FB6808488B72/0/AddedEBulletin_May2010_LK3648KB.pdf> at 4 July 2010; Housing NSW, *NSW Community Housing: Industry Develop-*

ment Framework (2010) <http://www.housing.nsw.gov.au/NR/rdonlyres/4091BF7B-F168-41FD-A8E5-96B29C6C01FE/0/IDFfinalversionMay2010tobeputonHNSWinternet.pdf> at 18 July 2010.
15. (Unreported, Supreme Court of NSW, Badgery-Parker J, 24 December 1991).
16. Ibid 35.
17. Ibid 25-26.
18. *Roads and Traffic Authority v Swain* [1997] NSWSC 181 (Unreported, Priestley, Meagher and Cole JJA, 7 May 1997); *Adavale Realty v Williams* [1996] NSWRT 190 (Unreported, Keenan M, 19 November 1996).
19. *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) ss 3, 54.
20. Crawford, above n 5, 488.
21. *Residential Tenancies Act 1987* (NSW) s 23; *Residential Tenancies Act 2010* (NSW) s 51.
22. *Residential Tenancies Act 1987* (NSW) s 23(2)(b).
23. *Residential Tenancies Act 1987* (NSW) s 64(4); *Residential Tenancies Act 2010* (NSW) s 152.
24. *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) s 54.
25. Ibid s 48.
26. [2010] NSWCA 11.
27. *NSW Land and Housing Corp v Thurlow* [2010] NSWCA 11 (Unreported, Basten and Young JJA, Handley AJA, 10 February 2010) [17] (Young JA).
28. Ibid [15]-[16].
29. *NSW Land and Housing Corporation v Fiti* [2001] NSWRT 243 (Unreported, Peter Smith M, 26 October 2001).
30. *NSW Land and Housing Corporation v Fiti* [2002] NSWCTTT 90 (Unreported, Connolly M, 14 May 2002).
31. Human Services: Housing NSW, *Eligibility for Social Housing Policy* (2010) <http://www.housingpathways.nsw.gov.au/Ways+we+can+help/Social+Housing/Eligibility+for+Social+Housing+Policy.htm> at 18 July 2010.
32. Crawford, above n 5.

Rethinking Equality for Women in the Workplace

1. See Belinda Smith, 'Not the Baby and the Bathwater – Regulatory Reform for Equality Laws to Address Work-Family Conflict', (2006) 28(4) *Sydney Law Review* 689, 692; Chris Ronalds, *Affirmative Action and Sex Discrimination*, 2nd ed., (Pluto Press, Leichardt, 1991).
2. Margaret Thornton, 'EEO in a Neo-Liberal Climate', (2001) 6(1) *Journal of Interdisciplinary Gender Studies* 77; Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, (1990).
3. Sandra Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation', (2005) 12 *Maastricht Journal of European and Comparative Law* 369, 369.
4. Suzanne Jamieson, 'Regulation and deregulation in Australian labour law: Through a reflexive lens', in Mark Hearn and Grant Michelson (eds) *Rethinking work: Time, space and discourse*, (Cambridge University Press, Melbourne, 2006), 60-78, 63.
5. Stephen Deakin and Colin McLaughlin, *The Regulation of Women's Pay: From Individual Rights to Reflexive Law?*, Working Paper No. 350 (2007) Centre for Business Research, University of Cambridge, 14.
6. Glenda Strachan, John Burgess and Liny Henderson, 'Equal Employment Opportunity Legislation and Policies: the Australian Experience' (2007) 26(6) *Equal Opportunities International* 525.
7. Many industrial relations and labour law academics argue that 're-regulation' more aptly describes the changes in recent decades instead of 'de-regulation'. See John Buchanan and Ron Callus, 'Efficiency and equity at work: the need for labour market regulation in Australia', (1993) 30(3) *Journal of Industrial Relations* 533; Joe Isaac and Russell D Lansbury, *Labour Market Deregulation- Rewriting the Rules* (2005).
8. See Belinda Smith, 'A Regulatory Analysis of the *Sex Discrimination Act 1984* (Cth): Can it effect equality or only redress harm?' in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds), *Labour Law and Labour Market Regulation - Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, (Federation Press, Sydney, 2006), 105-124.
9. *Sex Discrimination Act 1984* (Cth) s 7D.
10. Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2008), Submission No.22, Professor Margaret Thornton, ANU College of Law, Australian National University, 1.
11. Clare Burton, 'Equal Employment Opportunity Programmes: Issues in Implementation', in Ailsa Burns and Norma Grieve (eds), *Australian Women: New Feminist Perspective* (1986), 292-304.
12. Above n 2.
13. Glenda Strachan and Erica French, 'Equal Opportunity: Disentangling Promise from Achievement' in *Proceedings of Gender, Work and Organisation: 5th Biennial International Interdisciplinary Conference*, (Keele University, 2007).
14. EOWA, *Why EO makes business sense* (2010) http://www.eowa.gov.au/Australian_Women_In_Leadership_Census/About_Equal_Opportunity/Why_EO_Makes_Business_Sense.asp (accessed: 28 April 2010).
15. Linda Dickens, 'Beyond the business case: A three-pronged approach to equality action', (1999) 9(1) *Human Resource Management Journal* 9; Sara Charlesworth, 'Understandings of Sex Discrimination in the Workplace: Limits and Possibilities', *The Clare Burton Memorial Lecture*, (RMIT, 2007), 10.
16. Sara Charlesworth, Philippa Hall, and Belinda Probert, *Drivers and contexts of equal employ-*

ment opportunity and diversity action in Australian organisations (RMIT University, Centre for Applied Social Research, 2005), 12.
17. See Belinda Smith, 'Australian Anti-Discrimination Laws – Framework, Developments and Issues', in Takashi Araki & Hiroya Nakakubo (eds), *New Developments in Employment Discrimination Law*, (Kluwer International, 2008), 115-146.
18. Above n 5.
19. Belinda Smith, 'It's About Time – For a New Approach to Equality', (2008) 36(2) *Federal Law Review* 117.
20. Christopher McCrudden, 'Equality Legislation and Reflexive Regulation: A Response to the Discrimination Law Review's Consultative Paper', (2007) 36(3) *Industrial Law Journal* 255, 259; see also Gunther Teubner, *Law as an Autopoietic System*, (Blackwell, Oxford, 1992).
21. Above n 20, 259.
22. Ibid, citing to Colin Scott, 'Regulation in the age of governance: The rise of the post-regulatory state', in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation* (Edward Edgar, Cheltenham, 2004) 145, 151.
23. Above n 20, citing to: Hugh Collins, 'Book Review', (1998) 61 *Modern Law Review* 916, 917.
24. Above n 20, 259.
25. Ian Ayres and John Braithwaite, *Responsive Regulation*, (Oxford University Press, New York, 1992).
26. Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A new framework – Report of the Independent Review of UK Anti-Discrimination Legislation* (2000), 56-59.
27. Above n 1, 707, citing to John Braithwaite, 'Webs of Explanation, Webs of Regulation, Webs of Capacity', Presentation given at the Regulation Institutions Network, (Research School of Social Sciences, The Australian National University, Canberra, 21 February 2006).
28. Above n 1, 707.
29. Ibid, 706.
30. Above n 20, 259.
31. Above n 5, 8.
32. Bob Hepple, 'Equality and Empowerment for Decent Work', (2001) 140(1) *International Labour Review* 5, 17.
33. Above n 20, 262.
34. Ibid, 262.
35. Ibid, 265.
36. Ibid, citing to: Olivier De Schutter and Simon Deakin, 'Reflexive Governance and the Dilemmas of Social Regulation' in Olivier De Schutter and Simon Deakin, *Social Rights and Market Forces: is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (Bruylant, Brussels, 2005) 3.
37. EOWA, *Online Searchable Database of Reports*, (2010) http://www.eowa.gov.au/Reporting_And_Compliance/Online_Searchable_Database_Of_Reports.asp (accessed: 28 April 2010).
38. Above n 17, 109.
39. Above n 1, 721.
40. Ibid, 706.
41. Above n 20, 265.
42. Above n 20, 263.
43. Above n 5, 8.
44. Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2008): Submission No.12, Dr Belinda Smith, Faculty of Law, University of Sydney; Submission No.39, Dr Sara Charlesworth, Centre for Applied Social Research, RMIT University; Submission No.57, WA Equal Opportunity Commission; Submission No.60, Collaborative Submission from leading women's organisations and women's equality specialists; Submission No.69, Human Rights and Equal Opportunity Commission.
45. Bob Hepple, Mary Coussey and Tufyal Choudhury, above n26.
46. Jenny Watson, Chair, Equal Opportunities Commission (now the Equality and Human Rights Commission), *Overview of the gender equality duty: Guidance for public bodies working in England, Wales and Scotland* (2007) http://www.equalityhumanrights.com/en/forbusinessesandorganisation/publicauthorities/Gender_equality_duty/Pages/Genderequalitydutydocuments.aspx (accessed: 28 April 2010).
47. The duty extends to all UK public bodies and private and voluntary organisations carrying out public functions.
48. Equality and Human Rights Commission, *Gender Equality Duty: Specific Duties*, (2007).
49. Equal Opportunities Commission, *Gender Equality Duty: Code of Practice – England and Wales*, (2006), 5.
50. Above n 20, 265.
51. Ibid, 265.
52. Above n 26.
53. Above n 25.