Any PRIVILEGE for the UNLUCKY?

Matthew Groves

Unrepresented prisoners and legal documents.

A Victorian prisoner recently circulated a letter outlining a difficult problem. The prisoner was held on remand pending trial for various indictable offences. He was in possession of important documents to assist the conduct of his defence. These documents included copies of his interview statement, witness statements, police photographs, the presentment, the committal and defence briefs, and several pieces of correspondence from the prisoner's former legal representatives. The prisoner made detailed notes and comments on these documents, and wrote many additional pages of notes relating to his proposed defence. Subsequently he became unrepresented and, therefore, had no legal adviser who could take custody of these documents. The events that followed demonstrate the vulnerable position of such a person.

The prisoner was transferred from the Melbourne Custody Centre to a police lock-up near the court of his committal hearing. He kept possession of his legal documents during the journey, but on arrival they were seized by the officer in charge. Interestingly, the prisoner had anticipated this problem, and had written in advance to a senior officer in the district to which he was to be sent, expressing concern and requesting to be allowed to retain possession of his documents. The officer who seized the documents allegedly saw this letter. When it was brought to his attention, the policeman replied, 'you don't have a right to keep any papers . . . prisoners don't have rights'. Nevertheless, after some argument, the documents were eventually returned. The prisoner kept the documents in his possession for the rest of that day, which was the first day of a two-day committal hearing. Later that night the documents were again seized and kept overnight. Over the course of the next few days this process was repeated several times.

In total the police held all of the prisoner's legal papers for perhaps two and a half days. During that time an uncertain number of police officers would have had access to them. The police station was equipped with a high speed photocopier. Some of the officers, one of whom was the informant, were scheduled to give evidence for the prosecution at the prisoner's committal hearing. The senior officer at the station apparently did not intervene to ensure that the prisoner's documents were returned promptly.

Some of the wider questions raised by this incident are as follows: What rules govern the holding of legal documents by prisoners? What powers do police officers have to seize legal documents? Can an unrepresented defendant claim legal professional privilege (LPP)? If LPP is not available, is there any other means by which a prisoner, whether on remand or otherwise, can prevent custodial staff from seizing his or her legal documents?

Defence legal documents

The question of whether a prisoner may resist the seizure of legal documents by custodial staff, is mainly a question of privilege. However, it is first useful to explain how a prisoner may come to possess a

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large pile of sensitive legal documents. Several Victorian statutory provisions require that a defendant be given copies of certain documents related to his or her prosecution. Various provisions require that a defendant is given copies of: tape recordings and transcripts of interviews taken by police (*Crimes Act 1958* (Vic.) s.464H(3)); the notice of the presentment (*Crimes Act* s.353(2A)); depositions, including statements tendered by way of a 'hand-up brief' (*Crimes Act* s.412); and the 'hand up brief' (*Magistrates' Court Act 1989* (Vic.) sched. 5, cll.1 and 2).

Accordingly, a defendant normally receives a large number of legal documents that are used in the conduct or his or her defence. In most cases those documents will be delivered directly to the defendant's solicitor, or the defendant will pass them on. However, an unrepresented defendant will normally retain possession of his or her documents. A significant number of defendants facing serious criminal charges do not receive bail, and an increasing number do not receive legal representation.[1] Therefore, it is not unreasonable to assume that a fair number of defendants held in custody have possession of their defence documents. The next question is, what official regulation, if any, governs those documents?

Rules governing prisoners in Victoria

The prisoner's letter did not clearly state the nature of his custody, but it seems clear that he was held in police custody. The point is important. Prisoners held in police gaols are not subject to the *Corrections Act 1986* (Vic.). That Act extends only to people deemed to be in the Director-General's custody. This phrase expressly excludes prisoners who are: serving all or part of their sentence in a police gaol (s.4(2)(b)); held in police custody by order of a court (s.4(2)(d)); or have been transferred to a police gaol by order of the Director-General under s.56(2) (s.4(2)(ba)). A prisoner held in police custody for any other reason might fall within the scope of the *Corrections Act*, otherwise he or she would be governed by the *Corrections (Police Gaols) Regulations 1995* (Vic.).

The Corrections (Police Gaols) Act Regulations 1995 (Vic.)

These brief regulations authorise police officers to conduct a search in two situations. First, the officer-in-charge of the station may authorise a search if he or she believes on reasonable grounds that the search is necessary for the security, management or good order of the police gaol (reg. 6(1)(d)(e)). The scope of that clause is complimented by another that allows the seizure of anything 'which the member believes on reasonable grounds jeopardises or is likely to jeopardise the security, good order or management at the police gaol' (reg. 6(3)). Second, officers may seize items believed to be associated with some sort of illegal purpose (anything deemed to be a weapon, anything that could be used in an escape, etc.) (reg. 6(3)(b)). Some regulations give minor guidance on how any seized property must be handled. One clear requirement is that a seized item must be either stored or destroyed (reg.6(4)) and that officers must make a written record, as soon as possible, of any dealing with seized property (reg. 6(5)).

None of these regulations, however, expressly authorises the seizure of legal documents; nor is it clear that they are intended to cover legal documents. Instead, the regulations appear to be intended to deal with the maintenance of security and the discovery of evidence from arrested prisoners.

The Victoria Police Manual

The *Administrative Procedures* of this manual include guidance on how police officers must deal with documents. The manual places great emphasis on the security of many forms of documents. A register must be kept of important official documents, described as 'accountable documents' (para. 5.3.1). Items of property are subject to different recording requirements. The station commander is responsible for ensuring that records of property received by officers are kept. However, prisoners' property is expressly excluded from the general requirements regarding the keeping of particulars of property that is kept in the store (para. 10.1.3).

The *Operating Procedures* provide no solace for prisoners held by police. The procedures direct that, as a general rule, prisoners should only be searched in accordance with reg. 8 of the *Corrections (Police Gaols) Regulations*. The manual reiterates the general wording of that regulation, in an apparent attempt to authorise blanket searching of all prisoners in all circumstances. The purpose of this policy is clear. The *Operating Procedures* state that '[T]he safety of members should be paramount when making a decision as to whether to search a prisoner' (para. 10.2.3). The procedures also direct that an officer should inform the prisoner of the reason for the search, unless the circumstances render the giving of reasons unnecessary or impracticable (para. 10.2.3). The manual explains the purposes for which property may be seized according to the terms of the *Corrections (Police Goals) Regulations*, and concludes that '[I]n carrying out such searches a member may seize any items found that on reasonable grounds fall into the (specified) categories'. There are strict requirements on the recording of details about a prisoner's property. Details of any property seized must be recorded in the general property register. If the property is to be used as evidence, the details must be recorded in specific forms (para. 10.2.4).

Correctional legislation

Most remand prisoners in Victoria are held in prisons rather than police gaols. Therefore, to gain a comprehensive view of the law regarding unrepresented defendants and the possession of legal documents, it is necessary to also examine correctional legislation.

The only clear right of prisoners to possess property is a provision which states that prisoners have a right to 'be provided with clothing that is suitable for the climate and for any work' that they must do (s.47(1)(d)). No other provisions clearly allow prisoners to possess property or documents. The *Corrections Act* makes clear provision for visits by legal advisers and their assistants (s.40). The *Corrections Regulations* allow a prisoner to exchange legal documents with his or her lawyer (reg. 76(3)). However a prisoner may *retain* legal documents only with authorisation from the governor (reg. 76(5)). There is no mention of LPP, or any other form of protection, in relation to such documents. Accordingly, documents are subject to the other regulations dealing with letters and parcels sent to, or by, prisoners (reg.76(4)). The *Corrections Act 1986* (Vic.) and the *Corrections Regulations 1988* (Vic.) contain many sections that are indirectly relevant to an unrepresented prisoner who is in possession of legal documents. None of those provisions deal directly with the possession, seizure or storage of legal documents, but the powers of search and seizure conferred on prison officers are drawn in sufficiently wide terms to enable guards to seize any documents held by a prisoner.

There are no provisions that expressly cover the sending and receipt of mail which, by implication, means that legal documents are subject to the normal rules of search and seizure. There are, however, some clear exceptions. Correspondence with the Ombudsman's office is subject to special rules. Prisoners may send and receive mail to the office of the Ombudsman, without interruption (s.47(1)(m)). A further, more general right, enables prisoner to send and receive mail 'uncensored by prison staff' (s.47(1)(n)). This provision makes no mention of seizure.

The Act and Regulations include detailed powers of search and seizure (ss.43-45, regs 87-92). These provisions are clearly designed to empower custodians to fully search a prisoner, and to seize any unauthorised material, whether at reception or at any subsequent time. Officers may seize anything 'found on a prisoner or in a prisoner's possession, other than a thing which the prisoner is authorised to wear or to possess' under the Act or regulations (s.46(1)(b)). As mentioned above, prisoners are 'authorised' to possess very few items, so a statutory power to seize 'unauthorised' items potentially has a very wide scope. Even authorised items of clothing or personal possessions may be seized if an 'officer believes on reasonable grounds [it] jeopardises or is likely to jeopardise the security of the prison or the safety of persons within the prison' (s.46(1)(d)).

Summary

The legislation governing prisons and police gaols makes no real provision for prisoners in possession of legal documents. Without exception, the legislation is designed to maximise the powers of custodians to search prisoners. Widely framed powers of search are complemented by the similarly wide powers of seizure. There is not one provision in Victoria that may operate to prevent custodians from searching through, reading, and confiscating defence documents. More disturbingly, there are no provisions which clearly anticipate or accept that prisoners may be entitled to possess any significant items of personal property. The next question to be examined is whether there is any common law rule which may be used by prisoners to secure their legal documents.

The rights of prisoners

The legal status of prisoners is an important preliminary issue to the problem under discussion. An understanding of prisoners' rights can help explain whether a person's right to possess legal documents without interference is affected if the person becomes a prisoner.

A useful starting point is *Raymond v Honey* [1983] 1 AC 1. In that important decision, the House of Lords held that a convicted prisoner retains all of his or her civil rights that are not expressly, or by necessary implication, removed by statute. The House of Lords did not identify any of the rights in question, but the facts of *Raymond v Honey* are instructive. The case was an appeal by a prison governor, convicted of contempt after withholding a letter from a prisoner. The prisoner had made a complaint about the governor. The governor stopped the letter on the grounds it was mischievous. The prisoner then sought to cite the governor for contempt. The governor also stopped this letter. The House of Lords held that the *Prison Rules* 1964 (Eng) enabled the governor to stop the first letter, since it was mischievous. The second letter, a plea for judicial intervention, was viewed differently. The House of Lords held that a person's right of unimpeded access to the courts was fundamental and could only be removed or limited by clear statutory authority. As the *Prison Rules* did not clearly provide the governor with such power, the conviction for contempt was upheld.

Raymond v Honey has been endorsed in several Australian Supreme Court decisions, and cited with apparent approval by the High Court.[2] The approach of the House of Lords is useful because it suggests that prison legislation should be interpreted strictly. As a result, gaolers must be able to point to clear statutory authority before they may lawfully interfere with the rights of a prisoner. However, this view also contains a limitation. *Raymond v Honey* is not itself a source of rights for prisoners, but a presumption of interpretation which can limit the ability of gaolers to interfere with the rights of prisoners. Another, more substantial, difficulty arises in any attempt by prisoners to use the case to any advantage in a case like the present one. The source of that difficulty is simple: does a prisoner acting as his or her own counsel possess any right of legal professional privilege to begin with?

The common law — is legal professional privilege available to litigants in person?

In both the NSW and Commonwealth jurisdictions, legal professional privilege is extended to unrepresented parties in respect of confidential communications/documents prepared for the 'dominant purpose' of preparing or conducting court proceedings (s.120 *Evidence Act 1995* (NSW/Cth)). Such a position is consistent with the recommendations of the ALRC some ten years earlier.[3] Until passage of a similar provision in Victoria, unrepresented litigants in this State must rely on the common law.

Although LPP has been considered in detail by large number of cases, there is no reported decision on whether an unrepresented person may claim the privilege. Several commercial decisions, dealing with the privilege in the context of discovery, are nonetheless instructive. For example, in *National Employees Mutual General Insurance Association v Waind* (1979) 141 CLR 648, 654, Mason J strongly doubted suggestion that the privilege applied to documents created by a litigant in person. He reviewed a number of English decisions in favour of this view. Mason J's decision was generally endorsed by other members of the court, though none expressly referred to this issue.

None of the standard evidence texts consider in detail whether an unrepresented defendant may claim LPP. Many cases are summarised in Aronson and Hunter, *Litigation — Evidence and Procedure*.[4] Those authors conclude that the balance of authority suggests that LPP does not extend to a litigant in person because the solicitor/client relationship is crucial to attract the privilege. Aronson and Hunter cite *Ventouris v Mountain* [1991] 1 WLR 607 as one exception to the common law rule. In that case Bingham LJ pointed out the inherent problem in any attempt to apply the doctrine of LPP to an unrepresented party; the phrase '*legal professional* privilege' suggests that the privilege belongs to the lawyers. The court pointed out that this view was wrong; the privilege belonged wholly to the client. The phrase also suggests that an unrepresented person cannot claim the privilege, because no 'legal professional' is involved. The court felt that this view was also wrong. The term 'litigation privilege' was criticised because it implies that the privilege requires active litigation, rather than the involvement of a lawyer. The court felt that this unduly limited the proper scope of the privilege by excluding communications and documents prepared even when no litigation was pending or contemplated (at 611).

Another useful case, mentioned by McNicol in *The Law of Privilege*,[5] is *R v Heston-Francois* [1984] 2 WLR 309, 318-9. McNicol notes that in *Heston-Francois* the English Court of Appeal proceeded on the assumption that LPP may apply to material prepared by a defendant conducting his or her own defence. The case has relevance to the present problem. The police searched a defendant's home, using a warrant issued to allow a search for items allegedly stolen in a burglary. During their search the police also seized documents prepared for use in his defence to the burglary charges. The defendant applied for a stay of proceedings on the grounds that an abuse of the process had occurred. The application was refused, and the defendant convicted.

The English Court of Appeal dismissed the appeal, mainly because the judge had not erred in refusing to hold an inquiry into pre-trial conduct of the police. The Court held that the powers of the trial judge were appropriate to deal with such conduct. However at the end of its judgment the court offered strong criticism of the behaviour of the police. The court stated that the documents should not have been seized, for seizure had 'possible implications upon the conduct of a trial'. It added that, even where documents are lawfully seized, the police should exercise 'great caution lest they contain matters for which a defendant is entitled to claim the protection of privilege so that his right to silence be not destroyed' (at 320). It is not clear whether this was a reference to legal professional privilege or the privilege against self-incrimination.

There is, however, some common law authority in support of change. For example, Murphy J expressed strong support for an extension of the privilege to litigants in person (*Baker v Campbell* (1983) 153 CLR 52, 90). McNicol, while admitting that the current weight of authority suggests that LPP does not favour the view of Murphy, cites this dicta in a call for the privilege to be extended to litigants in person.[6] McNicol is correct. If this issue is addressed solely in terms of LPP, the common law holds little comfort for an unrepresented person. Perhaps the best course by which change can be secured is through legislative reform, as was suggested by the ALRC in its reference on evidence.

How can unrepresented people be protected?

The general requirement that a criminal trial be fair is one common law doctrine that could easily be utilised to offer protection to unrepresented people so as to prevent interference with their legal documents. The right to a fair trial has been strongly affirmed by Australian courts in recent times. It is true that in *Dietrich v R* (1992) 177 CLR 292 the High Court explained that the right was not so much a positive right, but rather a right not to be subjected to a trial that is unfair.[7] There is an important reason why the High Court formulated the right in negative terms. The main means by which a court can ensure that a trial is fair is through the exercise of its inherent power to order a stay of proceedings if the court concludes that the trial is, or may not be, fair. That power extends to the entire *proceedings*, but very often unfairness will arise from another source. For instance, in *Dietrich's* case, an accused person was sent for trial on serious charges without any representation. The accused submitted that he should not be tried on serious criminal charges if, through no fault of his own, he could not obtain representation. Neither the presiding court nor the High Court could order the legal aid office, or the government in general, to provide Dietrich with state-funded legal representation. So if the trial proceeded, the court could not ensure that it would be fair. However the court could prevent an unfair trial from beginning, by ordering that Dietrich's trial be stayed until legal representation was provided.

Any attempt by an accused person to invoke the right to a fair trial will not be without difficulty. The precise qualities of a fair trial, or the events that may render a trial unfair, are not clear. The High Court has pointed out that fairness in this context is inherently flexible, so that it may be adapted to the particular needs of each case. Nonetheless some decisions about the notion of fairness in the conduct of criminal trials provide guidance for unrepresented defendants who are subjected to improper pre-trial conduct by the police. When considering the fairness of a trial, courts will examine the whole of the criminal process rather than the trial alone.[8] For example, where the police produce confessional evidence that has not been corroborated by some form of recording, and no good reason is given for that failure, the requirements of fairness will necessitate a detailed direction to the jury about the specific dangers of such evidence.[9]

There is no reason why the general principles of fairness that underpin the right to a fair trial cannot extend to situations such as the one considered in this article. At a conceptual level, the requirements of fairness in criminal proceedings provide a more coherent foundation than LPP on which some form of protection may be extended to the documents of an unrepresented person. It is difficult to imagine how a trial could properly proceed after custodial staff — particularly police officers who are closely associated with the defendant's prosecution — have had unrestricted access to an accused person's legal documents. One significant practical problem may arise from any attempt to utilise the fair trial doctrine, however, an unrepresented person held in custody cannot realistically take preventative legal action against police or prison officers. Accordingly, the fair trial doctrine would normally be invoked in an *ex post facto* manner, after custodial staff have had possession of a defendant's legal documents. Surely the better solution is to *prevent* any interference by custodial staff with the legal documents of an accused from the outset?

Conclusion

There is no secure means by which an unrepresented person who is held in custody in Victoria may protect his or her legal documents from interference by custodial staff. The legislation and administrative guidelines that regulate the property of prisoners provide no basis on which prisoners may retain possession of documents, or resist a search for, or seizure of, legal documents. The doctrine of LPP currently offers no significant protection to prisoners. Until the applicability of LPP to litigants in person is directly ruled upon, any consideration of the doctrine in this context is largely speculative. The right to a fair trial provides a logical foundation on which protection can be extended to the documents of an unrepresented person. However, until the doctrine is authoritatively invoked by a superior court in a case such as the present, the practical value of the broad principles espoused by the High Court remains unproven. Furthermore, the fair trial doctrine may only offer an *ex post facto* response to inappropriate behaviour by custodial staff.

A sensible solution could be achieved through several pieces of complementary legislation, containing the following elements: first, clear legislative recognition of the right of people held in custody to possess and retain control of legal documents (perhaps by means of an express statutory

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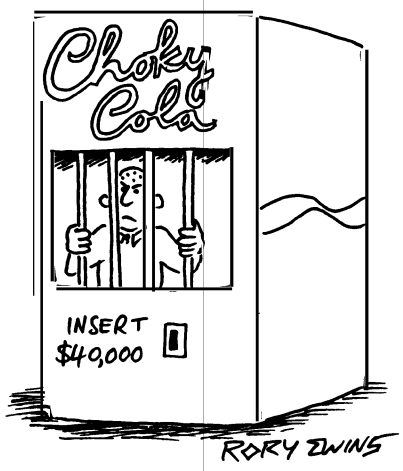
Private Prisons FOR PRIVATE PROFIT

Stuart Russell

The private prison industry is burgeoning in Australia.



While the Australian business community continues to suffer from the worsening world economic crisis, one burgeoning growth industry is private security, which is the fastest growing industry in the country after tourism. The construction and administration of private prisons constitute a major component of this private security goldmine. Moreover, Australia has one of the highest rates of prisoners in private prisons in the world.[1] Some 10% of the prison population in Australia is on private facilities, compared to 2% in the United States. That figure will increase substantially with recent moves in the State of Victoria to privatise 40% to 50% of its prisoners.[2]

The relatively recent emergence of private prisons in Australia is a by-product of the drive by capital to expand into new markets because of a decreasing rate of profit, and the desire by government to respond to fiscal crisis by cutting costs. For the state considers it to be more cost-effective to use poorly paid and trained and generally non-unionised staff in private prisons, which cost less to run than public institutions, rather than better paid and trained unionised public prison staff. A massive movement towards privatisation has led to the transfer to the private sector of a variety of public services. As Smith argues, private prisons 'are a symptom, a response by private capital to the "opportunities" created by society's temper tantrum approach to the problem of criminality in the context of free-market supremacy'.[3]

While much of the critique of private prisons has been focused on issues of accountability and efficiency,[4] comparatively little has been written about the impact of private prisons on prisoners. The aim of this article is twofold: first, to sketch the growth of private prisons in Australia, and second, to argue that private prisons should be opposed fundamentally because of the inferior quality of services prisoners receive as a result of the insatiable drive to increase the profit margin in such institutions.

The rise of private prisons in Australia

The privatisation of public services has been an increasingly popular choice of many Western governments to the deepening crisis of government and capital: the need by government to cut costs, and the desire by private capital to increase its profit margin. Privatisation of prisons first became popular in the United States in the 1980s, primarily because of massive overcrowding.[5] In New South Wales the privatisation idea arose after a former Liberal Corrective Services Minister toured the USA, inspecting private and public prisons.[6] Confronted with increasing overcrowding (primarily the result of 'truth in sentencing' legislation, which prevents early release on probation), inadequate facilities, staff shortages, lack of staff training and poor management practices, the NSW Government pressed ahead with privatisation.

The privatisation drive in New South Wales was also propelled by experiences in Queensland, where Australia's first privately operated prison, the 244-cell Borallon Correctional Centre, was opened in

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January 1990, at a cost of $22 million to build with a contract fee of $9.7 million for the 1991 financial year.[7] Borallon is located 60 km west of Brisbane, and holds 244 medium security inmates. It is operated by Corrections Corporation of Australia (CCA), as a joint venture with Chubb Australia, a wholly owned subsidiary of Chubb UK. CCA US was financed on capital from Kentucky Fried Chicken. According to the vice-president of CCA US, 'the business of private prisons is just like selling cars, real estate or hamburgers'.[8] Or as one private prison contractor frankly admitted, 'We'll hopefully make a buck at it. I'm not going to kid you and say we are in this for humanitarian reasons.'[9]

The newest private prison contractor in Australia is Australasian Correctional Management (ACM), a wholly owned subsidiary of another US private prison company. ACM operates the 600-cell medium and minimum security gaol in Junee, about 400 km southwest of Sydney, which was opened in March 1993, and built for $53 million. It also runs the 380-cell Arthur Gorrie prison in Queensland, which commenced operations in June 1992. Each of ACM's Australian prison governors come from US prisons. A 600-cell medium security prison, Fulham Prison, is due to open in 1997 in Victoria. These four institutions are only the first of many more private prisons planned to be opened across the country in the near future.

A reduction in quality of services for inmates

Prisoners have violently opposed being transferred to these remote private prisons, because of the fear that their families would be unable to visit them as the journey would be expensive and lengthy. In fact, one prisoner at the Long Bay gaol in Sydney preferred suicide rather than transfer to the Junee Prison.[10] In the first 18 months of operation, five prisoners committed suicide at the Arthur Gorrie Centre near Brisbane, thus contributing to an already unacceptably high number of deaths in custody in Australian gaols.

During this early period, the prison's management was criticised by a corrective services inspector for subjecting prisoners to 'indignity and acute physical discomfort'.[11] Three serious disturbances, and several gassings, occurred in the same prison during its first 15 months.[12] Insufficient opportunities in education, training and industry and poor treatment of prisoners have led to an increased level of tension in all private institutions, which has spilled over into a number of riots.

The poor conditions of Arthur Gorrie Prison are well documented by Moyle:

> Inmates have reported they have spent up to 20 hours in their cells, have nominal exercise regimes, poor quality programs, delays in getting access to books from the library, inadequate basic facilities and a high incidence of assaults within the centre . . . Within 14 months of operation there had been two riots, one of them leading to hundreds of thousands of dollars worth of damage when a unit was set alight, and three suicides, including one by an Aboriginal inmate who was experiencing a gender identity crisis . . . The Prisoners Legal Service indicated that it was very difficult to gain regular access to the centre to take instructions from clients.[13]

At Junee, original plans to link educational training with the local community college were foiled, and the prison has not employed a welfare officer or a psychologist. Moreover, ACM refuses to release details of the medical services available to inmates.[14]

Similar complaints have been documented at Victoria's first private prison, Metropolitan Women's Correctional Centre, opened at Deer Park in August 1996. At the same time Fairlea Women's Prison in Fairfield was closed, and the women transferred to the new prison in Deer Park. It is reportedly only the second private prison for women in the world. Visits there are highly restricted, and children's visits can be denied as a punishment. There is inadequate or inappropriate clothing for the women. An increase in internal violence has occurred, and three officers resigned during the first few months after opening, as well as the program manager. During the same period at least nine attempted suicides occurred.[15]

Private prisons can directly affect remission, parole, disciplinary decisions and a number of other issues which potentially increase the length of sentence of an inmate, and some of these matters are not subject to review or appeal. An added problem is that prisoners in Australia:

> are not protected by constitutional safeguards, and there is no provision for prisoners or members of the public to sue private prison operators over contractual breaches, since the contracts are between the operator and the government.[16]

One of the major difficulties for many prisoners is separation from families and friends, and this has been accentuated by the remoteness of private prisons. Visitors at Junee have been abused, searched and have faced long delays. Transportation to the facility is sporadic, time-consuming and expensive, and visitors are able to see prisoners only on a two-monthly basis.[17] In many cases these visits involve overnight stays, and many families are not able to afford such expenses. Such difficulties have resulted in the further isolation of inmates, and the reduction in solidarity and support from community groups.

The quality of staff is a further problem with private prisons. Many workers have minimal or no prior custodial training; there are not enough staff; and there is a higher ratio of casual and lower ranking prison officers than in the public system. Many staff are hired at a lower average hourly wage, some are not unionised and are on fixed contracts with few fringe benefits.[18] At Junee, all officers must sign an enterprise agreement that prohibits staff from taking industrial action concerning staff levels.[19] These poor working conditions result in huge staff turnover, reduction of morale and a poor quality of services for inmates.

This worsening situation is rooted in the profit motive of the private corporation, and its zealous drive to cut costs in order to maximise profits,[20] since private prisons generally receive a flat rate for each prisoner they house. Like any other capitalist business, the raison d'être of the private prison is profit generation. But this creates a discordance between the private need of capital to accumulate profit against the social need of inmates for proper custodial conditions. As Chan explains:

> [the] profit motive provides no incentive to reduce overcrowding or to increase the use of non-custodial penalties. Instead, it encourages the filling of prison cells and the building of more prisons.[21]

The profit motive has dominated training and programs at the Borallon Correctional Centre, and most other aspects of the administration of private prisons. It causes management to cut corners, leading to poor or unsafe conditions. Private prisoners are seriously disadvantaged, as a result.

Globally the slow collapse of the Western capitalist system has been unfolding. The expenditure base of the state is being squeezed so severely that it is forced to trim down the services it provides. To increase the sagging profit margin of capital and bolster this sector, the state cake is being re-divided and the state restructured; private capital is no longer

willing to fund the state as in the boom days of capitalism. The veil between the state and corporate capital is therefore being lifted, as in the case of private prisons, revealing their dynamic interdependence and a shift in their configuration. Faced with an increase in the fear of crime, largely because of a crumbling socio-political world order, private prisons become very profitable avenues for market-hungry capital.

A gloomy future in Australia

The Commonwealth Government has begun to implement sweeping cutbacks in public spending. In the context of continuing and deepening cutbacks combined with a deteriorating domestic and world economy, the drive towards private prisons is inexorable. Such cutbacks in funding to private prisons will result in an even further deterioration of services for inmates, including a reduction in rehabilitative programs coupled, paradoxically, with a massive private prison construction program. Drastic changes to the industrial relations system will also intensify staff discontent, which will negatively affect inmates. The privatisation campaign, of which the drive for private prisons is emerging as a key player, has already enabled the state to curtail the power of the unions with the view to diminishing labour unrest.

But private prisons must also be opposed because they are a diversion from alternatives to imprisonment. As Hester cogently argues, public money:

> would be better spent on programs which effectively rehabilitate offenders, on compensation and assistance for victims, and on addressing the social problems such as unemployment and poverty which lie at the heart of crime.[22]

If anything can be learned from this tragic experience, it is that private prisons are not an appropriate alternative to the public prison crisis. The privileging of profits before human needs must be stopped.

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'Tell Someone Who Cares'

Excerpts from the nightly talk by AMANDA GEORGE at Somebody's Daughter Theatre's production to celebrate the women of Fairlea (28-31 August 1996).

In August 1996 the Victorian Government closed Fairlea Women's Prison, which was opened in 1956, the first women-only prison in Australia. In its place they opened the first private prison for women in Australia, at Deer Park. Eventually the Government plans to have 80% of female and 40% of male prisoners in Victoria in prisons for profit (compare this with only 2% of prisoners in the USA in private prisons).

Prisons for profit

Corrections Corporation of America (CCA), the parent company of Corrections Corporation Australia, which runs our new private women's prison, is the largest private prison corporation in the world.

In 1995 the number of cell beds that CCA profit from increased from 15,000 to 30,000. On the New York stock exchange that year they had the fourth highest gain, their shares increasing from $16 to $68.[1] An article published in the *Bulletin* (3 September 1996) reveals that CCA and Wackenhut (which has been awarded the contract to run the Sale 600-bed men's private prison) have reaped profits of more than $10 million from Australia in the last two years .

With CCA making such profits why have they been saying they can't afford to pay community groups to run programs in the prison? Perhaps this is why they are revenue raising from the women we pay them to imprison. The women have been told they will be fined $50 for swearing.

Only Tasmania spends less per capita on people in prison than Victoria. Each of us contributes less than $2 a year to women prisoners.[2] The Government has been reported in the *Herald Sun* (13 April 1996) as saying that at most, private prisons will save 20 cents a prisoner.

Security and surveillance

In 1987 the Victorian Department of Corrective Services dismantled parts of the new Jika Jika high security unit in Pentridge Prison, after a fire in the unit (acknowledged by the department as 'the electronic zoo'). The Department's Annual Report for 1987-88 said they removed '...oppressive features such as ...electronic surveillance, pneumatic doors' (p.9).

Yet these same features are in the new women's prison. The prison is surrounded by razor wire. The cells, gym complex, pool and prison 'town square' are all constantly monitored by cameras. The perimeter fence is topped with cameras that can see anywhere in the prison grounds and there is a camera tower in the visitor's car park. (Fairlea prison had no cameras at all, inside cells or monitoring the grounds. It had no razor wire.)

Tear gas has never been used on women in Victorian prisons. Yet CCA have been given authority by the Government to use tear gas at Deer Park.[3] Victorian prisoners are fortunate, however, that the centrally controlled ducted tear gas systems used in US prisons have not been imported here — yet.

Public scrutiny

At the prison's 'public open day' before women prisoners were moved there, I was refused entry to the prison because I was identified from a photo as having handed out leaflets at a previous peaceful protest outside the prison — they were private prison information leaflets and flyers for this play. I identified myself and asked that my name and their refusal be passed on to the general manager. Twenty minutes later I was told I could go in.

For 16 years I have gone into prisons as a lawyer and, with many others, I have been a critic of prisons. During that time, I have organised and spoken to rallies of thousands outside Fairlea and handed out thousands of leaflets at prison gates, but never once have I been refused entry to a state-run prison.

Two years ago I received a letter from CCA's lawyers claiming I 'seriously defamed' them, because in a letter to the editor of the *Age*, I said that CCA used leg shackles in its US prisons —it does— and that exemptions from freedom of information law because of 'commercial confidentiality' created accountability and information problems. Although I have often made loud and harsh criticisms of the state-run prison system, I have never received a letter from the Government asking me to apologise publicly for the 'harm I have caused their reputation'. If the company is so concerned to stifle criticism from the outside, shutting us out and trying to shut us up, what can women inside its razor wire and electronic fence expect?

Government dishonesty

The Government's media release (15 August 1996) issued for the opening of the new prison stated that Fairlea was 'antiquated and overcrowded'. This can be disputed on two grounds. First, the Department's own statistics show Fairlea was not full to its capacity. Secondly, in 1986, just 10 years ago, it was completely rebuilt except for two cottages, after a fire. The Government media release said then that Fairlea was the 'most modern prison for women in Australia' (4 July 1986). Since then a new high security unit and a new 10-bed cottage have been built. Ten years old equals antiquity?

Children's visits

On the first day that the Fairlea women were all in the new prison, all 84 of them signed a petition about children's visits. At Fairlea, children came in for all day Saturday visits and had the run of the prison. At the new prison the women have been told that because of the electronic fencing, children would set off alarms. This is despite a specific promise by CCA that children would be able to have all day visits. [Update: They now do have these visits.]

Of even greater concern, it has transpired that despite the fact that for 16 years women at Fairlea got all day visits with their children, and that for six years the Government's policy documents on women prisoners have stressed the importance of women's continuing relationship with their children outside, the Government did not require in the prison contract that the company provide any more than the one-hour visit required by law. It is a matter up to the absolute discretion of the company, and so permits them to deny children's visits as a punishment.

It is difficult enough as it is for visitors as there is no public transport to the new prison, which is 26 kilometres from the city.

The Corrective Services Commissioner, John Van Groningen, a graduate of the Californian prison system, was asked on ABC TV (Stateline, 16 August 1996) whether there will be more strip-searching in pursuit of the drug free prison (given that 13,752 were done in the two years at Fairlea with an average popoulation of 100 women). His reply was, 'We will do whatever we need to do, if it means more strip searches, tighter control of visits, checking children more carefully'.

Mr Van Groningen went on to speak of drugs coming into prison in women's body cavities and children's nappies. I spoke with a woman today in prison who has been there for 10 of the last 12 years. She said that to her knowledge drugs have come in with children three times in that time. She said that overwhelmingly women frown on using children like this. Essendon Community Legal Centre's freedom of information request in February 1996 revealed that out of two random months of strip searches at Fairlea women's prison, no contraband was found in one month and two items were found in the other month — cigarettes.

Rehabilitation

Prisons say they aim to rehabilitate. Rehabilitate is from the French word to re-clothe[4] and that is about all the rehabilitation there is. You get a uniform to wear that someone else has been incarcerated in.

State prisons don't rehabilitate, neither will private ones. Prison is not the solution to crime. Punishing poverty doesn't take it away. Prison doesn't stop violence or alienation, it breeds it. It may give you a roof for a while but it compounds your homelessness.

There are 125 women in prison in Victoria; 80% are drug users. It is precisely because there are so few women in Victorian prisons that we can make a difference by providing a variety of services and support in the community. There is no gender specific residential drug rehabilitation for women with children outside. Why not? It's cheaper than prison.

Somebody's Daughter Theatre is a theatre company of women prisoners and ex-prisoners from Fairlea. It started from drama workshops run at the prison. The company has had a number of successful seasons at the CUB Malthouse. Their next production, 'The Cosmic Laundromat', will be at the CUB Malthouse, Melbourne in April 1997.

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The Rhetoric of RISK

Nicki Greenberg

A dialogue about HIV, sex workers and the law.

The players

Nadja: a law student and part-time sex worker, 23 years old.

Roger: a physician specialising in infectious diseases, 49 years old.

The scene

A summer afternoon in the year 1999. The Liberal Party has just been voted out of Government in Victoria — but not before securing the passage of the new *Crimes (HIV Exposure) Act 1999*. Roger has decided to treat himself to a little post-election consolation in the form of an afternoon with Nadja. They have not met previously, but the receptionist at Satin Nights has assured him that Nadja will meet his expectations.

We join Nadja and Roger in a large rumpled bed at Roger's place. The interior is tasteful but expensive, and sunlight and garden views stream in through the French doors. Evidence of an absent wife is apparent — there are twin bedside tables, one laden with books and jars of moisturiser, a pile of women's shoes tossed in one corner, photographs of smiling family on the dresser. Nadja's satiny black evening dress, stockings and shoes are strewn around the bed.

The rules of the game

1. The Crimes (HIV Exposure) Act 1999 (Vic.)[1]

Based on the provision proposed in September 1996 by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC/SCAG), the new Section 19B of the *Crimes Act 1958* provides that:

(1) A person who places another person in danger of contracting HIV

(a) intending that the other person contract HIV; or

(b) being reckless as to whether or not the other person contracts HIV,

is guilty of an offence.

Maximum penalty 10 years imprisonment

(2) A person places another person in danger of contracting HIV if the person causes the other person to be exposed to an appreciable risk of contracting HIV, even if the risk is low.

2. The Prostitution Control Act 1994 (Vic.)

s.20 *Prostitute working while infected with a disease*

(1) A person must not work as a prostitute during any period in which he or she knows that he or she is infected with a sexually transmitted disease.

Penalty: 20 penalty units

(2) If it is proved to a court that a person worked as a prostitute during a period in which he or she was infected with a sexually transmitted disease, he or she must be presumed to have known that he or she was so infected unless he or she proves that at the time the offence is alleged to have been committted

Nicki Greenberg is a Melbourne law student.

The dialogue form has been used here in order to emphasise the way that theoretical and legal constructions may impact on individuals, as well as allowing for a more direct and varied style of argument.

The character of Nadja is used to present the writer's own points of view.

The structure used to explore these arguments differs from that of a more conventional essay in that the flow of analysis is forced to take sharp bends and unexpected turns as it encounters challenges and comments from Roger.

There can be no clear beginning or end in any real conversation — particularly with a word limit — and I hope that the debate is continued in the reader's own mind well past the final page.

All characters are fictitious. They are not intended to resemble particular 'real' people, nor are they designed to function as representatives — let alone stereotypes — of their professions, ages or genders.

I chose to set this piece in the future to provide a scenario where the recently proposed Serious Disease laws (see ref. 1) could be imagined in operation. There is as yet no indication that Victorian Parliament will pass this type of provision; however, there has been considerable pressure to do so in the wake of Justice Teague's decision in *R v Beckley* (an unreported 1995 decision of the Supreme Court of Victoria). See Magazanik, Michael, 'Should HIV partners have to tell?' *The Sunday Age*, 8 September 1996.

(a) he or she had been undergoing —

(i) regular blood tests, on at least a quarterly basis, for HIV (as defined by s.3 of the Health Act 1958) and each other sexually transmitted disease for which blood tests are appropriate; and

(ii) regular swab tests on at least a monthly basis, for the purpose of determining whether he or she was infected with any other sexually transmitted disease; and

(b) he or she believed on reasonable grounds that he or she was not infected with a sexually transmitted disease.

The intercourse

R: *You know, with the risk of AIDS being what it is, I'm amazed that a girl like you would choose to enter the profession...Still, it looks like they've passed those new HIV exposure laws — and a good thing, I'd say. It's amazing how irresponsible some people are — some of the ones who come to me for their test results, well, they're into bed with the next thing that comes along — no qualms at all about passing it on...*

N: I can't say that I'm quite as enthused as you are about those provisions. And I certainly don't believe that they might offer me any sort of protection. As a substitute for traditional reckless endangerment laws they leave a lot to be desired. Of course, the traditional provisions are far from satisfactory in any case — they're almost impossible to apply[2] — but that doesn't mean that these new laws are a vast improvement.

These HIV laws differ from the traditional reckless endangerment laws[3] in two significant ways: first, they relate specifically to HIV, and second, they broaden the concept of danger or risk. Under the traditional 'conduct endangering life/persons' laws, the risk of death or injury had to be 'appreciable' — both in terms of objective probability and the accused's subjective knowledge of the risk. And that was a concept that caused enormous amounts of confusion, particularly in HIV exposure cases where even the experts couldn't accurately assess the risks involved.[4] These new laws have tried to get around the problems of risk assessment by adding a corollary to the appreciable risk rule: 'even if the risk is low'. In my opinion this strategy fails to engage in any really useful analysis of risk or responsibility — it simply makes obtaining a conviction easier.

R: *Look, the fact is that we doctors can't as yet precisely define the probabilities — the risks — involved in a situation like a sexual encounter. But then we can't give an exact assessment of the risks in almost any real life situation. And that doesn't mean that we should treat it as acceptable when one person exposes another to that kind of risk. The law isn't based on fiddling around with probabilities — it's about punishing those who act in a blameworthy or dangerous way.*

N: I'd have to disagree with you when you say that these laws are not based around risk analysis, but on 'dangerous behaviour'. The concept of dangerousness itself is understood by the law in terms of probability of harm. The behaviour is judged as 'unacceptable' on the basis of the level of risk that you engender, the seriousness of the harm that you could cause and finally, your own comprehension of that risk and that harm.[5] So I don't think you can approach HIV exposure under these laws without getting tangled in some sort of risk analysis. What concerns me is not so much that behaviour involving a lower level of risk might trigger criminal liability, but the way that risk is conceptualised and constructed.

One of the major problems as I see it is that faced with the impossibility of accurately assessing risk in HIV exposure cases, we are left with an understanding of risk that is based on stigmatising certain supposedly 'risky' groups. But more fundamentally, we are rooted in a concept of risk which involves setting up the participants in a sexual encounter in the rigid roles of 'risk creator' and 'risk receiver'. Not surprisingly, this resembles the active-encroaching/passive-receiving construction of sex.

R: *Risk creator and risk receiver? Well, that seems fair to me. If 'X' has HIV and his partner, 'Y' doesn't, then surely X is creating a risk that is received by Y. Y is certainly not creating any risk for X. What are you getting at?*

N: I'm suggesting that risk cannot be so neatly allocated in the circumstances of a sexual encounter. See, you're taking certain risks when you have sex with me, aren't you? You don't know precisely what those risks are, or how they might be realised. But in every sexual encounter there are risks — health risks, emotional risks — there could even be risks of a personal, professional or social nature...For example, your wife could catch an earlier flight and walk through the door in two minutes time. That is a risk that you choose to take.

The fact that you choose to run this and other risks is very significant — it demonstrates your agency, and therefore your responsibility — for what happens to you.

What interests me is the way that risks pertaining to HIV are differently conceptualised. Unlike the other risks which may be involved in a sexual encounter, the risk of HIV infection is conceived of as an allocated risk. What I mean by 'allocated' is that the risk is not seen as a part of the sexual scenario — something imbued in the interaction of two (or more) people. Instead, one person is designated as the 'risk creator' and one as the 'risk receiver'. There is no recognition of the complex interplay of wills involved in the situation. The person with HIV, or the person who, whether they have HIV or not, is constructed as an 'HIV suspect' — someone like me who is commonly (unfairly) viewed as an agent of danger and disease — is from the outset positioned as the risk creator. By virtue of my HIV status, whether actual or presumed, I am attributed a malign motive — to expose others to danger — even where this is not my intention. And you, the 'unsuspecting innocent', the risk receiver, are imagined as passive, with no directional power. Because all control of risk in this encounter is assigned to me as the HIV suspect, you, the passive 'victim' are then conceptualised as having no control or agency in the encounter. We both know that the realities — and I'm using the plural very deliberately, because there can hardly be a single, objectively shared perception of a sexual encounter — are far more complex than that.

R: *OK, I understand what you're saying. The person with the virus is allocated a greater responsibility, and I would say rightly so. But I don't believe that this puts you as a, um an escort in a different position from me vis a vis the law. Take our 'encounter', as you put it, this afternoon. Either of us could theoretically have HIV. The condom could have broken, and either of us could have knowingly or unknowingly exposed the other to the virus. If I were positive and you weren't, your chances of contracting the virus would in theory be higher than mine would be, were the situation reversed. Of course, as we discussed earlier there are too many variables to give a really accurate risk assessment, but the virus can be more effectively transmitted to a woman through vaginal intercourse than to a man. Now as I understand it, endangerment laws could apply equally to you or to me. And given the fact that you would in theory be exposed to a greater degree of risk than I would, perhaps the laws would be more successfully applied to me. I don't see how your position with regard to any sort of HIV exposure laws is any different to mine, simply because you work in the sex trade. Surely our responsibilities are the same.*

N: Yes, excised from their social context, these laws might appear to be utterly impartial — you're right — they look as if they would apply equally to anyone. But I think that it's very naive to suggest that the law does in fact work this way. The legislation has a built-in potential for bias in that it contains no requirement that the person charged *knew* that he or she had HIV. It would therefore be possible for the prosecution to argue recklessness based on *constructive* knowledge — in other words that the accused knew or *ought to have known* that she or he was HIV positive — because this is the inference that a reasonable person would have drawn under the circumstances. The danger is obvious — are we going to say that anyone who falls into a statistical 'risk group', or anyone who has engaged in particular activities should presume themselves to be HIV-positive and therefore potentially criminally liable when they have sex? Will a gay man, for example have to presume that he puts his partner at risk where a heterosexual man does not? This sort of approach was taken in the US case of *Cooper v State of Florida*.[6] Couldn't it happen here too?

I would also dispute the impartiality of these laws when applied to HIV exposure on purely practical terms. How many men do you think have been prosecuted for exposing a sex worker to HIV? I can tell you that having scoured the journals and cases from Australia, the US and Canada I couldn't find a single one. That doesn't mean that there haven't been *any* prosecutions of course, but I think we're safe in presuming that very, very few cases of this type have arisen.

As for sex workers being prosecuted for continuing to work when HIV positive, there have certainly been plenty of cases — take a look at the detailed survey by Minouche Kandel[7] of female sex workers processed by Boston courts, and you'll see that sex workers are viewed as a public threat. One judge even recommended posters being put up saying 'Prostitution = Death'. Sex workers are being prosecuted not only under endangerment laws but also under HIV-specific and prostitution-specific statutes. I even found another Florida case — *State v Sherouse*[8] — where a woman was charged with attempted manslaughter for continuing to work on the street after testing positive. The charge was dismissed on appeal because there is actually no such thing as 'attempted manslaughter'. The judge did say though that had she been charged with attempted *murder*, she might well have been convicted.

These prosecutions are happening despite the fact that there is no conclusive evidence that sex workers in the US are transmitting HIV to their clients. Similarly in Australia, according to two Sydney studies[9] you don't have a situation where sex workers pose a threat to public health.

So why are sex workers being monitored and prosecuted in relation to HIV but their clients are not? I'd say there are a number of reasons. On the simplest level, it's generally a lot easier to track down a sex worker than his or her client, whether they work on the street, from home or from a registered brothel. We are heavily regulated when we're legal and under heavy police scrutiny when we're not. You, on the other hand can visit for half an hour and then drive away and no-one knows if you've ever been there at all. Also, it would ordinarily be very difficult for a sex worker to isolate instances where she or he is exposed to HIV. We take precautions, we can sometimes turn away a guy we don't like the look of, but that's it.

R: *Well, I don't mean to sound callous, but isn't that just an occupational hazard? You've chosen to work in a job where you are potentially exposed to this risk every time you see a client, so really you're accepting that any customer could be HIV-positive and that you're going to need to do what you can to minimise the risks.*

N: Wait a minute. You say that since I have chosen this kind of work, therefore I have implicitly consented to a risk of exposure to HIV. Now, why does that rationale not seem to apply to my customers as well? I am expected to be responsible for my own protection, yet I am expected to bear the responsibility for *your* protection too. If the risk of HIV is seen as my 'occupational hazard', why is it not equally seen as *your* 'recreational hazard'?

The onus is firmly on me as the sex worker — and this is amply demonstrated by legislation like the Victorian *Prosti-*

tution Control Act 1994. Under section 20 of that Act I am prohibited from working if I know that I have HIV/AIDS, regardless of what precautions I take. I can't just use condoms or restrict my business to masturbation, oral sex, fantasy play or other safer sex variations. If I am positive, I am barred from the profession, so to speak. And even if I am *not* aware that I have HIV, if I am proved to have been working when infected then I must be *presumed* to have known of my condition unless I can prove that I've been having at least monthly checkups and blood tests, and have 'reasonable grounds' for believing that I wasn't infected. Reasonable grounds! Anti-discrimination laws prevent employers in other industries from refusing to hire someone who is HIV-positive. You can work in practically any field you choose, and rightly so. You can play a contact sport or work as a dental technician or whatever. But you can't have any involvement in the sex industry. Given that studies show that we are not a threat, this seems to be a panic-driven overreaction.

R: *Look, I don't think that it's an overreaction at all. When I called your agency I certainly had the expectation that the girl they sent me would not have HIV — or anything else for that matter. I'm an infectious diseases specialist — I know enough about the transmission of this virus to realise that even if you definitely were positive my chances of contracting HIV would be extremely low. And with condoms they'd be practically nil. But I am simply not willing to take any risks of that nature whatsoever. If your employer were not able to ensure me a healthy um — partner, I would choose a different agency. As a paying customer I believe that I have a right to some sort of 'minimum standard' in the goods and services that I receive.*

N: So what you are saying is that because you have outlaid money for this sexual encounter you deserve a guaranteed measure of protection. And because you have *paid* to have sex with me, you have the right to expect a higher standard of 'safety' than I do. Meanwhile I am supposed to approach the risks that *you* might pose to *my* health as an 'occupational hazard', to use your words. You see, you are allowed — no, you are encouraged — to demand certain assurances of me which I cannot expect from you in return. I cannot expect any assurance that any of my clients will be free of diseases, clean, considerate or non-violent. The bottom line is that I have not paid them, and therefore I have not purchased that right. But if we were to treat this situation realistically, perhaps I should be the one demanding greater protection — I'm exposed to more — and more serious — risks a dozen times a week!

As I see it, the essence of your view is that rights are available only to those who have 'rights bearing' status, and this status is conferred only on persons who are economic players. I am treated not as a *person* who provides a service, but as an economic good — an object of trade. And it is only *people* who have rights, not goods! If I get sick, I have become 'dangerous goods' and must be removed from circulation. You, on the other hand are a consumer in this market. And unlike me, your trading chips — money — are recognised as separate from your person. You can therefore use them to purchase a service, complete with customer guarantee. And coming back to the question of equality under HIV laws, I think it's quite obvious that if we are not entitled to demand equivalent rights to protection, then we are certainly not going to be equals under a law designed to protect rights to bodily integrity and safety.

R: *Look, I've heard this sort of Marxist stuff a million times before. And really, all this frowning theory aside, are you really treated that poorly by the likes of me? We're reasonable people, and we've gone through with this whole transaction with perfect equanimity. You've demanded certain things, like payment in advance, condoms and so on, and so have I — I've asked you to do this and that and the other...And everyone has come away with something. The regulations put in place by the law with regard to prostitution generally, including the HIV provisions, are just a mechanism for making sure that our contract runs nice and smoothly. They help to ensure that our transaction isn't complicated by the unexpected — by the risk of you being underage, or of one of us catching HIV.*

N: Yes, these laws are designed to protect *one* of us from the risk of HIV — you! We've been through that, and I think that it's clear whose right to protection is privileged and whose is not. Sure, you and I have completed a relatively amicable and painless 'transaction'. I can't really complain. But I can assure you that it's not always like this. Particularly

for sex workers who don't have a nice agency with security guards and licences and the support of a union. Stories from the street are often not so smooth, you know.

I would, however, agree with you that the prostitution laws are designed with the purpose of regulating something that is seen as unruly or susceptible to the 'unexpected'. But I don't think that it's as simple as regulating the size and shape of sex workers. I would suggest that there is a deeper regulatory process at work here. There is a social and legal desire to control and contain sexuality that unsettles,[10] that challenges and disturbs conventional concepts of sexual relations. And it seems to me that even laws which don't purport to apply explicitly to the behaviour of people with this 'suspect sexuality' — people like sex workers, gay men and lesbians, transgender people and so on — may well be employed in a way that serves this controlling or regulatory purpose. The regulatory impulse that drives the *Prostitution Control Act* is abundantly clear. What is less obvious, and therefore more insidious is the use of the general criminal law — these new HIV exposure laws for example — to designate particular types of sexuality as suspect and dangerous. To view certain groups from the outset as 'risk creators'. In this way these supposedly impartial laws participate in the controlling, the stigmatisation and denigration of disfavoured sexualities.

R: *But where does HIV come into your theory? That was where all this began, and suddenly you're onto social control, Big Brother and so on.*

N: Well, a number of commentators including Sander Gilman[11] have noted the way that HIV has been popularly understood as a sexually transmitted disease, rather than as a virus with various modes of transmission, which can include some sexual activities. The virus has in a sense become sexualised, and sex and illness are a pretty explosive combination. Historically, (and in many cases today as well) both illness and sex have drawn reactions of fear, uneasiness and moral condemnation. Not surprisingly the intersection of the two tends to set alarm bells ringing. I hardly need to remind you of the way that people with syphilis were treated in the early part of this century — they were made into pariahs, criminals; they were basically excommunicated. And I don't think that this ostracism was simply the result of people wishing not to catch the disease themselves: deeper motives were at work. The sexuality of these people with syphilis was seen as just as dangerous, both morally and medically, as the bacterium itself, and the fact that they had contracted the disease was a sort of physical proof of their moral and sexual corruption.Although anyone was susceptible to the disease, it was characterised as 'belonging' to the despised 'lower classes' generally, and to prostitutes in particular. They were viewed as the source of the contagion, punished for their sins with disease.[12]

William Flanagan noted the way that we imagine disease as a sort of punishment for corrupt behaviour, and in this way convince ourselves of our own invulnerability. He wrote that: 'We do not like to believe that our suffering or the suffering of others has no meaning. People demand a moral construction that permits them to vilify disease, providing the comforting distinction of otherness that offers the illusion of protection.'[13]

It is very significant that HIV/AIDS has been associated with sexualities that were *already* the subject of fear, suspicion and prejudice — in particular gay and bisexual men and sex workers. The stigma of HIV has compounded the stigmatisation of these groups, and has provided a convenient justification for further marginalising them. So any legislative or social movements to regulate, suppress or even outright criminalise disfavoured sexualities have used HIV/AIDS as a sort of 'rational' touchstone.[14] We are told that we need protection from the agents of disease, whether actual or presumed. And this will always depend on a construction of a particular group or groups as the 'enemy', whether it's sex workers or gay men or anyone else.

R: *Don't you think that 'enemy', 'punishment' and 'corruption' are rather too strong words? Doctors know very well that disease isn't about divine punishment for sins of the flesh! This is all a bit melodramatic, don't you think? As I see it, what is going on is a regime of public health protection. We know that certain practices carry a risk of HIV, and the people who engage in those practices therefore may pose a threat to the health of others — and thus to the public good.*

N: I think that your comments demonstrate precisely the 'us and them' — or 'enemy' — mentality that I'm talking about. By setting up the 'HIV suspects' — the risk groups — in opposition to 'the rest of the community', you are effectively saying that these people are outside of normal, clean society, and that their rights are inherently at odds with the rights of other people. I agree that HIV is something that we need to protect ourselves from. The problem is that you've conflated the virus, HIV, with the people who have the virus, or who are suspected of having it. Your desire to contain and control the virus is translated into a desire to contain and regulate the forms of sexuality that have become associated with it, and the first step in locating these 'enemies' is to separate them from yourself with some sort of moral construction. But as I said before, I think that there are deeper anxieties than the fear of HIV/AIDS behind the desire to regulate. I'd argue that this desire grows largely out of feelings of helplessness in the face of unruly sexualities — sexualities that challenge, confuse, distort, parody or unsettle the conventional heterosexual/marital 'norm'. And HIV/AIDS has served to highlight that helplessness.

R: *Look, you've just put forward two things which I consider highly questionable. Firstly, I take it that you're categorising the 'sexuality' of sex workers, if this can actually be considered a separate form of sexuality, as one of these 'challenging', 'unsettling' sexualities —*

N: Absolutely. I'm taking a very fluid view of sexuality. I'd describe it as a combination of the way people identify themselves and the meanings that they and others ascribe to their acts. It's not simply a case of classifying a person into a neat, supposedly objective category — gay, straight, etcetera — or understanding them purely in terms of the physical acts they perform. It's more complex than that. I think, for example, that my sexuality is rather different from, say, yours, or your wife's — whatever that might be.

R: *Let me finish — you're saying that it is somehow challenging the conventional sexuality, right? Well, I can't help but disagree. Prostitution developed right alongside conventional marriage and the family and all the rest of it. They don't call it the oldest profession for nothing. In fact, I would even go so far as to say that prostitution is part of the same system of social order as the family — that the two things feed one another. Prostitution has always been a way of providing the variety that monogamy can't — it's discreet, it entails obligations of a financial nature only, and it's usually a comparatively known quantity. I'd say that it's not unruly at*

all — quite the opposite; it's very neat and contained within the larger social picture. I don't think one institution would exist without the other. I'm living proof of that, I suppose.

N: There is a lot of value in your argument that prostitution and marriage are symbiotic institutions. I would agree — and I think that both have developed to cater to male needs and desires. Both are key elements in a system of subjugation of women, too. But where my view differs from yours is at the point where you say that because the two institutions are interdependent, therefore prostitution does not disturb and problematise the heterosexual/marital paradigm. I think it does, and I think that that discordance is as old as the oldest profession itself.

Sex work is defined by contradictions and stereotypes.There is no denying that sex workers have always been, and continue to be, approached with simultaneous fascination and contempt, desire and revulsion, romanticism and moral condemnation. We are looked down upon, we are reviled and viewed as less than complete moral persons. But at the same time we are desired — we are certainly not short of trade. But as I see it, these forces of attraction and repulsion are explicable when we realise that they actually have different objects. In my experience what is desired is an illusion — a stereotyped recital of femininity. What you are paying for is the cipher of a woman, something made up of a sequence of generic gestures. What repulses you, on the other hand is the fleshy reality — me — a woman who also lives outside of the codes of commercial sex, and whose otherness and ambiguity is threatening.

I could be charitable and call this ambivalence, but I think I'd rather be direct and name it hypocrisy. I believe that the reason for all this moral condemnation lies in your transference of your own feelings of shame and moral corruption onto us. And in the same way, in our society the physical 'shame' of a sexually transmitted disease is culturally located in the sex worker. We are being used as a receptacle of blame for the problems, whether moral or physical, of society, even as the sex trade is encouraged in its many forms, some of which are highly exploitative.

R: *I understand what you're saying, and I concede that there is a lot of...ambivalence about what you do. But there was something else that you said before that I wanted to take up with you. You said that we feel the need to control sex workers' sexuality because we feel helpless in some way. I think you couldn't be further from the truth. OK, society as a whole might feel in some way unsettled by prostitution, but as for me, the customer, well this is the least threatening, most controlled and uncomplicated 'relationship' I could possibly have. I know exactly what I'm getting into, I've paid my money and we'll each play by the rules. I can fairly safely assume that I won't be hurt. And that emotional distance does involve seeing you as a vehicle of fantasy fulfilment. Why not? Neither of us really want to be involved in one another's lives any further than this transaction, do we? You're just like an actor playing a part and I've read — or maybe helped write — the script. We both know what's going on. So how can you say that I'm helpless??*

N: No, you've misunderstood me. I'm certainly not saying that you're helpless. Far, far from it. You've very accurately described the situation. I would even go further and say that it is I, as a sex worker, who is in the more vulnerable position. But this is where I want to come back to our original discussion of danger and risk. We have agreed that in the context of our relationship you do not feel *personally* helpless and vulnerable. You feel in control. Yet, in *direct contradiction* to what we have agreed is the subjective/situational 'reality', you are nonetheless construed both socially and legally as the innocent, vulnerable party, whereas I am the agent of danger, threat and risk. And in the eyes of the law, it is this cultural 'reality' that is privileged over our own subjective stories.

You and I are understood in different ways, both legally and culturally. Different stories are told in order to make sense of what we do and who we are, and informed by these stories, the law interprets our actions in different ways. The power dynamics of our brief interaction are inevitably distorted in the eyes of the law through the assumption of all these narratives — the story of the disease-spreading whore, the innocent 'john', the dangerously sexual woman. And as long as these narratives retain their popular validity you and I will not be equal under these HIV exposure laws.

References

1. This 'Act' is a fictional one, based on a model provision drafted by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys General (MCCOC/SCAG). See MCCOC/SCAG Discussion Paper *Non Fatal Offences Against the Person,* August 1996. The model provision on p.56 of the Discussion Paper (s.26.5) differs from the 'Crimes (HIV Exposure) Act' only insofar as the model provision refers to 'a serious disease' rather than specifically to HIV. Although there is a suggestion in the commentary on p.63 that this provision might apply to diseases other than HIV/AIDS, it is clear from the bulk of the commentary that the provision was drafted with HIV in mind as its focus.
2. This was the comment made by Justice Hampel during the trial of a man, 'D' in April 1996. Justice Hampel said that these laws required the accused to have a subjective appreciation of 'the probability of a possibility' of harm occurring, a concept which he described as almost impossible to apply. D was charged under ss.22 and 23 of the *Crimes Act 1958* (see ref. 3) with conduct recklessly endangering the lives/persons of two women with whom he had consensual sexual intercourse while he was HIV positive. His defence was that on each occasion condoms had been used and that the women, who had consumed large quantities of alcohol, had been mistaken in their belief that no condoms were used. D was acquitted.
3. *Crimes Act* 1958 (Vic.), ss.22, 23 — *Conduct recklessly endangering life (s.22) / persons (s.23)*: A person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of death (s.22) / serious injury (s.23) is guilty of an indictable offence. Penalty: Level 5 imprisonment.
4. For example, in D's case, where there was a great deal of emphasis placed on the statistical probability of the women becoming infected with HIV, Dr Nick Crofts, one of Australia's foremost experts on HIV/AIDS and epidemiology testified that the risk of transmission through unprotected vaginal sex was one in 1000 to one in 2000. But more significantly, he then said that these figures were essentially meaningless. There are so many variables involved which affect each individual situation that the risk cannot be accurately assessed. His words were, 'You either get it or you don't'. (All quotes taken from D's case were recorded when I attended the trial on 16-21 April 1996.)
5. *R v Nuri* [1990] VR 641.
6. 539 So 2d 508 (1989) Fla Dist. App. Ct.
7. Kandel, Minouche, 'Whores In Court', (1992) *Yale Journal of Law and Feminism 329.*
8. 536 So 2d 1194 (1989) Fla Dist App Ct.
9. The two studies are cited by Crofts, Nick, in 'Patterns of Infection' in Timewell et al. (eds), *AIDS in Australia,* Prentice Hall, 1992.
10. See Smart, Carol, *Regulating Womanhood* Routledge, 1992.
11. Gilman, Sander L., *Disease and Representation — Images of Illness From Madness to AIDS,* Cornell University Press, 1988.
12. Gilman, Sander L., *Difference and Pathology — Stereotypes of Sexuality, Race and Madness,* Cornell University Press, 1985.
13. Flanagan, William, F., 'Equality Rights for People with AIDS — Mandatory Reporting of HIV and Contact Tracing', (1989) *McGill Law Journal* 350.
14. See Atkinson, Max, 'Homosexual Law Reform', (1992) *University of Tasmania L R* 206.

WATCH OUT for the native

Daniel Nina

A comparison between non-state forms of justice in (black) Australia and South Africa.

In contradictory terms, Paul Hogan makes an important contribution to the debate of 'native vis a vis settlers' in his film *Crocodile Dundee II.* He shows us an important understanding of the culture, behaviour and practices of Aboriginal people in Australia — 'how they are', 'how they react', in fact, 'their traditions'. His aim is the same as many others — to interpret how the Aboriginal people feel and act. Paul Hogan in a way, re-creates the 'native'.

This article analyses the act of representation of the native, the 'other'. Why do they need to be represented, interpreted? Probably they have no 'voice' to speak by themselves — they need an interpreter, someone who can tell the outside world how they do it, how they are.

It is here, at least for me, that the 'ugly face' of Paul Hogan emerges: he is definitely a smooth operator, of kind manners and slow pace, assertive and swift in his actions. But he is also part of another experience — he is part of an unfinished project: the 'civilising mission' of the 'native'.[1] All native traditions need to be filtered through Paul Hogan in order to be good, in order to be Westernised, in order to be — in fact — civilised.

My purpose is not to talk about films and actors, but about non-state forms of justice in a comparative way, between two countries whose basic commonality lies with the British Empire, a history of settlers' colonisation, migration of population across oceans, and fundamentally the exclusion of native/indigenous population by the mainstream society for many years after colonisation began. The need to discuss these diverse societies lies, at least within my line of thought, with exploring the other side of the debate — not only how the 'other' is being colonised, but how the 'other' colonised the mainstream signifier.

The object of the study has to be reduced to analysing existing forms of 'justice' within black communities in Australia and South Africa, and which way these forms of 'justice' are appropriated by the state. It is a continuous interaction between state hegemony and non-state hegemony in the area of justice. (Note: I am using the name 'black' in a South African tradition, as a collective denominator for all people who are not of European descent. In the Australian context, I incorporate the same racial denominator to include the Aboriginal and Torres Strait Islander people.)

Questions need to be asked: Why the interaction between different forms of justice? Who, in the final instance, controls those interactions? What happens with those instances of non-state justice that are not interpreted and incorporated to the state? Do they disappear?

I would like to begin a new exploration, a comparative one, between two communities whose mechanisms of conflict resolution have been integrated with those of the state. How has this happened? Who has brought it about? In what way, if any, has the logic of Paul Hogan been applied to non-state forms of justice? How does its incorporation (by the state) resemble the values of mainstream society?

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I begin my story from what seems to be a relative crisis, at least within those circles that analyse the transformation of the state and its sovereignty. Then I will explore non-state forms of justice in Australia and South Africa, and focus on an emerging process of 'indigenising' the state. Lastly I will provide some observations about the socio-legal implications for Australia and South Africa.

The end of Enlightenment?

It seems as if we are going through the end of an era. Some have claimed that it is the end of 'history', as Francis Fukuyama did a few years ago. Other more progressive writers, like Eric Hobsbawn, have a more complicated and, in a way, catastrophic view:

> Under these circumstances of social and political disintegration, we should expect a decline in civility in any case, and a growth in barbarism. And yet what has made things worse, what will undoubtedly make them worse in future, is that steady dismantling of the defences which the civilisation of Enlightenment had erected against barbarism, and which I have tried to sketch in this lecture.[2]

What I found interesting at least in the literature on criminology and the state, is the fact that for many writers we are going through the worst era, where everything has been dealt with before, and where it seems as if, to paraphrase the old Marx, 'everything that is solid melts into air'. Scholars like Stanley Cohen, Nicolas Rose, Jean Marie Guehenno, and others, illustrate in their more contemporary writings, that there are serious transformations taking place at the level of the nation-state as the main organiser of the project of modernity.[3]

But thinking of Hobsbawn, I need to think in a way, of the end of a particular aspect of the Enlightenment movement, and attempt to assess this process through the emergence of what Foucault called, 'subjugated knowleges'. The transformation at the state level, and the continuous expansion of the process of globalisation where the state has begun a process of decentralisation and deregulation, creates contrasting and conflicting scenarios which have an effect on the way in which we have been 'ruled', at least in the Western Anglo-Saxon world, since the Second World War. When discussing the state and its transformation it is important to make a clear distinction between the state in Anglo-Saxon traditions (Canada, United Kingdom, Australia and New Zealand) and the state in other types of cultural traditions. In particular, one has to be cautious of scholarly discourse which attempts to establish generalisations across the world, when the experiences have been quite different in many countries. For example, the discourse on the transformation of the state between the United Kingdom and Kenya is not the same, and cannot be simplistically presented as such.[4]

In the particular field of the area of governance (including issues of justice) there has been a serious attempt in the last decade or so, to launch a process of devolution to the 'community', as a way of re-organising the social imaginary (to paraphrase Baudrillard via the work of Nicolas Rose). The re-birth of the 'community' is partially linked with serious state attempts to re-define its logic of rule and control — by delegating back to the 'community', the state emerges as a facilitator of development and social transformation instead of the initiator of these type of processes. The 'community' in this regard emerges as a conduit for a new and different type of social regulation and ordering. The emergence of the community as the new social imaginary, where development and transformation is to happen, through processes of grass-roots empowerment and control, has led to the emergence of concepts such as: community policing, community justice, community art centres, community development, and many more.[5]

The art of governance, re-thinking Foucault's project on governmentality, which was very much part of the Enlightenment movement — as least within Hobsbawn's intellectual preoccupations — is changing in a rapid way. The state decentralises and deregulates itself, but it learns to re-configure itself in new forms that incorporate aspects of the traditional forms, for example, the use of local government. Part of this process, as a way of extending and re-organising state rule, is the incorporation of forms of governance which are traditionally linked to the 'other'.[6]

I attribute the emergence of the 'other' to circumstances in which aspects of the Enlightenment movement have collapsed or have been seriously challenged. Words such as 'indigenous', 'traditional' and 'native' re-emerge in order to pursue a new project of governance, which has the state as one component, but in which different sectors of the 'community' have to be included so that an effective process of regulation takes place — no longer controlled by the government, but exercised by individuals and different sectors of civil society or traditional society. In Africa, for example, in certain societies in (democratic) transition, areas of traditional society/culture have been re-invented by the state in order to diversify the sources of governance. This has been the case in Uganda, where traditional authorities have been re-created by the democratic government in order to assist it in the development and transformation of the country.

The experience of the re-birth of the 'community' and the 'native' in the Australian and South African context, opens the possibility of new and interesting explorations, in particular, because the process of rationality and regulation — by-products of the Enlightenment era — do not disappear. The re-emergence of the 'indigenous' or 'native' experience is conquered or hegemonised by the state as representative of a dominant paradigm of Western origin. There is opportunity for development of a different paradigm, although this is a process still at an embryonic stage.

O'Malley captures this idea quite clearly:

> But this indicates very clearly that the processes of resistance are carried into the subjugating programme of rule along with the appropriated forms. Resistance inscribes its presence, then, not only by providing particular forms which are then unproblematically deployed to intensify government. The existence of indigenous forms within the subjugating regime provides sites within rule for the operation of counter-discourses and subordinated knowleges.[7]

It is at this level, that I locate the discussion of non-state forms of justice of (black) Australia and South Africa. In particular, I will explore the reasons behind the re-emergence of the 'indigenous' and 'native' concept of justice in both Australia and South Africa.

As I will discuss later, South Africa since 1994 has experienced a process in which at one level of state discourse, there has been a serious attempt to popularise and Africanise the judicial system of the country — in other words, to make it more 'indigenous', representative of the vast sector of the population which is of African descent.

The implications of this re-emergence affect the nature and authority of state sovereignty in contradictory ways. In particular, it is a process that encourages the emergence of limited sovereign powers controlled by the community, by

the 'native', but supervised and monitored by the state — a shift from state to civil society.

I also explore a second tier of this process of 'indigenising' governance, at least within the area of justice. It is a line of inquiry which does not limit itself to exploring the impact of the incorporation by the state of non state-forms of justice. It explores, following O'Malley's quotation above, the subversive element which the encouragement of 'indigenising' state justice has for the 'native'.

What becomes for me important, is the element of subversion, of sabotage, of aspects of the Enlightenment movement which the promotion of 'subjugated knowledges' has. In a way, this second exploration lies with what happens with the 'native' when certain traditional forms of its justice are accepted by the state, and on some occasions, widely encouraged. On the other hand, what happens to those other forms of 'native' justice not sanctioned by the state that are rejected by the state? It is here, in this dialectical relation of incorporation and rejection that (black) Australia and South Africa have interesting similarities and also differences. .

Who is the 'other'? — (black) Australia and South Africa

There is probably a vision of 'mainstream' Australia, against which those who do not fit are aligned as the 'other'. Probably the current debate on race in Australia, allows us to ask who are 'those who do not conform with the dominant view of who we are'. I am referring here to the debate sparked by the opening speech in Parliament of the independent member, Ms Pauline Hanson, in September 1996, and its aftermath. I interpret Ms Hanson's speech to be about 'who' we are, and who 'they' are. The 'other' is most of the time constructed by those who define themselves as the main signifier.

Aboriginal and Torres Strait Islander people are the 'other' for two different reasons: first, on the construction made of them by mainstream Australia — by colonial Australia and by post-colonial Australia. But, second, the Aboriginal and Torres Strait Islander people also construct their own identity — as the 'other', whose 'country' has been in existence for over 40,000 years, and which has been invaded in the past 200 years or so by the 'other'.[8]

With a population of 300,000, this 'other' is classified as 'traditional', 'country/rural' and 'urbanised' — all different categories to symbolise a person who claims to be Aboriginal. However, what emerges as the dominant perception of what is Aboriginal, is linked to the notion of 'traditional' Aboriginal ways of living, and not with contemporary and urban ways of living. In a way, the dominant construction of the Aboriginal is that of the boomerang, the traditional dancing and the dot paintings.

South Africa, has a different picture of the 'significant other'. With a total population of approximately 40 million people — roughly 30 million are of African descent and five million or so of European descent — the construction of the 'other' has to be different to the experience of Australia. Until 1994, the state, and components of civil society, fundamentally represented a partial 'picture' of South Africa — that of white South Africa and its culture.

The transformation of South Africa's national identity is quite a complex process in which the new state is pursuing a multi-faceted process of national reconciliation and nation building. This process, not without contradictions, is encouraging the emergence of a new collective identity, which portrays a multicultural society, and which encourages the emergence of those 'subjugated knowledges' and cultures that apartheid censored in the past.

One area in which (Black) Australia and South Africa coincide is their experience with state justice and state regulatory institutions such as the police. The lack of satisfaction and understanding that the core of both populations find in the state institutions of justice and social ordering has been extensively documented and reported.

Out of these reports and many public discussions, there have been state reforms or state initiatives to regulate the 'other'. Aboriginal Courts in Australia and Traditional/Tribal Courts in South Africa, epitomise this process. There has been an attempt by the state to regulate what is roughly called customary law — both in Australia and South Africa. However, there has been a different process of re-inventing the 'other' within the mainstream component of the state.

In the dispensation of justice and access to justice within the current transformation that the (Western) state is experiencing is an interesting process of adoption of indigenous practices. However, this process occurs within the logic of the state.

Indigenisation of state justice?

It is interesting that in both Australia and South Africa their fundamentally European systems of justice have begun a process of 'indigenisation' — a process which in a way looks like a challenge to the Enlightenment movement, and, rethinking O'Malley's ideas, a process which re-creates the state by adopting different sources for exercising governance. Some of the reasons behind the emergence of this process have been discussed. There are other reasons, which are also related to the inadequacy of the judicial system of the state to deal with the 'other', which had forced the state to transform itself. The experience of the 'other' with the state justice system, has been characterised as one in which cultural and identity considerations pose a problem for effective dispensation of fair justice. In both South Africa and Australia, it has been argued that state justice is alien to the culture of the 'other', where language, different visions of how to solve conflicts outside the state domain, and complexity of the legal procedures, create an environment of alienation between the 'other' and state justice.[9]

The question is not 'is there more or less traditional state justice?' Rather, state justice expands by means of regulation, sanction, or implementation of indigenous practices of conflict resolution. It just re-configures its logic or rule.

In Australia we have multiple examples in recent times:

- community justice groups for Aboriginal people,
- community justice centres for urban populations,
- community accountability (family) conferences as a diversion program for juvenile offenders.

The experience of these mechanisms of conflict resolution, drawing their principle from non-state forms of justice, has been documented by others.[10] What is interesting, is the fact that the 'other' way of doing conflict resolution becomes part of the state, and in that regard, a process of indigenisation starts. The spirit of non-state forms of justice of non-Western origin are formally incorporated by the state, where reconciliation rather than adjudication, is the dominant rationale.

However, it is a process that adopts the practices of the 'other' for different reasons related to the discussion above. It

does not represent the end of the state, but rather its re-configuration to a new level of control and of exercising authority in the dispensation of justice and conflict resolution. This process also begins to transform the nature of state justice. In fact it becomes more indigenous, more representative.

The problem with this process of 'indigenising' in Australia, seems to be that it narrows the existence of the 'other' way of solving conflict through the process established and controlled by the state. What happens outside state regulation, and documenting the experience of the process of 'indigenising' the state justice, seem not to be within the interest of those doing research, at least not at this stage.[11]

On the other hand, in pre-democratic South Africa, the apartheid regime began a process in the early 1980s of making the judicial system more popularly oriented by way of incorporating certain 'indigenous' practices. It established the *Small Claim Courts* in 1983, and adopted the *Lay Assessors* scheme for magistrates and the *Short Process Court and Mediation for Certain Matters*, both in the early 1990s.

This process of 'indigenising' apartheid's justice system was linked to a strategy of the regime of controlling the insubordination of the 'other'. In the particular period of the 1980s, a people's revolt against apartheid was conducted, which had — in the particular urban context of township residential communities — the effect of making the communities 'ungovernable'. In many communities throughout the 1980s, the political motto was that of 'organising people's power', which led to the establishment of the (in)famous 'people's courts'. The experience of popular justice is a rich one in (urban) black South Africa. In addition to the people's courts, it includes street committees, disciplinary committees, anti-crime committees and people's forums. In particular, the regime's response and reaction aimed to challenge the urban form of justice, located within the black residential areas, that is, the townships. The people's courts, were one amongst many different expressions of popular justice that developed in South Africa within a political project in the 1980s.

In post-regime South Africa, the process of 'indigenising' state justice is moving at a rapid pace. At the moment there is a serious process in progress, for establishing community courts, religious courts and for re-launching traditional courts, all models based on indigenous practices. In addition, the concept of popular participation mooted through the lay assessors, is now being considered for use at the level of the Supreme Court.

In both South Africa and Australia the state in the field of justice is 'indigenising' itself. The examples discussed indicate that where traditional state-controlled justice is concerned, these two countries show a new pattern which by appropriating from the 'indigenous', breaks away from a Western concept based on the Enlightenment movement, where reason and regulation were the main motive for organising and regulating the social imaginary.

What will need to be assessed, is what happens in these new locations of state 'indigenous' practices of dispensing justice — what is the nature of the emerging limited sovereign power? For example, in the community justice groups of Aboriginal Australia is the logic in operation that of the state-sanctioned process or an alternative one?

South Africa offers a similar scenario to Australia of the unknown in relation to what happens in those areas where the state 'indigenous' justice re-creates the native. The current discussion in South Africa about establishing the so-called community courts is a good example. The democratic government of South Africa needs to re-create 'community' practices of conflict resolution, which have their origin in the 1980s people's revolt. The process of re-creating them is now incorporated within the logic of the state and it will take a while before its impact in developing a 'community' sovereign power can be assessed.

Unlike Australia, in South Africa it has been more clearly documented that the existence of non-state forms of justice are operating outside the legality of the state and its sovereignty. Forms of popular justice, are still being conducted in South Africa in a dialectical relation with the state of co-operation and resistance; and, although the state would like to incorporate these forms via the community courts, the experience so far demonstrates that there will be forms of justice in South Africa operating outside the state sovereignty, with a great deal of contestation and of support on different occasions.[12]

Socio-legal implications

Interestingly, both countries need socio-legal analysis of some common aspects, in particular, of the impact of the continuous interaction between state and non-state forms of justice. I identify four areas in need of analysis.

1. Who represents what? What is indigenous? These are for me the most interesting questions that comparative research between Australia and South Africa provides: what is really 'indigenous'? The process of 'indigenising' the state is a complex one, which has at least a dual feature: on the one hand, the state response for 'indigenising' itself, amongst other reasons, resembles the practices of those 'subjugated' populations which now need to be incorporated into the art of governing; on the other, it is a process which is motivated by the need to develop new state-controlled, although less regulated processes of rule to exercise a more effective governance.

I challenge the notion that the practices incorporated are truly 'indigenous'. They represent state appropriations of indigenous practices, which in order to be adequately used by the state need to be 'cleaned'; they need to be — following Paul Hogan's tradition — civilised.

The best example of this process of 'indigenising' the state, but in a controlled, clean and civilised way, is through the so-called Family Conference Group, or Accountability Conference, led by the New South Wales Police Service. This is a diversion program for juvenile offenders inspired by a Maori tradition. The process of 'indigenising' the state occurs, but controlled and sanctioned by the state itself. It is interesting, for example, that the presiding officer at this conference, a process where a 'community of care' of the offender and the victim is created in order to heal and rectify the wrong done, is a member of the police force.

The process of 'indigenising' is partially inspired, in certain instances, by indigenous practices of the 'native', but when put into practice, it resembles a different process.

2. The depoliticisation of the political in the 'indigenous' tradition. Unlike Australia, the 'indigenous' in South Africa has been determined in the past decade or so, by a strong process of politicisation and contestation of the state. Popular justice in South Africa, has been part of a political process in a more distinctive way than what has occurred in Australia — amongst other things aiming towards social justice.

In South Africa, this process was seen in the past as a challenge to the oppressive nature of the apartheid regime, but it was also linked to the idea of the cultural values and traditions of an African social imaginary — of collective

decision making and participation. In this sense, the political nature of the project in South Africa was dual: a challenge to the state and a reaffirmation of cultural traditions.

In contradictory terms, when the state in South Africa begins a process of 'indigenising', it depoliticises the political aspect of certain non-state forms of justice, in particular the popular justice one. But it does so, at the expense of re-inventing the cultural element — the need for 'Africanising' the judiciary.

In Australia, this will have to be examined in the future. The tendency, has been for the implementation of a more Aboriginal 'friendly' system of justice (for example, as recommended by the Royal Commission into Aboriginal Deaths in Custody). The political component of Aboriginal traditions in the field of justice — their interaction with the state system of justice in a dialectical and conflictive/tense relation, needs to be explored.

3. The emergence of controlled and sanctioned 'sovereignties' inside the state is something to take notice of in Australia and South Africa. The development of the autonomy of those 'sovereignties', through the re-creation of the 'community', needs serious examination and study in both countries.

It is interesting that the emergence of the 'community' as a new way of organising the social imaginary, creates the impression of an autonomous body, controlled by the central sovereignty. This in itself represents the transition of the traditional state and the controlled delegation of its powers. We are still not too sure of the political dimension of this process both in South Africa and Australia.

4. The emergence and continuity of a bottom-up resistance to the state project of making life or the process of governance more 'incigenous', needs to be examined. What no-one has explored yet, is what does it mean for the 'other' when the state becomes 'indigenous'? The exploration of establishing a bottom-up process of subversion from the re-created 'other' is a matter that needs further investigation.

South Africa provides a peculiar scenario, where government initiatives are confronted by what can be reduced to the 'soft vengeance of the people'. This represents a process in which the government incorporates 'indigenous' practices but parallel to that the 'indigenous' people continue recreating their own cultural practices of conflict resolution outside state control.

Australia will probably need to move beyond the image of the dancing Aboriginal, whose autonomy is limited, at least within the imaginary of the research work conducted, to that confined to state institutions of conflict resolution. Research and debate should not only concentrate on examining what happens within the logic of the state-controlled process of 'indigenising', but it should also examine, as in the case of South Africa, the nature and strength of those processes of community justice which are not controlled under the hegemony of the state.[13]

Conclusion

The exploration within a comparative framework of non-state forms of justice within (black) Australia and South Africa opens the door to analyse, amongst other things, the limits of the state and state justice. The transformation of state justice, via a process of 'indigenisation', could be seen from the perspective of enhancing the capacity of state rule, but also within the limits of the project of the nation-state as a body of reason and regulations.

A process of resistance, which challenges the terrible side of the Enlightenment era, that of subjugating 'knowleges', might need to develop in this era when the state has seen its limits and has welcomed the idea of 'indigenising' itself. Who will determine the process of liberating the 'subjugated knowledges' is yet to be seen both in Australia and South Africa.

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CONTRACTING for CHAOS

Steven Reynolds

Commonwealth legal aid cuts and agency theory.

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The views in this article are those of the author and do not necessarily represent the views of the Board of Governors of the Law Foundation. The author wishes to thank Angela McGarry and Mary Stringer for their contributions to this article.

Economic rationalism: rhetoric or reality?

If there is an easy target in current policy debates it is that well known villain, the economic rationalist. When decisions are made such as that by the Commonwealth Government in 1996 to cut legal aid funding to the States by up to $100 million over three years, it is easy to describe this as yet another example of economic rationalism hitting the poorest, most vulnerable sections of society.

But is the decision one which follows an economically rational model? Would an 'economic rationalist' approve of the way agency theory is being implemented by the Commonwealth? In answering this question the article does not intend to address the economic impact of possible outcomes, the cost to society of these cuts and their flow on effects. Rather, the question is whether the funding cut itself is consistent with the 'rational' model it is seeking to implement?

There is a need first to explain in some detail what is meant by 'agency theory', a theory which has been drawn from an economic policy model and frequently applied in the public sector in recent years. The article does not take any view either way on the validity of agency theory, but rather seeks to examine what the theory has to say about the legal aid funding cuts as implemented.

Agency theory

Agency theory is a variant of the contractual model by which a government as purchaser contracts out service delivery to a separate agency as provider. In the contractual model the government funder is the 'principal'; relationships such as 'partnership' are irrelevant because the agencies that government contracts with to provide services are seen in the same way as any commercial supplier of services. Their role as 'agent' is to deliver to the principal the goods or services at the lowest unit cost consistent with the aims of the contract, unless the principal agrees otherwise.

Agency theory is primarily a response to two situations arising in the contractual model:

- where the goals of the principal and agent conflict, and it is difficult or expensive for the principal to verify what the agent is doing ; or
- where the principal and agent have different attitudes to risk.[1]

The response to these situations is for the principal to define either the *outcomes* or the *behaviour* of the agent in a formal contract document. Making the agent responsible for the outcomes shifts the risk of the contract to the agent, and can only be effective if the outcome is within the agent's control; behaviour-based contracts rely on the principal investing in information systems to monitor how the agent is acting.[2]

Agency theory and its variations have been widely used overseas and in some Australian States.[3] While some argue it simply shifts costs previously internalised onto the wider community,[4] even its supporters generally concede that the way in which it is used must be contingent

on the nature of the policy and organisational environment in which it is used.[5] Agency theory may be effective or inappropriate, depending on how it is introduced and the organisational environment into which it is introduced.

To examine the application of agency theory to legal aid, the circumstances of the current cuts need to be put in context.

Legal aid funding: a broken partnership

Since the 1970s the provision of legal aid in Australia has involved a largely unbroken partnership between the Commonwealth and the States.[6] While there is a complex history of development in Federal/State relations between 1973-1985,[7] the funding partnership has been formalised since 1987 by agreements under which the Commonwealth provides 55% of the agreed core funding for the provision of legal aid in each State. These agreements have been indexed so as to increase total levels of funding in accordance with changes in the Consumer Price Index and average weekly earnings.[8]

Although the States have contributed 45% of core funding, this is not merely State government funding. It also includes income from solicitors' trust account interest funds. As an example, the Commonwealth provided $37.7 million compared to $18.9 million from the NSW Government to the NSW Legal Aid Commission in 1992-93, with a further $13 million from solicitors' trust account interest funds.[9] With the decline in income available from Solicitor's Trust Funds (due to banking changes and lower interest rates) State governments would have to increase their contribution in coming years just to maintain the existing 45% State contribution to core funding.

Under existing agreements the Commonwealth estimates it will contribute $150 million to legal aid in Australia in 1996/97.[10] From 1 July 1997 the Commonwealth will terminate its existing legal aid agreements with the States and reduce funding by at least $33 million a year for each of the following three years.[11] The effect of this is an immediate 20% cut in the funding to legal aid commissions, organisations which have limited flexibility to respond to funding fluctuations. The result has been a unified outcry from all States, the legal profession, the judiciary and other service providers.

The head of the NSW Legal Aid Commission estimates the cuts could result in 30,000 fewer people being assisted in NSW each year.[12] The States will be forced to devote most of their remaining budget to criminal matters, as trials in serious matters may have to be aborted if no representation is available. Even so, more expensive trials will have to be extensively delayed, and legal aid for committal hearings will be scrapped in most States.

The biggest impact will be in the other areas of legal aid which are under State law. In NSW, for instance, the cutbacks will result in some or all of the following:

- reduced funding of domestic violence services,
- reduction of legal aid to children,
- cutting back on 1800 phone service to rural areas,
- reduced tenancy advice services to retirement village residents and nursing homes,
- reduced assistance in consumer credit and debt problems, and
- cutting legal aid in anti-discrimination cases.

The Commonwealth has announced it only wishes to have its legal aid funding used in Commonwealth matters, that is, matters under its laws such as family law and the *Trade Practices Act*. It will no longer fund criminal matters under State law, which make up two thirds of matters funded by State commissions.[13]

This change is said to ensure greater accountability in how the Commonwealth's funding is spent and 'better value' for the Commonwealth legal aid dollar.[14] This rationale for the funding cut has created additional problems which would not be present in a simple funding cut. While the Attorney-General has not used the jargon of economic policy, this type of 'value for the dollar' approach is typical of the arguments used in the application of agency theory. Agency theory has been the theoretical basis for many of the reforms in Victoria under the Kennett Government[15] and increasingly in most other States. It has been widely used in the health sector at a Commonwealth level but its appearance in the legal policy environment is relatively new.

Agency theory applied to legal aid cuts

Conflicting goals between the principal and the agent is said to be one of the situations in which agency theory can be considered as a useful tool. There has clearly been a sudden goal divergence between the Commonwealth and the States with regard to legal aid. In 1973, when the Commonwealth first began significant legal aid funding, Attorney-General Lionel Murphy expressed its commitment as being twofold:

> to provide legal advice and assistance on all matters of Federal Law [and]...on matters of both Federal and State law, to persons for whom the Australian government has a special responsibility, for example pensioners, aborigines, ex servicemen and newcomers to Australia.[16]

This partnership with the States in ensuring equality of legal access for disadvantaged Australians has remained a relatively stable goal over the last 23 years, through both Labor and Coalition governments. Now the Commonwealth has stated that this represents an 'unjustified subsidy to State...governments.[17] Its response to the shift in goals has been to see itself as a principal contracting the State legal aid commissions to deliver legal aid services for matters under its law only. The Government has shifted its perception of its role in legal aid from a partnership to that of a principal contracting services in return for its funding.

A theory poorly applied

The strength of agency theory is said to be its ability to define respective obligations that were previously unclear.[18] It is therefore essential that the principal can identify the services it is contracting the agent to deliver — this may either be by defining the outcomes or the way the agent is to behave in delivering the services. During the continuing debate on the cuts, however, the Commonwealth has never suggested a clear definition of Commonwealth matters for the States to use.

Several months after the initial announcement, the head of the Attorney-General's Department was quoted as telling heads of legal aid commissions 'there isn't a document, there isn't a definition'.[19] The Commonwealth in October 1996 submitted a general definition of 'Commonwealth matters' which was little more than a series of examples of what would and would not be funded. While this clarified Commonwealth priorities, the definition of what is a 'Commonwealth matter' is still the subject of much debate and needs further clarification.

In this case the principal is trying to contract with the agent without adequately specifying the services it wishes the agent to provide under the contract. The result is the agent has little guidance on how to comply with the intended contract.

In many cases such a Federal/State division is either an administrative impossibility or an encouragement to use

Federal Courts for matters previously best dealt with in State jurisdictions. Many (presumably) unintended consequences are already apparent. For instance, family law matters are a Federal matter but domestic violence, which may be associated with a marriage breakdown, is a State matter. Rather than resolve the domestic violence issue through a Local Court, for which legal aid may now not be available, solicitors would need to advise impoverished clients to attach this to an action in the Family Court.

Similarly in discrimination matters, lawyers in some States will have to advise needy clients to proceed in the Human Rights and Equal Opportunity Commission (soon to be in the Federal Court) under Federal legislation, even though the matter may have been more suited to proceeding under State anti-discrimination legislation in, say, the NSW Equal Opportunity Tribunal for which legal aid is now not available. In some States contractual and consumer credit matters previously litigated under State legislation will now have to be stretched to fit under Federal trade practices legislation to find legal aid support. It is difficult to see the efficiency gains from such redirection of litigation.

The impact of the cuts would be less serious if the State legal aid commissions could await the outcome of negotiations on the final form of the Commonwealth model before acting. However the nature of legal aid funding is such that commitments are made now which have their full impact in two to three years because of the nature of trial times and delays.[20] The sudden shift from 23 years of goal consensus means the legal aid commissions have to make cuts now to avoid a financial crisis later. The lack of flexibility of the agent in this case leads to a very harsh and immediate impact, before the final definition of services contracted by the principal has been clarified.

In addition to uncertainty in its definition of contracted services, the Commonwealth is trying to use agency theory when it has poor access to reliable information with which to monitor the State's performance.[21] Although the Commonwealth has made substantial efforts to improve information systems, logistical problems have made it very difficult to compare States' use of funds. The Commonwealth has relied on State legal aid commissions for raw data on use of funds, but most commisssions use different measures not easily comparable to each other. Despite a commitment by the Commonwealth to invest in the information systems necessary to monitor compliance, this is a long way from being a reality. The principal therefore has little ability to monitor compliance by the agent due to inadequate information systems.

A further organisational response by the commissions may make any ultimate cost savings for the Commonwealth negligible. The State governments have considerable ability to 'retaliate', and thereby gain the revenue they need to meet the funding shortfalls.[22] The Commonwealth is a major user of State courts for importation cases and corporate law cases: the States may choose to levy greatly increased court charges on the Commonwealth.

A recent threat along these lines[23] is that the State legal aid commissions could refuse to administer legal aid for any Commonwealth matters, forcing the Commonwealth to establish its own administrative infrastructure to deliver legal aid in family law and other matters. This would see the agent refusing the terms of the principal. While perhaps only part of the negotiation process, it nevertheless illustrates how agency theory used in the wrong situations may simply bring out previously internalised costs with efficiency losses rather than gains overall.[24]

Conclusion

The main conclusion which can be drawn is that this is an inappropriate application of agency theory; alternatively the Commonwealth Government purports to be using agency theory to justify what is simply a funding cut affecting the most disadvantaged sections of society.

Legal aid in Australia is very narrowly targeted to the most disadvantaged sections of the community;[25] any cuts to its funding directly impact on the poor. The recently announced cuts have been accompanied by a sudden shift from a partnership based on agreed goals which has lasted more than 20 years, to an application of agency theory which has seen the Commonwealth greatly limit its responsibility.

The approach taken has worsened the impact of an already significant cut because of the Commonwealth's failure to adequately define its change in goals, and the lack of flexibility of response open to legal aid commissions. The impact will see all legal aid recipients suffer, but particularly women, children and the aged. The outcome is likely to be at best administrative chaos or, at worst, an overall increase in public expenditure on legal aid in a less effective way.

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MID-LIFE CRISIS

Australian community legal centres

Mary Anne Noone

For independent centres the struggle to be born has turned into the struggle for survival...If ever they lose their sense of political purpose and their innovative tendencies they will die and probably deserve to. But I see no signs of senility yet.

John Basten[1]

Can Australian community legal centres survive 1990s neo-conservatism?

Australian Community Legal Centres (CLCs) are facing a mid-life crisis. This is reflected in several recent developments discussed in this article. The theme for the annual national conference of CLCs, 'Defining our Future: the Challenge of Change', held in August 1996, gives a flavour of the current mood.

In the 1970s CLCs developed (like their counterparts in other countries) a distinctive, alternative style of delivering legal services to the poor and disadvantaged communities. But the 1990s are vastly different from the period when CLCs first opened their doors; the political, economic and social climate has changed dramatically.

Originally CLCs were considered radical in both their form and content and were often in conflict with both governments and the legal profession. Ironically, in recent years, CLCs have been embraced by government in an attempt to solve the 'legal aid crisis' and now live in harmony with the legal profession. Government support and funding to CLCs has increased. CLCs are no longer on the fringe of the legal aid system but are considered to be an essential element of the system by both government and the legal profession. As a result CLCs in Australia are at risk of losing 'their sense of political purpose and their innovative tendencies': they are facing an identity crisis.

Even prior to the change of federal government in March 1996, there were several indicators that the rationale of CLCs was under threat. This is despite various reports and the previous Federal Government giving its seal of approval to CLCs on several occasions.[2] The decline of the welfare state, the rise of neo-conservatism and economic rationalism have altered the way government operates. More specific changes are occurring within the legal system and legal aid arena which also challenge the position of CLCs. In this article I begin to analyse what these changes might mean for the future of CLCs.

Australian community legal centres

There are currently more than 160 CLCs in Australia. They include both generalist and specialist centres. Generalist centres provide services to a local geographically defined community, and specialist centres provide services to a community defined by a common characteristic such as tenancy, welfare rights, women, mental health, credit, immigration, environment. Almost half the CLCs are specialist centres catering to groups of people with some common interest or characteristic or interest in an area of law. CLCs are supported by both the Commonwealth and most State governments.

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In 1992, Williams noted that substantial differences existed between the CLCs in various Australian States. In particular he highlighted the differences in:

- the mix of types of centres within each State — specialist, metropolitan-based generalist, or regional area-based generalist centre;
- the extent and organisation of education and reform activities; and
- the style of casework services.[3]

Williams recognised that the differences were interrelated. For example education and reform work is more easily undertaken with a clearly identifiable group. Consequently specialist centres do more of this type of work. Similarly the differences between States reflect differences in client communities and the range and availability of other legal aid and related services.

The diversity amongst centres is usually portrayed as one of the strengths of CLCs. It is justified by the need to respond to differing needs of the various communities served by CLCs. CLCs argue that they have developed an alternative and distinctive model of delivering legal services to the community. This mode of operation has been described as 'solution oriented' rather than 'services oriented'. Strategies used by CLCs include community legal education and law reform activity as well as the traditional forms of legal assistance.[4]

Current economic, political and social climate

Clearly a detailed analysis of the current political, social and legal climate is beyond the scope of this article. Instead I highlight particular aspects of significance to CLCs.

> The 'taken-for-granted' assumptions that underpinned the modern welfare state...are under attack...The neo-conservatives are more strictly laissez-faire and market oriented, and endorse an 'enterprise culture' which subordinates welfare to the rationality of market forces. It is therefore a question of private individuals securing their welfare by their own efforts. The ideology of the 'neo-conservative' New Right rejects the concept of the welfare state, takes the rhetoric of individualism literally and downplays the probable adverse social and political consequences of the 'conflictual order' it advocates.[5]

The economic, social and political framework has altered markedly since CLCs first opened their doors. The welfare state is in decline and some scholars argue that governance with a view to the 'social' is declining if not dead.

> The economy is no longer to be governed in the name of the social, nor is the economy to be the justification for the government of a whole range of other sectors in a social form. The social and the economic are now seen as antagonistic, and the former is to be fragmented in order to transform the moral and psychological obligations of economic citizenship in the direction of active self-advancement. Simultaneously, government of a whole range of previously social apparatuses is to be re-structured according to a particular image of the economic — the market. Economic government is to be de-socialized in the name of maximising the entrepreneurial comportment of the individual.[6]

Those concerned for the social and economic well-being of the poor and disadvantaged, including those involved with CLCs, need to acknowledge these fundamental shifts and assess how best to respond. In practice these changes affect not only the lives of the clients of CLCs but also the way government views and deals with CLCs.

The prevailing government policy of economic rationalism and the imperative of a balanced budget has repercussions for government expenditure and, consequently. funding of legal aid and CLCs, for example, the announcement in June 1996 that the Federal Liberal Government planned to cut $33 million from its spending on legal aid in 1997/98.

The policy of economic rationalism applies irrespective of the political persuasion of the party in power. The broad effect of this policy has been to exacerbate the gap between rich and poor in Australia: to further concentrate wealth in the hands of a few. Approximately one-half of Australia's wealth is owned by 5% of the population, 22% is concentrated in the top 1% of the population, and the bottom half of the Australian community owns less than one-tenth of the wealth.[7]

One of the features of economic rationalism is the focus on user-pays principles. This has already been applied in welfare and more recently the legal system.[8] With the current Liberal Government the principle will become more entrenched.

Recent changes to legal aid system

Since the Commonwealth Government established the Australian Legal Aid Office in 1973, there has been ongoing debate about the Commonwealth's role in the legal aid system. The innovative leadership begun under Attorney-General Lionel Murphy, was slowly whittled away during the 1970s and the States took on primary responsibility for the development of the legal aid system.

In 1987, the Commonwealth Government created a new legal aid body called the National Legal Aid Advisory Committee (NLAAC) to advise the Minister responsible for legal aid. NLAAC undertook a review of Australian legal aid, publishing a report in 1990. One of the recommendations of 'Legal Aid for the Australian Community' was that the Commonwealth Government take a more active leadership role in legal aid.[9]

In 1993 the Commonwealth Attorney-General and the Minister for Justice formed an Access to Justice Advisory Committee (AJAC). AJAC's task was 'to make recommendations for reform of the administration of the Commonwealth justice and legal system in order to enhance access to justice and render the system fairer, more efficient and more effective'. A principal task was to review and draw on the various recent Commonwealth and State reports in the justice and legal systems.

The AJAC's report, titled 'Access to Justice — an Action Plan', was published in May 1994. It covered a wide range of issues related to the legal system. In the section on legal aid it recommended that legal aid should be more broadly based than just financial assistance for legal representation.

> Legal aid should include such services as telephone advice schemes (incorporating skilled interpreters where necessary), training for community and social welfare groups, and community education programs. [p.xxxvii]

In relation to the role of the Commonwealth it said:

> the Commonwealth has and should have a clear responsibility, as the major funder of legal aid to ensure that legal aid provision operates efficiently and effectively and in accordance with the objective of national equity. [p.238]

The Justice Statement

In May 1995, the then Commonwealth Government released the Justice Statement. This was the Government's response to the AJAC report and it contained strategies to be adopted by the Commonwealth Government in relation to a range of issues affecting access to justice. In particular, the introduction to the Justice Statement states:

> The Commonwealth will also assert its proper role and authority as the major provider of legal aid funding. It will ensure that community needs regarding legal assistance are addressed fairly and efficiently, and that legal aid policies and priorities are oriented properly to meet community expectations. [pp.1,4]

The Justice Statement indicated that funding for legal aid was to increase by $68.7 million over a four-year period nationally.[10] Funding was provided for more services in civil and family law and more legal advice that is not means tested.

Following the Justice Statement the Government established a non-statutory body, the Australian Legal Assistance Board (ALAB) to pursue a national approach to the delivery of legal aid. Unlike its predecessor, NLAAC, ALAB has no members from the private profession nor from CLCs.

Victoria Legal Aid

In the same month the Justice Statement was released, the Victorian State Attorney-General, introduced the *Legal Aid Commission (Amendment) Bill* into Parliament. Part One of the *Legal Aid Commission (Amendment) Act* came into effect on 14 June 1995, with the remaining substantial part of the Act coming into effect on 14 December 1995. The Act turned the Legal Aid Commission of Victoria (LACV), an independent statutory body, into Victoria Legal Aid (VLA), a 'new and more business like corporate body'.[11]

The VLA five-member board of directors is constituted solely on the nominations of the State (3) and Commonwealth (2) Attorneys-General. Unlike its predecessor, the LACV, there are no nominees from the legal profession, community legal centres, salaried legal aid staff, the Council for Social Services or the community.

As a result, the management of legal aid in Victoria altered radically. The previous system relied on a partnership between various sections of the legal profession, the community and both State and Commonwealth Governments. The new legislation creates a legal aid system in which there is little opportunity for input from either users of the system or providers of the legal services.

Commonwealth support for the abolition of the LACV by the *Legal Aid Commission (Amendment) Act* signals a significant policy shift in the way the Commonwealth Government wants the Australian legal aid system to operate.[12] This is a policy change that does not rate a mention in the Justice Statement and appears inconsistent with other policies in that statement, especially the sentiment that the Commonwealth will ensure that community needs for legal assistance are addressed fairly and efficiently, and that legal aid policies and priorities are oriented properly to meet community expectations. The Statement provides no detail on how the Commonwealth intends to implement this aim, but without genuine input from the legal profession, community legal centres, users of legal aid and staff of VLA, the VLA and the Commonwealth cannot ensure that community needs are met.

The change in the Victorian legal aid body indicates the trend for legal aid nationally. It is most unlikely that the new Liberal Federal Government will revert to a more consultative format.

Whatever the structure of legal aid, it seems certain that the trends to privatisation and user-pays in the provision of government services will transform the way legal aid is delivered. Already in Victoria there is a compulsory contribution for people granted legal aid and franchising is being piloted.[13]

CLCs funding program

Most CLCs are funded through a combination of both State and Commonwealth CLC funding programs. The Commonwealth funding for CLCs reflects the developments in the broader legal aid system. Up until 1996 the number of CLCs has increased each year. In 1993/94, $10,808,000 was allocated to fund 94 centres around Australia. The Commonwealth contribution was 74%. Only one State contributed more than the Commonwealth and in three States, there was no contribution at all to the funding of CLCs.

In the Justice Statement, CLCs received substantial additional funding. This was used to expand the network of generalist (nine new centres) and specialist community legal centres. There was also a substantial injection of funds to the Women's Legal Resources Group to extend its services to rural women and aboriginal women in particular.[14]

Implementation of the Justice Statement came to a halt with the announcement of an election in March 1996. The August budget phased out Justice Statement moneys to legal aid commissions but continued funding to CLCs. The implications for CLCs of the funding cuts to legal aid commissions is not clear at the time of writing.

Changes to CLC funding process and service agreements

Until recently the State legal aid commissions were solely responsible for administering both the State and Commonwealth CLC funding programs. This situation recently changed with the distribution of the Justice Statement moneys. The Commonwealth ignored or did not seek the assistance of the legal aid commissions. The Commonwealth sought submissions and allocated funds without referring to the current funding guidelines or any published criteria.

The Commonwealth is preparing a National Funding and Performance Agreement('Service Agreement'), in particular for signing by those centres funded under the Justice Statement, with a view to having all CLCs sign for the 1997 financial year. Although CLCs recognise the need for appropriate service agreements and accountability, various concerns have been expressed by the National Association of Community Legal Centres (NACLC). These include that the agreements are fundamentally flawed and lack clarity. The role of the Commonwealth in the management of the CLC funding program is unclear.[15] However the Commonwealth is pushing ahead requiring CLCs to sign.

Consequences of changes for CLCs

Economic rationalism and the threat to 'community'

In the *Study of Four Centres* the common features were said to include:

> Each CLC has developed in response to communities that sought to fill a gap in unmet legal need in their community. Each Centre's development has been dependent on a number of factors including the persistent commitment and activism of their community, the particular needs of that community, the prevailing political climate and the availability of resources.[16]

This indicates the emphasis placed on the importance of 'community' in the development of CLCs. Links with a 'community' are stressed as imperative. The fact that CLCs respond to communities rather than being inflicted on communities is perceived as relevant.

The concept of community was an essential element of the original ideology underlining the opening of the Fitzroy Legal Service (FLS) in 1972. It has been argued that Fitzroy Legal Service was the manifestation of 'New Left' politics in the legal arena.[17] A common thread through the New Left approach was a focus on community participation and control. FLS was used as a model for other centres both within Victoria and in other States. The commitment to community participation as espoused by FLS was endorsed in the 'Law and Poverty Report' of the Commission of Inquiry into Poverty in 1975.

Community participation is still presented by CLCs as central to their mode of operation. As recently as May 1995, the rhetoric was adopted by the then Commonwealth Government in its Justice Statement:

> The Government recognises that community legal centres' close links to their communities are an important part of their effectiveness and accessibility and will continue to support and foster this fundamental characteristic through encouraging community participation and development. [p.109]

However, given the new ideological force within which CLCs have to operate, CLCs need to reflect on the concept of 'community' and what it means to their mode of operation.

Previously a CLC would only receive government funding after proving local support and involvement by operating as a voluntary service for a substantial period of time. Recently the Commonwealth Government has decided that a particular town or area should have a CLC, allocated funds and then sought community involvement. This represents a significant change in the importance the Commonwealth Government places on community participation in the development of CLCs.

Whilst the Commonwealth Government endorses community participation and involvement in CLCs it is increasingly focusing on the 'legal aid services it can purchase'. It is irrelevant what sort of organisation provides the service. In order to compete, CLCs need to analyse and present the benefits of community participation in economic terms.

As the economic imperative of the market takes hold in the legal aid arena, CLCs will have to compete with the private profession to provide services, particularly as the National Competition Strategy is applied to the legal profession.[18] A local private practitioner could compete to provide legal aid services to a geographic area. More disturbingly, CLCs will compete against other CLCs or welfare organisations. The basis of the CLC community involvement may well be undermined.

When discussing the implications of the application of competition principles to the legal profession to access to justice issues and legal aid services, Sackville said:

> The fundamental policy question is how best to allocate scarce public resources to assist most effectively those who cannot afford to purchase legal services in the marketplace...The [competition] principles will be important in creating a condition in which the legal aid agency can obtain legal services at the lowest cost to itself and to the community. But the major point is that in these contexts questions of equity loom larger than market considerations.[19]

The challenge for CLCs is how to keep the question of equity at the forefront of decisions in legal aid policy.

Equally, as the neo-conservative approach prevails, the Government will no longer countenance CLCs acting in the 'community's' interest to achieve improvements to the 'social' well-being of the poor and disadvantaged. This type of governmental policy shift fundamentally attacks the rationale of CLCs as they exist today.

Funding program and loss of control and independence

A major concern arising from the changes in the funding arrangements for CLCs is the increasing intervention of the Commonwealth Government to the detriment of State-based legal aid commissions. With this development, the control of the funding program becomes centralised. The funding program will be administered by an isolated bureaucracy which is concerned with counting outputs rather than promoting and planning efficient ways of addressing the legal needs of the poor.[20]

In commenting on the diversity of CLCs amongst the States, Williams concluded that:

> attempts at planning on a national basis, would impact not just on the particular centres concerned, but will have effects on the complex relationships that have developed between centres at a State level...It strikes at the heart of the community basis of the legal centre movement, and is another example of governments' general inability to accept that communities can make rational planning decisions about their need for services. [p.294]

The draft service agreements are an illustration of these concerns. They concentrate on outputs and increased reporting requirements without setting out the responsibilities of the State commissions or the Commonwealth.

These developments are a threat to the independence of CLCs and an attempt to limit the type and style of work centres engage in. Previously the Commonwealth Government has not sought to exert this level of influence although they required certain financial and statistical reports. The new service agreement is the instrument which will be used to exert this control.

Further, if the services that the Government wishes to purchase from CLCs are traditional legal services, than the financial viability of CLCs in their current form is threatened. As Basten predicted in 1980, increasingly CLCs will have to fight to maintain their unique approach to providing legal services to the poor and disadvantaged.

Legal aid system and loss of influence

As referred to above, the preferred option in management structures for the Commonwealth Government is smaller, 'more corporate like' legal aid commissions. The new national body NLAB and the new State body VLA are examples of this approach. The bodies exclude direct input from CLCs as well as other interested parties. This is a significant change from the recognition of the CLC contribution by legal aid policy makers since the mid-1970s and reflects a possible decline in their influence.

CLCs no longer have direct input into decisions made about the broader legal aid system. As a consequence they are not able to represent the views of those who use their services. In particular, they do not have the direct opportunity to advise on the practical results of certain policy decisions. Additionally, with the loss of direct input into legal aid bodies, the innovations in the delivery of legal services

developed by CLCs will take longer to penetrate the broader delivery of legal aid services. Nonetheless, CLCs have mounted a significant campaign against the cuts to legal aid funding.

Conclusion

In light of the decline of the welfare state, the rise of neo-conservatism, changes to the legal aid system, the legal profession and the economic imperative of market forces in the way government operates, it is not surprising that CLCs are facing an identity crisis. Much of the underpinning philosophy of CLCs has been aimed at improving 'the social': enhancing the lot of the disadvantaged and poor. Some theorists argue that with the decline in the welfare state there has been a 'death of the social'.

A new analysis of the aims of CLCs, the role of 'community' in the CLCs mode of operation and the mode of operation itself is warranted. This task will be difficult and possibly divisive amongst CLCs within the current threatening environment. But unless it occurs quickly, there is a real risk that CLCs will have 'their sense of political purpose and their innovative tendencies' trampled on and as a result the senility Basten feared may set in.

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3. Williams, K., 'Legal Centtres Across Australia' (1992) 17(6) *Alt.LJ* 293.
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6. Rose, N., 'The Death of the Social? Re-figuring the Territory of Government' (1996) 25(3) *Economy and Society.*
7. See Saunders, P., *Welfare and Inequality,* Cambridge University Press, 1994.
8. Thorne, E., *Broad Factors Affecting Legal Aid in the 90s: Economic Factors*, Paper given at National Legal Aid Conference Legal Aid — Legal Access, Sydney, February, 1992.
9. NLAAC report p.63 and the Access to Justice report para 9.37 endorsed this view.
10. In 1994, the Law Council of Australia estimated that to restore legal aid funding to those who were eligible in 1987/88 (the benchmark for current funding arrangements) there would need to be an increase of funding of $50 million per annum nationally.
11. *Legal Aid Commission (Amendment) Bill 1995*, Second Reading Speech, 3 May 1995, p.4.
12. Similar legislation was proposed in New South Wales in 1994 but was never passed after extensive lobbying by community legal centres opposing the changes.
13. A $30 compulsory contribution was introduced in 1992. The first Australian franchise of legal aid services was piloted in December 1994. See Legal Aid Commission of Victoria, *16th Statutory Annual Report 1994-1995,* p.24. For a detailed discussion of the issues in franchising see Giddings, J., *Franchising Arrangements and the Quality of Legal Aid Services,* unpublished M LLB thesis, 1995.
14. For a detailed account of the results of the Justice Statement and CLCs see *CLC Notebook — Newsletter of the National Association of Community Legal Centres,* Issue 3, May 1996, p.13.
15. See *CLC Notebook -Special Bulletin,* May 1996, p.1.
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20. For a discussion of how community legal clinics in Ontario, Canada suffered from interference and control by the funding body see Blazer, M., 'The Community Legal Clinic Movement in Ontario: Practice and Theory, Means and Ends' (1991) 7 *J of Law and Social Policy* 49.

Groves article continued from p.6.

extension of LPP to unrepresented people along the lines of s.120 of the *Evidence Act* (Cth and NSW)); second, specific legislative measures to prevent, or control, the behaviour of custodial staff in respect of any documents held by accused people; third, detailed administrative guidelines designed for custodial staff.

References

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2. See, for example, *McEvoy v Lobban* (1988) 35 A Crim R 68, 71 (Carter J, Qld Sup Ct); *Kuczynski* (1994) 72 A Crim R 568, 589 (Owen J, WA Sup Ct) and *Coco v R* (1994) 179 CLR 427, 436 (Mason CJ, Brennan, Gaudron and McHugh JJ).
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7. See also *McKinney v R* (1991) 171 CLR 468, 478 where Mason CJ, Deane, Gaudron and McHugh JJ emphasised that the concept of fairness in this context is both variable and normative.
8. *Jago v District Court (NSW)* (1989) 168 CLR 23, 29 (Mason CJ), 57-8 (Deane J). See also *McKinney v R* (1991) above, at 478 (Mason CJ, Deane, Gaudron and McHugh JJ).
9. See generally *McKinney v R* (1991) above.

Postscript

By amendments passed in late 1996, these powers have effectively been transferred to the *Corrections Act* 1986 (Vic.) ss.104A-D. The amendments, not yet commenced, introduce some important changes. The amendments extend police powers of search and seizure to *all* people held in police gaols, irrespective of whether they have been charged with an offence (s.104A). They also enable the police to conduct a 'formal search', using a hand-held metal detector, presumably to find weapons on anyone who wishes to enter or remain in a police gaol. A person who refuses to be searched cannot enter or remain in the police gaol (s.104B). Under the new provisions the grounds on which prisoners may be serached, and property seized, are otherwise similar to those in existing legislation (s.104C). As with the existing regulations, these provisions make no specific reference to lawyers or legal documents. Accordingly, it is not clear whether they are intended to cover any legal documents held by, or passed to, a person held in police custody. However, the general language of the provisions indicates that they appear to be designed to find weapons and evidence.