

Interview: Emeritus Professor Ron McCallum AO

Eli Fisher, co-editor, sits down with Emeritus Professor Ron McCallum AO, former Dean of Sydney Law School and consultant to HWL Ebsworth, to discuss Australia's implementation of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled in the Copyright Act (Marrakesh Treaty), by way of the Copyright Amendment (Disability Access and Other Measures) Act 2017 (Amendment Act).

Professor McCallum, who lost his eyesight at birth, has been a fierce advocate for the rights of people with disabilities for many decades. He is an expert in labour law and among the most acclaimed legal academics in Australia. He is the first totally blind person to be appointed to a full professorship in any subject at any university in Australia or New Zealand, and was also the first to become a Dean of Law in those countries. Professor McCallum was an inaugural member of the UN Committee on the Rights of Persons with Disabilities from 2009 to 2014, and he served as its Chair from 2010 to 2013. The Committee, which meets in Geneva, monitors signatory nations' compliance with the *Convention on the Rights of Persons with Disabilities*. Ron served on the Board of Vision Australia from 2006 to 2015, and he is a current member of the Board of Ability First Australia. He has also been a Don't DIS my ABILITY ambassador since 2010. In 2011, Professor McCallum was named the Senior Australian of the Year.

ELI FISHER: Ron, on behalf of our readers, thank you so much for your time discussing the recent amendments to the *Copyright Act* and the other work in which you have recently been involved. The *Copyright Act* was amended in June this year, following the passage of the Amendment Act. The Amendment Act came about following Australia's ratification of the Marrakesh Treaty on 10 December 2015. Can you tell us about your involvement?

RON MCCALLUM: My work on the UN Committee better exposed me to the plight of people with disabilities around the world, which obviously is in many respects different

from the plight of people with disabilities in Sydney. Most people with print disabilities are poor and live in developing countries. Even in Australia, we still need to do a great deal to increase the workforce participation of people with disabilities. But most people in developing countries don't have access to books or basic education. In 2016, the World Blind Union estimated that less than 10% of published works are made into accessible formats in developed countries, noting that "millions of people, including children and students, are being denied access to books and printed materials". But the situation is even worse in developing countries, where less than 1% of books are ever made into accessible formats. As the World Blind Union noted: "In places like India, the country with the highest number of people who are blind or partially sighted, over half of all children with a visual disability are out of school. This global lack of accessible published materials is known as the 'book famine'"

There are, according to World Health Organization estimates, 253 million people living with vision impairment in the world, 36 million of whom are blind. Of those living with vision impairment, 19 million are children - that is, under the age of 15. Keeping in mind that 80% of vision impairment can be prevented or cured, much of the prevalence of vision impairment takes place in the developing world. When we talked to governments from the developing world, they would often say that they have enough trouble catering for the able-bodied, and they considered that people with disabilities are most

appropriately left to the domain of charity.

Our UN committee was and is a strong supporter of the Marrakesh Treaty. When countries would report to us about their compliance with the *Convention on the Rights of Persons with Disabilities*, we made an effort to question them about whether they intended to support the Marrakesh Treaty. The UN Committee argued in written submissions and in its constructive dialogues with reporting countries, for all nations to ratify the Marrakesh Treaty. I am delighted that Australia has now done so, and has implemented corresponding legislation.

I'm quite fortunate, to live where I live and in my circumstances I can take advantage of various technological resources that are not available to everyone. But more can be done for people with vision impairments in Australia and *much* more can be done for those with vision impairment in the developing world - and the Marrakesh Treaty is a great example of this.

FISHER: So, talk us through the issue. Where does copyright come into the picture?

MCCALLUM: People with print disabilities need to be able to access content that is usually stored in print form in order to participate in society to the fullest extent possible. Ordinarily, copyright will prevent a person from taking text and making copies of it, or adapting it, without permission. Often, therefore, copyright restrictions can mean that people with print disabilities have difficulty obtaining texts in a format that is accessible to them. So, quite helpfully, there have for

many years been exceptions in the Copyright Act to allow organisations like Vision Australia to reproduce books in accessible formats, such as in braille or in digital formats. There is a format-shifting exception that allows a book, photo or video to be copied into another format, such as an accessible format digital file, subject to various restrictions. There is an exception at section 200AB(4) that provided that individuals with disabilities, and people who assist them, do not infringe copyright in certain circumstances. That provision will be replaced a broader fair dealing provision on 22 December 2017. There was a statutory licence, which permitted declared institutions assisting people with a print disability to reproduce and communicate literary and dramatic works in other accessible formats. A specifically licensed radio station is entitled to broadcast certain copyright works, including newspaper articles or scripts from plays.

Those exceptions operate within the boundaries of Australia. And similar exceptions exist in Britain and the United States. But there were no exceptions to allow an accessible format copy that has been prepared, for example, in the United States to be used by blind people in Australia. That means that when a book such as the Harry Potter books were put in accessible formats, there had to be separate accessible format copies created in Canada, Britain, Australia and the United States - which is terribly wasteful of resources, especially in circumstances where resources can be put to better and more efficient use. Personally, there are accessible format copies of law books by foreign publishers, which are available in the United States, but which I cannot access legally in Australia. This applies also in respect of recent novels, which were not available on Kindle in Australia, but were in American blind libraries. There are a couple of book libraries, for example Bookshare in the United States, which has put (at current figures) almost 580,000 titles into an accessible format. In Australia, I

can only gain access to a quarter of those books, because there were no provisions for such works crossing borders.

But this challenge is far more pronounced in the developing world, and it is here where the importance of the Marrakesh Treaty is most keenly felt. Particularly in the developing world, there is no way to allow books created in Australia to go overseas. And we are able to be of great assistance to the developing world in exporting English-language books. Another example is Spain, which has quite a large Spanish-language library of accessible works, but which cannot get content across to parts of South America without infringing copyright law. To allow this sort of exchange countries had to amend their laws.

FISHER: So what did the Treaty seek to achieve?

McCALLUM: Essentially, the Treaty required signatories to legislate for exceptions to their national copyright law that permitted people with a print disability and certain organisations that assist people with print disabilities to make accessible format copies, and transfer accessible format copies between other signatory countries without the permission of the rights holder. It removes that obstacle to access. It should be noted that the obligations in the Treaty apply not only in respect of blind people, but those who have a visual impairment or a perceptual or reading disability which cannot be improved but which means that the person cannot read printed works to the same degree as a person without such an impairment, and also to those who are unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading. The Amendment Act takes it even further: "a person with a disability" means a person with an impairment that causes the person difficulty in reading, viewing, hearing or comprehending material in a

particular form. Thus, it applies as much for those with hearing and other impairments as those with vision impairments, which was the focus of the Marrakesh Treaty.

There is an important exception to this provision. The Treaty provides that at the domestic level countries are entitled to limit the protection so that it does not extend to dealings with works that can be "obtained commercially under reasonable terms for beneficiary persons in that market." That is, one can only rely on the protection if there is no commercially available accessible format copy already in existence. And this is what Australia has done. The new fair dealing exception at section 113E of the Act provides that a *fair dealing* with copyright material does not infringe copyright in the material if the dealing is for the purpose of one or more persons with a disability having access to copyright material. The matters to which regard must be had in determining whether the dealing is a fair dealing for the purposes of that provision include the purpose and character of the dealing, the nature of the copyright material, the effect of the dealing on the potential market for, or value of, the material and the amount and substantiality of the part dealt with. Likewise, the provision at section 113F which provides organisations assisting persons with a disability with protection from infringement, does so only where the organisation is satisfied that the material cannot be obtained in that format within a reasonable time at an ordinary commercial price.

Last month, Nigeria and Costa Rica ratified the Treaty, taking the number of countries that have ratified the Treaty to 34, following many others in the developing world, including Burkina Faso, Malawi, Kenya, Kyrgyzstan, Honduras, Panama, Liberia, Sri Lanka, Botswana, Tunisia, Saint Vincent and the Grenadines, Guatemala, Ecuador and El Salvador. India, which was referred to specifically in the World Blind Union quote earlier, was the first to ratify the treaty. Developed

countries, such as Australia, Canada, Israel, Argentina and South Korea have also ratified the treaty - but we are eagerly hoping for the UK and the US to ratify the treaty, as that will free up a lot of works, especially in the English language.

FISHER: Do you consider that there is, or should be, a human right to access information?

I don't think that there is a human right to access all information for free. I write, and so I consider copyright to be very valuable. But equally, I think that the law should not discriminate against the print handicapped. In that sense, you can understand why the provisions of the Treaty which permit an accessible format copy to be made are very important, but you can also understand why the exception regarding commercial availability is there too.

These provisions are not about people with disabilities not having to pay to access works like other people would, or publishers giving charity to the print-handicapped. They are really about fair access. The idea is to increase the amount of the accessible books available.

FISHER: Changes to copyright legislation can sometimes be fraught. Was there significant resistance to the changes, either at an international level, or locally?

McCALLUM: I wasn't involved in the negotiations directly. Much commendation should go to the head of the World Intellectual Property Organisation - Frances Gurry, an Australian of whom we should be very proud - for the manner in which he handled the negotiations. There was a lot of understanding and goodwill from the West - US, Canada, Australia - when it came to exceptions for accessibility. There was generally a level of comfort among rights holders about agreeing to reasonable exceptions for assisting the print handicapped. These countries had exceptions already in place. But this was about

moving these arrangements from a national level to an international level. This was a big step, and there were complicated negotiations. Publishers said, at some point, that they were prepared to provide access on a voluntary basis, and consult with various organisations as to the most appropriate way to do so, for example the Canadian National Institute for the Blind and Vision Australia. But the developing nations pushed for a treaty, which was understandable.

I am loath to put book publishers in a bad light, as they have always been very decent and accommodating in respect of accessibility. Personally, my experiences with publishers have been very positive. Many law book publishers have provided me with accessible resources upon request, and they should be commended. But we want to make more and more books accessible. Why can't all print books be made accessible on programs such as EPUB, using whatever protection methods deemed necessary, to make books accessible to people with print disabilities?

If I seem a bit soft on publishers, you have to keep in mind that publishing in Australia is a difficult business. And we add significantly to their cost. They have to compete with international online services, such as Amazon. And it is a tough industry. But we can find a way to encourage better access.

I also note that publishers, authors and other members of the rights holder community are actively engaged in ongoing fruitful discussions with disability associations, government and accessible format providers, through the Marrakesh Treaty Forum, to exchange ideas about how to make published material accessible to people with print disabilities. One of the projects of the Marrakesh Treaty Forum is to develop "Born Accessible" Australian standards and pitch those standards to the Accessible Book Consortium. Born accessible books are books that are

usable directly from the publisher both by people with print disabilities and those without print disabilities. The Accessible Book Consortium is another initiative being led by WIPO, and includes organisations such as the World Blind Union, libraries for the blind and the publishing community.

FISHER: Did the changes go far enough, or is there more yet to do?

McCALLUM: The Treaty does not force publishers to make books accessible; it only gives organisations rights to make accessible copies, and for accessible copies to go across borders. But beyond the Treaty, we should be thinking within our own domestic framework how to encourage publishers to make texts accessible as a matter of course. Not free of charge, but virtually automatically. My intention would not be to impose upon publishers; but we should be looking for ways to help publishers enable better access for people with disabilities - say, by way of a subsidy or some other legal encouragement - particularly for textbooks for students beginning at kindergarten and going all the way through to university.

Some younger advocates for people with disabilities think that there should be laws forcing automatic accessibility. I'm not so fervent. I want to continue dialogue with publishers and government. There is a lot of goodwill there. Marrakesh is a good example of what can be achieved when people get together and each community - those with print disabilities, publishers, etc - understands the difficulties that the other faces.

FISHER: You recently launched your latest book, *The Legal Protection of Refugees with Disabilities*, with your co-authors Professor Mary Crock, Professor Ben Saul and Laura Smith-Kahn. The book follows the investigative field work the four of you undertook over three years to explore the intersection between the Convention on the Rights of Persons with Disabilities and the Convention relating to the Status of Refugees.

In particular, you were looking at the treatment of refugees with disabilities in six countries hosting refugees in a variety of contexts - Malaysia, Indonesia, Pakistan, Uganda, Jordan and Turkey. What are some of the key findings of your work?

McCALLUM: The most important aspect of our findings was debunking myths that had been allowed to exist and, in some respects, hinder the development of appropriate national policies. There was a big myth that refugees did not have disabilities, because it was perceived that disabled people could not travel. For example, we were initially told that UNHCR had oversight of more than 100,000 refugees in Malaysia, but that UNHCR had identified only 202 as having any form of disability. We began questioning the refugees, using the Washington Group approach to identifying disability using 'functionality' questions. And sure enough we found the prevalence of disability in the refugee community roughly mirrored that of the non-refugee community: about 15%. If you ask a refugee whether they are disabled, we found that they tend to deny that label. But you have to ask the right questions: Do you have trouble seeing? Do you have what you need to correct your poor vision?

Blind people are pretty conspicuous. Those who are confined to a wheelchair are also pretty obviously disabled. But with people with hearing difficulties, for example, it can be difficult to determine just from looking. Their appearance does not necessarily give you any indication. So you have to ask functional questions. Do you need a hearing aid? Do you have a hearing aid? Disability is not just about impairment. It is about the obstacles created for people with impairments that prevent their participation in society. Likewise, mental illness will only become apparent if questions are asked about cognitive functioning. Of course PTSD is common among refugees.

In many countries, where refugees are not allowed to work - Malaysia and Indonesia are examples - they end up working, but doing degrading and dangerous jobs. There is quite a high prevalence of refugees *becoming* disabled as a result of injuries related to their displacement.

One of our key findings was that we need to develop new ways of identifying and managing disabilities within refugee camps. In Uganda we came across a settlement where people with disabilities were all housed together. But this was problematic, for two reasons. First, where people with disabilities live within the general population of a camp, their able-bodied neighbours can assist with various aspects of their daily activities. The concentration of disabled people threw the burden of care and accommodation on to the camp authorities (including UNHCR). There needs to be a workable ratio of disabled people to those without disabilities living together so to assist those with disabilities. Second, we found that women with disabilities, including cognitive disabilities, were particularly susceptible to sexual assault. Again, in Uganda we found examples of good practice where this reality was recognised in the careful placement of particularly vulnerable women and children. So we were able to make recommendations based on the negative things we saw, but also based on the many positive things we observed.

FISHER: Your upcoming memoir, *Born at the Right Time*, tells of some of the difficulties you have faced in your life, but also how certain challenges have been overcome in recent years with various technological developments. Could you give us some examples, and tell us how certain technologies may have been stifled by an intellectual property law not sensitive to the needs of people with disabilities?

McCALLUM: A lot of technologies have worked amazingly well, and I am lucky to be able to use them

- hence the name of the memoir. There is a constant battle to get accessible books, because I am often looking for rare and esoteric books. Additionally, blind people would like to be able to borrow accessible format copies from vision impaired libraries, as opposed to purchasing them, in the way that those without vision impairment can borrow ordinary books from a local library. But apart from access to printed works - particularly in countries where provisions for people with disabilities did or do not exist - intellectual property law has not had a significant stifling effect in regards to technologies assisting people with disabilities, to my knowledge.

Some examples that come to mind in respect of technologies that have assisted people with disabilities, and me in particular, are audible traffic lights, which came into use in Australia in the 1990s. You have no idea the stress that that has taken out of my life. It was like playing Russian roulette each time I crossed the road. There are ATMs with braille, which have made things much easier for me (and relieved my children from having to take me to use an ATM). These days, if you look closely at an ATM, you'll see an earphone jack. I often carry earphones with me, and I plug it in and the machine talks me through the transaction.

The blind community is now very concerned by silent electric cars. We have been arguing at the UN level about regulating electric cars to have a noise, to avoid unfortunate accidents. I have been an avid radio listener since I was in diapers, and podcasts have become an exhilarating new medium for the spoken-word format, one that I hadn't anticipated.

Other areas, like films, have become and are becoming more accessible to people with disabilities. All films have to have Audio Description in the United States - essentially an audio narration of what the characters on the screen are doing, that visually impaired members of the

audience are able to access through headphones. Now, you can also get Audio Description from an app through your phone. Likewise, if you are playing Netflix on your computer, you can turn on Audio Description. The ABC has trialled Audio Description on some of its programs on iView. Some theatres are working on captioning for individual seats for the hearing impaired.

Technology has been tremendously helpful in increasing participation, and not just for those with vision impairments. I remember when fax first emerged, and the impact that it had on my deaf brothers and sisters

who could not use a phone. All the more so with emails now. And there are apps that enable deaf colleagues to sign to one another over their phones.

When I grew up, there were braille works, but no braille printing press. That meant that you would have people - mostly old women in their own homes - transcribing works into braille one dot at a time. So you can imagine how limited was the range of available accessible books. Then there were long-playing records. Over the years, technological developments changed that landscape. But over the last 10

years in particular, it has changed so significantly for the better. For example, if you take out your iPhone now, and click on Settings, and then Accessibility, you can see a range of features that are installed in smartphones to which you may not have turned your mind, which help those with disabilities make use of technology and thereby participate in society in ways that were inconceivable when I was growing up.

FISHER: Thank you Ron. Once again, we are grateful for the work you do, and for your time discussing it with us.

CAMLA Young Lawyers Speed Mentoring

On 26 October 2017 CAMLA held its Young Lawyers Speed Mentoring networking event at Baker & McKenzie. The event was proudly organised by the CAMLA Young Lawyers Committee, with key addresses by Nicholas Kraegen (Baker & McKenzie and CAMLA Young Lawyers Committee) and Sophie Ciuffo (Viacom and CAMLA Young Lawyers Committee).

The Speed Mentoring evening provided an excellent opportunity for law students and young lawyers to gain valuable insights into a number of career paths within media and communications industries from a variety of accomplished and inspiring speakers. The event also provided an opportunity to announce the CAMLA essay competition (further details in this Bulletin).

The evening adopted a light-hearted circuit format, with mentors including Dr Fady Aoun (The University of Sydney Law School), Michelle Caredes (Network Ten), Michael Coonan (SBS), Emma German (Stan), Katherine Giles (MinterEllison), Adrian Goss (Bauer Media), Ryan Grant (Baker McKenzie), Rebecca Lindhout (HWL Ebsworth), Grant McAvaney (ABC), Rebecca Sandel (Universal Music), Linda Taylor (Practical Law) and Rebecca White (Ninth Floor Selborne Chambers). The mentors provided the mentees with fascinating insights into their career journeys so far, candidly recounted their professional highlights and challenges and provided advice to young lawyers as to where their law degrees and experience may take them.

By all reports the speed mentoring (and of course the lavish refreshments) were enjoyed by all. Particular thanks must go to each of the mentors for their time, insights and advice, Cath Hill and to Baker & McKenzie for hosting the event.

Stay in touch with CAMLA via our website (www.camla.org.au) and LinkedIn page for news on upcoming CAMLA events, the bulletin and membership information.

Report by **Katherine Sessions**, Australian Communications and Media Authority and CAMLA Young Lawyers Committee.

