

MELBOURNE LAW SCHOOL

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MELBOURNE LAW SCHOOL REPORTER

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NEW HIGH COURT APPOINTEE

BY JACK O'BRIEN

In explicitly calling for his successor to the High Court be a woman, outgoing Justice Michael McHugh evoked a continually simmering legal issue, that of the struggle which women face to be appointed to high judicial office.

McHugh believes that the problem is the product of the discriminatory, systemic and structural practices in the legal profession that have been well-documented in recent years which prevent female advocates from getting the same opportuni-

ties as male advocates.' Whilst the recent appointment of Justice Susan Crennan to the bench may have quelled some discontent amongst both female lawyers and the broader legal community, it is evident that there many factors competing with gender when a High Court judge is chosen.

Speaking at Sydney University earlier this year, Commonwealth Attorney-General Phillip Ruddock maintained that the essential criterion for appointment to the federal judiciary is merit. It is possible, however, that

the term merit operates in a manner which re-asserts the status quo. In 2002 Justice Gaudron claimed that 'merit slyly conveys the message that men of silk are men of merit,' while earlier this year academic Professor George Williams suggested that merit 'has been applied in a way that excludes women from consideration.' Given that Susan Crennan is only the second female appointee to the nation's highest court, it is apparent that the application of the merit criterion is failing to produce a representative bench.

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IN RE

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NEW HIGH COURT APPOINTEE

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Yet how much should the legal community strive to ensure a gender balance on the High Court? There would be little disagreement in asserting that a bench of seven women would be as desirable as that of seven men, but we are evidently far from a stage in time where a woman can be appointed to high judicial office without reference to her gender. Indeed, following the appointment of Crennan, Phillip Ruddock reminded the legal fraternity that his selection had been based on merit. Whilst there can be no doubting Crennan's credentials, the ire which would have been raised had Justice McHugh's replacement been a man is unfathomable.

Coupled with the fact that there has never been an appointment from South Australia or Tasmania, heed should be given to Justice McHugh's call to maximise the opportunities which will arise over the next three and a half years with the retirements of Justices Callinan and Kirby and Chief Justice Gleeson.

Representational issues are not limited to those of gender. South Australian Attorney-General Michael Atkinson believes that it is important to have judges from the smaller states on the High Court in order to resist what is perceived to be centralising tendencies of the court. Whilst he concedes that geography and gender are minor considerations, and that the most im-

portant attribute a judge can possess is the ability to do the job, he asserts that 'amongst the minor questions I think geography is more important than gender.'

Such a response evoked an understandable, if not predictable, response from the former president of Australian Women Lawyers, Dominique Hogan-Doran, who stated that a male judge from Adelaide and a male judge from Sydney are likely to be far similar in judicial outlook than a man and a woman. 'I think gender is a different matter,' she says, 'because it goes to the question of the credibility of the institution from the perspective of the people that it

'WE ARE ENTITLED TO ABSOLUTELY DEMAND THOSE PEOPLE WITH THE APPROPRIATE CONSTITUTIONAL VISION, WHO ARE VERY, VERY CLEVER AND SUPERB LAWYERS.'

represents.' Such a theme was picked up on by Justice McHugh, who stated that unless the gender imbalance was restored that 'there is an ever-increasing risk in the society of today that the public support on which the legitimacy of the judiciary rests will erode.' In explicitly calling for the government to appoint a woman as his successor, McHugh cited research in the United Kingdom, New Zealand and Australia that female litigants and women generally do

not have the same confidence in the fairness and impartiality of the justice system as men do.

Perhaps then the question to be pondered is whether female judges approach cases in a different manner to their male counterparts. The first woman appointed to the Canadian Supreme Court, Bertha Wilson, made this distinction. 'Men see moral problems as arising from competing rights; the adversarial process comes easily to them. Women see moral problems as arising from competing obligations... the goal, according to women's ethical sense, is not seen in terms of winning or losing but rather, in terms of achieving an optimum outcome for all individuals involved in the moral dilemma.' Whilst such a statement may be seen as pandering to stereotypes, arguably, just like stereotypes, there is some degree of truth in it.

As the public, we are entitled to 'absolutely demand that in picking those people with the appropriate constitutional vision, they also pick people who are very, very clever and superb lawyers.'

Justice Crennan is undoubtedly very, very clever, and a superb lawyer. So for that matter is Justice Dyson Heydon, the much-maligned 2003 appointee selected to replace Justice Gaudron. A further common theme is that they have both been thought of as conservative judges. Professor Williams believes

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A BETTER FUTURE AHEAD?

BY JOANNE KHOO

The defence of provocation can be traced back to 16th and 17th century England when drunken brawls and fights arising from 'breaches of honour' were common.

The modern law of provocation shifted from being based on the idea of anger as a justified response in some situations, to being based on the idea of 'anger as loss of self-control.' Provocation is generally justified on the basis that the accused could not properly control his or her behaviour in the circumstances, and an ordinary person might react similarly. A person who kills due to a sudden loss of self-control after being provoked is regarded by some as being less morally culpable than someone who kills 'deliberately and in cold blood.'

However, this defence seems to pose many problems - one of which is that the defence is seen as gender biased. Because the defence was originally framed to deal with male aggressive responses to provocative conduct, the sexless ordinary person, it has been argued, is in fact male. Accordingly, women are seen

to be significantly less successful in their claims of provocation. Whatever the old law's intent, in practice it disadvantaged women, particularly women who suffered domestic violence - who generally do not directly confront violent, stronger partners at a time of imminent threat. It is much easier for male defendants to plead a "crime of passion" — and seven out of 10 murders in Victoria are committed in intimate or family circumstances.

The landmark case of Heather Osland clearly reveals the problem of gender biasness of the defence. Heather Osland and her children were subject to 13 years of physical, emotional and sexual abuse by her husband. During the 13 years of violent abuse, Heather tried to leave but each time she was forced by threats from her husband to return to the family home. She knew that there was an escalating level of threat. As she believed herself and her son to be at risk, she took steps she believed was necessary to protect themselves. Heather Osland mixed sedatives in Mr. Osland's

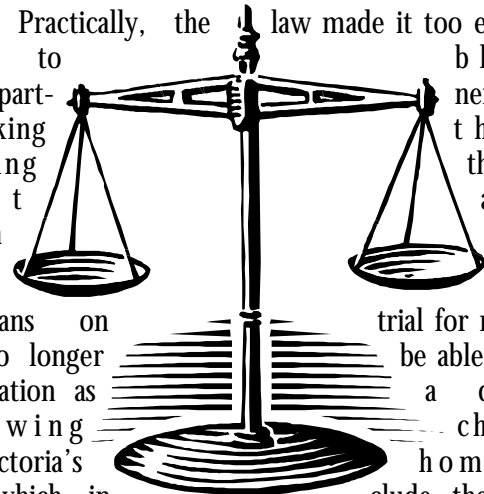
food prior to the killing and Heather and her son also dug a hole a day before the killing to bury his body. Because the killing was considered premeditated and not at the spur of the moment, Heather was unable to claim provocation.

The suddenness element of the defence, which is more reflective of male patterns of aggressive behaviour is unfavourable to women as seen in the Osland case.

Women, unlike men cannot strike out in the spur of the moment because of an imbalance of power, both physically and emotionally. Thus, they have to plan the kill as they believe that it is necessary to defend themselves. Accordingly, the defence is not designed for women.

Also, a loss of self-control is seen by many as an inappropriate basis for a partial defence. Individuals should be able to control their impulses, even when they are angry. A violent loss of control should not be excused. Practically, the law made it too easy for men to blame their part-provoking enablers "get away with murder".

Victorians on trial for murder will no longer be able to use provocation as a defence following changes to Victoria's homicide laws which include the abolishment of the defence of provocation. However, defensive homicide, imposing a maximum of 20 year's jail will be introduced. Men who kill their partners in a jealous rage will no longer be able to use the partial defence of provocation to escape a murder conviction. The question of provocation will simply be taken into account, if relevant, alongside a range of other factors in the sentencing process.



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ABOLISHMENT OF THE DEFENCE OF PROVOCATION

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The offence of defensive homicide aims to take account of situations where people believe, albeit unreasonably, that they must kill to protect themselves against an inevitable threat. Under the proposed changes, the law will take into account situations where a person kills in response to long-term family violence, even if they were not facing immediate harm. This means that if a person believes his or her conduct is necessary to defend oneself or another person (such as her child) from death or really serious injury and this belief was reasonable, that person can argue self-defence. Importantly, where a killing occurs in the context of family violence, the legislation will affirm that she can argue self-defence even if the threat from which she is defending herself is not immediate, and even where her response involved greater force than the harm with which she was threatened.



However, cases that involve a question of provocation in its purest form might cause injustice for the Accused. For instance, in the case of *The Queen v R*, the short time before the killing, Mrs R found out that her husband of many years had been raping their daughters as they grew up. Her feelings of rage grew, and on the fatal night, he came home and said, 'You know dear, I've always loved you', and gave her a kiss and went to bed. That final act sent her over the edge. She went to a shed, got the axe, came back and killed him. The jury, overwhelmed by the circumstances of the case acquitted the Accused. However, if that particular case was to be judged under a law that excludes the defence of provocation, the Accused might be convicted of murder which is considered by some to be an unjust outcome. The betterment of Victoria's homicide laws could only be tested in time to come.

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NEW HIGH COURT APPOINTEE

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that Justice Crennan will 'not change the political outlook of the court on a range of key issues, such as the place of human rights in the constitution.' Further, whilst serving on the Federal Court, Crennan made 76 major judgments. Of these, 33 concerned refugee appeals and another 11 concerned migration appeals. Of the 24 decisions in which she was the presiding judge Crennan ruled just three times in favour of an applicant. Yet one should not be hasty to classify Crennan as an archetypal conservative. 'She can't be pigeon-holed,' stated Commonwealth Solicitor-General, and former reading partner, David Bennett QC. She is 'not a black-letter lawyer. Not a leftie. Not a conservative. Not an

Anglo-Celtic private school type who had done nothing but law...she was a fine lawyer full stop.'

One thing is certain though, regardless of any inferences of political interference that may arise. That is, that the appointment of Justice Crennan, as a female judge, is vital for the legitimacy of the High Court, for to quote an oft used equitable maxim, 'justice must not only be done, but seen to be done.'

100 years on: the NSW Children's Court

by Emily Cheesman

Dealing with issues ranging from an infant caught in a home rife with domestic violence to deciding whether a child should stay with an abusive family or be placed foster care is part of the everyday work of the NSW Children's Court. Charged with the responsibility of making life-changing decisions for some of the most vulnerable members of society, the Court faces ongoing challenges as it celebrates its 100th year this October.

As the second oldest institution of its kind in the world, the NSW Children's Court is the legacy of the legislative recognition provided by the Neglected Children and Juvenile Offenders Act 1905 NSW. Acknowledging the injustice of trying children as young as seven under the law without distinction from an adult offender, the Act established a court 'to make better provision for the protection, control, education, maintenance and reformation of neglected and uncontrollable children and juvenile offenders.' Building upon the NSW legislative movement in the late 1850's towards the 'relief of destitute children and the prevention of juvenile delinquency', 1 October 1905 saw the opening sitting of the Children's Court's Ormond House in Paddington NSW.

The Act enabled the Court to hear a wide scope of cases, dealing with children suffering from neglect to juvenile offenders charged with summary and indictable offences. More importantly, the Children's Court consisted of 'special magistrates' and employees whom were trained to deal with children. The new Children's Courts were designed to have what Hilary Golder, in her book 'High and Responsible Office, A History

of the NSW Magistracy' noted as 'somewhat of a parental, informal character rather than the severity, formality and possible terrorism of the ordinary courts of the land.'

The court experience nevertheless remains a traumatic ordeal; children are often burdened with the same psychological strain raised by doubts, confusion and disbelief that confront adults trying to establish proof of a highly personal situation and gaining a desirable outcome. Deciding between emotionally-charged accounts of familial abuse and legal arguments for custody is a juggling act described by Senior Children's Magistrate Scott Mitchell as absolutely profound and extremely challenging.

Disputes between family members are often reduced to a point where its rests with the care jurisdiction of the court to put the children first and break the cycle of abuse or fear.

Presiding over its two jurisdictions - care and protection and juvenile criminal matters - each governed respectively by the Children and Young Persons (Care and Protection) Act 1987 and the Children (Criminal Proceedings) Act 1987, the breadth of circumstances and people dealt with is consistently confronting. Armed with a wide range of orders for the children's care in different circumstances, the Court is faced with dealing with government bodies, frustrated parties and parents, many of whom are concerned with what is seen as a fundamental part of being a family - to care for children.

Ultimately, in line with international obligations enumerated in the UN Convention on the Rights of the Child, the children's lawyers must attempt to voice their client's wishes, mitigated by the desire for

the best possible outcome for the child's situation. Although legislative direction allows the children's lawyer's discretion as to raising the child's desires if they are under the age of 10, the legal representation is charged with the duty to reflect the views and instructions of any client over 10, even if it may be against professional intuition to do so.

It is a tough call to make life-changing decisions for children who have, in many cases, been deprived of a consistent environment of love and care. Concerns influencing the Court orders often flow from the need to help the children manage these problems often not of their making and minimize the future impact of the common reactions of depression and anger.

As it celebrates its achievements, the current Court remains the product of continual reform. Although guided by a philosophy geared towards a holistic and accessible service with specialist clinics and mentoring programs, it is confronted by questions of effectiveness in providing deterrence from repeat offences, (26 May 2005, 'NSW: Juvenile justice system failing young offenders' AAP News feed), the provision for adequate protection of children and what the Law Society of New South Wales identifies as a lack of adequate conditions 'which contribute to unnecessary stress for the children and families using the Court.' With the prospect of a new multi-court specialist Children's Court opening in Parramatta in 2007, these issues cannot be quickly dismissed and must be addressed, because these Courts heavily influence the future of many. For further information on the NSW Children's Court, visit www.lawlink.nsw.gov.au/childrenscourt.

LAW AND MUSIC BY YII VERN, PHANG

Proposals for Australian copyright law reform-Should an open-ended 'fair use' defence be introduced?

The Copyright Act 1968(The Copyright Act) gives copyright holders in the Australian music industry exclusive economic rights to control certain uses of their works, such as public dissemination. This operates as an incentive to promote musical creativity and innovation.

Lately, these rights have become more uncertain as digital technologies have given users wider access to copyright material. More than 2.7 billion songs and other files are shared annually, facilitated by Peer to Peer (P2P) software. These constitute personal uses of copyright material that infringe copyright. Currently, there is no general defence for copyright infringement available to individuals. Accordingly, in Australia all file sharing users potentially face the wrath of copyright law, which includes civil/criminal sanctions. This is despite the fact that most users do not believe that they are copyright pirates or should be considered as such. Copyright prosecutions in Australia have been small for the simple reason that it is difficult to prove infringement. As these activities are damaging to copyright holders' economic interests, P2P file sharing can also pose a threat to the supply of future creative works. It becomes obvious that technology has increased pressure on copyright law to strike a balance between the rights of copyright holders and users.

Interest groups, such as the Electronic Frontier Australia (EFA), a non-profit government group representing Internet users concerned with online freedoms and rights, feel that a copyright balance might be better maintained in a rapidly changing digital environment should the Copyright Act include an open-ended

'fair use' exception that would allow courts to determine whether a particular use of copyright material is 'fair' and 'lawful'. This 'fair use' defence would be similar to the United States model. The Federal Government in their May 2005 Issues Paper on 'Fair Use and Other Copyright Exceptions' invited public comment on the issue of adopting this



Tchaikovsky, Composer and Jurisprudence Graduate.

approach.

Current defences available under the Copyright Act are called 'fair dealing' exceptions. They are confined to 4 specific purposes: research or study; criticism and review, reporting of news; and professional advice. The Government is reviewing whether these current exceptions are adequate and sufficiently flexible to provide for new uses made possible by digital technology.

Calls for the introduction of 'fair use' flow from concern about the impact of the Australian-US Free Trade Agreement (AUSFTA). Users expressed unease that the agreement followed aspects of US copyright law that strengthen copyright protection without also adopting an

open-ended 'fair use' exception which would provide a balancing element. For example, under the AUSFTA, the Government agreed to extend copyright life from 50 years past the holder's life to 70 years.

Any changes introduced to the Copyright Act have to comply with the international standard for copyright exceptions set by international treaties (including AUSFTA) to which Australia is a party, known as the 'three step test'. Under this test, copyright infringement exceptions must be confined to 1) special cases, 2) which do not conflict with a normal exploitation of the work and 3) do not unreasonably prejudice the legitimate interests of the copyright holder. The first step of the test clearly states that copyright exceptions should be limited to special cases only. Consideration must be given to whether new exceptions are clearly defined and narrow in scope and reach. In the Issues Paper, it was recommended that even though the 'fair use' approach was broader in scope than existing specific provisions, it still complies with the 'three step test'. Thus, copyright holders are still protected by adherence to this international standard.

The fundamental difference between the US 'fair use' defence and existing Australian defences is that it permits activities that infringe Australian copyright law. For example, it permits 'space shifting' – eg. when digital content is shifted into a different format, such as copying files from a CD to an MP3 player. 'Space shifting' is a common practice for music even though current Australian copyright law deems it illegal. For policy reasons, having a 'fair use' provision may resolve this legal anomaly by giving assistance in legitimising activities commonly undertaken by Australians.

Perhaps the greatest argument in favour

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LAW AND MUSIC

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of 'fair use' would be that the doctrine's flexibility allows courts to adapt copyright law to major changes in technology. That being said however, as 'fair use' is a product of the US legal system and constitutional framework, if implemented in Australia, Australian courts operating in a different legal system may take a different approach and read down any new 'fair use' type exception, particularly if it appears to overlap with other specific exceptions in the Copyright Act.

An unexpected connection between lawyers and music

Is there much of a connection between lawyers and music? One aspect integral to music is performance, also the key to a barrister's success. For example, the barrister speaking to a

jury is in effect performing to them as he has to put more expression or thought into his presentation of his case. Timing, communication, the emotional engagement of audience, these are factors common to a courtroom performance and musical performance. Precision is also very important to both lawyers and musicians. A clear chain of argument for a barrister makes for easy, enjoyable listening by the jury-the same effect technical precision has on the performance of a song.

It is possible to analogise legislative and musical interpretation because words and musical notes have this in common: they are both open to being interpreted in different ways. Therefore, an understanding of that can be usefully applied in both disciplines. The structure and form of a musical piece and a Counsel's address to the Court, for example has many similarities. Each has an opening theme, a development, and then a recapitulation and perhaps a finale. When presenting a legal argument, the barrister seeks to convince his audience, drawing them in emotionally. If the musician adds expression to his piece, this adds a certain meaning, which if successful, can get a very important message across.

Another example: in the case of a statutory interpretation the lawyer endeavours to construct a meaning of a statutory provision which favours his client's case, by trying to persuade the Judge that it was meant to be interpreted a certain way. Judges are not left out in this exercise in interpretation similar to musical interpretation either. By interpreting statutes, they endeavour to determine the intentions of the composer, the legislature. Interestingly, in Queensland, a retired judge, Justice Jim Thomas, wrote most of his judgements in sonata form.

The notion that interpretation is important in both disciplines of law and music is common to both parts of this article. If a general defence of 'fair-use' is introduced, it may provide greater flexibility in judicial interpretation. The law has to evolve to reflect the needs and interests of contemporary society, just like how music is constantly evolving.

FEEL SAFE STUDYING LAW

From The Age, October 1st 2005

According to an article in *The Age*, newly minted law graduates are using their degrees to pursue a myriad of interesting careers – helped no doubt by the well known fact that law courses are essentially an exercise in rigorous mental training.

The Age also reports that completing a law degree is increasingly seen to be a matter of pride and confidence, plus

the fact that graduates are armed with



valuable skills which are much in demand.

To meet the demands of students who increasingly view a law degree as a 'generalist' course, law schools are expanding subject choices to include courses that are not purely 'black letter law'.

From next year, Melbourne Law School students will be able to opt for subjects such as Trauma, Justice and Psychoanalysis (offered in Semester 2).

THE NEW LLB

BY LEJLA BOSNJAK

A little while ago I met up with Associate Professor Malkin and Larry Isaac to discuss the changes to the undergraduate law program.

There seemed to be some mystery to exactly what kind of changes were occurring in the upcoming year and who exactly would be most affected by them. The fresh bunch of first years arriving come March will probably not notice the transition that the rest of the students, as well as all the staff, will be undergoing. The first year course looks very different to that which most of us experienced.

HPL and TPL are no more, instead different 'principles' subjects are being created so as to seamlessly introduce the students to not only the law but the necessary skills that a law student should possess.

For them, an ethics subject will be compulsory, the quasi-compulsory subjects (ones you need to finish to be admitted to practice in Victoria) already set out in their course plan and optional subjects sorted into neat categories. The new course aims to sequence the material and achieve flow throughout the compulsory subjects. It looks to achieve this aim quite easily.

For the rest of us, the ride will be a little more complicated. The days of year long subjects are definitely behind

us thanks to the Nelson reforms, but now, all our subjects also have different names, are set out in a different order, and include subject matter that we either have not learned or have done too much of.

It looks rather scary at first glance, that is, until you discover the course plans set out at the law school website. They are divided by not only cohort but also what kind of degree that you are doing, so that it easily accommodates pretty much everyone.

For those who are caught outside the typical course plan, further accommodation has been made to make the transition as smooth as possible.

There have been many frightened voices lately saying that failing subjects this semester may not be the brightest idea. Everyone somehow feels as if they are the ones to be caught out by the new system as soon as it comes into play.

There have been safety nets put into place to ensure that no one ends up being in trouble. For example, everyone who gets 48 or 49 as a final score for a subject that ends that year will be allowed to resit their exam.

My main worry had been the grouping of optional subjects into sub categories of relative fields of law. It seemed to be the first step towards creat-

ing the LLB into a specialisation degree, much like that of commerce where one is encouraged to specialise from first year even though they finish with a generalist degree.

However, as Professor Malkin pointed out, most of the changes to the way the subjects are introduced to us are done for ease of reference and structure. They are not to be seen as prescriptive, rather as there to offer alternative and complimentary subjects with simplicity.

It is important to remember that we all must finish at least 300 points of law and that as long as one does all the pre-requisites (and the quasi-compulsory subjects if you decide to practice) then the rest of the subjects are truly what their name suggests, optional. Professor Malkin and the undergraduate office are working hard to make the transition seamless. As Larry Isaac mentioned, the faculty is ready to undergo the changes without any major hiccups.

The biggest test, of course, will come when it is time for us to re-enrol for the upcoming year. It is hard to think that anyone could have missed all the talk about the changing LLB; however, it may be possible that some people are in for quite a shock.

I do recommend to them, or anyone else who is interested

in the changes to their course to either contact the undergraduate office or to actually attend one of the upcoming lectures that are being offered.

This new system seems easier in the long run. There is much more flow from one subject to the next.

It will hopefully continue the proud history of the law school and create worthy graduates. In the end, it is important to note that the entire program was created around the idea of having graduates with not only all the necessary skills needed in the current law climate, but with a sense of social justice and personal attributes that will be favourable to all.

Sample list of optional subjects available in later years:*

Advanced Legal Philosophy

Crime, Punishment and Legal Genealogy

Current Issues in Indonesian Law

Indigenous People, History and The Law

International Business Transactions

Negotiation Theory and Practice

**Not all subjects are available in 2006.*

THE JUSTICE SYSTEM IN MEXICO

The ECONOMIST (8th October 2005) reports that the justice system in Mexico is almost down on its knees. The flaw in the organisation of the Mexican justice system is evident as only 20 per cent of crimes in Mexico are reported. Less are actually investigated. This has led the Mexicans to draw on reforms in Chile and Costa Rica to introduce a British style adversarial system and abandon the inquisitorial system currently in place. In inquisitorial systems, there is more emphasis on the prosecutorial nature of the proceedings, as judges largely act as 'rubber stamps'. The reforms aim

to achieve the basic objectives of a justice system : transparency and efficiency. Critics, including a state judge, note that it will take a long time for before the reforms actually take effect, as the plans represent a complete change from the current state of affairs. Problems could stem from the fact that legislators, judges, and judicial officers are all schooled in the old justice system.

ABORTION LAWS IN COLOMBIA

Colombia is one of the few countries which continue to ban abortion even when the life of the mother is in danger.

A current challenge to the abortion laws in Colombia could lead to a more liberalised stance on abortion. The challenge is based on the premise that the draconian laws violate Colombia's international obligations. United Nations bodies involved in human-rights conventions have supported the challenge as total ban on abortion arguably interferes with a woman's fundamental human right to life and good health. The Economist reports that a decision on the legality of Colombia's abortion laws is due in December.

DIGITAL MUSIC DOWNLOADS IN AUSTRALIA

A Herald Sun investigation (22nd September 2005) has reported that Australia's millions of iPod users are apparently breaking the law as there is no legal method for Australian iPod-

ers to fill their players with music. The report also notes that unlike the U.K. and U.S., there is no equivalent Apple iTunes store for iPod compatible music downloads. The Sydney Morning Herald also ran an article on how Australian copyright law lags behind that of other countries. With the current state of the law, tech-

nically anyone that copies a CD they bought to an iPod is breaking the law. In the U.S., copyright laws allow users to copy music for personal use. Apple is thought to be in talks with music companies in Australia to launch an Australian iTunes web-store but the local music industry will most likely block such a move. Even in the face of increasing global online music sales,

Stephen Peach, CEO of Australia Recording Industry Association comments: "Obviously we are running behind North America, Europe and UK in digital download services, but we see no reason why we can't achieve the same sorts of market penetration in Australia as overseas."

SIR ANTHONY MASON LECTURE—BY YII VERN, PHANG

The Honourable Sir Anthony Mason himself delivered the annual lecture this year. The main highlight of Sir Mason's lecture was his description of Hong Kong's extensive use of international materials on human rights in the interpretation of its Constitution called the Basic Law. This provided a useful example for the purposes of comparison, of a jurisdiction whose human rights regime differs from that of Australia's in several respects.

In constitutional and public law litigation concerning human rights in Hong Kong, reference is given to decisions by other jurisdictions and reliance on these deci-

sions play a prominent part in arguments mounted in court. Reliance has been held on decisions of the European Court of Human Rights, the Supreme Courts of Canada and India, the Privy Council and the English Court of Appeal.

Sir Mason pointed out that what distinguishes the Basic Law from other Constitutions is that Article 158 enables the Standing Committee of the People's Republic of China to issue an interpretation of the People's Law which is binding on the Courts of Hong Kong. This is seen as a threat to the rule of law and does not accord with our traditional understanding

of it.

Overall, from this lecture one can garner Sir Mason's stance on the issue of usage of international law in Constitutional interpretation, is that its role should be that of a factor being taken into account as distinct from being given a controlling operation. He subscribes to the view that the Constitution has to be interpreted as an instrument that has an enduring operation, and to apply the international rule of law to constitutional power itself seems to limit what was intended to be a plenary power.

In the Fulbright Symposium on Peace and Human Rights Education hosted by the Faculty of Law, University of Melbourne, Professor George Williams presented a public lecture on "Balancing National Security and Human Rights" from the Australian perspective. This article is based on the lecture.

The Australian legal and political environment has been transformed fundamentally by the threat of a terrorist attack in ways that were unimaginable four years ago. Following the inescapable event on September 11, 2001, the federal government responded by introducing new laws on terrorism which are excessively harsh and severe. Today, the law has broad definition and power to criminalize terrorists and their associates, ban organizations and detain suspects for investigation for up to a week.

The need of a change in law is recognized. However, the draconian nature of the new laws must be followed by strong justification. The fact that we are facing an unknown threat and not having concrete information made it difficult to genuinely assess the adequacy of the current law. Thus, the key issue of law and policy of our time focuses on balancing national security and human rights.

Although there were several terrorist threats and bomb scares which appeared in the media in recent times, there has never been any terrorist attack on the Australian soil. The government website at www.nationalsecurity.gov.au remains medium under the four-level alert system (low, medium, high and extreme), which has been the same since September 2001.

This assessment does not reflect community beliefs. According to a Newspoll conducted in

Fulbright Symposium

BY DON SOH SHE JI

Sydney in April 2004, 68% of adults were in consensus that terrorists would "strike before too long" and that a terrorist attack in Australia was inevitable. These community fears reflect what the current legal system is and how the law should be in dealing with terrorism. This is the reason why the law is reformed in ways that were unthinkable prior to September 11. Since then, law reform has been extensive and exhaustive.

There are two important lessons to be learnt from the way that Australia has dealt with the war on terrorism. First, Parliament has demonstrated that it has the power to protect human rights. It appears that the original bills were far worse and strikingly against the proud democratic tradition that Australia possess in protecting human rights. Through well-organised campaigns, the community expressed their concerns and consequently the bills were examined. The government was forced to amend the bills substantially. The essence of this lesson is that parliamentary processes are an important tool to achieve balance between national security and human rights.

Second, Parliament has limited and insufficient power to protect human rights at a time of community fear of a terrorist attack. Even though parliamentary processes have shown significant changes, many aspects of the new laws are still without sufficient justification. Clearly,

detaining a non-suspect for up to a week to assist ASIO in their investigation or the imposition of a 5 year jail term for speaking about or reporting of the detention of a person by ASIO are characteristics of dictatorship and not democracy. In fact, these unjust measures are more likely to alienate the communities whose cooperation is vital to counter terrorism.

Problems with the new anti-terrorism laws have proven to be more significant with Australia lacking a Bill of Rights. This is because human rights have no legitimacy in political debate. When Parliament deals with terrorism issues, human rights are often being left out. Without the benefit of a Bill of Rights, it is difficult for Australia to balance national security and human rights. Especially at times of grief and fear, Australia responded by making new laws with great haste and thus sacrificing society's basic human values and principles.

Clearly, the primary purpose of the new anti-terror laws is to protect the society from the war of terrorism. By saying that, it is insufficient and inappropriate for the government to reform laws in a draconian way to counter terrorism. The government needs to consider fundamental long term issues such as causes of terrorism, poverty and matters that relate to the community. All these are ultimately tied to fundamental human rights principles.

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FINDING THAT HUNGER FOR JUSTICE

In our quest for the elusive article clerkship, sometimes we forget the big picture: i) that we actually live in a community, and ii) the quest for justice. However, it is fortunate that our law school is indeed blessed. For within these stone-cold walls are a growing bunch of colourful students, supported by teachers, who have a strong sense of a “just community” – for our fraternity, for our society and – hopefully, for our world.

The Law Students for a Just Community (LSJC) was established by a team of visionaries, including Dalit Kaplan, Evelyn Tadros and Julie Fraser. It was set up to awaken our desire to be part of the social justice movement. This included providing a forum for discussion of fair trade issues and poverty, the plight of Indigenous people and refugees, environmental issues and what safeguards should be in place for preserving fundamental human rights.

Naturally, these issues would appeal to the jaded law student who refuses to climb the corporate law ladder. However, even the aspiring corporate law student is not spared, for she or he may find issues of “ethical consumerism”, “corporate citizenship” and/or pro bono work appealing. The canvassing of these issues enables the LSJC’s cause to appeal to most law students – even you. Indeed, if YOU have a good idea for a community project, you may wish to approach the LSJC for support (just email lsjcgroupp@gmail.com).

So far the project initiatives under the LSJC include the Law Students Environment Collective, Law Students for Fair Trade, and for the flamboyant—Charity Latin Dancing at our Law School every Thursday afternoon (if you’re so

inclined, it’s in G29 at 1 pm). However, its most telling contribution of late was the LSJC Conference from 5th-7th August at Mt Evelyn. Several prominent figures gave speeches, including Liz Jackson, Associate Professor Jenny Hocking, former PM Malcolm Fraser, Justice North, and Reverend Tim Costello. Not forgetting, of course, some of our very own academic power-houses –Associate Professor Ian Malkin and John Tobin.

As the first speaker, Professor Kathy Laster appealed to us to use the three features that the characters in the Wizard of Oz were seeking: brain (scarecrow), heart (tinman) and courage

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(cowardly lion). In particular, the brain, heart and courage are essential prerequisites for a good lawyer. A crusader for justice, pursuing the cause with too much courage and heart, may do so foolishly. Hence, the lawyer, like any other individual, must think before acting. Conversely, the overzealous paper chase without heart will leave you bewildered. The same goes for the procrastinator in all of us, abstaining from lectures simply because we haven’t read. Indeed, it is in the most simple of stories from which we can derive inner strength, particularly in difficult times.

As the final speaker, Matt Albert, a former student of this school, left a lasting impression that still resounds to-

day. Matt is a co-founder of the Sudanese Australian Integrated Learning Program, a non-profit organisation providing free support and community services to the Sudanese Refugee Community in Melbourne. This includes tutoring, home help, camps and excursions to about 400 people every week. It is from the strength and dedication of such individuals that we can derive continued inspiration –not only to finish our law degree, but to think about how we can use it to help during our course (as Matt did) and after.

For the future, Dalit wishes to “see a loose visible network of law students who feel passionate in social justice causes formed”. From the success of the Conference, it appears this has already come to fruition. Currently, Teena Zhang and Anjalee De Silva are keeping the cause on track. Indeed, Teena and Huich have been updating the website on “what’s cooking” for the LSJC post-conference. Anj has proposed distributing booklets informing refugees of their legal rights. Other LSJC members, such as Niva Sivakumar, are earnestly helping them to “put these ideas in practice”. On Friday, 15th October, Yoriko Otomo spoke on Wildlife Protection of the Blue Fin Tina and the ramifications of the Federal and State Legislation. Her speech was secured by Agata Wierzbowski, who has a refreshing smile that never wanes.

So if you’re sinking into the abyss of exam stress with me, perhaps you should look at the person sitting next to you. She or he may well be a law student for a just community. The question is: will you?

By Sanjay Palakrishnan