

## **SOCIAL INEQUALITY AND JUSTICE**

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*'I have come to regard the law courts not as a cathedral but rather as a casino.'* Richard Ingrams, British Editor. The Guardian 30 July 1977

### **INTRODUCTION**

Justice, or belief that it is achievable, is one of civilisation's building blocks. People who believe they will be treated fairly are prepared to give up personal liberties and satisfying their own preferences in exchange for the advantages of living in a community.

This ideal stabilises societies and their governments. That is why governments who want full economic membership of the European community must agree to comply with its treaties, such as the European Convention on Human Rights, and with the decisions of its Courts, such as the Court of Human Rights in Strasbourg. Member nations also have to set up their own laws and systems to ensure that their laws and practices comply.

Australia has no such incentive to comply with international treaties, but it is a basic assumption of our Common Law tradition, our system of representative democracy and the rule of law. These principles mean that individual rights and responsibilities don't depend on the will of the majority or the powerful. In a just society people are treated as individuals, and as they deserve, in a way that is proper for them. The ideal of the rule of law, according to A V Dicey who coined the phrase nearly 130 years ago, is equality before the law and uniformity, constancy and certainty in decisions arrived at by a disinterested and impartial application of legal rules.<sup>i</sup>

Achieving this ideal is another matter. Traditional approaches have not been enough to give access to 'justice' in rapidly changing societies with new groups of outsiders. After the Second World War there was a growing

understanding of the need for international standards of human rights protection. Australia has ratified UN treaties that guarantee that vulnerable people will not be discriminated against and their social and economic needs will be met. These are not enforceable unless and until Australia makes laws that implement these promises.

Since the early 1970s Australian lawmakers have tried particularly hard to reform our legal system. We have developed innovative laws and institutions that take into account social inequalities, from poverty and homelessness and social marginalisation, to race and sex and disability discrimination and consumer disadvantage in the face of market or administrative power. We have set up 'tsars' to administer anti discrimination and consumer protection laws; tried to write our laws in 'Plain English' so ordinary people can understand them; set up legal aid schemes and new tribunals which are informal, low-cost or free (and often lawyer-free). Yet Australia continues to fall short in delivering equality before the law.

Perhaps the quality of Australian civilization is properly judged by the way our legal system protects, or doesn't, the rights and interests of children, asylum-seekers or refugees and migrants from other cultures, women, brain-injured or mentally ill people and the 'stolen generation' of Indigenous Australians.

## **ANTI DISCRIMINATION LAWS**

The first Australian equal opportunity laws came into operation in 1977. Now there is a national network of state, territory and federal anti-discrimination laws and tribunals that offer informal conciliation of complaints and specialist tribunals that are not bound by the ordinary rules of evidence.

These were initially resisted. It took Deborah Wardley seven years to achieve the equal opportunity to be employed as a pilot by Ansett Airlines<sup>1</sup> - she was

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<sup>1</sup> Wardley v Ansett Transport Industries (Operations) Pty Ltd 1979 EOC 92-002, and Ansett Transport Industries (Operations) Pty Ltd v Wardley (1980) EOC 92 003  
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barred because of the owner's prejudice, which he assumed his customers shared, about the women pilots of commercial aircraft.

Institutional defensiveness is still a feature of equal opportunity litigation. Sometimes governments lead by example. Two Aboriginal children fought for two years and through nine court appearances to establish that the Victorian government's closing their special school, Northland Secondary College, was indirectly racially discriminatory – they could not meet the demands of mainstream schools to succeed educationally because of their historical and social disadvantage, and get it reopened.<sup>2</sup>

Traditional appeal courts have tended to rule against complainants in appeals from anti discrimination tribunals though the High Court said in 1992 that equal opportunity law should be interpreted generously because it is human rights legislation.<sup>3</sup>

Ten years later, for instance, in a case called Kapoor v Monash University<sup>4</sup> the Victorian Court of Appeal ruled against an academic who had successfully complained of race discrimination when her contract to teach an Aboriginal Orientation course was not renewed because of the University's wrong assumption that she was unsuitable because of her 'reserved disposition,' a characteristic of her race (Indian) and religion (she was a Brahman Hindu). The Court said that though it was wrong, the University did not know that her 'disposition' was a characteristic of her race and religion and because there was no causal relationship between treating her less favourably and her 'race' it was not unlawful discrimination. The 'reason' for discrimination was an uninformed if not ignorant assumption about her competence.

Yet Australia is a successful, highly multicultural nation and cultural insensitivity should not really be expected today especially in universities. Migrants and racial minorities already have problems 'fitting in'. In fact racial

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<sup>2</sup> For a description of the case see Rayner, M. Rooting Democracy – Growing the Society We Want, Allen & Unwin 1997.

<sup>3</sup> Waters et anors v Public Transport Corporation (1991) EOC 92-390

<sup>4</sup> (2002) EOC 93-188

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minorities find it especially difficult to prove discrimination, and win much lower damages when they do, compared with the complaints of sexual harassment (nationwide, over 90% of sexual harassment hearings end in success for a complainant, compared with less than 30% in race complaints).

People whose disabilities affect their behaviour, such as brain-injured or mentally ill people, too, face problems. In November 2003 our High Court said that the expulsion of a brain-injured boy from school because of his anti social and violent behaviour (caused by his brain injury) was not disability discrimination because, it said, he had been treated no differently from any other 'misbehaving' student and therefore no less favourably.<sup>ii</sup> But that means that the school didn't have to consider his special needs or the effect of his disabilities on his behaviour, which does make him quite different from any other child.<sup>5</sup>

Carers of young children have problems too. In April 2004 the Victorian Court of Appeal<sup>6</sup> said that a woman who wanted but wasn't allowed to work from home sometimes (online, as a sub-editor of Parliamentary debates) so that she could look after her sick child, had not been indirectly discriminated against as a woman and a parent. She should have proved that what she wanted was as efficacious as what the employer preferred, full-time work on site – because that was what the court thought was 'reasonable'.

These cases made very fine distinctions based on social opinions that deny the rights of people who are already disadvantaged because of a particularly narrow discretionary approach to interpreting laws that has little or no regard to the human rights principles underlying the legislation. They are almost on a par with the notorious remarks of a judge in a 1990 Victorian case<sup>7</sup> who described the Equal Opportunity Act as 'well-intentioned' legislation capable of becoming, in the 'wrong' hands, 'a fearful instrument of oppression.' That

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<sup>5</sup> The case may not have the same impact on some state equal opportunity laws, which refer to 'characteristics' of a person with a disability. For example, the WA Equal Opportunity Act defines discrimination to include less favourable treatment because of a characteristic that is generally imputed to persons because of their membership of a group defined by a ground of discrimination such as impairment or sex

<sup>6</sup> Schou v Victoria

<sup>7</sup> CPS Management et Ors v Equal Opportunity Board (1991) EOC92-332.

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involved two men who were sacked for their ‘political’ activities, whistle blowing about unethical expenditure of public moneys by their employer, which was publicly funded to provide rehabilitation services. The power was significantly one-sided: the judge thought he could decide whose hands were the ‘wrong’ hands.

### **PROTECTING CHILDREN’S RIGHTS**

The law does not protect the rights of children very well, either. Children have no direct voice in legal decision-making as a matter of public policy. Yet researchers in psychology, education, public health and sociology have found that even very young children can make intelligent contributions to adult decisions if adults take the time and respect their developmental limitations and listen to them. There is a demonstrable link between children’s resilience (surviving and overcoming adverse life events), and their feeling valued and participating in decision-making that affects them.<sup>8</sup> – which happens to be a principle in Article 12 of the UN Convention on the Rights of the Child (“UNCRC”).

This knowledge has not yet been reflected in our laws and training of lawyers and judges. As well, though we say their ‘disability’ is to protect children, no Australian law ensures that someone has an enforceable duty to do so.

We have moral rules that we shouldn’t be cruel to children; legal rules that parents should not neglect or abandon them; special courts to sort out parental duties when people divorce or neglect or abandon children; paper mountains of research and philosophising on what ‘good’ parenting is and risks to children’s survival and development.

We also have decades of Royal Commissions and Inquiries into the failure of them all to protect the rights of children: to the *provision* of a decent quality of life; to *protection* from harm and maltreatment, and to *participate* and

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<sup>8</sup> Such as the Woodford Royal Commission report into institutionalised child abuse in Welsh institutions, 1999.

influence the outcome.<sup>9</sup> These are the rights guaranteed by Australia's signing the UNCRC

The Law does not protect children's rights unless someone can go to the courts and claim them. When parents don't or can't, for example when they are 'unlawful non citizens' suffering badly in immigration detention, who can review a Minister's decision to keep them there?

The Family Court tried to, in 2003. However early in 2004 the High Court pronounced it had no constitutional jurisdiction, no matter how reprehensibly the Minister may have acted or the suffering of the children, because there is no limit on the draconian laws that Parliaments may make. Mandatory detention of asylum-seekers is such a law.

Yet as one sociologist <sup>10</sup>has pointed out, sometimes a 'right' is so clearly '*. . . of such importance that it would be wrong to deny it or withhold it from any member*' : a right and a remedy must be found, and a person to fulfil the duties attached to it should be identified.

The 19<sup>th</sup> century philosopher John Stuart Mill<sup>11</sup> wrote that it is unjust to punish children for their parents' irresponsibility, poor judgment or poverty. It remains true today, but Australian Law does not protect it. Overlooking children's rights may be a breach of natural justice – the High Court said this in the Teoh<sup>12</sup> case, when immigration officials decided to deport the father of dependent, Australian-born children without warning the family that they would not taking into account the UNCRC promise not to separate children from their parent without their consent, and to consider their best interests as a paramount consideration. But having done so, they could still have deported Dad and separated the children from their only parent.

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<sup>9</sup> These are the three general groupings of rights under the UN Convention on the Rights of the Child.

<sup>10</sup> MacCormack N. Children's Rights: a Test-Case, in *Legal Rights and Social Democracy: Essays in Legal and Political Philosophy*. Clarendon Press. Chapter 8, PP 154-156. 1982

<sup>11</sup> Mill, J.S. *On Liberty*. Everyman's Library, London. 1906.

<sup>12</sup> *Teoh v. Minister for Immigration* already cited..

## THE RIGHTS OF ASYLUM-SEEKERS

Perhaps the most vulnerable humans of all are asylum seekers. They are an 'invisible' group because of their needs, how they arrive and how their claims to relief from persecution are received.

In November 2003 a group of lawyers published a report of what happens to women who claim asylum because they are persecuted as a social group in their own countries – by not being protected from rape, domestic violence, or because they are married to or related to political activist men, forced into abortion, genital mutilation or infanticide.<sup>iii</sup> For the first time we learned that the customs and immigration practices of modern Australia, and the 'triggers' of the Australian legal system simply do not hear or support their unique claims.

We also have no means to protect children who come here needing refuge. We have a particular obligation to children, not only in international law - we ratified UNCRC in 1990 and the Refugee Convention in 1954)- but because of their 'natural' dependency. The rules for civilized treatment of children should be able to cross all borders.

There is no need, nor moral right, to lock them away. Many of these children have been detained in difficult, deleterious and (for some) dangerous immigration detention conditions for months or years.

Children should not be kept in detention centres. Article 37 of UNCRC requires that children should not be detained unless as a last resort and never with adults. Article 3 makes a child's best interests a primary consideration in all decision making. The child also has a right, as the UNCRC preamble states, '[F]or the full and harmonious development of his or her personality ....[to] grow up in a family environment of love and understanding.' Nor should children be separated by being allowed into the community while a parent remains 'hostage' in a camp: UNCRC Article 9 requires that a child not be

separated from parents against their will except when it is necessary in the child's best interests.

The conditions under which we detain children not only breach international guidelines for the detention of prisoners, let alone children, but quite possibly our international obligations under the 1987 Convention Against Torture or other Forms of Cruel, Inhuman, or Degrading Treatment and Punishment. There, “torture” is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on someone by way of punishment, the intimidation or coercion of themselves or a third person, or for a discriminatory reason, inflicted by or at the instigation of or with the consent or acquiescence of a person acting in an official capacity.

Australia detains children in order to deter people-smugglers.

The Report of the National Inquiry into Children in Immigration Detention by the Human Rights and Equal Opportunity Commission published in May 2004 documented the horror of children’s lives in immigration detention, and said it was a severe breach of Australia’s international obligations.<sup>iv</sup>

The government has rejected the report.

### **PUTTING OLD WRONGS RIGHT**

Australian law and courts do not deal well with remedying past wrongs or their contemporary effects. Women, historically discriminated against, are formally entitled to equality in public life. Girls are achieving better at school and Universities now – boys less well, but not because of this – and entering the professions in large numbers, even in Law. Yet women are still not properly represented in the powerful institutions of the law, in politics, on company boards and decision-making bodies that decide what kind of a society we live in. This is because of the scars of past discrimination. Careers and working conditions are still structured on the old ideal of the single male worker with a wife looking after children at home, though that is simply not the norm any more. After more than 27 years of sex discrimination laws, special bodies set

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up to right the old wrongs and special programs to advance women, women still earn less, retire poorer, and though they live longer suffer more poverty and poor health, than men. Women's social and economic segregation cannot be remedied through law alone.

Aboriginal and Torres Strait Islander people were poorly treated when Australia was colonised. We even took their children away, to 'assimilate' them into colonial culture. This caused immense suffering, but it was supposedly 'legal.' No claims by the survivors for damages have succeeded in Australian courts.

But in 2003 old records in Western Australia <sup>v</sup> were found that seemed to prove that, in that State, since January 1937 the Commissioner for Native Affairs and his Minister knew that, because of drafting problems in the WA Aborigines Act and the unlawful practices of JPs and government officers including misleading Aboriginal people about their rights, many Aboriginal children were illegally taken away. In one particularly outrageous memorandum written in 1958 the Acting Commissioner, actually advised that 'the laws should be used as a broad guide for procedure, but in in our work the most important factor is what is in the best welfare interests of the native or native concerned'.

That is not, of course, what the Rule of Law requires. The law applies even to 'native' children.

Efforts to win compensation by now-grown, 'stolen' children have failed in the courts, largely through lack of documentary evidence. But in those cases there was no evidence of actual illegality, as there may be in WA. But no legal action has been taken to establish this. Those Aboriginal children probably cannot sue today. There are time limits on taking legal action for old wrongs. But even if they know about it, they do not have the money, the confidence or support for seeking a judicial determination out, once and for all, about whether it was illegal as well as immoral to do what was supposedly in their 'best interests', so long ago.

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## Conclusion

It takes confidence, support and commitment to use Australia's ordinary courts to establish rights and remedies. Australia has no way of testing our laws and institutions against the standards of our international human rights treaties. We have no constitutional bill of rights such as the US does, nor even a 'Human Rights Act' which the UK adopted in 2000, making its laws subject to challenge if they are incompatible with fundamental human rights principles in the European Human Rights Convention.

Australia needs to do better. It should not rely on individual courage and dumb luck and charity to protect the rights of the inarticulate, excluded, marginalised and disadvantaged in Australian society.

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<sup>i</sup> A V Dicey Introduction to the Study of the Law of the Constitution. MacMillan London 1959, 1885

<sup>ii</sup> Purvis v New South Wales (Department of Education and Training) [2003] HCA 62

<sup>iii</sup> Stephanie Cauchi, Mary-Jane Ieriodiaconou and Angela Perry. The Invisible Women: a report on gender based persecution claims by women asylum-seekers in Australia. Available from [www.ajustaustralia.org.au](http://www.ajustaustralia.org.au).

<sup>iv</sup> The full Inquiry report, Summary Guide and other resources are available on the Commission's website at [www.humanrights.gov.au/human\\_rights/children\\_detention\\_report/](http://www.humanrights.gov.au/human_rights/children_detention_report/)

<sup>v</sup> Moira Rayner, Who Cares About the Facts? Eureka Street October 2003