

The Rule of Law

Law as an Instrument of Justice and a Tool of Oppression

Presented by Joe Harman at the Legal Studies Teachers Conference 15 March, 2014

Introduction

Thank you for inviting me to attend today to speak.

Before beginning and especially as I will be discussing issues of justice and the rule of law I would like to acknowledge and pay my respects to the traditional custodians of these lands upon which we meet, the Darug people.

I recognise their culture as the oldest living culture on this planet.

I acknowledge and offer apology for the great injustices that have been inflicted upon the Darug people and all indigenous peoples throughout Australia and around the world including through the passage, application and enforcement of laws that were unjust, barbaric and genocidal.

The strength of Australia's indigenous peoples has been shown through their survival and maintenance of language, lore and culture.

These are and always will be aboriginal lands and that truth must be acknowledged before reconciliation or justice can be truly achieved. However, the survival of Australia's first inhabitants and the strength and courage they have shown in enduring injustice is a lesson to us all to reflect upon today and every day.

What are Laws?

The existence of laws is fundamental to a society governed by the rule of law. However, the creation and enforcement of laws does not, of itself, constitute or enable a society to be governed by the rule of law.

The important distinction must be drawn between a society governed by laws and a society governed by the rule of law. A society governed by laws, without consideration and embrace of the rule of law as a guiding and underlying principle, has the potential to be a tyrannical or “Police” state.

There are a myriad of definitions of “*law*” and it is, perhaps, instructive to consider a number of those definitions and statements made regarding them before turning to consider how laws might be (or have been) used to achieve justice or oppression and thus why the “*rule of law*” is fundamentally important in achieving the former rather than latter outcome.

The Organisation of American States¹ provides this useful definition:

The law is a set of rules for society, designed to protect basic rights and freedoms, and to treat everyone fairly

The Legal Services Commission of South Australia provides the following useful and interesting discussion (rather than definition) of laws²:

a law is the product of the social conditions at the time it is made. The law is not static. Just as relationships between people or between people and the Government are not fixed permanently, so the law changes by responding to the current social and political values of the dominant culture. As societies become more complex so too does the law. It governs our private relationships through contract, tort, property,

¹ https://www.oas.org/juridico/mla/en/can/en_can_mla_what.html

² <http://www.lawhandbook.sa.gov.au/ch27s01.php>

succession, trust and family law as well as our public relationships with the State through criminal, constitutional and administrative law

The Canadian Department of Justice provides the following insight³:

Rules made by government are called "laws"⁴. Laws are meant to control or change our behaviour and, unlike rules of morality, they are enforced by the courts... Ever since people began to live together in society laws have been necessary to hold that society together... Even in a well-ordered society, people have disagreements, and conflicts arise; the law provides a way to resolve disputes peacefully... Laws help to ensure a safe and peaceful society in which people's rights are respected

Whilst the above examples are illustrative they make clear that laws are generally accepted as addressing fundamental purposes including:

- Universality
- Consistency
- Regulation
- Changeability and responsiveness
- Protective of individual and collective rights

If one were to turn to utilitarian jurisprudential philosophers⁵ such as Bentham, Mill and Paine it might be opined that a “good” law:

- Protects individual freedom;
- Ensures collective security (including through the individual’s responsibility to not infringe that security through the prudent exercise of his/her freedom by reference to the freedom of others); and,
- Acknowledges and protects fundamental rights.

³ <http://www.justice.gc.ca/eng/csj-sjc/just/02.html>

⁴ This leaves aside that body of Judge made and interpretative law including “common law”

⁵ Utilitarian jurisprudence suggesting that laws are intended to and should achieve the greatest happiness for the greatest number

Yet clearly there are examples where laws have not met these purposes and yet have been laws enacted by elected governments. Readily recognised examples might include:

- “*Jim Crow*” segregation laws in various of the United States of America (whereby segregation was legally imposed or protected by “*separate but equal*” laws) and enduring until the 1960’s⁶
- Similar Australian laws establishing the various officers of the Protector of Aborigines⁷
- Apartheid and Pass laws in pre 1994 South Africa⁸
- Russia and Zimbabwe’s recent anti gay laws
- The suggested “*Illegality*” of recent Crimean succession motions.

The importance of laws being uniform in their application is generally accepted as fundamental to their doing justice. However, there are clear and obvious examples when this has not been so even when suggested to be so or where on the laws’ face it has appeared to be so. On such example is the 1776 American *Declaration of Independence* which contains the prosaic opening passage:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness

Whilst few would cavil with these words it must be remembered that at the time such “*freedom*” was declared as universal that:

- Women were not legally recognised as equal nor permitted to vote (a circumstance I have listed first amongst many injustices arising from the Declaration as I prepare this speech on International Women’s Day);

⁶ See for example 347 U.S. 483 (1954),

⁷ For excellent resources on the laws creating the office in various States and how they operated see www.aiatsis.gov.au

⁸ For a summary see <http://www.mtholyoke.edu/~rrothe/timeline.htm>

- The First Nations Peoples of the then United States were not treated with such unanimity of equality⁹;
- Slavery flourished¹⁰ (and including a number of the drafters and signatories of the Declaration owning slaves).

The injustice of such anomalies (indeed hypocrisies) has been the subject of substantial and significant comment by judicial officers and political and Civil Rights leaders including:

Our constitution is color-blind, and neither knows nor tolerates classes among citizens.... The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved

- Justice Harlan¹¹

Freedom and justice cannot be parceled out in pieces to suit political convenience. I don't believe you can stand for freedom for one group of people and deny it to others.

- Coretta Scott King

Law and order exist for the purpose of establishing justice and when they fail in this purpose they become the dangerously structured dams that block the flow of social progress.

- Martin Luther King Jnr

Laws are the means by which political will is given expression. Thus if the political will is not just then nor will be the expression of that will. In this sense

⁹ American First Nations People are referred to in the Declaration as “*the merciless Indian Savages*”

¹⁰ See Thomas Day's "Fragment of an original letter on the Slavery of the Negroes, written in the year 1776" including "If there be an object truly ridiculous in nature, it is an American patriot, signing resolutions of independency with the one hand, and with the other brandishing a whip over his affrighted slaves."

¹¹ *Plessy v. Ferguson* 1896

the absence of justice constitutes injustice and injustice oppresses. Similarly, a law passed for an unjust purpose will oppress.

Martin Luther King Jnr had sagely opined that:

Law and order exist for the purpose of establishing justice and when they fail in this purpose they become the dangerously structured dams that block the flow of social progress

Sadly time does not permit any detailed discussion of what might be meant by “justice”

What is the Rule of Law?

Robin Speed, President of the Rule of Law Institute of Australia offers the following as regards the rule of law:

The rule of law is an overarching principle which ensures that Australians are governed by laws which their elected representatives make and which reflect the rule of law. It requires that the laws are administered justly and fairly.

The website of the Federal Attorney General’s office states¹²:

The rule of law underpins the way Australian society is governed

The website goes on to indicate that:

We uphold the rule of law through our daily work to ensure:

- *laws are clear, predictable and accessible*
- *laws are publicly made and the community is able to participate in the law-making process*

¹² <http://www.ag.gov.au/About/Pages/Ruleoflaw.aspx>

- *laws are publicly adjudicated in courts that are independent from the executive arm of government*
- *dispute settlement is fair and efficient where parties cannot resolve disputes themselves*

These statements whilst accurate and appropriate assume a shared understanding of what is meant by “*the rule of law*” and its importance to the community. The difficulties with such definition are inherent in the following by Geoffrey de Q. Walker in *The rule of law: foundation of constitutional democracy*, (1st Ed., 1988)¹³:

There is no single agreed definition of the rule of law. However, there is a basic core definition that has near universal acceptance. As Emeritus Professor Geoffrey Walker, has written in his defining work on the rule of law in Australia “most of the content of the rule of law can be summed up in two points: (1) that the people (including, one should add, the government) should be ruled by the law and obey it and (2) that the law should be such that people will be able (and, one should add, willing) to be guided by it”

With regards to disobedience of the law the 1946 Nuremberg War Trials (*The International Military Tribunal for Germany*) had concluded:

...individuals have international duties, which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorising action moves outside its competence under international law.

That a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defence to such acts of brutality, though...the order may be urged in mitigation of

¹³ Melbourne University Press, 1988

the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.

Such dicta would, in the case of unjust laws, such as might authorise torture or extra judicial killing, be argued to apply.

Martin Luther King Jnr had expressed the domestic and generally Nuremberg position succinctly as:

One has not only a legal, but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws¹⁴

And Henry Thoreau had described the role of the citizen as regards unjust laws:

If the machine of government is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law¹⁵

The World Justice Project¹⁶ (WJP) provides a more expansive definition of the Rule of Law in the following terms:

The rule of law is a system of rules and rights that enables fair and functioning societies...in which the following four universal principles are upheld:

- 1) The government and its officials and agents as well as individuals and private entities are accountable under the law;*
- 2) The laws are clear, publicised, stable and just; are applied evenly; and protect fundamental rights, including the security of persons and property;*

¹⁴ Letter from the Birmingham Jail August 1963

¹⁵ Civil Disobedience and Other Essays

¹⁶ The World Justice Project is an independent Multidisciplinary organisation established in 2006 as an initiative of the American Bar Association. See their website www.worldjusticeproject.org

- 3) *The process by which laws are enacted, administered and enforceable is accessible, fair and efficient;*
- 4) *Justice is delivered [in a] timely [fashion] by competent, ethical and independent representatives and neutrals who are of sufficient number, have adequate resources and reflect the makeup of the communities they serve.*

These 4 principles are then further developed by 9 factors by which the extent to which the rule of law is experienced being:

- *Constraints on government powers* (meaning that legislators are held accountable)
- *Absence of corruption* (such as use of public power for private gain)
- *Open Government* (including transparency of decision making, freedom to information and free and open reporting)
- *Fundamental Rights* (such rights being clearly identified, acknowledged, protected, universally applied and free from infringement by legislation or application of decisions)
- *Order and Security* (ensuring that individuals and society collectively are protected from violence so that citizens feel secure)
- *Regulatory enforcement* (ensuring that laws are openly, publically and consistently applied and enforced)
- *Civil Justice* (the availability of and free, unfettered and equal access to a means of resolution of civil disputes between citizens)
- *Criminal Justice* (a means of redressing grievances arising from alleged offences against society)
- *Informal Justice* (the acknowledgement of traditional, tribal, religious and community based systems of law and dispute resolution).

Based upon these factors the WJP maintains a world “*Rule of Law Index*”¹⁷ in which Australia ranks 8th¹⁸ of 99 countries ranked¹⁹.

There are a number of particular areas of Australia’s ranking that are less favourable than others (both within Australia’s overall ranking and as compared with comparable, western countries). It is these aspects of the ranking which I wish to explore and discuss as illustrative of challenges which the rule of law faces in the 21st Century and including:

- No discrimination in Criminal Law (0.53/1)
- No unreasonable delays in justice systems (score 0.6/1)
- Effective Correctional System (0.64/1)
- Access and affordability of Civil Justice (0.48/1)
- Equal treatment before the law with no discrimination (0.65/1)

One aspect of the WJP Index which inherently impacts the last criteria above (equal treatment before the laws) is the acceptance and differentiation within the index that those members of society within a “*high income group*” enjoy a far better experience of and express a far higher confidence in the effective operation of the rule of law than those from without that group.

One further observation which must be made and which is a great credit to the Judiciary within Australia (of which I am part) is scoring with respect to the issue “*How serious is the corruption of Judges and Judicial Officers...they won’t move the case unless the parties bribe them*” which

¹⁷ http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf

¹⁸ The top 8 Countries were ranked:

1. Denmark
2. Norway
3. Sweden
4. Finland
5. Netherlands
6. New Zealand
7. Austria
8. Australia

Canada ranked 11th, the United Kingdom 13th and USA 19th.

¹⁹ <http://data.worldjusticeproject.org/#/index/AUS>

attracts a 0% response and which applies equally to both criminal and civil Courts as well as the response to “*No corruption in the judiciary*” at 94% (both responses demonstrating a substantial and appropriate public faith in the independence and integrity of our judiciary).

No discrimination in Criminal Law

Criminal laws that are passed entirely without inclusion of discriminating factors can, through the operation of that law, on its face of universal application, create discrimination based on either non universal enforcement or based on the existence within one group of behaviours or factors which means the law is more likely to apply to persons from within that group.

Such matters can arise through non-uniform application of a law. This is an issue raised by many commentators as regards US drug laws²⁰ and London and New York “*stop and frisk laws*”.²¹

It is clear that there is pronounced discrimination, in its broad sense, as regards aboriginal Australians and the criminal justice system.

The Australian Bureau of Statistics in 2013 produced the following as regards aboriginal incarceration rates²²:

The rate of imprisonment for Aboriginal and Torres Strait Islander prisoners was 15 times higher than the rate for non-Indigenous prisoners at 30 June 2012, an increase in the ratio compared to 2011 (14 times higher). The highest ratio of Aboriginal and Torres Strait Islander to non-Indigenous imprisonment rates in Australia was in Western Australia (20 times higher for Aboriginal and Torres Strait Islander prisoners).

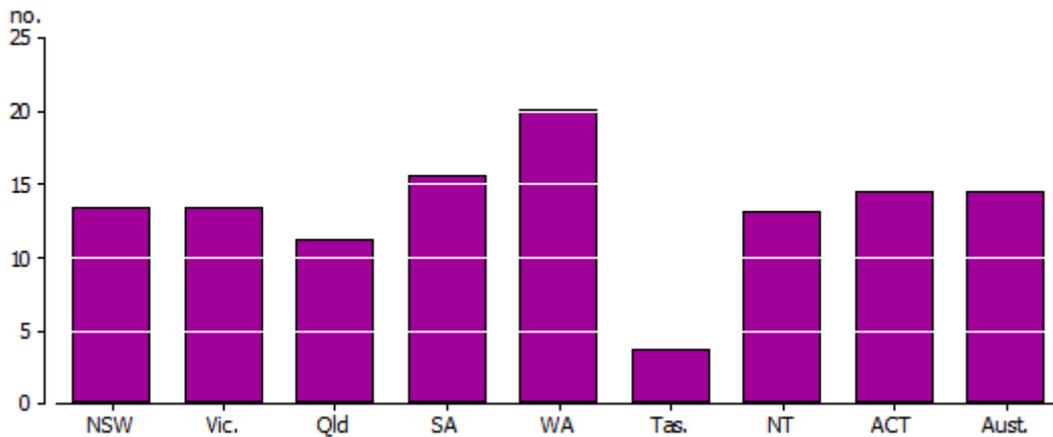
²⁰ For an excellent discussion see Michelle Alexander’s “The new Jim Crow”

²¹ See for example <http://www.nyclu.org/publications/report-nypd-stop-and-frisk-activity-2012-2013> and <http://www.opendemocracy.net/opensecurity/sophie-lewis/unreformable-end-to-stop-and-frisk-in-nyc>

²² <http://www.abs.gov.au/ausstats/abs@.nsf/Products/BD0021D329F0464FCA257B3C000DCCE0?opendocument>

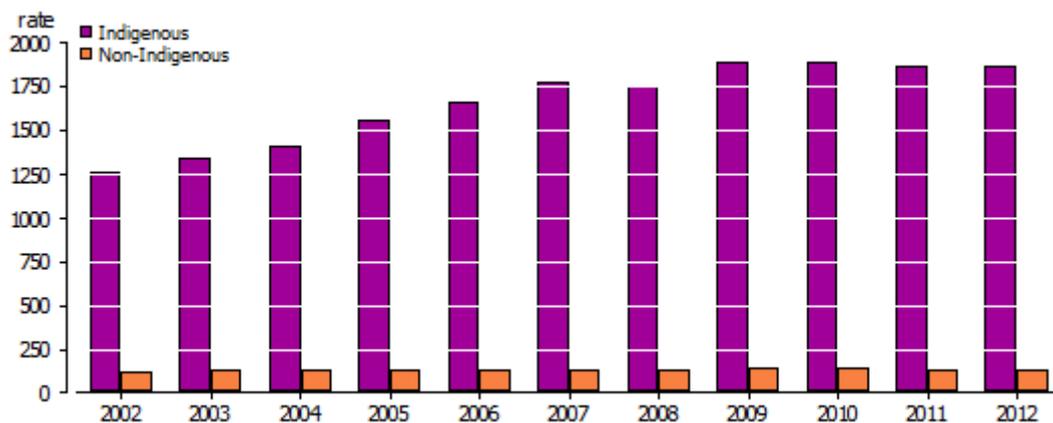
Tasmania had the lowest ratio (four times higher for Aboriginal and Torres Strait Islander prisoners). (Table 4.2)

RATIO OF INDIGENOUS TO NON-INDIGENOUS AGE STANDARDISED RATES OF IMPRISONMENT, state and territory



Between 2002 and 2012, imprisonment rates for Aboriginal and Torres Strait Islander Australians increased from 1,262 to 1,914 Aboriginal and Torres Strait Islander prisoners per 100,000 adult Aboriginal and Torres Strait Islander population. In comparison, the rate for non-Indigenous prisoners increased from 123 to 129 per 100,000 adult non-Indigenous population. (Table 4.2)

AGE STANDARDISED IMPRISONMENT RATES(a), Indigenous status



(a) Rate per 100,000 adult population. For a definition of age standardised rates, see Explanatory Notes, paragraphs 33–38.

This incarceration rates Australia wide represents the reality that an aboriginal man is 15 times more likely that a non aboriginal man to be imprisoned.

Aboriginal people represent only 3% of the total population, yet more than 28% of Australia's prison population is Aboriginal.²³ As such 30% of prisoners incarcerated in Australia in 2014 (both male and female) are aboriginal. This rises to 42% for juvenile prisoners.

Australia is heading towards one in two of the prison population comprised by Aboriginal prisoners by 2020. In 1992, the ratio was one in seven.

The fastest growing portion of the prison population is aboriginal women. Between 2000 and 2010 the rate at which aboriginal women were imprisoned increased by 58.6%. Over that period the increase for non-aboriginal women was 22.4%. The rate of increase of imprisonment for aboriginal men over the same period was 35.2% (as opposed to 3.6% for non aboriginal men).

Re offending rates are similarly high and disproportionate.

Also of concern are statistics relating to aboriginal children involved in State Care and Protection (Child Welfare) jurisdictions and a similarly alarming rate of over representation.

In a 2013 statistical review by the Australian Institute of Family Studies²⁴ (AIFS) it was observed that:

Aboriginal and Torres Strait Islander children are over-represented in the Australian out-of-home care system. In 2011-12, approximately 34% of all children in out-of-home care were identified as Aboriginal or Torres Strait Islander. Overall, rates of out-of-home care for both Aboriginal and Torres Strait Islander children and non-Indigenous children have continued to increase since 2000-01 (AIHW, 2013). The number of Aboriginal and Torres Strait Islander children in out-of-home care rose by 7% from 11,468 children in 2009-10 to 12,358 children 2010-11 (AIHW, 2012). These numbers continued to rise a further 7.6%

²³ read more: <http://www.creativespirits.info/aboriginalculture/law/aboriginal-prison-rates#ixzz2vLVRAfbb>

²⁴ Child protection and Aboriginal and Torres Strait Islander children Last updated June 2013

in 2011-12 with 13,299 (55.1 per 1,000) placed into out-of-home care. Aboriginal and Torres Strait Islander children were 10 times more likely than non-Indigenous children to be placed in care nationally with rate ratios ranging from 3.4 in Tasmania to 15.8 in Victoria.

In the 10 years from 1998 to 2008 there was a 258% increase in the number of aboriginal children in NSW living in out of home care²⁵ and such that the rate of aboriginal children in out of home care (largely government arranged care) is now higher than at any previous point in history including during the periods when the Office of the Protector of Aborigines was in existence and during the eras of the Stolen Generations. This is so at a time when adoption is proposed as a preferable outcome to care proceedings.²⁶

AIFS produce the following chart to demonstrate the stark disparities between the rate of indigenous and non indigenous children living in out of home care:

Table 2: State and territory data comparing rates of Aboriginal and Torres Strait Islander children in out-of-home care compared to non-Indigenous children on 30 June 2012

	Number of children		Rates per 1,000 children		Rate ratio*
	Indigenous	Non Indigenous	Indigenous	Non Indigenous	
NSW	5,991	11,177	83.4	7.1	11.7
VIC	1,028	5,106	66.4	4.2	15.8
QLD	3,041	4,919	42.2	4.9	8.7
WA	1,614	1,760	51.6	3.4	15.3
SA	706	1,828	55.0	5.4	10.2
TAS	212	789	25.1	7.4	3.4
ACT	134	421	68.0	5.3	12.8
NT	573	127	20.7	3.7	5.7
Australia	13,299	26,127	55.1	5.4	10.3

²⁵ NSW Ombudsman Report “Supporting the Carers of Aboriginal Children” June 2008

²⁶<http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/Permanencyplanningandadoptionofchildreninout-of-homecare>

There are many factors which might contribute to this chronic and unacceptable over representation of aboriginal people in both criminal and child welfare populations. In this brief time they cannot be properly or accurately explored although the “*creative spirits*” website²⁷, drawing on a broad range of data and reports, offers the following contributing factors:

- **Stolen Generations.** *Those taken away from their families as a child are twice as likely to be arrested than their peers.*
- **Disconnection from land.** *When Aboriginal people are not able to live on their traditional lands they are more likely to come into conflict with the law.*
- **Police behaviour.** *Police might act racist, violently or inappropriately.*
- **Offence criminalisation.** *Aboriginal people are 15 times more likely to be charged for swearing or offensive behaviour than the rest of the community.*
- **Social and economic situation.** *Poverty and unemployment, particularly for young Aboriginal people or in rural and remote areas (“crimes of need”).*
- **People’s attitude.** *Some police and community members have a “law and order” attitude.*
- **Lack of language skills.** *Some Aboriginal people are sentenced to jail without them fully understanding the court process because English is not their first language.*
- **Foetal alcohol syndrome.** *Many children enter the justice system because their mother drank too much alcohol during her pregnancy. Her*

²⁷ Ibid

children are often unable to appreciate the consequences of their actions.

- **Family breakdown** due to various social factors.
- **Disintegration** seems to manifest in deliberate attempts to strip away Aboriginal culture in some communities.
- **Lack of accommodation.** The Children's Court is often being told imprisonment was the only option.
- **Inflexible funding.** Bureaucracy prohibits progress when programs cannot go ahead due to red tape.
- **Reoffending.** Across Australia about 70% of prisoners (Aboriginal or non-Aboriginal) reoffend. 38% are back in prison 2 years after their release.
- **Lack of community services.** According to *The Medical Journal of Australia*, "there is increasing evidence that many people in prison are there as a direct consequence of the shortfall in appropriate community-based health and social services, most notably in the areas of housing, mental health and well-being, substance use, disability and family violence."

Other matters of a socio-economic or cultural nature are also opined as impacting on arrest and incarceration rates including:

- *Did not receive court mail*
- *Can't make it to court*
- *Driving unlicensed*
- *Disorderly conduct*
- *Being "selected" by police*

...There is no greater inequality than the equal treatment of unequals

No unreasonable delays in justice systems

Delays arise in all processes including Court processes.

The Australian Federal Courts (High Court, Federal Court, Family Court and Federal Circuit Court (FCC)) as well as the various Federal Tribunals²⁸ have all faced a number of operational challenges in recent times. Budgetary efficiency dividends and lesser operating budgets are now realities as is the joint administration of most aspects of the 2 mid tier Courts and the FCC (the first instance Federal trial Court).

Beyond budgetary considerations which impact upon the service delivery of Courts other matters, largely external to the Court, pose challenges. These include:

- *Work loads*

Put simply the work load of all Federal Courts is higher than it has ever been. The resources of Courts have not necessarily kept pace with or matched the growth rate of filings.

- *Limits on legal aid funding and representation.*

The means and asset tests which are applied by State and Territory legal aid commissions means that only the most socially and economically disadvantaged qualify for such assistance. However, as with many services, demand outstrips supply and thus even when all

²⁸ The Refugee Review Tribunal, Migration Review Tribunal, social Security Appeals Tribunal, Defence Force Discipline Appeal Tribunal, Copyright Tribunal, Australian Competition Tribunal and Administrative Appeals Tribunal

relevant tests to qualify for assistance are met such assistance may not be available²⁹.

In Victoria for example legal aid is now rarely available for the representation of parties at trial and parties who have been and who would remain eligible for legal aid assistance routinely represent themselves. This increases obligations upon the Court³⁰

- *Self Representation*

In addition to the cohort of litigants who do not qualify for legal representation there are many litigants who choose or who cannot afford legal representation.

In Family Law matters self representation and legal representation is reflected (for the FCC) in the following table:

Party representation	Number of applications	Percentage
Both have legal representation	11,873	67.4
Neither have legal representation	1379	7.83
Only applicant has legal representation	3751	21.3
Only respondent has legal representation	611	3.47
Total	17,614	100%

- *The competence of legal representation*

In matters where parties are represented the Court depends, to some extent, upon legal representatives, as officers of the Court, to deal with and address issues (such as disclosure, lawyer assisted negotiation and resolution of minor disputes and prompt and timely preparation of

²⁹ It should be made clear that this is not a slight of the Commission or the valuable work they perform. From the 2012-13 annual report of NSW Legal Aid one can glean that 972,650 clients were assisted. Funds as are available are used to best advantage including incredibly valuable services such as the representation of children, the Early Intervention Unit, Court Duty solicitor services, DV out reach services and training and up skilling of other community legal sector services

³⁰ See for example *Re F Litigant in person guidelines* [2001] FamCA 348 to control and explain the hearing process and requiring more time to hear proceedings.

materials). This role of the legal profession in acting in aid of the Court, to whom the primary obligation of lawyers is owed, for the efficient administration of justice is long standing.

Changing legal training, non availability of work in some traditional areas of practice, financial pressures and other factors (including misunderstanding of the role and importance of the rules of evidence arising since the introduction of Division 12A of Part VII of the *FLA and s.93 Children and Young Persons (Care and Protection) Act 1987*) have all had an impact on the presentation of matters before the Court.

- *The changing dynamic of the Court's workload*

One possibly unforeseen consequence of the roll out and establishment of community based Family Relationship Centres is the reality that the matters which are litigated before the Court are now more complex and increasingly involve allegations of family violence, drug and alcohol use, mental illness, generational disadvantage, litigants from a NESB and diverse cultural considerations, (the simple matters are settled).

This work load requires greater time, more court events, greater forensic exploration and longer trials.

- *Increasing legislative obligations*

What on their face present as relatively minor (and welcome) legislative changes increase the Court's work load and the time taken to deal with each matter. Two particular examples have arisen in recent years being:

- ◆ The June, 2013 changes to the family violence provisions of the Family Law Act. These changes require that the Court enquire into certain matters and list matters in short time frames and act

protectively to ensure the safety of children and parents and commence evidence gathering³¹;

- ◆ Changes to the Migration Act that have significantly increased the volume of migration matters that come before the FCC.

Many of the above matters also impact upon access to justice and these will be dealt with separately.

Delays in Court proceedings are inevitable. However, the one maxim that is well known in the community (and for good reason) is “*Justice delayed is justice denied*”.

Delays impact on litigants, (and their children, businesses, etc) financially and emotionally as is well recognised by the Court³². Delays also create resource and forensic difficulties (e.g. reports require up dating, more interim issues arise when there is delay with more applications to the Court and evidence becomes harder to locate, present or test).

Some delay is deliberate and beneficial (e.g. to allow a parent to complete a rehab program or parenting course that might assist in settlement of the matter or parts of it or make arrangements work more effectively in the future). However, delay remains a significant basis of community complaint about Courts.

As I sit in the FCC I propose to deal with the workload of that Court as an illustrative example of the work performed by Australian Federal Courts.

In the 2012-13 financial year the below table reflects the Court’s work (by matters filed)³³:

Family law	Total	% of total
Final orders	17,364	20

³¹ See especially s.67ZBA FLA

³² See for example *Sali v SPC Ltd (1993) 67 ALJR 841*

³³ <http://www.federalcircuitcourt.gov.au/pubs/html/AR1213P3.html>

Family law	Total	% of total
Interim orders	20,242	23
Divorce	43,288	48
Other	1724	2
Total family law	82,618	93
General federal law	Total	% of total
Bankruptcy	3984	4
Migration	1981	2
Industrial	763	1
Other	253	0
Total general federal law	6981	7
Grand Total	89,599	100%

The breakup of applications filed in family law matters in the FCC is as follows:

Application	Filed	%
Final orders applications	17,364	21
Interim applications	20,242	23
Divorce applications	43,288	54
Other applications	1724	2
Total	82,618	100%

Within the FCC uncontested Divorces are dealt with by a Registrar. Thus, if the divorces are removed this leaves 39,330 applications to be dealt with by approximately 54 FCC Judges (or over 720 applications each Judge each year). Notwithstanding this 83 per cent of applications were completed within six months and 94 per cent were completed within 12 months. 70 per cent of matters filed were resolved without the need for judicial determination.

The gradual increase in filings (and disposals or pending matters) can be seen from the diagrams below.

Figure 3.2: Final order applications 2008–09 to 2012–13

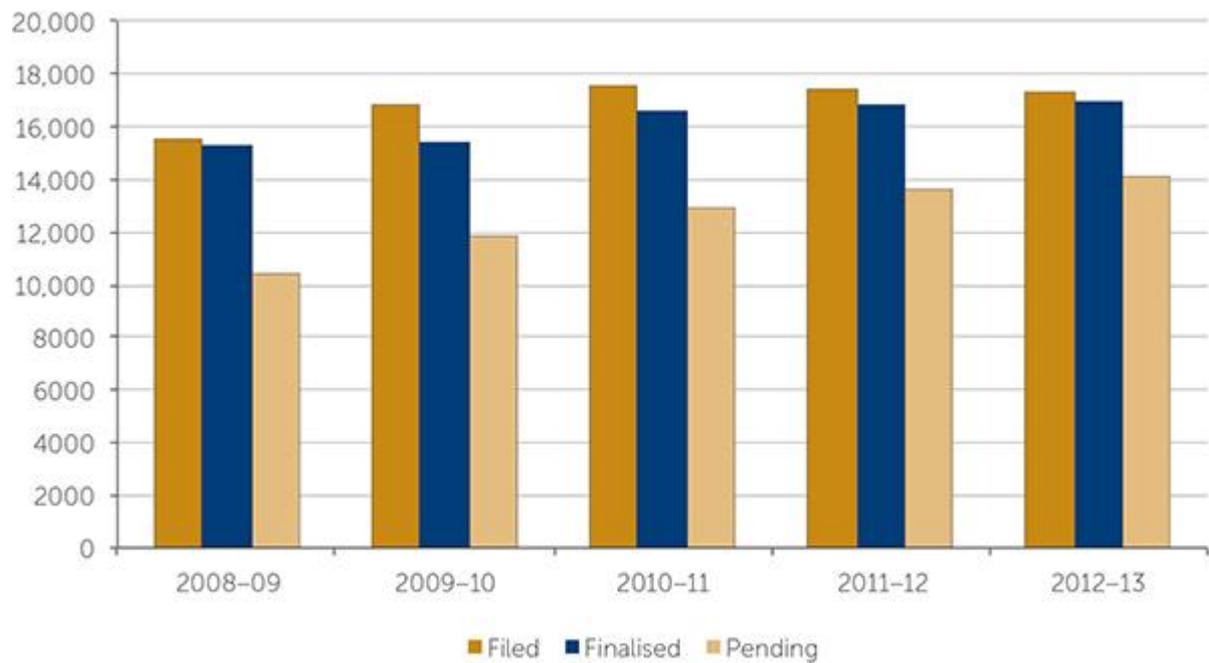
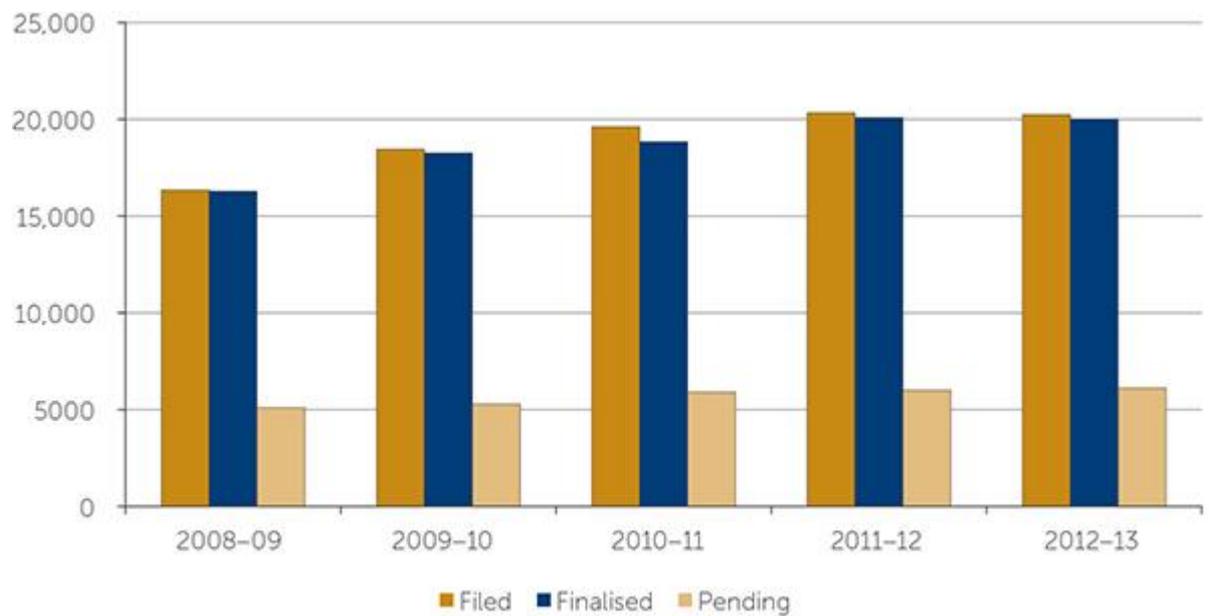
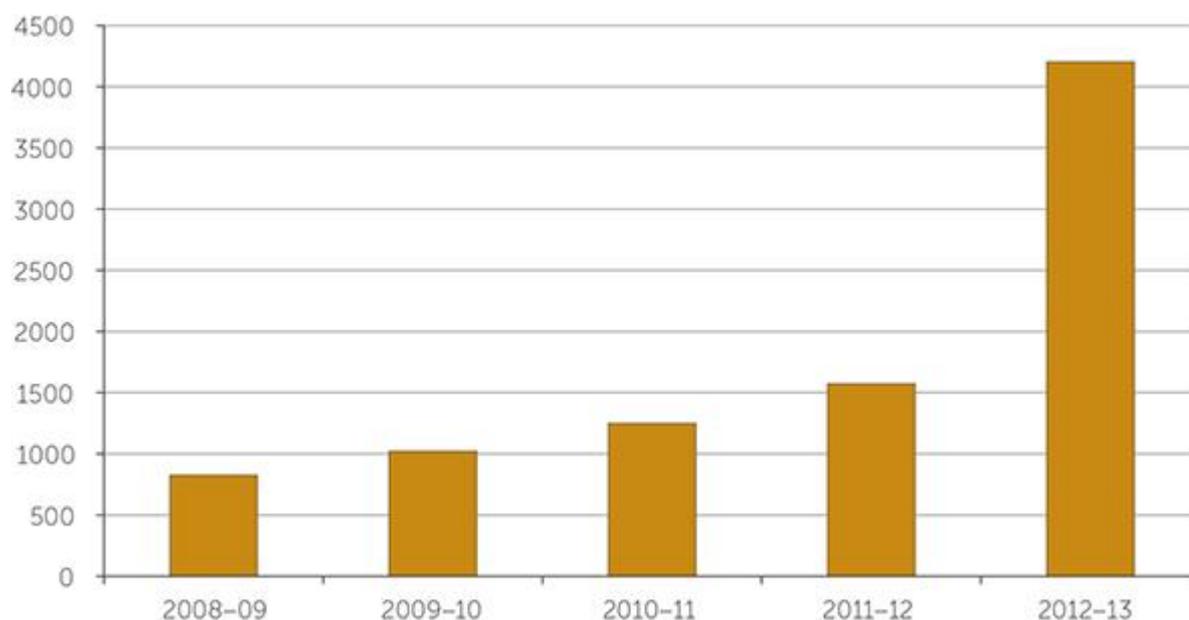


Figure 3.3: Interim order applications 2008–09 to 2012–13



The increasing number of matters involving allegations of risk is shown in the following diagram:

Figure 3.5: Notice of Child Abuse, Family Violence, or Risk of Family Violence filed



The particularly significant increase in 2012-13 relates to:

- A genuine increase in allegations;
- The changed and expanded definition of both “*abuse*” and “*family violence*”³⁴
- An increased insistence by the Court that a notice alerting the Court to allegations of abuse and/or family violence be filed when such allegations are raised³⁵

The timely delivery of resolution or determination of disputes is fundamentally important to community perceptions of justice and the health of society. As was observed by Albert Einstein:

In matters of truth and justice, there is no difference between large and small problems, for issues concerning the treatment of people are all the same

³⁴ See ss.4 and 4AB *FLA* respectively

³⁵ The *FLA* imposes a mandatory obligation to file such a notice (see s.67Z) and specific pilots have been commenced in SA requiring the filing of a notice in every matter to trial a better regime of compliance with the obligation.

Effective Correctional System

Above I have discussed the statistical over representation of aboriginal Australians in the criminal justice system and prison population.

A separate issue arises as to the effectiveness of the correctional system.

There have been many changes in the measures used to determine the effectiveness of the correctional system. However, fundamental to the measure of effectiveness based on the nomenclature used is the correction, rehabilitation or reformation of the prison population and thus a low recidivism or reoffending rate.

Based on research published by the Australian Bureau of Criminology³⁶:

About 60 per cent of those in custody in Australia have been imprisoned before. Reoffending behaviour or recidivism can be influenced by many factors including poor education and employment histories, mental illness and bad physical health, as well as drug and alcohol misuse

A 2010 report by the English Ministry of Justice³⁷ commenced with a statement which resonates for all western systems:

Despite record spending and the highest ever prison population we are not delivering what really matters: improved public safety through more effective punishments that reduce the prospect of criminals reoffending time and time again

Research in all western countries including Australia has consistently urged:

³⁶ http://www.aic.gov.au/crime_community/communitycrime/recidivism.html

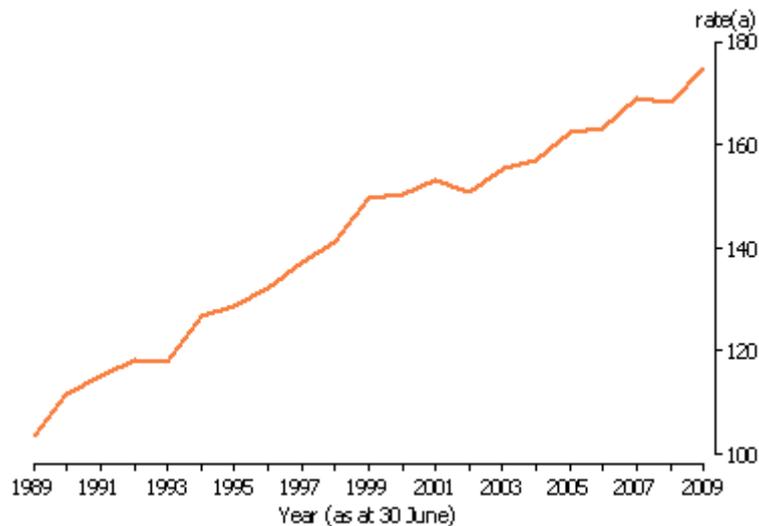
³⁷ <http://webarchive.nationalarchives.gov.uk/20120119200607/http://www.justice.gov.uk/consultations/docs/breaking-the-cycle.pdf>

- Addressing and treating the problems which have given rise to offending such as drug and alcohol use, poverty, poor education and vocational skills and health (physical and mental).
- To recognise that reoffending is often significantly impacted by not only the failure to address the behaviour/s that caused offending but also the fact that a conviction has then been recorded which excludes the offender from many employments and programs upon release. Indeed, in some States of the United States a felony conviction can bar an offender from public housing, social welfare and voting for life.
- Shorter sentences for less serious crimes (longer sentences only erode already limited social skills and take resources from rehabilitative programs) and, preferably, community based programs rather than custodial sentences
- Consideration of decriminalisation of offences with no discernible social cost (e.g. personal possession of marijuana).

In Australia, the increase in the imprisonment rate generally has been significant. At 30 June 2009, there were 29,300 prisoners in Australia. This is equivalent to an imprisonment rate of 175 prisoners per 100,000 adults in Australia.

Since 1989, the imprisonment rate has increased by around two-thirds. The table below shows the increasing imprisonment rate trend³⁸.

³⁸ Source: Australian Prisoners: results of the National Prison Census, 30 June, Australian Institute of Criminology; Prisoners in Australia, 2004 and 2009



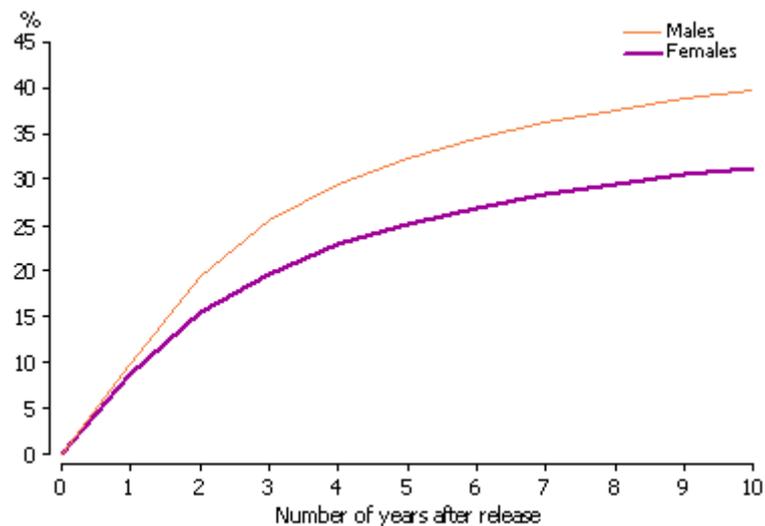
Prisoners per 100,000 people aged 18 years and over. From 1989 to 1993 the rate is for people aged 17 years and over.

Whilst the data is somewhat aged the following suggests a significant failure of present correction policies to “correct” and avoid reoffending³⁹ the ABS data also suggesting:

During the 10 years after being released, men were more likely than women to return to prison. Although this gap was quite small at the beginning it increased with the passage of time. By the tenth year, 40% of released men had been reimprisoned at least once, compared with 31% of released women.

PRISONERS RELEASED IN 1994-1997, CUMULATIVE REIMPRISONMENT RATE, BY TIME TO FIRST REIMPRISONMENT

³⁹ <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10Mar+2010>



ABS data also supports the proposition that juvenile detention significantly increases the risk of adult detention:

Younger prisoners were more likely than older prisoners to be reimprisoned following release. Within 10 years of being released, the reimprisonment rate for the teenager group (those aged 17-19 years when released) was 61%, compared with 23% for those aged 35 years and over.

There are many bases which might be explored to explain these trends such as:

- Youthful behaviour and lack of emotional maturity (whether expressed as aggression, naivety or ignorance);
- Detention representing a “*school for crime*” and networks;
- Interrupted education, peer groups or employment;
- Homelessness, family break down and unemployment.

The most recent ABS statistics⁴⁰ suggest a worsening of the situation:

⁴⁰ <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4517.0main+features42013>

At 30 June 2013, at least half of prisoners in all states and territories were recorded as having had prior adult imprisonment under sentence. Where prior imprisonment status was known, there was a higher proportion of male prisoners compared to female prisoners with prior imprisonment across all states and territories, except in the Australian Capital Territory where females had higher prior imprisonment than males (80% compared to 73%).

Similarly overall imprisonment rates continue to climb:

The imprisonment rate for males at 30 June 2013 was 322 prisoners per 100,000 adult males, approximately 12 times the rate for females (26 female prisoners per 100,000 adult females)⁴¹

Access and affordability of Civil Justice

A 2013 report by RMIT Centre for Innovative Justice⁴² opened with:

For a great many in the Australian population, the prospect of seeking professional help to resolve a civil legal problem can be too costly to contemplate. In fact, many people perceive professional assistance in some areas of the law to be out of reach to all but those with either the greatest, or the least, economic resources

This mirrors a survey conducted by The Australia Institute which found that:

83% of respondents believed that ‘only the very wealthy can afford to protect their legal rights’, while only 43% said they ‘could afford a good lawyer if they had a serious legal issue’⁴³.

Such circumstances have been the subject of comment by Lawrence Lessig⁴⁴:

⁴¹ *ibid*

⁴² Affordable Justice – a pragmatic path to greater flexibility and access in the private legal services market October, 2013

⁴³ R Denniss, J Fear and E Millane, ‘Justice for all: Giving Australians greater access to the legal system’, The Australia Institute, Institute Paper No. 8, March 2012, ISSN 1836-8948, p 22

The legal system doesn't work. Or more accurately, it doesn't work for anyone except those with the most resources. Not because the system is corrupt. I don't think our legal system (at the federal level, at least) is at all corrupt. I mean simply because the costs of our legal system are so astonishingly high that justice can practically never be done

Many years earlier Frederick Douglas had commented:

Where justice is denied, where poverty is enforced, where ignorance prevails, and where any one class is made to feel that society is an organized conspiracy to oppress, rob and degrade them, neither persons nor property will be safe

And Che Guevara⁴⁵:

Justice remains the tool of a few powerful interests; legal interpretations will continue to be made to suit the convenience of the oppressor powers

Australia is not alone. In 2011 the UK Civil Justice Council wrote⁴⁶:

It is a reality that those who cannot afford legal services and those for whom the state will not provide legal aid comprise the larger part of the population of England and Wales...The thing that keeps that reality below the surface is simply the hope or belief on the part of most people that they will not have a civil dispute

The RMIT report highlighted the following factors which possibly contributed to costs of such nature and magnitude as to preclude access by citizens to or use of legal services:

⁴⁴ *Free Culture* (2004)

⁴⁵ a speech delivered at the plenary session of the United Nations Conference on Trade and Development in Geneva, Switzerland (25 March 1964)

⁴⁶ UK Civil Justice Council, *Access to Justice for Litigants in Person (or self-represented litigants)*, A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice, November 2011, p 8.

- *the labour intensive nature of much legal work due to the growing complexity of the law*
- *the inherently unpredictable nature of the litigation process and common law system alike*
- *an adversarial system that encourages a ‘warrior mentality’*
- *the risk of adverse costs orders in litigation*
- *a progressive move away from the more standard use of scales of costs*
- *Australia’s comparatively insular legal market*
- *the lack of national uniformity*
- *a comparative lack of awareness amongst individual or small business clients*
- *costing methods that continue to be based on rates x people x time*
- *the culture around legal practice that presents exclusive offices and expensive fees as commensurate to the expertise on offer*
- *the costs that accumulate as a result of work duplicated by solicitors and barristers*

Equally, ‘the tyranny of the billable hour’ has also long been acknowledged, criticised by an increasing number within and outside the profession as discouraging efficiency and collaboration; encouraging procrastination and mediocrity; preventing any concerted investment in other approaches; and demoralising legal practitioners

Many of the matters above are either not new (such as the unpredictable nature of litigation) or are actively addressed by legislation and Court rules (such as the shift of focus to resolution, Family Dispute Resolution and mediation and mandated pre filing disclosure).

Legal consumers are significantly unsophisticated (ie they do not know how to “*tell*” a good lawyer) and thus have traditionally been at a distinct

disadvantaged in a professional relationship with their lawyer. However, this is slowly changing whilst lawyer's costs are not.

There are certainly examples of extreme overcharging including, in more recent years, a willingness by those overseeing the legal profession⁴⁷, to address excessive overcharging as “*professional misconduct*” and a disciplinary offence leading to consequences including being struck off⁴⁸.

Access to the law has traditionally been achieved through legal representation. As cost becomes a barrier of such significance and the rate of self representation rises Courts and community agencies endeavour to assist through information kits, instructional videos (including on YouTube) and by moulding and designing systems to be more flexible and responsive to this new cohort of self represented litigants.

The absence of effective legal advice and representation raises questions for the modern Court including the significant issue of affording the same level of due process to both legally and self represented parties (and avoiding perceptions of favouritism and bias in doing so) as well as ensuring effective participation and evidence.

There have been recent and more radical calls for reform including a movement to or inclusion of elements of an inquisitorial system of civil justice rather than the strictly adversarial model presently enjoyed⁴⁹.

Access to justice is profoundly important to our way of life and everything underpinning our society and its institutions and as President John Kennedy acknowledged:

⁴⁷ In NSW the Office of the Legal Services Commissioner

⁴⁸ For example see *Legal Services Commissioner v Keddie [2012] NSWADT 106*

⁴⁹ Including by the Lord Chief Justice of England and Wales see

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-speech-reshaping-justice.pdf> and by the ACT Law Society see http://www.pc.gov.au/__data/assets/pdf_file/0004/129118/sub027-access-justice.pdf

*...where legal remedies are not at hand. Redress is sought in the streets*⁵⁰

Equal treatment before the law with no discrimination

I have, early in this paper, referred to the words of US Supreme Court Judge Felix Frankfurter that “...***There is no greater inequality than the equal treatment of unequals***”

The discussion of over representation of aboriginal people in gaol and care populations might suggest one area of unequal treatment even if only on the basis suggested by Judge Frankfurter.

Beyond the examples that are already offered there remains little time to explore the possible bases upon which it might be suggested that a person or group of persons might be treated differently or unequally before the law. As justice cannot be done to a proper discussion of those hypotheses and to avoid either needless controversy or blithe address of issues of significance I will instead leave you to pose questions that might draw on the above matters and form the basis for classroom discussion.

Finally, however, I would leave you (and your students) with the words of two great philosophers, firstly, Edmund Burke and secondly the philosopher and economist, Friedrich August:

The only thing necessary for the triumph of evil is for good men to do nothing.

From the fact that people are very different it follows that, if we treat them equally, the result must be inequality in their actual position, and that the only way to place them in an equal position would be to treat

⁵⁰ Civil Rights Message June 11, 1963

them differently. equality before the law and material equality are therefore not only different but are in conflict with each other; and we can achieve either one or the other, but not both at the same time.

And

Perhaps the fact that we have seen millions voting themselves into complete dependence on a tyrant has made our generation understand that to choose one's government is not necessarily to secure freedom

An Illustrative Example

Let us never forget that the elected government of Germany in 1933 was established by law and that evil empire presided over the death of at least 20 million people by passing laws.

Law can, in the wrong hands and when used without the framework of the rule of law, be an instrument of evil and oppression rather an instrument of justice.

The tool used by the tyrant to oppress is law. They are laws which bear none of the hallmarks of a society governed by the rule of law. They are laws that are arbitrary, unclear, unpredictable, applied unevenly and fail to protect fundamental rights and/or discriminate in their application.

I wish to leave you with a clear example of such a law being *Article 6.21* of the Russian law banning and criminalising propaganda of non-traditional sexual relations in which:

Propaganda is the act of distributing information among minors that

- 1. is aimed at the creating non-traditional sexual attitudes,*
- 2. makes non-traditional sexual relations attractive,*
- 3. equates the social value of traditional and non-traditional sexual relations, or*

4. *creates an interest in non-traditional sexual relations*

The legislation requires the interpretation in each case of each of the words and phrases used within the article and which are not defined. This has called a number of commentators to observe⁵¹:

The law passed by the Duma is so ambiguous for a reason. Without a legal definition of ‘propaganda’ or ‘non-traditional sexual relations’ — key operative words in Article 6.21 — we are not getting a clear picture of how the authorities will use it

And to comment that the article contains:

*...a row of mistakes and judicial-technical inexactitudes⁵² [and]
...contradicts article 29 of the Russian Constitution⁵³*

Many things, one would hope, have changed over time regarding “*traditional*” sexual relationships and marriage including the imposition of or increase to the age of consent and marriageable age, recognition of prohibited degrees of consanguinity and, in many jurisdictions, the repeal of racial and ethnic exclusions. Indeed, as regards “*traditional*” attitudes to sexual relationships one would need to consider, within the context of such legislation, the place of traditional attitudes towards misogyny, non-equality, sexism, harassment, incest, adultery, rape, prostitution, violence, homosexuality and even unprotected sex.

May you enjoy many interesting discussions with your students.

⁵¹ <http://www.policymic.com/articles/58649/russia-s-anti-gay-law-spelled-out-in-plain-english>

⁵² Former Russian Deputy Prime Minister Alexander Zhukov

⁵³ Article 29.1 *Everyone shall be guaranteed freedom of thought and speech*