



*School of Business Law and the Office of Ethics, Equity and
Social Justice at Curtin University of Technology*

&

Australia & New Zealand Education Law Association

[ANZELA] present:

**Equal Opportunity within the Education
Context: A Judicial Perspective**

Opening address by

The Hon David K Malcolm AC
Chief Justice of Western Australia

**BankWest Theatre, John Curtin Gallery
Curtin University**

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Present-day Western Australia is a multicultural and multi-ethnic society. The Census carried out in 2001 tells us that 12 per cent of our community were born in countries where English is not the principal language, and also that only 3 per cent of our population is Indigenous. Since the events of September 11 2001, there has never been closer scrutiny on those areas of uncertainty which inspire fear, some would say unjustly. As such, refugees and aspects of racism have been thrust into the national spotlight on an almost daily basis. However, while we are regularly confronted by images of terrorism and border patrols, the prevailing forces of inequality still hold root in our society. It is these basic strains of inequality which require our urgent priority – issues such as gender bias and racial vilification, which form the basis of many unjust beliefs and promote inequality. The law and access to justice help to stem the tide of oppression and support those who are unfairly discriminated against.

I am honoured to have been invited here today to present my contribution to commemorate the 20th Anniversary of the *Equal Opportunity Act 1984* (WA) and the 50th Anniversary of the United States Supreme Court decision in *Brown v Board of Education* 347 US 483 (1954). My presentation is a historical synopsis based on the concept of equal opportunity through a judicial perspective. In particular, I shall examine the treatment of two specific groups who have been the target of

discrimination in the history of European civilisation – the rights of females, and those of indigenous peoples.

Throughout the modern history of exploration and colonisation, there have been three main groups of people who have proved to be easy targets of discrimination. Specifically, women, immigrants and Aboriginals (in which I includes Torres Strait Islanders) were consistently deprived those basic rights which are now enshrined in our legal system by virtue of Human Rights and Equal Opportunity legislation. Australia, and Western Australia's experience, has proved particularly telling in terms of the legal recognition of those whose basic rights have been denied for in the past. In Australia there is a history of gender inequality before the law, and also within the practise of law. Women and Australian Aboriginals, in particular, have been treated as second-class citizens. It is within that context that I also propose to examine the legal treatment of Aboriginals in a historical sense, during their struggle to be recognised as legal "citizens" and, in turn, full citizens of modern Australia.

GENDER BIAS IN THE LAW

The last decade has seen the extensive analysis and development of measures to improve access to justice for women, in other words, improving equality before the law. The area which I would like to touch on today however, and one which has a significant effect on the future of legal practice, is gender equality within the practice of the law, that is, in the legal profession and the judiciary. I acknowledge from the outset that in many respects these two elements are inexorably linked. The issue of women's access to justice is linked to broader issues of gender bias and inherent systemic inequality in the legal system, in respect of which there

has been much debate in recent times. There is an ever-increasing body of literature on gender bias in the application of the law and its roots in gender inequality in the legal profession and the judiciary. For example, the 1994 Senate Standing Committee on Constitutional Affairs report entitled *Gender Bias and the Judiciary* focussed on inappropriate judicial remarks, particularly in the context of sexual assault trials, which demonstrated an overt gender bias on the part of some members of the judiciary. I am pleased to be able to say that although the Supreme Court of Western Australia sent copies of transcript of the Judges' summing up and sentencing remarks in all sexual assault trials in the preceding year to the Senate Committee, there was nothing which could be found in them which was in any way inappropriate. There have since been one or two instances in the District Court which have been dealt with on appeal. This relatively satisfactory position was related to the fact that the Supreme Court had been dealing with the issues relating to systemic gender bias since the first Australian Seminar on the topic by Professor Kathleen Mahoney at the Supreme Court in 1992.

The 1994 Senate report recommended that one method of dealing with systemic bias against women was to address gender inequality within the ranks of the judiciary and improve gender awareness among Judges¹. The issue had already been dealt with in this way in Western Australia. Support for the Senate recommendations can be found in the Australian Law Reform Commission's report *Equality Before the Law*, which was published in the same year. The Commission focussed on women's experiences with the law and the Courts. Submissions to the Commission in the course of its inquiry revealed that women were more likely to be considered poor witnesses because they failed to meet

¹ Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary*, (1994) at pp. 75 *et seq* (hereinafter "Senate Standing Committee")

masculine concepts of being “reasonable” or “rational”², be subjected to the imposition of stereotypes such as the “homemaker”³ and the subsequent discounting of their contribution to family and home life or simply to have their experience discounted as being “alien” or unfamiliar to the principle actors in a Court room, namely, Judges and lawyers⁴. One method of addressing these shortcomings in the justice system being to encourage greater participation by women in law-making.

There is little doubt that the law stands to benefit from improvements in the representation of women both in senior positions in the profession and in the judiciary. The challenge now is to move on from the lament that there are not enough women in the profession, to the development of practical strategies to address the circumstances which present barriers to women pursuing a career in the law.

Edith Haynes

A number of barriers can be discounted fairly quickly. For example, it has been 76 years since specific legal barriers existed in Western Australia to women entering the legal profession. Just last month, the Supreme Court was privileged to host the Women Lawyers of Western Australia Inc.’s celebration of the centenary of the landmark decision of *re Edith Haynes*⁵. This case is significant in that it marks a turning point in our national history in terms of the legal recognition of women.

² Australian Law Reform Commission, *Equality Before the Law: Women’s Equality*, Rep. No. 62 (II) (1994), at p. 23 (hereinafter “ALRC”)

³ See the Commission’s findings on property division in the Family Court of Australia; *ibid* at p. 25

⁴ *Id* at p. 22

⁵ [1904] 6 WAR 209

Since the passage of the *Women's Legal Status Act* of 1923, women have been permitted to be admitted as legal practitioners. I am very proud of the fact that this legislation was introduced by my Great Aunt Edith Cowan, then the member for West Perth. Until that time, the provisions in the *Legal Practitioners Act 1893* (WA) pursuant to which "a person" possessing the necessary qualifications was entitled to be registered as an Articled Clerk and that "every person" possessing the necessary qualifications was entitled to apply for admission as a legal practitioner, were interpreted as applying only to men. The principle decision on the interpretation of the provisions was *re Edith Haynes*, Edith Haynes had been registered as an Articled Clerk. In 1904 she sought to be admitted to her examination. The Barristers' Board refused her admission on the ground that women were not eligible.

Courageously, Edith determined to challenge this decision. She obtained an order from the Supreme Court, requiring the Barristers Board to show cause why an order of mandamus should not be issued requiring it to permit her to sit her examination. The return of the administrative order was heard by the Full Court, comprising Acting Chief Justice Parker, and Justices McMillan and Burnside. The Full Court discharged the order Edith had obtained against the Board. It's reasoning was that while the Act permitted the admission of "persons" this description did not include women. The fact that no other woman had been admitted in the common law world appeared to influence their Honours greatly, perhaps more than a strict application of the principles of statutory interpretation would warrant. This argument was seen to be considerably more weighty than the enactment of the Interpretation Act in 1893 which provided that the word "person" meant both "man" and "woman". The Full Court solemnly held that the word "person" in the *Legal*

Practitioners' Act did not include women. The Acting Chief Justice of the day said:

"The idea of women practicing in the Supreme Court seems to be quite foreign to the legislation which has prevailed for years past, not only here but in the Mother Country. ... I am not prepared myself to create a precedent by allowing the admission of a woman to the Bar of this Court."

We can only imagine how devastating it must have been for Edith Haynes to hear that as far as the Legal Practitioners Act was concerned, she lacked the status of a “person”, suffering apparently from the disability of being a person of the female gender, who, like infants, and others suffering from a disability, could not be entrusted with the heavy responsibilities and duties required of legal practitioners.

The *Women's Legal Status Act*, introduced in 1923, contained only one substantive provision. The Act provided that:

*"A person shall not be disqualified by sex from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from being admitted and entitled to practice as a practitioner within the meaning of that term in the Legal Practitioners Act 1893, or from entering or assuming or carrying on any other profession, any law or usage to the contrary notwithstanding."*⁶

Edith Cowan, the State's first female member of Parliament, introduced this Act as a private member's bill. To read the Hansard debate relating to the Bill shows us just how tenacious, clever and

⁶ s. 2, *Legal Status of Women Act 1923* (WA)

determined our first female Parliamentarian was. Despite this groundbreaking legislation, it took a further seven years before the first woman was admitted to the roll of practitioners, when Alice Cummins was admitted in 1930.

Edith Haynes began a revolution which continues today. Four women now hold office as Judges of the Supreme Court of Western Australia. In addition to the Chief Judge, five women are now members of the District Court, and seven women hold office as Magistrates. Two out of five judges of the Family Court are women, and four women sit as Family Court magistrates. More than 50 percent of law graduates are women. The right of women to practice any profession, trade or vocation is now beyond doubt.

Despite these significant advances, Edith Haynes' challenge has yet to be completely met. Equal opportunity for women lawyers, and women in our legal system remains elusive. Only 10 percent of all members of the Independent Bar are women, and partnerships in firms, particularly large firms, are heavily dominated by men. Structural inequalities, and particularly the lack of availability of part-time work in private practice militate against the advancement of women in the profession.

In the context of finding employment in the legal profession, we now mark the 20-year anniversary since legislation was enacted to remove informal barriers. Section 11(1) of the *Equal Opportunities Act 1984* (WA) for example provides that:

“It is unlawful for an employer to discriminate against a person on the ground of the person's sex, marital status or pregnancy -

- (a) *in the arrangements made for the purpose of determining who should be offered employment;*
- (b) *in determining who should be offered employment; or*
- (c) *in the terms or conditions on which employment is offered.”*

Section 14 of the Act also makes it unlawful to discriminate on the basis of sex, marital status or pregnancy in determining who should be offered a partnership in a legal firm⁷.

In the context of legal education, women have represented in excess of 30% of all new law graduates since 1977. Between 1984 and 1994, men and women were reported to be graduating in equal numbers from law schools in Western Australia⁸, and this number remains constant today.

Objectively, there is nothing which now prevents women undertaking studies in law, finding employment as articled clerks, being admitted to practice or advancing through the ranks of the profession. In practice, the experience has been significantly different. In 1998, women represented 31% of the profession resident in Western Australia. Women were well represented in the lower levels of the profession representing 44% of employed solicitors. Women however remained significantly under-represented in terms of membership of the bar and as partners in firms, traditionally the areas from which judicial appointments are made, representing only 8% and 13% respectively⁹. In New South Wales, 50% of practitioners admitted are women, yet only 10 of the 330 Silks are

⁷ Subss. 14(1) and (2), *Equal Opportunities Act 1984* (WA)

⁸ The Hon Justice Gaudron, Speech to launch Australian Women Lawyers, Australian Legal Convention, 19 September 1997; The Hon DK Malcolm AC, *Report of Chief Justice's Taskforce on Gender Bias*, (1994), p. 75 (hereinafter "Gender Bias Taskforce")

⁹ "Composition of the Practising Profession in Western Australia as at 30 June 1998" provided by the Legal Practice Board of Western Australia. The percentages are calculated according to the numbers of practitioners resident in Western Australia.

female. The experience is the same in the United States. In the 500 major law firms throughout the United States, only 14% of the partners are women even though women represent 39% of staff attorneys and 43% of summer or vacation clerks¹⁰. By comparison, only 14% will become partners. On the other hand, 73% of women are working as employed solicitors compared with only 29% of men.

The fact that women remain over-represented at lower levels of the profession would suggest that there is some sort of “bottle-neck”, in the context of the advancement of women in the profession, somewhere between admission and appointment to the bench. The most glaring current example of this is the composition of the High Court, which lost the Hon Justice Mary Gaudron in 2003, and has now returned to its previous bench of seven men. Justice Kirby is not alone in hoping that the next appointment will be a woman¹¹, as the former President of the Australian Women’s Lawyers Dominique Hogan-Doran noted that there had been no women appointed, although there had been seven more appointments since Justice Gaudron was appointed in 1987.

The statistics on the appointments of women to senior judicial positions are equally revealing, bearing in mind the figure of 50 per cent of the graduates Universities being female. On a Commonwealth level, as mentioned, there are no representatives on the High Court bench; females comprise only 13 per cent of the Federal Court Judges; and 16 out of the 51 Family Court Judges are women. In Western Australia, there is an average representation of 1 out of every 5 members of the judiciary being female at all levels of jurisdiction, including the Supreme, District and Magistrates Court. However, it is distressing to note that out of a total of

¹⁰ “Women in Major Law Firms”, *ABA Journal*, March 1997 at p. 14

¹¹ Hon Justice Kirby, “Women in law: doldrums or progress?” (2003) 171 *Lawyers Weekly* 9

27 Judges sitting in the Supreme Courts of the Northern Territory, ACT, and Tasmania, and the Court of Appeal in Victoria, there is only 1 female Judge¹². Clearly, this reflects an issue which needs to be addressed.

Taskforce

A great deal of work has been done in the last ten years on issues facing women in the legal profession, in particular, those issues which drive women to abandon the law as a career. In 1990, I attended a conference in Edinburgh on the subject of *Equality and the Administration of Justice: Race, Gender and Class*. My interest was raised by a paper by Professor Kathleen Mahoney, who illustrated that the theoretical underpinning of the law was in many instances biased in favour of men. This was demonstrated in the specific application of legal rules and results across all legal subjects, such as tort, contract, criminal law and property law. It was also shown that judges unintentionally or unwittingly or unknowingly reflected a gender bias in their judgments.

Upon my return I proposed the appointment of a Taskforce on Gender Bias to investigate the extent to which gender bias exists in the law and the administration of justice in Western Australia and to make recommendations for its elimination. The 1994 Report of my *Gender Bias Taskforce*¹³ contained 198 recommendations under the headings: education, access to justice, women in the legal profession, appointments to the judiciary, the courts, women as victims, protection of Aboriginal women from violence, particular laws, police officers and punishment of women. The recommendations of the individual sub-committees were found to overlap to a large extent in some areas which would seem to

¹² Australian Women Lawyers (2004) 4 *Themis* March

¹³ The Hon DK Malcolm AC, *Report of Chief Justice's Taskforce on Gender Bias*, (1994), (hereinafter "Gender Bias Taskforce")

indicate the commonality of many of the problems experienced by women.

The 1994 Report suggested that women are confronted with indirect discrimination almost immediately upon graduation. For example, anecdotal evidence received by the Taskforce indicated that in articulated clerkship interviews, older women graduates felt that those interviewing found it difficult to accept that, if the applicant had children, she would be likely to give the firm the commitment required. In the course of its investigations, the Australian Law Reform Commission received a number of submissions which indicated that this practice was widespread¹⁴. Younger women on the other hand reported that they were asked questions concerning their intention to start a family as a method of assessing how long they proposed to stay with the firm. The Gender Bias Taskforce noted that men also leave firms for various reasons but that they were rarely asked how long they proposed to stay¹⁵. In its submission to the Australian Law Reform Commission, the University of New South Wales reported on the results of a survey it had conducted among students who had been interviewed for summer clerkship positions. Twenty-seven percent of women surveyed had been asked whether they had any intention of having children in the future compared to only 3% of men¹⁶.

Where women were successful in obtaining a position with a firm, both direct and indirect discrimination often played a part in the process of promotion. For example, women were often channelled into areas other than commercial law such as welfare or family law. The Gender Bias Taskforce reported that these areas were not considered as

¹⁴ ALRC, *op cit*, para 9.6

¹⁵ *Op cit*, pp. 78-79

¹⁶ ALRC, *op cit*, para 9.7

prestigious or valuable as commercial law. In the context of fee-earning potential, this can be significant, particularly where promotion can be dependent upon a solicitor's ability to meet budgets of "billable time"¹⁷.

Where women do choose to start a family, the perceived difficulties with arranging maternity leave, inflexible work practices and the opposition which greets requests to undertake part-time work were also cited as disincentives to continue with a career in the law. With regard to maternity leave, the *Minimum Conditions of Employment Act 1993* (WA) provides that all employees are entitled to 12 months unpaid maternity leave. Some female employed solicitors have however demonstrated a reluctance to take maternity leave for fear that it will demonstrate a lack of commitment to the firm¹⁸.

In the context of flexible working hours and part-time employment, a 1998 survey conducted by the Young Lawyers Committee of the Law Society found that the majority of articled clerks and solicitors up to their 5th year of practice¹⁹ are expected to work, and do work, up to 10 hours per day, excluding the lunch hour²⁰. Submissions to the Australian Law Reform Commission revealed that women working fewer hours due to family or child care commitments faced the criticism that they were not committed to the firm. One submission suggested that permission to work part-time was merely illusory, reporting that:

"A female practitioner... asked to work four days a week... There was considerable resistance to allowing her to work a shorter week and that it was agreed only on condition that she

¹⁷ *Op cit*, p. 79

¹⁸ Christensen S. & Jenkins K., "Solicitors and Parenthood", (1994) 68 *Law Institute Journal* 689 at 690

¹⁹ Including the year of restricted practice.

²⁰ Young Lawyers Committee, "Conditions of Employment Survey", (1998) 23 *Brief* 15 at p. 17

would work additional hours during each working day to make up for lost time. This practitioner was also expressly told that while she worked a four day week there was no prospect of her advancement to associate level or beyond."²¹

The Australian Law Reform Commission reported that women working part-time may also be subject to criticism from their colleagues were it is perceived, albeit incorrectly, that they are getting an "easy ride"²². The same criticisms have been levelled at members of the independent bar. For example, it was reported to the Gender Bias Taskforce that some male barristers demonstrated subtle prejudice toward their female colleagues arising out of family commitments. One female barrister indicated that she had received negative comments to the effect that she was:

*"[O]nly a part-time housewife barrister because of family commitments."*²³

In the context of judicial appointments, the establishment of part-time offices remains problematic. The legislation dealing with appointment to the bench of the Supreme, District and Family Courts envisages appointment to permanent full-time positions. Part-time appointments may involve practical difficulties including delays in the disposal of cases managed and heard by the Judge. "Family friendly" arrangements in order to deal with family and child care commitments, however, have been negotiated on an individual basis and there is an effort to maintain flexibility wherever possible. With regard to

²¹ ALRC, *op cit*, para 9.12

²² *Ibid*

²³ Gender Bias Taskforce, *op cit*, p. 82

Commissioners, Registrars and Magistrates, part-time appointments already exist.

One issue of considerable concern is that where women stay in the profession and work full-time, they may not receive the same level of remuneration as their male colleagues. For example, the Young Lawyers Committee survey of young Western Australian practitioners conducted last year found that male and female articled clerks were on the same salary levels. As they progressed through the profession however, disparity between salary levels grew until by their fifth year of practice, women were paid up to \$10,000 less on average than men²⁴. On a national scale, on average, Australian women lawyers earn \$20,225 less a year than males²⁵. This disparity is not limited to the legal profession. Figures released in 1999 by the then Acting Sex Discrimination Commissioner revealed that women working full time earn 83% of the average wage of men. This figure falls to 79% when overtime is taken into account²⁶.

These issues are however only symptomatic of what is considered a widespread systemic bias. In a briefing paper to the then Commonwealth Attorney General the Hon Darryl Williams QC, the Australian Women Lawyers asserted that this bias was characterised by widely held stereotypical assumptions about the physical and mental attributes of men and women²⁷. Discrimination remains difficult to detect where the

²⁴ Young Lawyers Committee, *op cit*, at p. 20

²⁵ Hon Justice Kirby, *op cit* 11

²⁶ Cited in Hampel F., *Women in the Legal Profession*, Briefing Paper to the Hon Darryl Williams QC MP, undated, p. 2

²⁷ Hampel F., *ibid*, p. 3

qualities which are required for a particular position are defined by the use of terms such as “merit” or “best person for the job”²⁸.

A number of initiatives have already been undertaken by the Western Australian profession in the wake of the 1994 Gender Bias Report to address the under-representation of women in the senior ranks of the profession. For example, a Committee was formed with representatives from the Law Society and the Women Lawyers Association to identify those forces which drive women to abandon the profession and devise strategies to encourage women to stay. In 1997, the Report was reviewed by the Ministry of Justice and significant progress was reported. In 1998, the Committee reported that it had developed a “mentor programme” which was designed to offer support and advice to young women practitioners²⁹. Later in the year, the Western Australian Bar Council reported that it was concerned at the under-representation of women at the independent Bar. It proposed the establishment of a steering committee to examine strategies and provide advice to the Council on encouraging women to stay at, or join, the independent Bar. I have recently reconstituted a Taskforce, chaired by the Hon Justice Christine Wheeler of the Supreme Court, to conduct a further review to determine what has been achieved, and what still needs to be done.

Examples from other jurisdictions include the New South Wales Bar Association, which initiated an Equal Opportunity Committee (EOC)³⁰ to address problems faced specifically by female barristers. In early 2004, the problem of under-representation of females at the Bar was directly addressed by the Law Council of Australia. On 20 March 2004, the Law Council released a guideline policy entitled the “Model Equal

²⁸ *Ibid*, p. 3

²⁹ (1998) 23 *Brief* 28

³⁰ formerly known as the Gender Issues Committee

Opportunity Briefing Policy for Female Barristers and Advocates”³¹, and this was adopted by the NSW Bar Council in June 2004. The stated objectives of the Policy are to import “equitable briefing practices”, to “maximise choices for legal practitioners and their clients”, to “promote the full use of the Independent Bar”, and to “optimise opportunities for practice development of all counsel or solicitor advocates”. By providing assistance at the early stages and changing the attitudes of solicitors, women are being encouraged to consider themselves in the role of barristers and advocates, which in turn, helps to promote the progression of women in the law, the judiciary and the wider community as a whole.

The most active proponents of the advancements of females in the legal profession are the Women Lawyers Associations, which have offices in all the States and Territories of Australia. I have been closely involved with the Women Lawyers of Western Australia Inc and regularly attend functions for first-year professionals and other members to meet with the judiciary, to assist in their induction as members of the legal fraternity. They had 60 members in their first year in 1982. As of 2002 this had increased to 300, including past presidents who are now members of the judiciary, the Hon Justices Wheeler and Johnson and the new Chief Judge of the District Court Judge Kennedy. The Associations play a great role in promoting the rights of women and their objective of achieving true equality. As Federal Attorney General Darryl Williams said some twenty years ago when still in practice:

³¹ Law Council of Australia (2004) “Model Equal Opportunity Briefing Policy for Female Barristers and Advocates”

“The very existence of the Women Lawyers Association has undoubtedly succeeded in focussing attention on the role of women within the profession”³²

ABORIGINALS: SECOND-CLASS CITIZENS?

The most disadvantaged group in our society are the Aboriginal and Torres Strait Islander peoples. One of the peak representative bodies, the Aboriginal and Torres Strait Islander Commission ("ATSIC"), so recently abolished, made a substantial contribution towards the process of reconciliation and restoring the balance of equality. Its abolition raises significant questions regarding the future of reconciliation and the opportunity for Aboriginal representation at the highest level.

Our indigenous citizens and their children are an underprivileged group who have been subject to a history of discrimination since European settlement some 200 odd years ago. Their plight has been well documented, and from a legal perspective, it is only in the last 30 years that Aboriginals have had a measure of formal equality of status conferred upon them. Given that our indigenous brothers and sisters were the original inhabitants of this land, they were only acknowledged as citizens as a result of the Constitutional Referendum of 1967. It is appropriate to now look back through the evolution of Aboriginal citizenship through the eyes of the law.

³² Taken from *“Women Lawyers Association of WA 20th anniversary celebrations” 2002 Brief 29(3) at 15*

One of the most important issues in the history of Aboriginals under European settlement is the legal and human aspect of citizenship. A 1991 Report on the status of Indigenous Canadians stated:

*"Every society has many distinctive ways and assumptions which are traceable to very deep and implicit convictions about what human life and existence is all about. These implicit convictions are so taken for granted that it is difficult for an insider to know how all other human beings can possibly see the world in any other way. The problems that Aboriginal people have with the criminal justice system are, to a large extent, a result of the implicit convictions of white society embodied in Canadian law. The end result is a clash of two cultures."*³³

In my view the same principles apply to the clash of cultures which commenced when white people first settled in the great south land which came to be called Australia. It continues to this day. It is still the principal issue in European - Aboriginal relationships, notwithstanding the significant changes in perception that have occurred over the past two and a half decades.

Who are the "Australian Aborigines"? For the purposes of this address I shall regard the expression as referring to the Aboriginal and Torres Strait Islander peoples of Australia. There have been and continue to be many definitions or classifications of who is an "Aborigine" or "Aboriginal". Some legislation (for example, the *Aboriginal Affairs Planning Authority Act 1972 (WA)*) and Commonwealth Government administrative programmes use a three part definition to identify Aborigines. The three parts are that the persons concerned are of Aboriginal descent, that they identify themselves as Aboriginal and that they are accepted as being Aboriginal by other

³³ *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta*, Vol 1, Main Report, March 1991, p9-1

Aborigines. However, use of the definition is far from uniform and there are many other statutory definitions.

Today, Aborigines come from many diverse backgrounds and are represented (if under-represented in many areas) in all walks of life. Some have given up traditional lifestyles and traditional connections to the land, others have not; and there are no doubt many variations of lifestyle in between. Consequently, though there are some issues which may be of importance to all persons of Aboriginal descent, they will be more important and relevant to some Aborigines than others.

What is citizenship? On the narrow definition of citizen as "inhabitant", Aborigines have long been citizens of Australia. They certainly have not always been enfranchised inhabitants, but nor have women.

Historically and legally, citizenship in Australia is far more complicated than the textbook definition. Australia's Constitution does not enumerate the rights of individuals. The Australian practice, inspired by the English system, has been to rely on the common law as guardian of individual rights and to retain the absolute sovereignty of Parliament. From a historical perspective, in the British Empire, citizenship was originally governed by the common law. Later, citizenship, or rather, who was considered to be a citizen, became the subject of legislation.

Implications of *Mabo*

Although until the *Mabo*³⁴ decision it had never been specifically judicially determined, it seems to have been generally accepted that, under British law, Aborigines became British subjects on the progressive

³⁴ *Mabo v Queensland* (1992) 66 ALJR 408

assumption of British sovereignty over the Australian colonies in 1788, 1824 and 1829³⁵ (sovereignty over the Torres Strait Islands, including the Murray Islands the subject of the *Mabo* case, was assumed in 1879³⁶). However, the principle was not universally accepted and may have represented the theory more than the practice.

In the *Mabo* case, the High Court made it clear that the Aborigines, upon the assumption of sovereignty over Australia by Britain, acquired the status of British subjects, owed allegiance to the Imperial Sovereign and became entitled to such rights and privileges and subject to such liabilities as the common law and applicable statutes provided³⁷.

Although it has been recognised by the High Court that Aborigines became British subjects when Australia was settled, this does not alter the history of the actual socio-economic status of the Aborigines since colonisation, about which much has been written in recent years. While in the eyes of the law Aborigines may have been equal in all respects to other British subjects, this tended to be the theory rather than the practice, though in the early days of the colonies there were some genuine attempts to treat Aborigines equally³⁸ - under the British system.

What has British subject status and Australian citizenship meant for Aborigines? Although the theory was that Aborigines were "entitled to such rights and privileges and subject to such liabilities as the common law and applicable statutes provided", in practice the Aborigines were treated far differently to their fellow British subjects.

³⁵ Reynolds, *Dispossession: Black Australians and White Invaders*, Allen & Unwin, 1989, pp182-3

³⁶ *Mabo*, p412

³⁷ *Mabo*, see, for instance, Brennan J at p420

³⁸ Russell, op cit, ch30

At the time of European colonisation in 1788 the Aboriginal population was estimated to be between approximately 300,000 and 1,500,000 persons. There were perhaps 500 tribes, who spoke more than 700 dialects and languages, and lived in scattered groups throughout the Australian continent. In *Their World of the First Australians* (1964) Professor and Doctor Berndt undertook a comprehensive survey of traditional Aboriginal culture. It is clear from their work that the complexity of the Aboriginal society was not recognised by Europeans at the time of first colonisation in 1788. Many Australians still have difficulty accepting it now. The Aboriginal system of law prior to British colonisation was reviewed in *Milirrpum v Nabalco Pty Ltd*³⁹. *Milirrpum* involved a claim by a group of Aboriginal people in the Northern Territory, citing the authority of the common law, to a proprietary interest in certain land. They were unsuccessful. Blackburn J said of the Aboriginal system of law in the Northern Territory at the time of colonisation that:

"It shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a Government of laws' and not of men it is that shown in the evidence before me."

By 1888 many tribes had been destroyed after conflict with European settlers. The traditional way of life had largely disappeared, except for a few isolated groups. The population had been reduced to approximately 60,000 by a combination of killing by settlers and the effect of introduced diseases, poverty and neglect. At the beginning of the 20th century most Aboriginal people still lived in the bush or in rural

³⁹ (1971) 17 FLR 141 at 267

areas. The Aboriginal population reached a numerical low point in the 1920s but has continued to show growth since 1930⁴⁰.

Under the doctrine of *terra nullius*, now overturned by the High Court in the *Mabo* case, Aborigines were effectively dispossessed of land which they or their ancestors had occupied for over 40,000 years. This occurred notwithstanding the finding of the House of Commons Select Committee on Aborigines (British Settlement) in 1837 that "the native inhabitants of any land have an incontrovertible right to their own soil: a plain and sacred right, however, which seems not to have been understood."⁴¹

The 1967 Constitutional Referendum gave the Commonwealth Government concurrent power with State governments to make laws for Aborigines. It took until the 1967 Referendum for Aboriginal people to finally be recognised as full citizens of Australia under the law. Then, from a position of having very few of the rights, freedoms and privileges available to other citizens, Aborigines were, in the space of a few years, handed a plethora of them. They were, however, given precious little assistance or guidance in adapting to their new status. There was no planning for the transition from non-citizens to citizens. Aborigines were suddenly given the opportunity to be a citizen on equal terms as every other European Australian, but the playing field was nowhere near level.

Until the 1967 Referendum, Aborigines were excluded from the census of national and state population and had no right to consume alcohol. In general Aborigines had no right to vote in Commonwealth

⁴⁰ Howe, KR, *Race Relations - Australia and New Zealand: A Comparative Survey 1770-1970*, p62

⁴¹ Stephenson, MA, and Ratnapala, S (Eds), *Mabo: A Judicial Revolution*, University of Queensland Press, 1993

Government elections until 1949 when the government amended the *Commonwealth Electoral Act* so that Aborigines who were entitled to vote in State elections could vote in Commonwealth elections. This meant that Aborigines in New South Wales, Victoria, South Australia and Tasmania could vote. In 1962 the Commonwealth Government extended the franchise to all Aborigines, as did the governments of Western Australia and the Northern Territory. Queensland followed suit in 1965.

Generations of Aboriginal children were removed from their parents in infancy and raised in orphanages or similar institutions. Aborigines were not entitled to receive the same wage or social security benefits as non-Aboriginal persons. While the position of the Aboriginal people under the law has in some respects dramatically improved since the 1960s they still constitute a seriously disadvantaged minority. Infant mortality among the Aboriginal population is high and proper nutrition in childhood low. In an address to the Australian College of Physicians in 1969 Doctor H C Coombes said that an Aboriginal baby born in that year:

"If it reaches the teenage years, it is likely to be ignorant of and lacking in sound hygienic habits, without vocational training, unemployed, maladjusted and hostile to society; ...

*If it reaches adult age it is likely to be lethargic, irresponsible and above all poverty stricken - unable to break out of the iron circle of poverty, ignorance, malnutrition, ill-health, social isolation and antagonism."*⁴²

This was echoed in a report in the Sydney Morning Herald in 1988:

*"In short, an Aborigine is much more likely than other Australians to be in one or more of the following states: sick, unemployed, uneducated, poor, imprisoned or dead."*⁴³

⁴² McConnie, KR, *Realities of Race*, p145)

⁴³ Pattel-Gray, op cit, p13

What does Australian citizenship mean for Aborigines today? Over 31% of Aborigines are homeless or living in inadequate accommodation. In surveys conducted during 1998 – 2000, it was revealed that life expectancy of Aborigines was some 15-20 years shorter than that of non-Aboriginal Australians and the infant mortality rate was around 4 times that of non-Aboriginal Australians. The ratio of Aboriginal people with post-secondary qualifications is less than one quarter of the national figure. Unemployment among Aborigines is six times higher than for white Australians and on average Aborigines earn half the income of other Australians⁴⁴. The *Alberta Task Force* considered that in Canada:

*"The social problems experienced by Aboriginal people are a result of the socio-economic conditions of impoverishment they face. Alcoholism, poor health, poor education, dangerous and unsanitary housing and unemployment are symptoms of powerlessness. They are not the causes of it."*⁴⁵

The parallel with Western Australia is obvious.

Criminal Justice System

In terms of the criminal justice system, which is the area with which I am most familiar, the situation is equally as bleak.

In Western Australia, although the Aboriginal population is less than 3% of the total population of the State, Aboriginal people represented more than 32% of the prison population during the 1980s. This was initially found to be the case by the *1981 Report of the Committee of Inquiry into the Rate of Imprisonment in Western Australia*. The Committee of Inquiry found that Aborigines were "grossly over-

⁴⁴ Australian Bureau of Statistics, "The ABS and Indigenous Statistics" <http://www.abs.gov.au>

⁴⁵ *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta*, Vol 1, Main Report, March 1991

represented in the Western Australian prison system". This gross over-representation of Aborigines in Western Australian jails has not diminished since 1981. The rate of imprisonment of Aborigines in 1987-1988 was 20 times more than that of the general population⁴⁶. Two-thirds of those sentenced had served previous sentences. Aborigines are grossly over-represented in respect of all offences, but particularly those attracting short sentences and, especially those involving breaches of the liquor laws. Many Aborigines find themselves in prison having committed grievous bodily harm while under the influence of alcohol. These represented nearly 39% of offenders on short-term sentences in 1987-1988. This was distinctly highlighted in the *Report of the Royal Commission into Aboriginal Deaths in Custody*⁴⁷.

Current statistics tell a similar story. Arrest rates for Indigenous juveniles have steadily increased over the last decade, even moreso amongst adult females who had a higher proportion of arrests than their male counterparts. In 2002, approximately one in every four persons arrested was Indigenous, and alarmingly, nearly 50 per cent of all juveniles arrested were Indigenous. The statistics are damning when it is revealed that in 2002, Indigenous people were over ten times more likely to be arrested by the police than were non-Indigenous people⁴⁸. This is compared to just 1.3% of the non-Indigenous population. An Aboriginal person is also 28 times more likely to be imprisoned than a non-Aboriginal person. Western Australia also exceeds all other States, as well as the Northern Territory, in terms of imprisonment rates for Aboriginal people. This amounts to a gross over-representation of

⁴⁶ Walker, J, *Prison Sentences in Australia - Estimates of the Characteristics of Offenders Sentenced to Prison in 1987-1988*

⁴⁷ Australia, Royal Commission into Aboriginal Deaths in Custody (Commissioner Elliott Johnston QC), *National Report: Overview and Recommendations*, 1991, para 13.1.2)

⁴⁸ Fernandez J and J Loh (2003) "Crime and Justice Statistics for Western Australia: 2002" The University of Western Australia, Crime Research Centre at 44.

Aboriginals in the criminal justice system, and the current statistics reflect how poorly we have assisted Indigenous people in terms of integrating two vastly different legal systems and cultures.

The *Alberta Task Force* considered that:

"The criminal justice system can be made more sensitive to the needs of Aboriginal people. However, no meaningful or everlasting change can be made to the involvement of Aboriginal people with the criminal justice system without an integrated and comprehensive approach to improve the socio-economic factors which contribute to the problems."

The Royal Commission into Aboriginal Deaths in Custody recommended the development of cross-cultural awareness programmes for the judiciary. It must be remembered that one of the most important tools used to redress inequality is education. In November 1992, accompanied by the former Justice Seaman, I attended a meeting of representatives of Aboriginal people and representatives of the judiciary in Melbourne under the auspices of the Australian Institute of Judicial Administration (AIJA) agreed on the core content of such programmes and a strategy for their development and presentation. A proposal for a pilot programme developed for the Supreme Court of Western Australia by the Centre for Aboriginal Studies at Curtin University was adopted as the pilot for a national programme.

Although the funding offered for so large a project was small, it was the view of the Council of the AIJA that, whatever the difficulties, Recommendation 96 of the Royal Commission was of such importance that the project should be undertaken in any event. The result was a very successful Aboriginal Cross-Cultural Awareness Training Programme that was run as a national pilot programme for the Judges and Masters of the Supreme Court of Western Australia in May 1993. The programme

was subsequently extended throughout Western Australia and was adopted by the AIJA as the model for programmes to be delivered throughout Australia with funding provided by the Commonwealth Attorney-General's Department. Similar programmes have been conducted throughout Australia on a continuing basis.

To complement the cross-cultural awareness programmes that have been developed for the judiciary in Western Australia, an *Aboriginal Benchbook for Western Australian Courts* was launched in May 2002. For some time the Supreme Court had been endeavouring to gather information to be included in a Benchbook for Judges identifying cross-cultural issues that may arise in the course of the conduct of trials involving Aboriginal people and, in particular, in criminal trials involving Aboriginal accused persons and Aboriginal witnesses. By addressing the concerns of Aboriginal people in dealing with the justice system, the *Benchbook* aims to encourage confidence in the ability of the law and the Courts to remain sensitive to community concerns and human rights issues. I also initiated a call for a specific position to be created for an Aboriginal Community Liaison Officer for the Courts, who assists in bridging the gap between Indigenous people and the legal system. This position has been ongoing since 1993. The Officer is a member of my personal staff. I have also been privileged to have been involved in informal discussions with various Aboriginal leaders and others on the ways and means of bringing together the various disparate groups of Aboriginal people in the Perth metropolitan area in an attempt to develop a united approach, both to reconcile the various factional groups among the Nyungah and others in the area among themselves, as well as to reconcile relationships between the metropolitan Aboriginal peoples, on the one hand, and the remainder of the community on the other. More

than ever before, members of our judiciary are striving to help level the playing field and provide Aboriginal people with an easier access to justice.

The High Court recognised in the *Mabo* case, both the status of Aborigines as the original or indigenous inhabitants of Australia and their continuing native title to some land. Most non-Aboriginal Australians still do not, or perhaps cannot, comprehend the significance of land to Aboriginal peoples. In this sense little has changed since colonisation of Australia, of which time it has been said:

*"...Aboriginal society was not only distinct from that of the Europeans but it did not even conform with the European concept of primitive societies. Settlers were not aware that the Aborigines had a spiritual link with the land that went far beyond the European's concept of land as an exploitable object for obtaining food, shelter and status. This led to many misunderstandings when the Aborigines tried to retain their traditional practices."*⁴⁹

In the *Mabo* case the majority of the judges of the High Court concluded, thereby changing Australian law, that Aborigines retain a native title to certain land which they occupy and have a traditional connection to if no other citizen has an interest in the land and if the land has not been appropriated, granted or otherwise alienated by the Crown . The *Mabo* decision created a constructive opportunity for a significant advance in the reconciliation of Aboriginal peoples with the wider Australian community. This was followed up by the *Wik*⁵⁰ decision, and the enactment of the *Native Title Act 1993*, which further empowered Aborigines with rights they have never possessed before. Whilst this had

⁴⁹ Stannage CT (Ed), *A New History of Western Australia*, University of Western Australia Press, 1981, p80

⁵⁰ *The Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors*, Matters No B8 and B9 of 1996.

the potential to again prove divisive, the inexorable connection of Aboriginals to their land being recognised in our peak legal jurisdiction is a great starting point to help non-Indigenous Australians understand how rich and unique the culture of the Indigenous Australian truly is. In the eyes of the law, one of the strongest indicators of the indigenous communities' united front is the formal recognition of their unique connection to the land, and specifically, native title. There is also a role for governments here to reconcile the aspirations and interests of all parties who deal with native title. The process for recognition of native title provides a larger scale precedent for the process of reconciliation and recognition of the Aboriginal culture within the wider community.

Another question raised by *Mabo* is the possible application of Aboriginal customary law - did native law survive with native title and should it be applicable to Aborigines? This is currently receiving a lot of attention in the press, but time does not permit me to analyse this topic in full.

It is often argued that making special provision for indigenous people, as by providing an Aboriginal Legal Service or funding such a service, infringes the principle of equality before the law and is discriminatory. Experience in the United States and Canada strongly suggests that the principle of equality before the law is consistent with special treatment of indigenous peoples, for whom there is a specific constitutional responsibility.

Making special provision for Aboriginal peoples is not, in my view, a means of appeasing or expiating guilt. It is predicated on a recognition of historical fact, coupled with a genuine desire to justly rectify, as far as is possible, the disadvantages suffered by Aboriginal

people as a consequence of the facts of history. The legacy of history has left them in a position of inequality. They are not equals.

What needs to be recognised is that treating unequals equally can infringe the principle of equality before the law as much as by treating equals unequally. In this respect I note that the *Alberta Taskforce Report* published in April 1991 under the Chairmanship of the Hon Mr Justice Robert Cawsey of the Supreme Court of Alberta, commences with a quotation from *The Sacred Tree*, namely:

"The final lesson ... is the lesson of balance, for wisdom teaches how all things fit together. And balance, when applied to the interconnectness of all human beings, becomes justice. With its aid, the traveller can see all things as they really are. Without it, there can be no peace or security in the affairs of the world."

The Aboriginal peoples of Australia will become not only full citizens of Australia in law but also full citizens in fact when they and all other members of the Australian community have learned sufficient about each other to learn the lessons of balance and the interconnectedness of all human beings. There is much to be done to redress the inequalities and disadvantages which our indigenous peoples suffer. In a year in which we celebrate 175 years of European settlement in Western Australia, we need to revisit once again the development of programmes and policies designed to address the disadvantages of our indigenous population and provide them with equal opportunities for education and advancement so that they can achieve not only citizenship but also true equality.