OPINION

TIME FOR A CHANGE

The inaugural *Alternative Law Journal* features 'scarlet' issues. Our intention is to highlight concerns generally ignored by mainstream law journals and to provide an alternative perspective. Very often it is the disadvantaged, the 'underdogs' and the victims in our society who reveal the most valuable insights into the way we structure our world and set the agenda for reform. Provided we are willing to listen, the experiences of black Australians, prisoners, young people, prostitutes, and the injustices implicit in our responses to those unfortunate enough to have contracted the HIV/AIDS virus have much to teach those of us who aim for a more just and humane Australia.

The controversy surrounding the Victorian case of *R v Hakopian* reached an extraordinary number of Australians. Surprisingly, the public objected to the judge's comments that prostitutes suffer less trauma from rape than do 'chaste women'. The young woman who came forward to report rape and kidnap was subjected to almost three days of vigorous cross-examination. Her bravery should not be forgotten. The case highlights some fundamental issues.

It raises the issue of the relevance of victim impact evidence in sentencing. The views expressed in *Hakopian* were no aberration; in fact, they were moderate by contrast with comments made in similar cases in comparatively recent times. In *Butler v R* [1971] VR 892 at 895, for instance, the victims were described by the Victorian Supreme Court as 'wayward girls of loose moral character, and . . . by no means without promiscuous sexual experience'. This was considered a mitigating factor for the offender who was convicted of a number of sexual offences! It is clear that many myths and moralistic views persist to this day about the criteria properly to be taken into account in the sentencing process.

But the argument is not a simple one. Taking the sexual component out of the debate, what should be done with the 'eggshell skull victim' whose reaction to a non-sexual assault is entirely beyond what could be expected of the 'normal' person? The civil law has an answer, but should it be the same for the criminal law?

Should offenders be held responsible for unexpectedly triggering extreme, hysterical responses in their victims? And what if a victim is extraordinarily stoic and surprisingly unaffected by a very nasty assault which would leave long-term disabling effects for the 'normal' victim? Should the 'fortuitous' bravery and resilience of the victim be a mitigating factor for the offender, in the same way as the opposite should be an aggravating factor? In either case, once the actual effects of criminal activity are taken into account for the purpose of determining appropriate sentence, the possibility of extensive cross-examination of victims of all kinds to determine the reality, as well as the normality, of their reactions to crimes of violence is opened up. The question must be asked: is this really to the advantage of victims?

Another issue highlighted by *R v Hakopian* is the narrow background and perspective of many judges. In response to the public outcry at the judge's and the barrister's comments about classes of rape victims, the Victorian Attorney-General promised the appointment of women judges. 'All male benches', he said, 'are by definition unrepresentative'. The question remains — when?

The different perspective of women judges was underlined recently in the Canadian Supreme Court in the landmark decision of Justice Bertha Wilson in *Lavallee v R* (1990) 55 CCC (3d) 97. The decision admitted battered woman syndrome evidence to explain why a female victim of domestic violence could have perceived herself as feeling under sufficient threat from her abusive husband to find it 'necessary' to shoot him in the back of the head. Her Honour rejected the argument that the reactions of women subject to domestic violence were part of jurors' general understanding of human nature, holding that community 'myths' needed to be exploded by expert evidence: 'Long after society abandoned its formal approval of spousal abuse, tolerance of it continued and continues in some circles to this day. . . . If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man"' (114-5).

The history of judicial officers who come from other than the traditional white, male, upper socio-economic stratum shows that creative perspectives *can* be breathed into issues that have long troubled the legal system. However, appointment of more representative judges alone will not cure all the ills. Ultimately the legislature must take responsibility for the quality of the criminal justice system. It is the Parliamentarians who deserve loud censure for draconian legislation drafted by the Labor Governments in Western Australia (dealing with young offenders) and in Victoria (dealing with those suffering from anti-social personality disorders) that authorises internment without trial.

In the Australia of the 1990s the alternative voice is being heard less and less in the clamour of economic rationalism, law and order politics, contracting media ownership and the desperate search for employment. The *Alternative Law Journal* plans to maintain the unique forum developed by the Legal Service Bulletin for views to be expressed which might otherwise be drowned out.

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