ASIO and economic espionage

The new 'subversion'?

Greg Carne

A proposal to allow ASIO to check the commercial backgrounds of government advisers raises concern about privacy and civil liberties.

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Last year, the Joint Parliamentary Committee on ASIO was asked by the Commonwealth Attorney-General to review the organisation's security assessments.[1] ASIO currently screens prospective Commonwealth employees and contractors who may require access in their work to material sensitive to national security interests. The Committee is formally required to:

> . . . review the operation of Part IV of the Australian Security Intelligence Organisation Act 1979 and to report on the manner in which the Organisation performs its function of giving security assessments under that Part, the effectiveness of the procedures established for the purpose of performing that function and the usefulness of assessments so issued.[2]

While the terms of the reference are broad, the Chairman of the Committee in announcing the review placed particular emphasis on the need for some wider powers for ASIO. These would enable the organisation to check the commercial backgrounds of government advisers in sensitive policy areas who could harm Australia economically.[2] Although apparently innocuous, changes required to the current legislative framework for security assessments would have implications reaching far beyond the commercial intelligence sphere. Civil liberty concerns such as privacy, association and expression unrelated to harm to Australian economic interests are potentially affected. This is made more probable in the context of ongoing reforms in an intelligence community reacting not only to financial constraints but also to a volatile international political and trade scene. The consequences for domestic civil liberties in allowing ASIO a commercial intelligence role have to date escaped serious discussion.

Commercial information and security assessments: new dangers for civil liberties?

The current definition of 'security assessment' in the *ASIO Act* 1979 (Cth) is:

> . . . a statement in writing furnished by the Organisation to a Commonwealth agency expressing any recommendations, opinion or advice on, or otherwise referring to the question whether it would be consistent with the requirements of security for prescribed administrative action to be taken in respect of a person or the question whether the requirements of security make it necessary or desirable for prescribed administrative action to be taken in respect of a person . . . [s.35, ASIO Act]

Central to the notion of a security assessment is the concept of 'security', defined in the Act to mean:

> (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
>
> (i) espionage
>
> (ii) sabotage
>
> (iii) politically motivated violence
>
> (iv) promotion of communal violence
>
> (v) attacks on Australia's defence system; or
>
> (vi) acts of foreign interference;
>
> whether directed from, or committed within, Australia or not; [s.5, ASIO Act]

If ASIO's capacity is to be increased to authorise it to conduct security assessments on commercially-related grounds, the first change needed will be to add commercial or economic related activities to the above list

of 'threats' to Australia. Importantly, the s.5 definition of *security* is the key to ASIO's major statutory functions. These functions enable ASIO to obtain, correlate, evaluate, communicate and advise on intelligence matters relevant to and relating to *security*. (s.17, ASIO Act). Therefore, *if* commercially related information pertaining to individuals and organisations were included in the definition of *security* (s.5, *ASIO Act*), the broader *security functions* (s.17, *ASIO Act*) would *also* be greatly enhanced. Indeed, to sever the nexus between the two uses of *security* – that is to conduct *security* assessments and to obtain, correlate, evaluate, communicate and advise *in relation to security* – would be both anomalous and contradictory. The narrower *security* objective of controlling Commonwealth employee and contractor access to information to those *security*-vetted by ASIO is a smaller part of the broader *security functions* of ASIO set out in the legislation. This includes advice given to Ministers and authorities of the Commonwealth in respect of matters relating to security (s.17(c), *ASIO Act*). This of course includes employment-related advice.

It is arguable that the potential for abuses of civil liberties would be increased. The likelihood of this would be affected by how tightly defined the collection and use of commercially related information would be under any amendments that may be proposed by the Committee. Any expansion of the charter of a largely clandestine organisation with surveillance and intelligence functions and with the added capacity to influence employment opportunities in its recommendations to Commonwealth departments must be viewed with caution. At worst, the flexibility, imprecision and breadth of concepts such as 'commercial background' recall the abuses engaged in by ASIO when its remit included 'subversion', a term interpreted as justifying the otherwise improper intrusion into lawful political activity.[4]

To incorporate inherently imprecise concepts within the definition of *security* in the *ASIO Act* would be dangerous and anti-libertarian. People potentially affected by such provisions may be deterred from criticism, debate and controversy, particularly in relation to the dominant commercial policies, including those of economic rationalism. Such expression, all too absent in the 1980s, is vital to the balanced development of public policy matters and essential to address the pressing issues of labour dislocation, de-industrialisation and high foreign debt.

Further, it is arguable that the legitimate national security, economic and trade interests of government can be accommodated within the existing *security* framework. This includes for domestic purposes 'acts of foreign interference' and 'espionage' (s.5, *ASIO Act*). The former refers to overseas inspired interference. To expand the definition of *security* would concede a wider and opportunistic role for intelligence agencies following the collapse of Soviet communism and the evaporation of perceived Cold War threats. A worldwide trend among intelligence agencies is a bid to acquire new and self-sustaining areas of intelligence activity, such as economic and trade information. To the present, the Commonwealth Government has resisted pressure to give increased priority to the collection of commercial and economic data.[5] In other countries such as the United Kingdom, the functions of the Security Service now include safeguarding 'the *economic* well being of the United Kingdom against threats posed by the actions or intentions of persons *outside* of the British Islands' (s.1(3), *Security Service Act* 1989 (UK)). The comments by the chairman of the Joint Parliamentary Committee envisage some form of *domestic* appraisal of commercial data on national security grounds. Australia is already engaged in the collection and evaluation of economic intelligence *overseas* through the Department of Foreign Affairs, the Defence Signals Directorate, the Australian Secret Intelligence Service, the Joint Intelligence Organisation and the Office of National Assessments.[6] From the intelligence community's perspective there is doubtless a compelling logic in extending the domestic agency, ASIO, enhanced powers to conduct commercially oriented intelligence operations.

The political context in which the review has emerged

The proposal that ASIO's security assessments should include information on commercial backgrounds has not arisen in a political and economic vacuum. National economic performance, highlighted by the worst recession for 60 years, has elevated economic and trade policy to the forefront of political debate. Other major responsibilities of government such as health, education, welfare and foreign affairs have been subordinated to the economic equation. The advocacy of a commercial or economic role within ASIO's agenda could amount to a cloaking of the demands of the intelligence community in fashionable political language. In adopting the economic jargon of government, the suggestions acquire an undeserved gravity and urgency commensurate with the proportions of economic crisis.

The orthodoxy of economic rationalism in mainstream politics is allied to the ASIO commercial information agenda. The corollaries of economic rationalism, namely deregulation and government expenditure cuts, compel bureaucracies to justify resource allocation. The security and intelligence community is not immune to this phenomenon. One method of meeting these demands is to reconceptualise and redefine the proper function of a modern intelligence agency. It is interesting to note that the reference to the Joint Parliamentary

Committee comes shortly after Dennis Richardson, the former Chief of Staff in the Prime Minister's office, comprehensively reviewed Australia's intelligence agencies. In ASIO's case, this has led to a projected $10 million budget cut and a staff reduction of 650 in the next few years.[7] The incorporation of economic intelligence naturally supports the goal of organisational survival. It is consistent with the neo-classical role of government of providing an optimal legal framework for private economic actors to participate. It is tailored to the free trade and no tariff assumptions of economic rationalism in the sense that economic intelligence is becoming increasingly vital

in redressing Australia's competitive imbalance on the so-called level playing field of international competition. Indeed, two of Australia's externally oriented intelligence organisations, the Defence Signals Directorate and the Australian Secret Intelligence Service are reputedly devoting a far greater proportion of their resources to the collection of economic and trade information than previously.[8] It may be that ASIO views the role of gathering domestic economic information as complementary to these new emphases. Equally, it may possibly also be an instance of intelligence agency rivalry.

A prospective broadening of ASIO's charter to include commercial information and its potential to diminish individual privacy and other civil liberties is similar to other incursions justified on economic grounds. The erosion of privacy instituted by Commonwealth interdepartmental data matching programs and the expansion of the tax file numbering system beyond limited original purposes have consistently been supported on the grounds of eliminating fraud and reducing expenditure.[9] A recurrent feature of the economic rationalist state is the coincidence of the reduction of government responsibilities and increasingly insidious measures of control required to ensure that change is successfully implemented. Commercial vetting for employment and for wider intelligence purposes is merely a more sophisticated indicator of this trend. It is unlikely, based on recent experience, that civil liberties values will be given their proper status in any commercial intelligence debate. This is for the simple reason that these values are antipathetical to the quantifiable monetary values of economic rationalism.

If these arguments appear fanciful, then two examples highlight the capacity of the intelligence community for creative expansion of its activities. The first is the reported reclassification of terrorism by the then head of the security division of the Commonwealth Attorney-General's Department, as merely 'the indiscriminate use of violence against the public'.[10] This suggests a very liberal disposition to construing ASIO's functions in relation to *security*. Ministerial responsibility for ASIO rests with the Commonwealth Attorney-General who receives communications from ASIO through this very officer. Second, the 1986 amendments to the *ASIO Act* facilitate a far greater degree of ministerial control. This takes the form of Ministerial Directions to the Director General of ASIO in the performance of the organisation's functions and exercise of powers, including those involving issues of politically motivated violence (ss.8(1)-(2), 8A(1)-(2), *ASIO Act*). In 1988 new guidelines on politically motivated violence were tabled in Parliament. These stated that acts of violence or threats of violence are not a necessary pre-condition to invoking ASIO's *security* functions.[11] Precedents therefore exist for powers to be broadened imaginatively without direct Parliamentary approval. This runs contrary to the need to define rigorously the limits of surveillance expressed by the Hope Royal Commission on Australia's Security and Intelligence Agencies.[12] Such restraints are vital if a society is to remain truly free and democratic. Expansionary motives cannot be completely dismissed in the claim for a commercial intelligence role for ASIO.

Commercial information and 'subversion': fresh opportunities for politically motivated surveillance?

A striking similarity exists in the ambiguity, flexibility and subjective character of the concepts 'subversion' and 'commercial information'. Prior to 1986, the inclusion of *subversion* within the *ASIO Act* enabled ASIO to monitor and adversely record any political expression dissenting from the conservative paradigm. The expression of reformist views was seen as subversive.[13] In other words, a capacity to 'pry virtually at will'[14] existed. The 1985 Hope *Royal Commission on Australia's Security and Intelligence Agencies* recognised these dangers to political expression and the corresponding risk that party political advantage could be advanced under the guise of national security.[15] It concluded:

> that there is substance in the proposal to do away, in the definition of 'security', with the separate categorisation of activities under the heading of 'subversion'. As I previously pointed out, subversion is not the name of any common law or statutory offence. The word has produced much adverse reaction and may also, by its vague overtones of anti-government activity, tend to mislead people as to the nature of the activity which ASIO is intended to investigate.[16]

The 1986 reforms removed *subversion* from the definition of *security*, and focused instead on actual or prospective violence on politically motivated grounds (ss.4 and 5, *ASIO Act*). A recognition of the right to engage in lawful advocacy, protest or dissent without attracting ASIO's security functions was also introduced into the Act (s.17A, *ASIO Act*).

Inherently vague and inexact concepts as 'commercial background' and 'economic information', however defined,

carry with them *a risk* of reviving many of the problems once associated with the concept of *subversion*. These words could incorporate a range of matters from personal indebtedness, financial, taxation, social security, income, expenditure and consumption patterns, employment and business history and associations to personal beliefs and opinions on government economic policy and management, economic theory and the state of the political economy. The danger is surveillance could quite readily extend beyond the *intended* concept of commercial background. The detail and quantity of information able to be acquired under such a provision are potentially limitless because commercial and economic matters have such all-pervasive links to individuals and institutions.

The adaptability of these concepts could unwittingly encourage some of the abuses engaged in by ASIO at the height of the Cold War: the monitoring and recording of reformist opinion and activity. The new imperatives come from the intensely competitive world trading environment, exacerbated in Australia's case by a highly elastic demand for unprocessed commodity and mineral exports, threats to traditional markets and an artificially high dollar. Policy makers can see the temptation of redressing some of the failings of economic rationalist policy by recourse to the medium of economic intelligence. More remarkable, however, are the parallels between current intelligence thinking and the original responses to the perceived menace of world hegemonic communism.

The persistence of economic rationalism in propounding the economic freedom of market competition and its unwillingness to countenance divergent views has McCarthyist tendencies. Michael Pusey in his book *Economic Rationalism in Canberra: A Nation Building State Changes Its Mind*[17] has documented how the proponents of this theory have attained a dominant role in the key economic departments of the Australian Public Service. They have thereby reshaped the nation's political and economic agenda. The real risk of conferring even a limited domestic commercial and economic intelligence role on ASIO is that the organisation could then become the co-opted instrument of this powerful bureaucratic elite. Its intelligence role could incidentally touch on political diversity and dissent from the prevailing economic orthodoxy. Its subjects could be trade unions or policy makers who oppose, for example, labour deregulation or removal of tariff protection for industry. Targets could also include those enterprises which prefer a more co-operative and participatory approach to workplace reform. Presumably this would have been even more likely had there been a change of government. It is possible, even if not probable, that these matters could become relevant for the purposes of a *security* assessment or for *security* functions in general.

A similarity also exists between the present fragmentation of common trade, economic and defence alliances between Australia and its traditional allies and the expansionary policies of a former ally, the Soviet Union, immediately following the conclusion of the Second World War. Anxieties associated with this prompted Australia's signing of the UKUSA intelligence sharing agreement in 1947, the establishment of ASIO in 1949, the Menzies Government's legislation and referendum to ban the Communist party in 1951 and the Petrov Affair in 1954. The risk today is of a comparable legislative and executive overreaction to an intense and disorientating period of economic adjustment where old allies become new trade enemies. Part of this reaction necessarily impinges on civil liberties and the rights to belief and expression. The threat is in an expeditious and unconsidered reworking of the intelligence function in pursuit of international economic advantage. The threat is real because of a rapidly changing and unfamiliar international environment where the '. . . flows of trade finance and technology are shaping the power realities and politics of the new era'.[18]

Conclusion

A historical survey of the intelligence and security functions of ASIO reveals a tradition of politically motivated surveillance, reined in only by the 1979 and 1986 reforms instituted in the wake of the First and Second Hope Royal Commissions.[19] Advances made in accountability and in narrowing the statutory definition of *security* would be seriously compromised if ASIO was given authority, however limited, to enter the field of domestic commercial and economic intelligence. The present legislation offers ample scope to deal with the domestic aspect of foreign interference directed towards affecting governmental processes (presumably also including economic and commercial matters) and like acts otherwise detrimental to the interests of Australia (s.4, *ASIO Act*). An expanded *security* role of the kind discussed in this article is but a modernised version of the old subversion menace. In its economic guise this once envisaged:

> . . . the manipulation of trade unions and other groups so as to create industrial and commercial chaos, the manipulation of the money supply and other circumstances to create and assist in bringing about a similar chaos, and the infiltration of the government and other areas of constitutional power by persons dedicated to overthrow of the constitutional system.[20]

Justice Hope took the view that, in the absence of violence or foreign interference, these types of activities that might be considered in the broadest sense to undermine the established order, are *not* the proper work of a security service.[21] It is better to leave them to be resolved in the general social and political process.[22] The interests of freedom of opinion and expression, and the interests of Australia's economic future, demand that the Parliamentary Joint Committee should carefully heed his advice as it conducts the review.

References

1. The terms of reference to review security assessment procedures under Part IV of the *ASIO Act* 1979 (Cth) were initially referred to the Committee on 24 July 1992. See also *ASIO Report to Parliament 1991-1992*, AGPS, Canberra, 1992, p.53 and Metherell, M., 'Commercial Espionage a new risk: ASIO review', *Age* 4.8.92, p.10.
2. Parliamentary Joint Committee on ASIO, *Review Into Security Assessment Procedures Terms of Reference*.
3. *Age*, 4.8.92, p.10.
4. Royal Commission on Australia's Security and Intelligence Agencies, *Report on the Australian Security Intelligence Organisation*, AGPS, Canberra, 1985, (the *Second Hope Report*, Robert Marsden Hope, Royal Commissioner), p.45 (hereafter referred to as *Hope* 1985); Bowman, D., 'Can the ASIO Revolution Last?', (1989) *Australian Society*, November p.23; and Pemberton, G., 'Empire of Fear', (1989) *Australian Society*, November p.58.
5. Metherell, M., 'ASIO faces staff cut in espionage shake-up', *Age*, 22.7.92, p.1 and 'Cuts in spy force mark a new approach', *Age*, 25.7.92, p.19.
6. See Metherell, M., 'Intelligence: from cold war to hot economies', *Age*, 22.5.92, p.13 and The Analyst, 'Spy vs Spy – The Renaissance of Economic Espionage', (1990) 5 (46) *Australian Journal of Mining* 23.
7. *Age*, 25.7.92; Metherell, M., 'Russia still spies on us: ASIO', *Age*, 27.11.92, p.16.

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The farmer and his wife

(Hey ho the dairy goes)

Malcolm Voyce

When farm marriages fail should husband and wife receive an equal share of the family farm?

In November 1992 a Joint Select Committee (JSC) of the Australian Parliament handed down a report on the *Family Law Act* 1975.[1] While the press ran stories about the report's recommendation that a 50/50 division of property be a starting point for Family Court property proceedings, little media coverage was given to the recommendations concerning the division of the family farm following divorce.

In short, the JSC recommended that the *Family Law Act* 1975 be amended to enable the Family Court to distinguish farming properties from other matrimonial property so that, in addition to other matters, the court is able to consider:

- whether the farming property was brought into the marriage by one or other party or whether it was acquired by both parties and developed after the marriage;
- the necessity for the retention of a farming property as an income-producing unit for the future needs of the separating family.

It is clear from the *Family Law Act* that the same provisions currently apply regardless of the nature of the property or the financial resources of the parties. This approach was reaffirmed by the Full Court in *Lee Steere v Lee Steere* (1985) FLC 91-626 at 80,076.

One instrumental reason advanced by the JSC for treating farming land differently was that a farm includes not only a dwelling but a business so that, should an order be made, the future productive capacity of the farm could be affected and the farmer could be deprived of his or her income and means of earning a livelihood (JSC 11:46). The sale of a farm may be the result in many cases as often farms are highly mortgaged and the male farmer has little room to move financially towards raising more money. Furthermore, both the older and younger generations could suffer as retiring parents may still depend on the farm for income while younger children may be deprived of the opportunity of inheriting the farm.

More fundamental to the JSC's reasoning seemed to be the 'greater emotional element' in proceedings relating to rural properties as against other forms of property. Frequently farms have been in the family for several generations and great attachment has built up towards the property which represents not only an income but a way of life. In many cases there is a perception that the land is a 'kind of trust or as if an entail – to be passed on to oncoming generations'.[1a]

The claim that farmers and their farms should be given special consideration is based on beliefs about the nature of family farming and the intrinsic values of its people and their way of life. In the political context farmers have long espoused the idea that they are a group deserving special consideration in the form of state protection or subsidies.[2]

This article explores the full significance of the JSC recommendations about family farming specifically:

- the position of rural women and the gendered division of farm work;
- the relevance of agrarian ideals or 'country-mindedness' on which the JSC seems to base its recommendations;
- the legislative background to these recommendations;
- the case law up to the Full Court's landmark decision of *Lee Steere v Lee Steere*; and
- the implications of these recommendations.

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The position of rural women in Australia

Farm families have a distinct rural ideology where farming is seen as a male vocation of honest hard work in a situation where self-reliance and independence are valued.[3] Rural life is portrayed as a constant struggle against a hostile nature which has historically been seen as a man's realm where women became background figures in the landscape.[4]

Women are usually regarded as farm hands and helpers rather than farmers.[5] They are frequently invisible despite their legal status as equal partners and their significant labour contribution. However, women's paid and unpaid labour is important in assessing family income especially in periods of economic recession.

Women who marry farmers (particularly non-rural women) in many cases are in a difficult position. They frequently are not told about the web of feudal-like arrangements of which they will soon become part. They may be marrying an agricultural labourer, rather that the 'inheriting son' should a father not leave the son the farm in his will. Moreover, the transfer of the farm itself might be delayed until the daughter-in-law 'settles down' as the parents may be fearful of transferring the farm until the relationship seems stable.

On many farms women are pressured to fit the confines of family tradition where there is a strong ideal that the farm stay in the family. In this process women have traditionally been regarded as vessels (or conduits), typically only receiving a life estate.[6]

One recent survey of farming women confirmed the persistence of very conservative attitudes concerning men and women's work in rural areas. The main feature of this is the prevailing ideology of farming as men's work and the high degree of the involvement of farm women in their husband's job or the family farm. Women frequently saw themselves as 'farm hands' or as 'helping out' even where they worked all day on the property.

Moreover many women are responsible for the housework and child minding while their husbands play little role in this area. To support the family, many women take on jobs while they receive little help in the home.[7]

The JSC's view of the rural community

The claim that farm property should be treated differently from other types of matrimonial property rests on the assumption that farming property and the farming way of life is somehow special. This claim echoes high-minded claims concerning the values of the farmers' work ethic, independence, self-integrity and farmers' harmonious co-existence with nature.

Aiken suggests that these attitudes which he calls 'country-mindedness' are no longer dominant.[8] Important factors in their decline according to Aiken were the growth of manufactured exports over rural exports, and post-war immigration to Australian cities rather than farms. These immigrants had no Arcadian view of rural life. Finally there has been the relative decline of farming incomes as thousands of farmers since the 1960s have left the land.

Recently, it has been claimed that there is some scattered evidence to show that these bucolic attitudes are 'alive if not abundantly well' and certainly that some farming families see themselves as distinctly different with special problems.

Aiken has claimed that country-mindedness is an ideology 'which may have a future as part of the romantic past, but that has ceased to have power in the practical present'. However, as the JSC seems to embrace the idea of family farming and the intergenerational devolution of property within the family, the committee is supporting the patriarchal notion of male inheritance of land and the notion that women are inherent dependants.

I suggest the vision of land holding in Australia that the JSC seems to be building on presents an oversimplistic and stereotypical view of Australian farming. First, fewer farms are now passed down through the generations. It appears few farms remain in a family for more than three generations. A survey in the mid-1960s in Western Australia found that for farms over 405 hectares only 15% of the farmers had been reared on the property they were currently farming. In another survey in 1979-81, amongst wheat growers in Southern Australia, it was found that only one-third of farm families had a grandparent on the property they were farming.[9] Second, many parents do not want their children to continue with what many see as a 'mugs' game'.[10] Many children do not want to continue farming and their parents actively try to educate them to give them 'better opportunities'.

While it is true that many farms which have been in a family for several generations might have to be sold to finance a settlement on dissolution, there is no discussion in the report on the effect of this on the assessment of the women's contribution. The question arises why the contribution of women should be disregarded to allow for the perpetuation of a farm thus leaving intact male patriarchal values and ideals.

Legislative background to the recommendations

The general thrust of the 1975 Act is that men and women, so far as possible, should be financially independent. The philosophy of the Act as regards property and maintenance is to give the parties a clean break.

Under s.79(4) of the *Family Law Act* the court has a broad discretion to alter property interests taking into account a wide variety of factors:

(a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them . . .

(b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage of a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them . . .

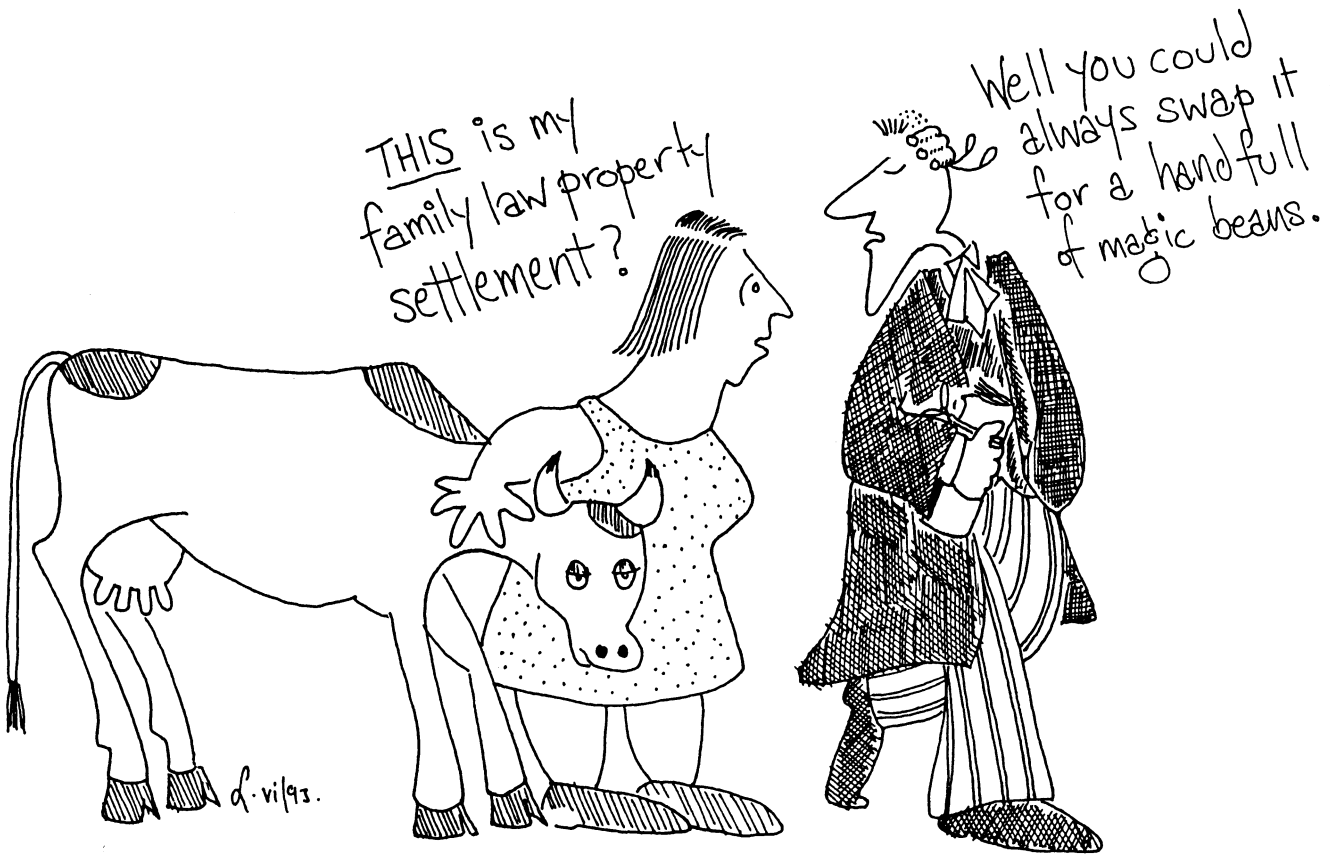
(c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent;

(d) the effect of any proposed order upon the earning capacity of either party to the marriage.

Gifts and inheritances

Common patterns are for a son to inherit a farm after working on it for a number of years; or for parents to buy another farm for a son. Women rarely inherit farms to become the sole managers or to work farms by themselves.

It is clear that inherited property is considered part of the property subject to division by order of the court. By bringing an inheritance into a marriage, a party is regarded as making a contribution to the pool of assets to be divided.



One of the principal factors of interest to the court in this context is the timing of the gift. Gifts received early in a marriage may not be taken away from the spouse who received the gift, in the event of an early separation. However, the longer the duration of the marriage the 'more the proportionality of the original contribution is reduced'. Thus by the passage of time the 'gift' is offset by the possible contribution of the other spouse. Therefore, where a gift is received late in a marriage even after separation it is very difficult for the spouse to claim a share of that gift based on contribution.

Contributions towards household and farm

While the court may divide the property as it thinks fit, the discretion must be exercised according to the factors set out in s.79 (as well as ss.75 and 81).

During the late 1970s there was a presumption that property should be divided equally. This 'equality is equity' approach was overturned by the High Court in *Mallet v Mallet* (1984) 156 CLR 605 as it was regarded as placing a fetter on the exercise of judicial discretion which was not authorised by the *Family Law Act*.

Under s.79(4)(a) and (b) it was recognised that contributions to the property may be financial or non-financial and may be direct or indirect. The contributions may be to acquisition conservation or improvement of the property.[11] What constitutes a 'contribution' to the property of the parties? It is clear from s.79(4)(a) and (b) that money, materials and physical labour can all constitute a contribution to the property?[12] The notion of contribution has been extended to include any act or advantage which has economic significance.

It is now clear following a 1983 amendment (s.79(4)(c)) that the contribution as a 'homemaker' and parent may be regarded as contributing in a substantial way to the value of property. This gives recognition to the position of a housewife who by her work in the home frees the husband to earn income and acquire assets.[13]

Section 79(4)(c) requires the court to take into account contributions by a spouse to the welfare of the family. This section is different in the sense that it does not solely concern contributions to property but contributions of a domestic nature such as support by way of cooking for the family, caring for the children and providing encouragement and support. It is acknowledged that financial contributions can also add to the welfare of the family.

Generally the domestic activities of one spouse are regarded as contributing towards property acquired during the marriage. However, the Family Court has adopted a different approach in the case of business assets (such as farms).[14] For example, in *Mallet v Mallet*, Mason J held:

> the property in issue consists of assets acquired by the party whose ability and energy has enabled the establishment or conduct of an extensive business enterprise to which the other party has made no financial contribution and where the other party's role does not extend beyond that of homemaker and parent. [at 625]

The implication of this approach is that if a wife devotes her life to homemaking and children to enable the husband to build up a business, she may never qualify as an equal in the distribution of the business assets.[15] In the case of a farm, the usual approach was that a judge would look at the farming assets as opposed to domestic assets and assess the contributions to each in their respective spheres.

I note later in this article how *Lee Steere v Lee Steere* is now authority for the fact that a judge will regard as equal the contributions of a wife as homemaker and parent as against those of a farmer running the farm.

Section 79(4)(d) and Lee Steere v Lee Steere

Section 79(4)(d) requires the court to take into account the effect of an order on the earning capacity of either party,[16] but it is one of several factors to be considered in order to arrive at a just and equitable order. Therefore if the court can frame an order for periodical instalments or postpone the order it will do so if there is no injustice to the parties (*Lee Steere v Lee Steere* (1985) FLC 91.626). This consideration has been especially important where a farm is the major asset or where a farmer knows no other means of making a living.

Some early decisions had held that land that was used for farming purposes and that was essential to the production of an income is in a different category from land which simply provided a place for the family home.[17]

A different approach was adopted in *Magas v Magas* [1980] FLC 9-0885 when it was stated that:

> If arrangements can be made which would relieve the spouse who is working on a farm as a farmer, from selling the farm but at the same time doing proper justice to the claim of the spouse, who is not living on the farm, then of course those arrangements should be made . . . [However] if there is no other way to do that which is just and equitable then a sale must take place.

In 1985 came *Lee Steere v Lee Steere*.[18] In affirming the approach of *Magas v Magas* the Full Court indicated an important new direction when it made clear there is no 'farming case' exception to the ordinary principles applicable under s.79 of the Act. Their Honours said:

> The fact that the subject of property proceedings under s.79 is a farm may give rise to considerations as to the way and means by which a property division should be effectuated . . . But there is no farming case exception to the ordinary principles applicable under s.79 of the Act . . . By the same token it is wrong to approach a farm case on the basis that the wife should only receive an amount which adequately meets her needs without considering first her entitlement by way of contribution . . . We must therefore reiterate that in relation to farming properties, as in relation to all other assets be they business assets or suburban land, the ordinary principles of s.79 of the Act apply. [at 80,076-80]

It is now clear that farms do not have any special status in property proceedings. First, the same principles of s.79 apply, whether, as in the case of *Lee Steere*, where the farm was inherited by the husband, or whether it had been acquired by one of the parties prior to the marriage. The fact that a farm has been in the family for several generations does not give it special status. Second, no special consideration will be given to farmers whose only life experience has been working on farms and who have to 'sell up' and face unemployment on the sale of the farm. Third, seen as a practical matter where a wife is deemed to have made a substantial contribution to a farm, because of the frequency of high debt levels and the inability to sell off part of the farm it would appear that it is difficult to avoid a sale of the farm.

The Lee Steeres were married in 1975. The husband had brought into the marriage a property which had belonged to his father. The husband acquired this property in 1965. Another property was also brought into the marriage which previously had been owned by other members of the family and which came to be jointly owned by the husband and his wife. As a matter of fact the judge decided the husband brought into the marriage these two properties while the wife brought in $2000.

The husband ran the farm while the wife reared the children and ran the home. Occasionally the wife helped on the farm when this was required.

The Full Court recognised the importance of the husband bringing into the marriage the pre-marital assets so 'that party is to that extent making a contribution which cannot be matched by the party who brings few if any assets into the marriage' (at 80,078).

As regards the various contributions of the wife and those of the farming husband, the court found that they were equal in their respective spheres as each party carried out his and her responsibilities equally as 'partners' and that 'within their own particular and agreed sphere of activity during the period of their marriage their contributions ought to be treated as equal' (at 80,079).

However, the final judgment awarded the wife, despite the apparent equality of contributions, only 20% of the value of the farm while the husband received 80%, the disparity being due to the inherited nature of the property rather than the equality of the contributions.

The conclusion to be drawn from the outcome of *Lee Steere* is that the contributions of a wife as a homemaker and parent may be regarded as equal to a husband who manages and runs a farm, where both spouses started off with equal contributions to the farming enterprise. However, where a husband brings major assets into a marriage, in general, the wife may only receive less than half the amount of the value of the assets.

Implications of the recommendations

The recommendation by the JSC that farming property ought to be treated differently from other matrimonial property seems to be based on two factors. First, the farm should be preserved against a forced sale or overwhelming debt. Second, special regard should be had 'where the farm was inherited and there was an expectation that the farm remains in the family for several years to come' (JSC 11.47 and 11.1).

The first recommendation which follows from this is that the *Family Law Act* be amended to distinguish farm properties from other matrimonial property so that the court can take into account 'whether the farming property was brought into the marriage by one or other party or whether it was acquired by both parties and developed after the marriage'.

This is hardly a new suggestion and indeed represents a standard approach by the courts to determine the degree to which the proportionality of the inheritance contribution was reduced by the respective contribution of the other spouse. This recommendation, in reality, endorses the 'asset by asset approach' to calculate the relative contributions of the parties.[19] This approach can of course create problems of tracing and identification of assets as they may be replaced in the course of the marriage.[20]

What is more far-reaching is the recommendation that the court has to take into account the necessity of preserving the farm as an income-producing unit for the future needs of the separating family. This approach is surprising given the *Lee Steere* decision and its endorsement by the Australian Law Reform Commission report in 1987.

I suggest the position of women on farms is sufficiently devalued to give concern as the law stands. Even under *Mallet* the difficulty is for women to prove that their contributions in the 'domestic' realm were equal to the man's in his 'farming' realm. The man, in most cases, inherited property and thus had the advantage of having this credited as a contribution. The rule that 'gifts equal contributions' has meant that women

get on average only 25%-30% of farming property settlements on divorce. However, surprisingly there has been no debate over this rule which in a situation where men usually inherit farms has led to the reproduction of male patriarchy on farms.

However, the JSC recommendation even further attempts to restrict women obtaining a fair share of the farm following divorce as the recommendation attempts to turn the clock back to the pre-*Lee Steere* stage where farming properties were put into a category different from other matrimonial property and thus preserved as a productive unit for male farmers. Following this approach, the wife's claim from the pool of assets would be restricted to her respective share of the domestic assets.

This recommendation must, by most views, be seen as a retrograde step. It makes a difference between urban and rural women. It would perpetuate the existing pattern of reproduction of farms based on male patriarchal notions. This leaves women's labour devalued and renders their contributions invisible.

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Incarcerating refugees

From killing fields to killing time

Anthony Reilly

Punishment usually reserved for the worst criminal offenders in our community is routinely applied to people whose only crime is fleeing oppressive regimes or economic hardship.

Despite the fact that asylum seekers are not criminals and have not been charged with criminal offences, the Australian Government continues to detain all such people who arrive in the country without proper documentation.

The Government argues that the policy of detention is necessary to control our national borders and to act as a deterrent to future undocumented arrivals. Critics, however, express concern over the effect of long periods of detention on already traumatised people, and the substantial economic costs involved. This article examines the arguments for and against detention of asylum seekers and concludes with recommendations for making the policy more humane without compromising Australia's interests.

Detention in Australia's refugee system

Australia has a clear obligation to assist refugees under international law, namely the 1951 United Nations Convention on the Status of Refugees (the Convention) and the 1967 Protocol, to which Australia is a Party. The domestic legislative basis of the program is s.22A of the *Migration Act* 1989 which provides that the Minister may (as opposed to must) determine whether a person is a refugee. This determination is a prerequisite for a number of different visas and entry permits. The definition of refugee is taken from the Convention and Protocol. Australia also has a large

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humanitarian program to provide for those who do not satisfy the definition of a refugee, but still require protection.

There are two classes of refugee in Australia: those granted refugee or humanitarian status overseas and accepted for resettlement in Australia (the off-shore refugee and humanitarian program), and those granted refugee or humanitarian status after arrival in Australia (the on-shore refugee and humanitarian system).

There are two categories of on-shore refugee applicants: those who arrive in Australia with a valid visa and entry permit and those who arrive here illegally. The latter group is comprised largely of people who arrive by boat with no documentation ('undocumented boat arrivals'). In June 1992 there were 21 653 on-shore refugee applications awaiting determination. Only 478 of those applicants were detained. Almost all of those detained were undocumented boat arrivals.[1]

Most of the undocumented boat arrivals in Australia are from countries such as Cambodia, the Peoples Republic of China and Vietnam. They arrive in the waters or coastline of northern Australia after long journeys through the seas of South East Asia. Under present laws they are deemed 'designated persons' and detained in immigration detention centres such as the Port Hedland Reception and Processing Centre. They are usually given assistance to apply for refugee status but are not allowed to apply for release. Many have been detained for years.

Conditions of detention

Conditions in immigration detention centres differ little from those in prisons. In March 1992, the Australian Council of Churches published a report on the Port Hedland Centre. The report noted the following concerns:

no psychiatrist at the centre;

no access for community or support groups (although the centre is called a reception and processing centre, it is virtually a closed detention centre);

- the gates are padlocked and the centre is surrounded by barbed wire;

the Australian Protective Service Staff are dressed in brown/khaki and blue uniforms;

a lack of interpreters on the site;

- a lack of professional torture and trauma counsellors; and
- the extreme isolation of the centre.

Similar problems arise in all the detention centres located throughout Australia, many of which are wings of high security prisons. For example, the immigration detention centre in Brisbane is a wing of the Wacol Remand and Reception Centre. The detention of refugees in such conditions, and indeed at all, places great demands on people who 'by definition . . . are people already under mental stress and may already have been ill treated in their country of origin'.[2]

The power to detain

The power to detain asylum seekers and others who enter or remain in Australia without permission is contained in various provisions of the Act.

Prohibited entrants

Section 88 of the *Migration Act* enables an authorised officer to keep in custody any person who is on board a vessel when that vessel arrives in Australian waters, being a stowaway or any other person whom the officer believes would become an illegal entrant if the person were to enter Australia. The prohibited entrant may be detained until the vessel departs, or until the person is granted an entry permit, or such earlier time as the officer directs.

Undocumented airport arrivals

Section 89 of the Act enables an officer to keep in custody a person who is on board an aircraft in the same circumstances as those delineated in s.88 above. The person may be detained at the airport or another place until the person is removed from Australia or is granted an entry permit.

Unprocessed persons

Sections 54B to 54H of the Act refer to people who have travelled to Australia in a boat or have disembarked at an airport. When an officer supposes that the person would become an illegal entrant on entry to Australia and that it is not possible to decide whether to grant the person an entry permit, the person becomes an 'unprocessed person' and may be taken to a 'processing area'. The unprocessed person may be kept in a processing area until granted an entry permit or becoming a 'prohibited person'. A prohibited person is one who has been requested to leave Australia, or has been refused or has not applied for an entry permit. A prohibited person must be removed from Australia as soon as practicable.

Designated persons

Sections 54J to 54U refer to people who arrive in Australian territorial waters after 19 November 1989 and before 1 November 1993 without visas, who are in Australia, and who have not presented a visa or entry permit. Such persons are referred to as 'designated persons'. They must be kept in custody and may only be released for the purposes of being removed from Australia or when granted an entry permit. They may only be removed on request, if they do not apply for an entry permit or if refused an entry permit.The designated person class appears to include boat arrivals who have not entered Australia as well as boat arrivals who have entered undetected. 'Designated persons' are prohibited from applying for release from custody.

Illegal entrants

Section 92 of the Act enables an officer to detain an illegal entrant in custody. The illegal entrant must be brought before a prescribed authority (magistrate) within 48 hours. The prescribed authority may order the release or authorise a person to be detained for no more than seven days. The Minister or Secretary (in practice, a compliance officer) may order the release of a person in custody at any time.

Deportees

Section 93 of the Act enables an officer to detain any person against whom a deportation order has been issued. Although a prescribed authority may not order the release of a deportee, the Minister or Secretary has a discretion to order a deportee's release.

The practice of detention

Because of the provisions cited above, it is often difficult to know under what section a person is detained. In practice however, the Department of Immigration, Local Government and Ethnic Affairs (DILGEA) distinguishes between undocumented arrivals on the one hand, and those who entered Australia with proper documentation but later became illegal on the other.

A person who becomes illegal after entering Australia legally may be arrested and detained. After arrest they are provided

with the opportunity to apply to remain in Australia, including applying for refugee status. If they so apply, they are usually released on certain reporting conditions until the application has been determined. If they do not apply, they are usually released on the provision of a surety of release, which is forfeited if they abscond before departure.

The more likely a person is to abscond, the higher the surety of release. Applicants must also purchase a one way ticket to another country and report to DILGEA as required. Even deportees (apart from criminal deportees) are usually released, subject to the above conditions.

The situation is very different for people who arrive without documentation and later apply to remain in Australia. Undocumented boat arrivals are usually detained under the 'designated persons' provisions. People who arrive on aeroplanes will be detained as 'unprocessed persons'.

Although only 'designated persons' must be detained, in practice all undocumented arrivals are detained until they are granted an entry permit or deported. For example, two asylum seekers travelled from Papua New Guinea to the Australian border late last year. By the time they were discovered, they had physically entered Australia. Instead of being declared designated or unprocessed persons, they were declared illegal entrants and deportation orders were issued against them. They were detained in the Brisbane Remand and Reception Centre until February of this year when they were deported. Their application for release was refused on the ground that the circumstances of entry and subsequent application to enter Australia indicated a strong desire to remain here and, therefore, they could not be trusted to honour conditions of release.

The distinction between undocumented arrivals and those who become illegal after entry has resulted in the absurd situation where refugee applicants:

> are categorised according to how they entered (or did not 'enter') the country. This statutory categorisation determines . . . whether the applicant will be detained . . . It is inequitable and arguably disadvantages those potentially most in need of protection (i.e. those not able to use regular modes of travel).[3]

As noted by Arthur C. Helton of the Lawyers Committee for Human Rights (about the United States system):

> There is no rational justification for subjecting undocumented excludable aliens to a rule of detention while all other aliens, documented or not, can be considered for release on an individualised basis . . . Excludable aliens cannot rationally be viewed as more likely to abscond than other aliens . . .[4]

International law and the detention of refugees

The policy of detention of asylum seekers as it currently operates in Australia contravenes international human rights law with respect to the detention of asylum seekers. Article 31 of the Convention provides:

> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory . . . where their life or freedom was threatened . . . enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

The United Nations High Commissioner for Refugees (UNHCR) has issued a resolution with respect to the matter. The UNHCR Executive Committee advised that it:

> (a) Noted with deep concern that large numbers of refugees and asylum seekers in different areas of the world are currently the subject of detention . . . by reason of their illegal entry or presence in search of asylum . . .
>
> (b) Expressed the opinion that in view of the hardship which it involves, detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents . . . or to protect national security and public order . . .
>
> (c) Recommended that detention measures taken in respect of refugees and asylum seekers should be subject to judicial review.[5]

The detention of refugees in Australia goes far beyond what is necessary to protect national security, verify identity, or determine the elements on which the claim to refugee status is based. The detention is long term, and despite efforts by the Government to speed up the determination process, there has been little reduction in the long waiting periods asylum seekers face while their applications are determined.

Further, the authorities make no attempt to screen criminal aliens or other security risks from the remainder of the arrivals. The policy of detention is universal – factors such as health, age, bona fides, and previous experience of trauma or persecution are not considered. The mere fact of arrival without documentation is alone sufficient to require detention.

I recall the absurd situation in 1992 of a compliance officer in Brisbane expressing relief when a Polish woman who was in the very late stages of her pregnancy was safely airlifted to Port Hedland Detention Centre after a long and stressful flight. The regulations did not allow her to be admitted to the nearest hospital or allow her to recuperate after the birth, nor did the officer appear to contemplate such a possibility. The universal detention of undocumented arrivals in such conditions clearly breaches the above human rights provisions.

Detention and national security

The Australian Government has an obligation to protect Australia's borders from invasion and a right to control entry by non-citizens. At the same time it has an obligation to ensure that the right to seek asylum is protected. Both interests can be protected without the need for universal detention of asylum seekers.

In 1990 the United States Immigration and Naturalisation Service (INS) authorised the commencement of a Pilot Parole Project to operate for a period of 18 months. The aim of the project was to determine the consequences of releasing undocumented asylum seekers into the community instead of holding them in detention centres. An INS review of the project undertaken in February 1991 found:

> inter alia, that those cases released with the assistance of community groups in New York achieved high rates on reporting compliance and immigration court appearances.[6]

The project was so successful that on the 20 April 1992 the INS decided to reimplement it and expand it to all Service detention facilities. The INS reported that:

> By adopting the Parole Project, the Service will be able to detain those persons most likely to abscond or pose a threat to public safety.[7]

The project relies on interviews conducted by trained officers to ascertain the person's bona fides and ensure they are not criminally dangerous or likely to abscond. An applicant for release must meet the following criteria:

1. The person's true identity has been determined with a reasonable degree of certainty.
2. The allegations in the person's asylum application . . . or in the case of a person who has requested asylum upon arrival at a port of entry, the statements made by the person in support of his or her request for asylum . . . appear to be credible and to provide substantial support for the application or request.
3. The person does not appear to fall within any of the following categories:
   a) Any person who . . . participated in the persecution of any person . . .
   b) Any person who has been convicted of an aggravated felony . . .
   c) Any person who may be regarded as a danger to the security of the United States.
4. The person has legal representation . . . and/or a place to live and employment or other means of support.
5. The person agrees to the following:
   a) to contact the appropriate local INS office each month . . .
   b) to appear at all hearings . . . and/or all interviews with the Service; and
   c) to appear for deportation, if the person is ultimately ordered excluded; and
   d) to report for detention if the person fails to comply with the above requirements, or if the alien is convicted of any felony or three misdemeanours.[8]

If the asylum seeker meets these criteria, she/he may be released. There is no reason why a similar release program could not work in Australia. The program protects the Australian community by screening undesirable elements. At the same time it ensures that genuine asylum seekers will not be penalised by long-term detention simply due to the circumstances of their arrival, thus protecting the right to seek refuge from persecution.

The economic costs of detention

The cost of a release program would be significantly less than the cost of detaining all undocumented arrivals.

Most of the costs associated with operating a release program already exist in operating detention centres – the costs of staff, food and accommodation for detainees, interpreters and legal assistance. Indeed many of these costs would be reduced. The major difference between the two approaches is the capital costs associated with detention centres. Also, with isolated detention centres such as Port Hedland there are costs in transporting DILGEA staff, lawyers and interpreters to the centre.

Last year DILGEA was questioned about the costs of maintaining immigration detention centres by the Senate Estimates Committee. The questioning revealed that the total cost of the custody and care of the 294 detainees in the Port Hedland Detention Centre for the period 1991 to 1992 was $7.922 million – or $27 184 per person. DILGEA was unable to provide a breakdown at the time of where the money was spent, although around $1.3 million dollars appeared to be capital costs. The Government also announced on the 18 August 1992 that an additional $1.578 million had been provided for security-related improvements and additional guarding for the centre. With respect to the other centres such as the Villawood Detention Centre in Sydney, Mr Sullivan of DILGEA stated that the average cost of detention was about $200 per day – equal to $73 000 per person per year! DILGEA was unable to provide a figure for the total cost of running these centres however.

A release program would avoid the costs of unnecessary detention set out above. The savings would be significant and could be directed to employing additional DILGEA staff to speed up the processing of the backlog of refugee applications.

Detention as a deterrent

When the Minister for Immigration, Local Government and Ethnic Affairs introduced the 'designated persons provisions' to the House of Representatives, he justified the detention of asylum seekers on the following grounds:

> I believe it is crucial that all persons who come to Australia without prior authorisation not be released into the community. Their release would undermine the Government's strategy for determining their refugee status or entry claims. Indeed, I believe it is vital to Australia that this be prevented as far as possible. The Government is determined that a clear signal be sent that migration to Australia may not be achieved by simply arriving in that country and expecting to be allowed into the community. [Hansard, 5.3.92, p.2371]

The issue of whether detention deters future asylum seekers has not been explored or researched in any form that I am presently aware of. Neither has the Government produced material to justify its belief that detention deters future asylum seekers from travelling to Australia.

Personal experience of refugee applicant clients, however, suggests that the prospect of detention would not have prevented them from travelling here. I recently had to advise a client that if he applied for refugee status he faced the prospect of long-term detention. He advised me that he was prepared to remain in custody for as long as it took to obtain refugee status, provided he did not have to return to his country of origin. In any case, the fact that most of the 'boat people' who travel to Australia from south-east Asia and southern China are prepared to endure long and dangerous trips through the open seas in small fishing boats with no guarantee that they will even land in Australia suggests that the prospect of detention will not deter them from leaving their country of origin.

Thus the argument that detention acts as a deterrent to future arrivals has little basis in the Australian context. It should not be forgotten either that protection for refugees is a basic human right. Policies designed to avoid the consequences of a genuine commitment to that right should not be tolerated.

Conclusion

In 1992 the Refugee Council of Australia published a series of recommendations concerning the detention of asylum seekers in Australia.[9] Basically, they recommend as follows:

- the Government's practice of detaining asylum seekers should be abolished;
- detention should only be used under special defined circumstances such as to establish the identity of the claimant or if the claimant is found by a magistrate to be a risk to the community;
- minors should not be detained under any circumstances;
- there should be regular judicial review of a decision to detain an asylum seeker;
- conditions of detention are to meet certain standards;
- no detainees should be held in penal institutions.

The recommendations, if adopted, would create a more humane and cost-effective approach to dealing with undocumented boat arrivals than the current practice of universal detention. They would also allow the Government to control entry into Australia without penalising genuine asylum seekers for exercising their basic right to seek protection from persecution.

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Legal aid in Victoria

Cash crisis

Jeff Giddings

The Attorney-General, Jan Wade, responds with new powers for judges to order legal aid but no fist full of dollars

During February and March of this year, Victoria's legal aid system received substantial attention from the media. Legal aid was described as being 'in crisis' and the State Government was called on by various groups to provide additional funds to cover the shortfall. The spark for this media interest was the decision of Judge Duggan in the Melbourne County Court to grant a stay of proceedings against five of the seven defendants in the Werribee land fraud conspiracy trial until legal representation became available to them. Judge Duggan found that the five were unable to pay for legal representation themselves.[1] The case had been estimated as likely to cost the Legal Aid Commission of Victoria (LACV) a total of $900 000.

Rather than responding with a fist full of dollars, the Attorney-General, Jan Wade, called on the LACV to review its guidelines for providing legal assistance and, at the end of April, introduced legislation giving judges the power to order that the LACV provide assistance in certain cases.

The LACV had, in early 1992, altered its legal assistance guidelines such that it would not finance any trial estimated to cost more than $200 000 unless additional funds were provided by Government, either State or Commonwealth, to cover legal representation for the defendant. In December 1992, the LACV restricted assistance further by imposing a $50 000 funding ceiling on both criminal and civil cases unless additional funds were provided. When this guideline resulted in major criminal trials being halted, Jan Wade, expressed the view that the Commission 'review its priorities for granting legal aid'.[2] Clearly, any move on the part of the LACV to fund such cases would be at the expense of many smaller grants of assistance in less expensive cases. At present, 40% of the LACV's funding is consumed by the 4% of grants of assistance where costs exceed $5000.

Impact of the Dietrich case

The LACV's expensive trial guidelines would not have created such turmoil had it not been for the High Court's decision in *Dietrich v R* (1992) 109 ALR 385. In the process of holding that the right to a fair trial will almost always mean that a person charged with a serious criminal offence must have legal representation at trial, there was little discussion of the role and function of legal aid in the provision of representation to indigent persons. In their joint judgment, Mason CJ and McHugh J noted that it was 'possible, perhaps probable, that the decision of a Legal Aid Commission [to refuse assistance to a defendant who was then unsuccessful in having that refusal overturned by a review committee] would be reconsidered if a trial judge ordered that the trial be adjourned or stayed pending representation being found for the accused' (at 397).

Their Honours then observed that the Commonwealth and the States had been given notice of the issues which were to be argued by the appellant, in particular the assertion that indigent accused people had a right to have counsel appointed at public expense in serious indictable trials. Despite this, only the Attorneys-General for the Commonwealth and South Australia intervened. Further, it was observed that no argument was put to the court that recognition of a right to the provision of counsel at public expense would impose an unsustainable financial burden on

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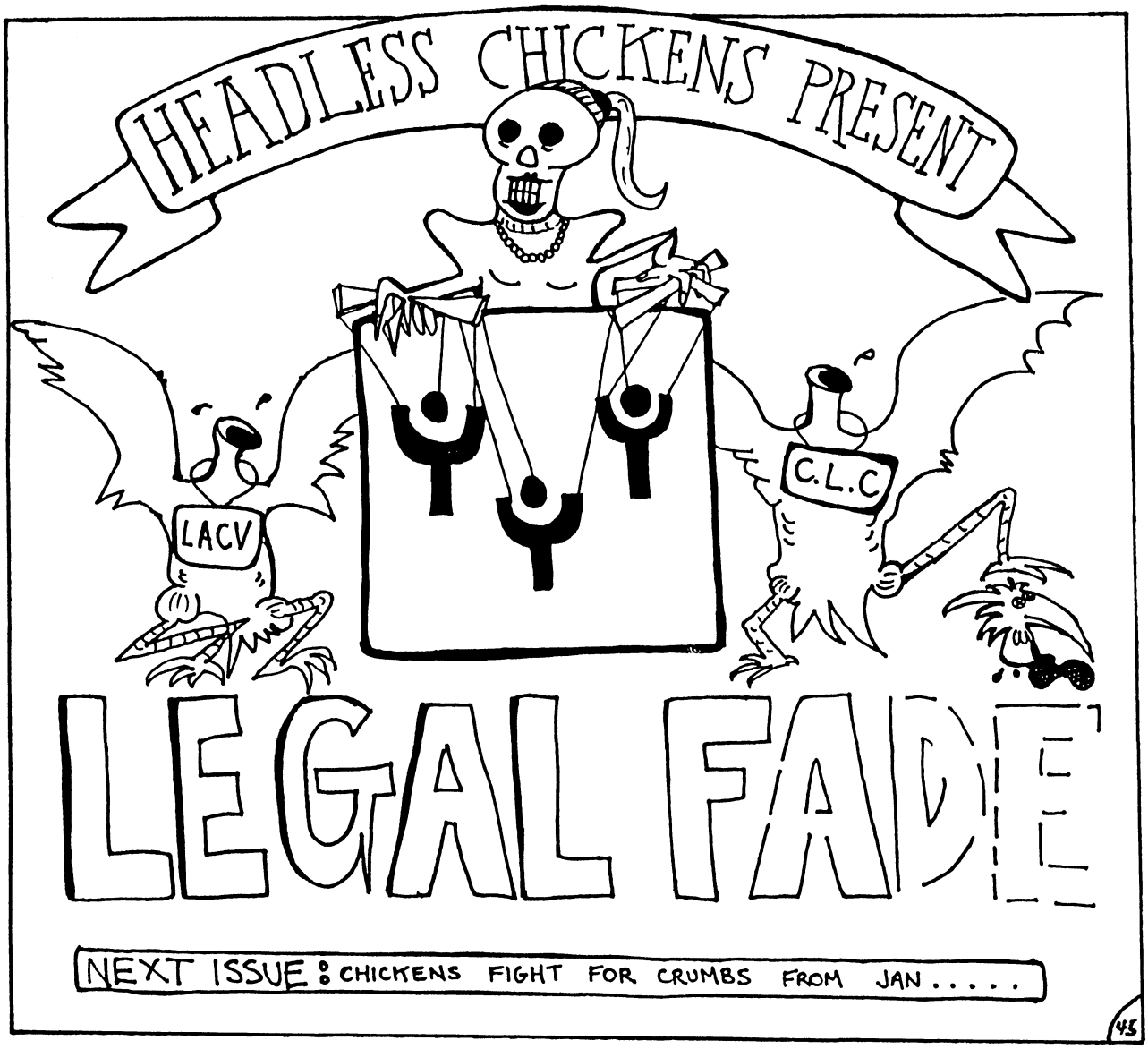

government. It should be noted that these issues were not specifically dealt with by any of the other members of the court in their judgments.

Commission restructure

The LACV also comprehensively reviewed its structure during 1992. In January 1993, the Board of Commissioners resolved to move ahead with implementation of restructuring, which, among other changes, would overhaul the senior management structure, replacing the post of Deputy Director with two positions:

- *Director, Legal Services*, with overall responsibility for the Melbourne and regional office legal practices,

  Director, Corporate Services, with overall responsibility for finance, administration and assignments functions.

The package of proposed changes would have a significant impact, most particularly with the demise of the Education and Information Division. The LACV has been acknowledged as a leader in the provision of community legal education services and there are major concerns that this focus will diminish. The Community Legal Education Unit and continuing legal education staff from the Division would be responsible to the Manager of the Melbourne legal practice. Research, media and law reform responsibility would be given to the proposed Executive Services Unit, and Publications and the Community Legal Centre Funding Program are provisionally proposed to be responsible to the Director, Corporate Services.

The restructure decision was described by LACV Director, Andrew Crockett, in a LACV staff bulletin as 'probably the most important decision the Commission has made since it commenced in 1981'. When the LACV sought approval from the Attorney-General to implement these changes to the senior management structure it was advised that no alterations would be approved until after the federal election. It is now clear that there will be an external review of the LACV[3] although it is not yet known who will conduct the review or what its terms of reference will be.

While it is important for the LACV to seek to ensure its structure is designed so as to effectively service Victoria's legal aid system, it must be recognised that external factors will continue to have an enormous effect on the LACV. The LACV needs to spend far more time considering long-term issues such as how to prevent the continuing escalation of average costs per legally aided case as well as developing political strategies to deal with its declining ability to service legal aid needs. When faced with funding cuts the LACV should vigorously defend the legal aid system rather than moving to further restrict the legal assistance guidelines in an effort

to appear responsible managers. Initiatives such as the cost limits for stages of matters introduced in 1992 will need to be strengthened and supported by other measures.

Declining financial position

The LACV's financial position has been deteriorating for several years. This has clearly hindered its ability to co-ordinate a comprehensive legal aid system in Victoria. As at July 1990, the LACV had an accumulated debt (fees owing for work already done for legally assisted clients) of $3.1 million. By July 1991, this debt had increased to $5.4 million. Clearly a significant contributing factor to this worsening position, average per case costs increased far quicker than government funding to the Commission. According to LACV annual reports between 1987-88 and 1990-91, the average cost of many legally assisted cases increased by 69% while government funding increased by only 31% over the same period.

By the end of 1991, the LACV was clearly signalling that it needed to achieve major reductions in spending. In late November 1991, it was estimated that, if applications continued to be approved at the current rate, the accumulated debt at July 1992 would be $8.5 million. This resulted in the introduction at the start of 1992 of what the LACV itself described in its 1991-92 Annual Report as 'the most restrictive Legal Assistance Guidelines in [its] history'. The situation was worsened further by the LACV receiving $3 million less from the then State Labor Government than was needed to cover the cost of expensive criminal cases and the ongoing operation of the Criminal Trial Delay Reduction Program.

The steps taken in response to this situation included:[4]

- tightening the legal assistance guidelines so as to reduce the number of grants of aid to 30 000, a drop of more than 6000 (16%) on the 1990-91 figure. The rate of rejection of applications for assistance increased dramatically to an overall rate of 29.3%. Criminal matters, which made up 62.7% of total applications and 73.5% of total approvals, had a rejection rate of 17.2% whereas the rejection rates for family and civil law applications were 42.7% and 65.7% respectively;

  imposing a $30 compulsory contribution on assisted persons. While this flat fee can be waived in cases of exceptional hardship, waivers are generally only given to people in custody;
- moves to increase the amount of self-generated revenue. This increased from $14.5 million in 1990-91 to $18.3 million in 1991-92. This increase was achieved, in the main, by increasing the costs recovered by assisted persons, with greater contributions being required both from people currently being assisted and those whose cases had already been finalised;

  amendment of the *Legal Aid Commission Act* 1978, removing the s.32 requirement that the Commission pay private practitioners 80% of the relevant scale fee for work done for legally assisted persons (there was subsequently a 10% reduction in the fees payable in criminal matters) and also giving the Commission the ability to charge interest on contributions required from assisted persons which remain outstanding;

  staff redundancies (26 staff accepted voluntary departure packages which the Commission had to fund itself) as well as leaving vacant positions unfilled for substantial periods of time. Staff levels have fallen from their 1991 high of 450 to 372 at 30 April 1993.

The funding situation continues to deteriorate and the State Liberal Government is maintaining the line that no additional funds will be provided to ease the legal aid difficulties. Funding of $2.3 million which had been promised to the Commission in the then Labor Government's August 1992 budget was withdrawn by the Liberals after the election. Further problems arose from recent substantial claims on the Solicitors Guarantee Fund which had, until recently, provided the major share of State Government funding of legal aid. In December 1992 the Law Institute of Victoria, which administers the Fund, set aside $10 million to cover claims against one particular law firm. This claim exacerbates the recession's effect on the Fund's income generating capacity, most notably through falling interest rates and smaller amounts being held in solicitor's trust accounts. It is estimated that the 1993-94 contribution by the Guarantee Fund to legal aid will fall by $6.75 million due to the claim, down to only $500 000.

The April mini-budget has significantly worsened the LACV's financial outlook. The Department of Justice, of which the LACV is part, is being required to achieve expenditure cuts of 11% over the next two financial years. The Ministry of Police and Emergency Services has been excluded from these expenditure reductions. As with other Departments, the Government has not specified where the cuts are to be made, preferring to leave this to the Departments. It is likely that the LACV will face a shortfall in State funding for 1993-94 of between $2 million and $3 million.

The situation for community legal centres (CLCs) is generally unclear and decidedly bleak in the case of those Centres reliant on funds from the former Ministry of Consumer Affairs (now the Office of Fair Trading within the Department of Justice). The Tenants Union of Victoria has been advised of a 52% cut and Consumer Credit Legal Service a 36% cut to their funding from this source. Those centres reliant on LACV funds are waiting to hear what funds will be available after 30 June from the State Government.

While this information is unlikely to be available until after the August State budget, the LACV has taken the step of providing three months' interim funding to cover CLCs until the end of September. Serious concerns have been expressed regarding the LACV's move to leave the decision as to CLC funding levels in the hands of the State Government. In a letter to the Acting Secretary of the Department of Justice dated 29 March 1993, the Director of Legal Aid stated:

> The Commission's role is not to determine the level of CLC funding. The State Government must decide on future funding levels and should do so in consultation with the Commonwealth. If the decision is to reduce CLC funding, then the Commission will advise on the distribution of the cuts and the likely impacts.

CLCs were not consulted by the LACV before this view was communicated to the Minister. It appears that the Commission was seeking to avoid having to apportion some of its own spending cuts to CLCs because, in the recent past, CLCs have successfully argued against cuts to their small part of the legal aid funding pie. It appears that the Department of Justice will handball the CLC funding decision back to the Commission rather than face the adverse publicity which would arise from making the decision itself.

Judges ordering legal aid

> Despite anything in the *Legal Aid Commission Act* 1978, the Legal Aid Commission of Victoria must provide legal representation in accordance with an order under sub-section (2).
>
> [cl.27(3) *Crimes (Criminal Trials) Act*]

The *Crimes (Criminal Trials) Act* is concerned primarily with a series of procedural reforms designed to reduce the length of criminal trials. The legislation was passed by the Legislative Council on 26 May 1993 but the relevant sections have not yet been proclaimed although this is expected to occur in the near future. While some of these proposals[5] may create difficulties for unrepresented defendants, s.27 of the Act threatens the independence of the LACV and will have a disastrous impact on Victorian legal aid, particularly when combined with the foreshadowed funding cuts. Supreme and County Court judges will be given the power to order the LACV to provide assistance to an accused where the court is satisfied that it would otherwise be unable to ensure that the accused will receive a fair trial and the accused is unable to afford the full cost of legal representation.

The section raises fundamental questions about the LACV's ability to determine priorities for the provision of legal assistance as well as guidelines for the implementation of those priorities. The Commonwealth Government, which provides 55% of Victoria's legal aid funding has, in recent times, expressed concern at the increasing share of the legal aid dollar consumed by criminal trials. This Act will no doubt cause the Commonwealth to further reflect on the escalating refusal rate for applications and increasingly stringent guidelines for assistance in family law matters in particular.

No guidelines are provided for judges in relation to the exercise of this discretion. It should also be noted that the section enables judges to order the Commission to provide assistance 'on any conditions specified by the court'. Does this include the general terms of legal assistance which apply to all legally assisted matters? Can a court override these?

One unintended consequence of the legislation could be to encourage defendants charged with indictable offences triable summarily to elect to go to trial in the hope that the court will order representation for them. In the past, defendants facing such charges have often considered they would be better served by having the charges against them heard in the County Court but have been effectively prevented from exercising this right by the LACV guideline that limited assistance in such cases to a summary hearing unless there were exceptional circumstances.

Conclusion

Despite denials from the likes of LACV Chairman, Peter Gandolfo,[6] the legal aid system is in crisis. Increases in average costs per case, lack of funds for implementation of the Criminal Trial Delay Reduction Program, declining Solicitors Guarantee Fund revenue, the impact of the *Dietrich* ruling and an increasing number of 'mega-cases' have all contributed to the current difficulties. The return to a legal aid system dealing in the main with criminal law cases will dilute the focus which legal aid should have on assisting people to positively assert their rights.

The independence of the Commission has been attacked by the *Crimes (Criminal Trials) Act*. This attack is all the more extraordinary given the strong recognition which is regularly given to the need for an independent legal system; an independent judiciary and independent legal profession. It will be a tragic state of affairs if, when faced with a greater need for legal aid, the Government responds by reducing the total funds available to legal aid and palming the problem off to a bureaucracy stripped of its independence and unable to provide a comprehensive legal aid system across Victoria.

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3. Evans, R., 'Legal Aid at Breaking Point', Law Institute Journal, May 1993, p.344.
4. Legal Aid Commission of Victoria, Thirteenth Annual Report, 1991-92, p.6.
5. See s.4 (requirement that the accused file a statement of defence disclosing elements of the offence charge which are admitted and those which are not admitted at least 7 days before the trial), s.5 (broad pre-trial decision-making powers given to judges), s.19 (power for the court to order either party or their legal adviser(s) to personally pay costs if they unreasonably fail to comply with the legislation), and s.26 (amendment of the *Sentencing Act* 1991 permitting the accused's lack of remorse (indicated by refusal to admit the truth of documents filed by the prosecution and subsequently failing to seriously contest the proof of those matters at the trial) to be taken into account by the court when imposing sentence).
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