

**EQUALITY BEFORE THE LAW:  
THE IMPORTANCE OF UNDERSTANDING THE EXPERIENCE OF  
'OTHERS' IN THE CRIMINAL JUSTICE SYSTEM**

ANTHONY HOPKINS

A thesis submitted for the degree of  
Doctor of Philosophy in Law (by Publication).

University of Canberra

2015

## CONTENTS

ACKNOWLEDGEMENTS.....	v
CERTIFICATE OF AUTHORSHIP.....	vii
ABSTRACT.....	ix
I INTRODUCTION	
A <i>Nature of Thesis and Purpose of Linking Dissertation</i> .....	1
B <i>Publications</i> .....	1
C <i>Equality and Equal Consideration for Difference</i> .....	2
D <i>Chapter Progression</i> .....	3
E <i>Limitations and Assumptions</i> .....	5
F <i>Situating the Author</i> .....	8
II SUMMARY OF PUBLICATIONS	
A <i>Women and Criminal Defences to Homicide</i> .....	9
B <i>Walking In Her Shoes: Battered Women Who Kill In Victoria, Western     Australia and Queensland</i> .....	10
C <i>The Relevance of Aboriginality in Sentencing: Sentencing a Person for     Who They Are</i> .....	11
D <i>The Relevance of Aboriginality in Sentencing: Findings from Interviews in     the ACT</i> .....	12
E <i>Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous     Justice</i> .....	12
F <i>Cross-examination of Child Sexual Assault Complainants: Concerns     About the Application of s 41 Evidence Act</i> .....	13
G <i>Teaching Evidence Law Within the Framework of a Trial: Relating     Theory to Practice as Students Take to Their Feet and Take Responsibility     for the Trial Narrative</i> .....	14

III	MAKING SENSE OF EQUALITY: LOOKING FOR PRINCIPLED GROUND TO STAND ON	
A	<i>The Principle of Equality Before the Law</i> .....	17
B	<i>The Formation of An Equality Intuition</i> .....	18
C	<i>Equality Amidst Inequality and Difference: Doubting the Very Idea</i> .....	21
	1 <i>Inequalities</i> .....	21
	2 <i>Differences and Inequalities</i> .....	22
D	<i>Equality as Human Beings</i> .....	24
E	<i>The Less Than Question</i> .....	25
F	<i>Power</i> .....	27
IV	IDENTIFYING INEQUALITY: WHEN IS A PERSON BEING TREATED AS LESS?	
A	<i>Direct and Indirect Discrimination: The ‘Difference Difference Makes’</i> .....	29
B	<i>Self-Defence and Battered Women</i> .....	32
C	<i>Aboriginality in Sentencing</i> .....	37
D	<i>Cross-examination of Child Sexual Assault Complainants</i> .....	42
V	ENGAGING WITH THE EXPERIENCE OF ‘OTHERS’: EQUALITY AS UNDERSTANDING	
A	<i>Barriers to Engaging with the Experience of ‘Others’</i> .....	49
B	<i>Bridging the Divide – Adopting a Positional Stance</i> .....	51
C	<i>Bridging the Divide – Informed Imagining</i> .....	52
D	<i>Facilitating Understanding</i> .....	55
	1 <i>Battered Women Who Kill</i> .....	55
	2 <i>Indigenous Offenders</i> .....	56
	3 <i>Child Sexual Assault Complainants</i> .....	57
E	<i>Role-play – Combining Information and Imagination</i> .....	58

VI	CONCLUSION – THE POTENTIAL OF EQUAL CONSIDERATION.....	61
VII	BIBLIOGRAPHY.....	65
	APPENDIX.....	75

**NB: Each co-authored publication is preceded by a co-author declaration.**

A.	Patricia Easteal and Anthony Hopkins, Chapter 7 ‘Women and Criminal Defences to Homicide’ in Patricia Easteal (ed) <i>Women and the Law</i> (LexisNexis, 2010) 109.....	75
B.	Anthony Hopkins and Patricia Easteal, ‘Walking in Her Shoes: Battered Women Who Kill in Victoria, Queensland and Western Australia’ (2010) 35(3) <i>Alternative Law Journal</i> 132.....	103
C.	Anthony Hopkins, ‘The Relevance of Aboriginality in Sentencing: Sentencing a Person for Who They Are,’ (2012) 16(1) <i>Australian Indigenous Law Review</i> 37.....	117
D.	Christina Lewis, Anthony Hopkins and Lorana Bartels, ‘The Relevance of Aboriginality in Sentencing: Findings from Interviews in the ACT’ in Patricia Easteal (ed) <i>Justice Connections</i> (Cambridge Scholars, 2013) 37.....	135
E.	Thalia Anthony, Lorana Bartels and Anthony Hopkins, ‘Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice’ (2015) 39(1) <i>Melbourne University Law Review</i> (advance).....	151
F.	Russell Boyd and Anthony Hopkins, ‘Cross-examination of Child Sexual Assault Complainants: Concerns About the Application of s 41 Evidence Act,’ (2010) 34 <i>Criminal Law Journal</i> 149.....	183
G.	Anthony Hopkins, ‘Teaching Evidence Law within the Framework of a Trial: Relating Theory to Practice as Students Take to Their Feet and Take Responsibility for the Trial Narrative’ (2009) 2(1&2) <i>Journal of the Australasian Law Teachers Association</i> 173.....	207

## ACKNOWLEDGEMENTS

Over the course of writing this thesis many things have become clear to me. Excavating the ethical foundation of each publication, and exploring the links between them, ultimately revealed a deep personal commitment to equality and respect for difference, together with a desire to understand the world from the perspective of others. I have come to realise that this commitment has manifested itself in a journey – starting well before this thesis or the papers in it were conceptualised – upon which I have often faltered, but one that I have continued to pursue, and will continue to pursue. On a personal level, it is a journey that has enriched my life and opened up possibilities and perspectives I never would have thought available to me. The journey has also taught me that valuing others for who they are can lead to a reciprocal valuing, and it has enabled me to ‘glimpse’ a potential unity and belonging which bridges difference. This thesis is both an intellectual and personal step on the path towards this potential.

The path of understanding difference - of equality and equal valuing - of which I speak, is one that I have been led to and guided along. It is one upon which many have walked with me, shared their insight and understanding, their pain, joy and commitment. To all of these people I am grateful. It remains to thank a few of those to whom I owe the greatest debt of gratitude.

To my mother and father, who separated in my early life but remained steadfast in their commitment and love for my sister and I, I am grateful for the worlds, and different but complementary perspectives, they opened up for me. I am grateful for the support, the concern and the unfailing belief in me. I am also grateful for the conversations about this thesis and the ideas it contains. Each continues to live a life of understanding and valuing others, passing this down to my children, their grandchildren. Each continues to inspire me.

To my father I am particularly grateful for the gift of argumentative writing that he has perfected.

To Heather, who joined my father – and my journey – at a formative time of my life, I am grateful for the dinner table conversations, the support, the reading of manuscripts that she (and my father) undertook, the belief and positivity in my capacity to write and for so regularly making the space for me to get on with writing by caring for my children, her grandchildren.

To Tamar, my sister, who works tirelessly as a human rights lawyer, challenging legal and racial boundaries to have her clients equally valued as human beings, I am grateful for inspiration, conversation, support and belief. This world needs people with your compassion and strength.

To Kelli, my wonderful wife, I owe much of my understanding of the reality of difference. As a Luritja and Warumungu woman, she opened up the world of the central desert to me, the world of her people and her family. Kelli lives at the crossroads of difference, grounded in a sense of identity and belonging that daily traverses realities. I am forever grateful that you chose to walk with me.

To my children, Kelvin, Jye and Ashton, I am grateful for support, conversation and the many joyful moments we have shared. Seeing the world through their eyes, as they have grown, has been a revealing journey in itself. I hope that our many conversations about equality and understanding difference will stand you in good stead as people who value others and are valued by others in this world.

To Annie, my external supervisor, I am grateful for pointed and constructive criticism that led to fruitful research avenues I would otherwise have missed.

Lastly, to my primary supervisors, who are so much more than that description suggests. To Patricia, who befriended and then mentored me from the time I commenced my academic career, who inspired and encouraged me, I am very grateful. At times when I did not believe in myself, she did. Over the course of writing this thesis I have come to respect her deeply for the extent to which she has dedicated her life to the pursuit of equality and understanding of difference. To Lorana, who enthusiastically came on board at a time when progress had ground to a halt and injected her energy, commitment and passion, I am also very grateful. She too has an unfailing and inspirational commitment to the pursuit of equality and understanding difference. To each of you, I am grateful for your support and friendship.

I hope that we will all continue to walk together.

6 February 2015

## ABSTRACT

*Equality is a fundamental concern of human existence. Expressed in the principle of equality before the law it requires that those who come before the law are entitled to be treated as being of equal value and to be given 'equal consideration'. In circumstances where those who come before the law are marked by their differences, giving of equal consideration requires that difference be understood and taken into account. This dissertation makes an argument for taking difference into account as a moral requirement – one that requires us to acknowledge the limitations of our capacity to understand the experience of 'others' within the criminal justice system and actively work to engage with these experiences.*