# 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 *Nature of Thesis and Purpose of Linking Dissertation*…….1

B *Publications*……1

C *Equality and Equal Consideration for Difference*…….2

D *Chapter Progression*…….....3

E *Limitations and Assumptions*…….….....5

F *Situating the Author*……...8

II SUMMARY OF PUBLICATIONS

A *Women and Criminal Defences to Homicide*……...…..9

B *Walking In Her Shoes: Battered Women Who Kill In Victoria, Western Australia and Queensland*……...……..10

C *The Relevance of Aboriginality in Sentencing: Sentencing a Person for Who They Are*.....11

D *The Relevance of Aboriginality in Sentencing: Findings from Interviews in the ACT*……..12

E *Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice*.....12

F *Cross-examination of Child Sexual Assault Complainants: Concerns About the Application of s 41 Evidence Act*……..13

G *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*……..14

III MAKING SENSE OF EQUALITY: LOOKING FOR PRINCIPLED GROUND TO STAND ON

A *The Principle of Equality Before the Law*……17

B *The Formation of An Equality Intuition*.....18

C *Equality Amidst Inequality and Difference: Doubting the Very Idea*…...21

1 *Inequalities*……...21

2 *Differences and Inequalities*……22

D *Equality as Human Beings*……... 24

E *The Less Than Question*……....25

F *Power*……27

IV IDENTIFYING INEQUALITY: WHEN IS A PERSON BEING TREATED AS LESS?

A *Direct and Indirect Discrimination: The 'Difference Difference Makes'*.29

B *Self-Defence and Battered Women*……32

C *Aboriginality in Sentencing*……..……37

D *Cross-examination of Child Sexual Assault Complainants*……..….42

V ENGAGING WITH THE EXPERIENCE OF 'OTHERS': EQUALITY AS UNDERSTANDING

A *Barriers to Engaging with the Experience of 'Others'*…….....49

B *Bridging the Divide – Adopting a Positional Stance*……51

C *Bridging the Divide – Informed Imagining*……..……52

D *Facilitating Understanding*.....55

1 *Battered Women Who Kill*……....55

2 *Indigenous Offenders*……...56

3 *Child Sexual Assault Complainants*…….57

E *Role-play – Combining Information and Imagination*…….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) *Women and the Law* (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) *Alternative Law Journal* 132……...103

C. Anthony Hopkins, 'The Relevance of Aboriginality in Sentencing: Sentencing a Person for Who They Are,' (2012) 16(1) *Australian Indigenous Law Review* 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) *Justice Connections* (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) *Melbourne University Law Review* (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 *Criminal Law Journal* 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) *Journal of the Australasian Law Teachers Association* 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 who 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.*

# I INTRODUCTION

## A *Nature of Thesis and Purpose of Linking Dissertation*

This is a thesis written for the award of a Doctor of Philosophy (by publication). As such, it is necessary to make clear from the outset that the body of the thesis is made up of publications meeting the criteria of eligible research outputs under the Excellence in Research for Australia Evaluation. These publications are listed below and contained in full as appendices to this linking dissertation in the order in which they are discussed. The purpose of the linking dissertation is to provide a cohesive, critical overview that converts the individual published research outputs into an integrated work. The overview is intended to position the individual publications within the discipline and demonstrate their contemporary relevance. In particular, the purpose of this dissertation is to investigate and make explicit the ethical foundation common to the published works. That common foundation is the principle of equality, and equality before the law. Accordingly, this thesis both explores the principle of equality before the law, and seeks to demonstrate how each publication engages with that principle and its moral imperative.

## B *Publications*

- Patricia Easteal and Anthony Hopkins, Chapter 7 'Women and Criminal Defences to Homicide' in Patricia Easteal (ed) *Women and the Law* (LexisNexis, 2010) 109.

- Anthony Hopkins and Patricia Easteal, 'Walking in Her Shoes: Battered Women Who Kill in Victoria, Queensland and Western Australia' (2010) 35(3) *Alternative Law Journal* 132.

- Anthony Hopkins, 'The Relevance of Aboriginality in Sentencing: Sentencing a Person for Who They Are,' (2012) 16(1) *Australian Indigenous Law Review* 37.

- Christina Lewis, Anthony Hopkins and Lorana Bartels, 'The Relevance of Aboriginality in Sentencing: Findings from Interviews in the ACT' in Patricia Easteal (ed) *Justice Connections* (Cambridge Scholars, 2013) 37.

H. Thalia Anthony, Lorana Bartels and Anthony Hopkins, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' (2015) 39(1) *Melbourne University Law Review* (advance).

- Russell Boyd and Anthony Hopkins, 'Cross-examination of Child Sexual Assault Complainants: Concerns About the Application of s 41 Evidence Act,' (2010) 34 *Criminal Law Journal* 149.

- 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) *Journal of the Australasian Law Teachers Association* 173.

## C *Equality and Equal Consideration for Difference*

Why equality? Shortly stated, the answer is that equality concerns are fundamental to our lives as human beings. For the most part, each of us has an intuitive engagement with what equality requires and a capacity to make arguments about perceived inequality of treatment. And, few of us would, or could, defensibly contest the inherent equality of human beings, as persons of equal dignity and value. In the context of the criminal law, the *principle* of equality before the law – as opposed to what the principle requires – is beyond question. As such, the principle of equality, and specifically equality before the law, provides an axiomatic foundation from which to consider the treatment of people who come before the law; a foundation from which to hold criminal law, criminal process and 'criminal justice decision-makers' to account;[1] and critically, a foundation from which to call for change. The challenge is to render an account of what the equality principle requires, for, to the extent that such an account is persuasive and capable of revealing inequality of treatment before the law, it brings with it a moral imperative for action.

Here it is argued that the principle of equality requires that each person who comes before the law – be they witness, defendant or complainant – is to be treated as being of equal value and thereby entitled to *equal consideration.* This formulation, it is argued, enables the asking of critical equality questions, such as: 'is this judge, this magistrate, this juror, this legal practitioner giving equal consideration to this person before the law?' And, one step back, 'does this law or legal process require, or enable, the giving of equal consideration to this person before the court?' These questions cannot be answered in the abstract. Sketching an answer requires a close contextual understanding of the person who comes before the court – an understanding that takes account of that person's 'different' experience, and the 'different' experiences of the intersecting social groups to which that person belongs. Sketching an answer also requires exploration of how these differences are, or are not, taken into account at particular locations within the criminal justice system. Thus, it is argued that a principle of equality, understood as an entitlement to *equal consideration*, requires a close focus on difference, and the 'difference, difference makes'. [2] This, in turn, brings attention to our capacity to perceive, consider and understand difference, and the different experiences of 'others' who come before the criminal courts. It requires us to acknowledge the limitations of our own socially-constructed perspective, and the barrier this presents to understanding the experiences of those who differ markedly from us. Entailed, therefore, in an entitlement to *equal consideration,* is the necessity for those who have the capacity to promote equality before the law to actively work to 'stretch' their perspective to engage with and understand the different experiences of others – a process that requires information, imagination and effort.

---

[1] The phrase 'criminal justice decision-makers' is used by Luke McNamara, '"Equality before the Law" in Polyethnic Societies: The Construction of Normative Criminal Law Standards' (2004) 11(2) *Murdoch University Electronic Journal of Law* 1 [54]-[55]. This category of persons is defined by McNamara to include 'police officers, prosecutors, defence lawyers, magistrates, judges and juries'. Here and throughout this linking dissertation the phrase 'criminal justice decision-makers' is used to refer to those whose actions and decisions most clearly impact the treatment of those who come before the criminal courts, in particular, judges, magistrates, legal practitioners, jurors and, one step back, legislators whose actions result in the law and process that shape the operation of criminal law.

[2] Deborah L. Rhode, 'Feminist Critical Theories' (1990) 42 *Stanford Law Review* 617 in M D A Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet and Maxwell, 6th ed, 1994) 1039.

## D *Chapter Progression*

Chapter II provides a summary of each of the publications, drawing initial attention to the ways in which each engages with asking or answering equality questions for particular groups of people who come before the law at specific sites in the criminal justice system. The chosen intersections are: battered women on trial for having killed their abusers; Indigenous offenders before the court facing sentencing; and child sexual assault complainants being subjected to cross-examination.

Chapter III considers the principle of 'equality before the law', establishing its status as foundational and investigating its roots in our intuitive engagement with a conception of equality. It argues that equality of treatment – understood as treatment of like alike and unlike differently, a necessarily comparative exercise – is a central concern of human existence. As such, our intuitions provide a foundation for engaging with equality questions, and, in particular, the question of when a difference will justify or require differential treatment. The chapter then considers the nature of 'differences' and 'inequalities' and the vexed distinction, and interactions, between these concepts. It maintains that despite marked differences and inequalities of and between people and groups of people, an inherent equality as human beings remains. From this flows the moral requirement to treat those who come before the law as being of equal value and entitled to *equal consideration*. It is then argued that determining whether equal consideration is being given requires engaging closely with the experiences of those who come before the law and asking whether they are being treated *as less* – that is, whether the law fails to take account of their experiences, as for example, battered women, Indigenous Australians or child sexual assault complainants. The central point being made in the chapter is that equality of treatment is fundamentally about understanding difference,[3] and taking difference into account. In the context of the criminal courts, criminal law and process, it is about giving equal consideration to those who come before the law, understood by reference to their differences, which are reflective of the intersecting groups to which they belong.

Chapter IV is concerned with the task of identifying inequality of treatment. Using the concept of discrimination – understood broadly as occurring wherever members of a defined social group are being disadvantaged or treated *as less* – the chapter explores inequality of treatment resulting from 'direct' and 'indirect' discrimination. It argues that discrimination manifests both in the unequal treatment of equals and the equal treatment of unequals. In other words, inequality of treatment can result from treating people differently because of their differences, just as it can arise from treating people as the same regardless of their differences. Thus, to determine whether a person, or group of people, is being treated *as less* by criminal law or legal process requires giving close consideration to the interaction between treatment and the relevant differences of the people being treated, or the 'difference difference makes'.[4] Consequently, it is

[3] Here difference is being used such that it encompasses both differences and inequalities on the basis that an inequality necessarily amounts to a difference, albeit a different sort of difference. The interaction is discussed further below.

[4] Deborah L. Rhode, 'Feminist Critical Theories' (1990) 42 *Stanford Law Review* 617 in M D A Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet and Maxwell, 6th ed, 1994) 1039.

argued that equality questions cannot be answered in the abstract. They require engagement with the concrete circumstances of the person who comes before the law, again understood by reference to the experience of the intersecting social groups to which the person belongs. In other words, explicit or implicit comparisons cannot be resolved without close contextual engagement with the reality of those upon whom law and legal process act.

After setting this base, Chapter IV moves to consider the ways in which the publications engage with asking and answering questions about whether battered women, Indigenous offenders and child sexual assault complainants are being treated *as less* at chosen sites in the criminal justice process. That is, whether these groups have been, and are being given, equal consideration. It discusses the extent to which the law of self-defence and its reform can enable engagement with the reality of battered women; the extent to which sentencing principle and practice can take account of Indigenous experience; and the extent to which the cognitive, linguistic and situational circumstances of child sexual assault complainants can be taken into account in the control of improper questioning in cross-examination. Full consideration of each of these topics is left to the publications themselves. The linking dissertation seeks to ground and connect each of the arguments made in the publications with the principle of equality, shoring up the shared ethical foundation of the publications. Central to the argument is the claim that in each instance there has been a historical and continuing failure to accord equal consideration to these groups of people. In other words, that at these sites, and no doubt elsewhere, there has been a failure to engage with their experiences and a consequent failure to take relevant differences into account. The point is made that, with varying degrees of success, the remedy for the failure to give 'equal consideration' has been sought – almost paradoxically – in laws and legal process designed to require and facilitate giving particular attention to the experience of these groups of people; people who can be understood as 'others' insofar as their experience and social position deviates from those 'giving' the consideration.

Chapter V considers the challenge of engaging with the experience of 'others' and approaches to overcoming these challenges. Drawing upon the work of Easteal,[5] it argues that accepting the challenge of engaging with the experience of others starts with a realistic appreciation of the extent to which each of us – including, critically, legislators, judges, magistrates, legal practitioners and jurors – has been enculturated or socialised to see the world from a situated and limited perspective that obscures the reality of others whose experiences we do not share. With this appreciation of the bounded nature of our own experience, meeting the challenge requires us to reach across the divide to understand the experience of others. It is argued that this must be a deliberate and conscious act of extending or 'stretching' our perspective to engage with the perspective of others.[6] Centrally, it is argued that adopting this 'positional stance' is required if fidelity to the principle of equality is sought.[7] And further, that giving equal consideration to others requires information about their experiences, and the experiences of the intersecting groups to which they belong, together with the

[5] See, eg, Patricia Easteal, *Less than Equal – Women and the Australian Legal System* (Butterworths, 2001) 1-3.
[6] Katherine T Bartlett, 'Feminist Legal Method' (1990) 103 *Harvard Law Review* 829 in M D A Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet and Maxwell, 6th ed, 1994) 1132.
[7] The concept of a 'position stance' is taken from Bartlett, though the connection with the principle of equality is not explicitly made by her therein, ibid 1133.

imagining of what it must be like to be in their shoes. This process of 'informed imagining' requires effort, and, it is argued, the more different the reality of the person whose perspective we seek to engage with, the more the requirement of information, imagination and effort. Put another way, the more different the reality of those with whom we seek to engage, the more attention we must pay to their experience and the relevant differences that may exist. The chapter then considers the importance of imagining ourselves into the shoes of others in moral reasoning, together with the limits on our capacity to actually do so. Finally, bringing the discussion back to a concrete engagement with the experience of battered women, Indigenous offenders and child sexual assault complainants, it is argued that the effort to give 'equal consideration' is furthered by the feminist method of 'consciousness raising', or 'making known the unknown'.[8]

From this foundation, Chapter V discusses the ways in which the publications engage with the reforms and approaches intended to facilitate understanding, making known the unknown and encouraging criminal justice decision-makers to walk in the shoes of battered women, Indigenous offenders and child sexual assault complainants. In particular, the dissertation considers the Victorian approach to facilitating the admission of evidence of family violence in self-defence cases;[9] the Canadian approach to paying 'particular attention to the circumstances of aboriginal offenders' in sentencing;[10] and the extent to which section 41 of the *Evidence Act*, augmented by judicial education, has the capacity to ensure that particular characteristics of witnesses are taken into account in the assessment of whether a question put to them in cross examination is improper.[11] Finally, Chapter V considers 'role-play' and experiential learning as a particular strategy for combining information and imagination in pursuit of making known the unknown known and engaging law students with the reality of others.

Chapter VI brings the thesis to conclusion, highlighting the potential of equal consideration.

## F *Limitations and Assumptions*

Just as it is important to establish what is being argued in this linking dissertation, it is equally important to establish the limitations of the argument and the assumptions upon which the argument proceeds. By selecting sites within the criminal justice process and asking whether particular groups of people who come before the law at these sites are accorded equal consideration, there is a risk that the bigger picture of systemic inequality will be obscured. This is not the intention. Indeed, the argument is made that understanding the broader social context, including social relationships of power, is a prerequisite for understanding the experience of battered women, Indigenous offenders

[8] Patricia A. Cain, 'Feminism and the Limits of Equality' (1990) 24 *Georgia Law Rev* 803 in M D A Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet and Maxwell, 6th ed, 1994) 1114. It is not here suggested that consciousness raising is not a strategy adopted by other emancipatory movements, undoubtedly is must be. However, the use of the term here is drawn from its well-recognised place in feminist thought.

[9] *Crimes Act 1958* (Vic) ss 322J and 322M.

[10] *Criminal Code Canada Criminal Code RSC* s 718.2(e).

[11] *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2011* (ACT); *Evidence (National Uniform Legislation) Act* (NT).

and child sexual assault complainants at the chosen sites. Yet it remains the case that seeking to promote equality at one site within the system is of little value unless that objective is seen as part of a broader movement towards a more just system of law and legal process.

More fundamentally, however, this dissertation assumes that something like 'equality' can be meaningfully approached within the existing criminal justice system, even though the system and society in which that system exists are shaped by deep and enduring social inequalities. From a 'radical' feminist perspective,[12] MacKinnon plumbs the depths of this all-pervasive inequality as follows:

> virtually every quality that distinguishes men from women is already affirmatively compensated in this society. Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experience and obsessions define merit, their objectification of life defines art, their military services defines citizenship, their presence defines family, their inability to get along with each other – their wars and rulerships – defines history, their image defines god, and their genitals define sex.[13]

The point is that the very structure of society, underpinning each of its institutions, is gendered.[14] So too are the structures of the law. For example, the gladiatorial features of dispute resolution,[15] its language,[16] and its definitions of determinative concepts such as credibility are a manifestation of gender power.[17] Even the concept of equality, based on a liberalist account of an autonomous and atomised human existence, is ripe for interrogation as arising from a patriarchal perspective.[18]

---

[12] Whilst the label 'radical' feminist may be applied to MacKinnon to distinguish her work from other feminist schools of thought, this thesis does not propose to engage with the taxonomy of feminist thought. It does however draw heavily on the insights of many key feminist thinkers. For a brief discussion of the feminist schools of thought and the bearing they have on law reform see, eg, Easteal, above n 5, 13-15; Marett Leiboff and Mark Thomas, *Legal Theories: Contexts and Practices* (Thomson Reuters, 2009) 413-426.

[13] Catharine A MacKinnon, 'Difference and Dominance' in Catharine A MacKinnon *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) 36.

[14] See, generally, R W Connell, *Gender and Power* (Allen and Unwin, 1987); R W Connell, *Gender* (Polity Press, 2002); Easteal, above n 5, 14.

[15] Easteal above n 5, 14 citing Regina Graycar and Jenny Morgan, *The Hidden Gender of the Law* (Federation Press, 1990) 410.

[16] See, eg, Easteal, above n 5, 17.

[17] Easteal, above n 5, 17 citing Jocelynne Scutt, 'The Incredible Woman: A Recurring Character in Criminal Law' in Patricia Easteal (ed), *Women and the Law*, (Australian Institute of Criminology, 1993) 9, 20; Mary Heath, 'Women and Criminal Law: Rape' in Patricia Easteal (ed) *Women and the Law in Australia* (LexisNexis Butterworths, 2010) 88, 89-90.

[18] See, eg, Robin West, 'Jurisprudence and Gender' (1988) 55 *Univ. Chicago Law Review* 1 in M D A Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet and Maxwell, 6th ed, 1994) 1062, 1076. Lacey argues that,

> liberal notions of equality are fundamentally premised on the idea of sameness: equal treatment is due to all who are similarly situated to the full liberal subject. Hence, if that subject is implicitly marked as masculine – is understood in terms of bodily and psychic characteristics which have been culturally understood to be associated with men – then the strategy of equality amounts to the assimilation of women to a norm set by and for men.

Nicola Lacey, *Unspeakable Subjects – Feminist Essays in Legal and Social Theory* (Hart Publishing, 1998) 240.

Critical race theorists have leveled a similar charge with respect to the structural basis of racial inequality and its institutional pervasiveness. According to Harris, considering the intersection of critical race theory and postmodernism,

> Postmodernist narratives, as used by race-crits, contend that concepts like neutrality and objectivity, and institutions like law, have not escaped the taint of racism, but rather are often used to perpetuate it. Postmodernist narratives emphasize the ways in which 'race' permeates our language, our perceptions, even our fondest 'colourblind' utopias. CRT tells postmodernist narratives when it digs down into seemingly neutral areas of law and finds concepts of 'race' and racism always already there.[19]

Achieving full equality, therefore, has to do with 'transforming existing structures',[20] and equalising the distribution of social power. [21] Lacey maintains, of the 'condition of the existence of genuine equality' that 'it is well understood that this has to do with broad distributions and flows of social power'.[22] She argues that, 'as Marxists saw, the reconstruction of the legal has to be premised on the reconstruction of economic, social, political relations: on massive changes in the configuration of social power at every level'.[23]

This understanding can lead to dissolution for the reformist, given, as Smart argues, 'all law reform empowers law', thereby empowering a key institution of domination.[24] Certainly this is a hazard of legal scholarship that promotes reform rather than revolution. However, as Carline and Easteal maintain, despite the undoubted need for 'radical transformation of the legal and social structure … there is an ethical responsibility to respond to those in the present, to try to find ways within the existing system to bring about some level of justice, however difficult that may be'.[25] This echoes Finely's call for continued engagement with law reform:

> We cannot get away from law, even if that is what we would like to do. Because law is such a powerful, authoritative language, one that insists that to be heard you try to speak its language… Nor can we abandon caring whether the law hears us. Whether or not activists for women look to law as one means for pursuing change, the law will still operate on and affect women's situations. Law will be present through direct regulation, through nonintervention when intervention is needed, and through helping to keep something invisible when visibility and validation are needed. [26]

Accepting the moral imperative to engage, even in the face of the limitations and assumptions inherent in doing so, this thesis seeks to add a voice to calls for justice.

---

[19] See eg, Angela Harris, 'The jurisprudence of Reconstruction' (1994) 82 *California Law Review* 741, 750 (footnote omitted).
[20] Ibid 762.
[21] MacKinnon, above n 13, 44.
[22] Lacey, above n 18, 241.
[23] Ibid 248.
[24] Carol Smart, *Feminism and the Power of Law* (Routledge, 1989) 161, discussed in Anna Carline and Patricia Easteal, *Shades of Grey – Domestic and Sexual Violence Against Women* (Routledge, 2014) 254-255 in relation to considering '[t]he (im)possibility of feminist law reform'.
[25] Carline and Easteal, above n 24, 256.
[26] Lucinda M. Finley, 'Breaking Women's Silence in law: the Dilemma of the Gendered Nature of Legal Reasoning' Reasoning' (1989) 64 *Notre Dame law Review* 886 in M D A Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet and Maxwell, 6th ed, 1994) 1135.

Moreover, it argues that the principle of 'equality', and 'equality before the law', provides a platform from which these calls can be made.

### G *Situating the Author*

Finally, by way of introduction, it is necessary to situate myself as the author. This thesis makes an argument that the promotion of equality before the law requires close engagement with difference and the experience of 'others' who come before the law. It speaks in the language of the third person, but there is an 'I' here, and it is not an 'I' traditionally associated with 'otherness'. I am a middle-class, white, heterosexual, able-bodied male from a socio-economically privileged background. I occupy a place of privilege as a legal academic and a criminal defence barrister. I have not been a victim of family violence, or witness to its perpetration against loved ones within my family. I am not Indigenous and do not bear the intergenerational scars of colonisation.[27] I have not been subjected to sexual abuse and compelled to give evidence against a perpetrator, defending my credibility in the face of public attack. In view of this, I acknowledge the wisdom of the words '[o]nly those who have known discrimination truly know its evil'.[28] Despite this, it remains for each of us who repudiate discrimination, who seek a more equal world, to engage with the experiences of 'others', and learn, and imagine, as best we can, what it would be like to be in their shoes. For there is a 'we' here, a humanity each of us shares that requires us to respect one another as equals, to respect the differences of others as we would have them respect ours. To this end, I frequently use the word 'we' to invite the reader to engage with an argument based on our shared humanity. Whether this invitation is effective, and the argument sound, is not ultimately for me to judge.

[27] My wife and children are, however, Aboriginal. I am indebted to my wife for opening my eyes to the experiences of her people.
[28] Noel Pearson, 'Eulogy for Gough Whitlam' (Speech delivered at Gough Whitlam's State funeral, Sydney Town Hall, 4 November 2014).

## II SUMMARY OF PUBLICATIONS

The thesis is comprised of six published research outputs, with a seventh publication currently under review. Six of the research outputs are concerned with the realisation of equality, approaching the issue at various sites in the criminal justice system. These publications ask questions about whether equality is or can be realised for particular groups of people who come before the law. The seventh publication focuses on an experiential learning approach to teaching evidence law through role-play, enabling students to engage with the experience of participants in, and the power dynamics of, the adversarial criminal justice system. Each publication, and the argument made within, is briefly summarised below for the purpose of grounding the discussion that then follows with respect to the theoretical underpinnings and the links between. It will be argued that each is an example of asking an equality question and promoting moves towards the realisation of equality.

### A W*omen and Criminal Defences to Homicide*[29]

This chapter in the edited book *Women and the Law* commences by asking the reader to imagine that s/he is a lawyer acting for three women charged with murder. The first accused has killed her husband with a gun whilst he was asleep, following years of violence perpetrated by him against her. The second has drowned her three-month-old daughter whilst suffering post-natal depression. The third has killed her lover in circumstances where her behaviour may be explained by the experience of premenstrual dysphoric disorder.

The chapter considers the difficulties associated with getting a full account of the motivations, history, experience and symptoms existing proximate to and more distal from the act of killing. In particular it considers gender, linguistic, practical, cultural and knowledge-based limitations to understanding. It then proceeds to consider substantive legal defences and the extent to which these exclude or embrace the experience of these women who have killed. The primary focus is a practical rather than theoretical survey of the legal terrain, designed explicitly to aid the understanding of lawyers and non-lawyers who may act for women who kill.

This dissertation will argue that the equality question is raised most clearly in relation to the issue of whether self-defence in its common law or statutory formulations can enable a contextual assessment of the 'reasonableness' of a battered woman's actions in killing her abusive partner. In essence the question is: can the defence, historically tailored to the spontaneous male response to an immediate threat, engage with the social and psychological context of family violence? Can it enable fact finders to judge reasonableness with a real understanding of the perspective and experience of the woman under judgment, and 'what it must really be like to live in a situation of ongoing violence'?[30]

---

[29] Patricia Easteal and Anthony Hopkins, Chapter 7 'Women and Criminal Defences to Homicide' in Patricia Easteal (ed) *Women and the Law* (LexisNexis, 2010) 109.

[30] Rebecca Bradfield, Submission No 17 to Victorian Law Reform Commission, *Defences to Homicide*, 13 December 2003, cited in Victorian Law Reform Commission *Defences to Homicide*, Final Report (2004) 135.

The chapter argues that the common law and statutory formulations of self-defence, to a greater or lesser extent, *enable* a consideration of the reality of battered women who kill. And, that this is particularly so where augmented by provisions facilitating the admission of social and psychological context evidence.[31] In the same vein the chapter considers the partial and complete defences of provocation and automatism respectively. The defences of insanity, mental impairment, diminished responsibility and infanticide are considered as they may apply to premenstrual and post-natal killing.

The latter part of the chapter focuses on 'how to help the judge and jury to hear women's stories' with the assistance of expert evidence. Again by reference to battered women who kill, it is suggested that a wide net be cast to consider all those who are, through their training, study and/or experience, in a position to take the decision-maker to a fuller understanding of the social and psychological context of the battered killer.

### B *Walking In Her Shoes: Battered Women Who Kill In Victoria, Western Australia and Queensland*[32]

This article again addresses the question of the extent to which common law and statutory formulations of the test of self-defence can embrace the experience of battered women who kill. It focuses on the challenge of 'reasonableness' and the extent to which the reasonableness of a perception of threat, or response to it, is to be judged from the vantage point of a battered woman. This challenge starts with an acknowledgement that 'a battered woman's experiences are generally outside the common understanding of the average judge or juror'.[33]

The article argues that the common law test of self-defence, properly understood, enables the fact finder to consider the situational and psychological predicament of the battered woman who kills, walking so far as possible in her shoes. It suggests that it is the application of the test, rather than its doctrinal content, that undermines claims to reasonableness.

To this end, the article moves to consider reforms introduced in Victoria designed to facilitate the admission of situational and psychological context evidence.[34] In contrast, Western Australia eschewed this legislative reform, opting instead to reform its statutory formulation of the test of self-defence by jettisoning associations with imminence, proportionality and a 'one-off physical attack' model.[35] It is argued that Western Australian reforms leave application of the test more open to judicial interpretation.

---

[31] *Crimes Act 1958* (Vic) 322J and 322M.

[32] Anthony Hopkins and Patricia Easteal, 'Walking in Her Shoes: Battered Women Who Kill in Victoria, Queensland and Western Australia' (2010) 35(3) *Alternative Law Journal* 132.

[33] *R v Malott* [1988] 1 SCR 123, [43 (L'Heureux-Dube J); *Lavallee* [1990] 1 SCR 852, 871-872; *Osland v The Queen* (1998) 197 CLR 316, 337 (Gaudron and Gummow JJ), 376-377 (Kirby J).

[34] *Crimes Act 1958* (Vic) s 9AH (now repealed and replaced by ss 322J and 332M *Crimes Act 1958* (Vic) inserted by *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) commencing operation on 1 November 2014.

[35] Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report* (2007) 97, 167; *Criminal Code 1913* (WA) s 248.

On the other end of the spectrum, the article takes aim at a Queensland reform enshrined in s 304B of the *Criminal Code 1899* (Qld), which commenced on 10 February 2010. This section operates as a partial defence, reducing murder to manslaughter in circumstances where 'the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship'.[36] The equality question is engaged because the same section requires both that the battered woman believed it was necessary to do what she did and that there were reasonable grounds for this belief.[37] Given that these two limbs are sufficient at common law to warrant complete acquittal on grounds of self-defence (as opposed to a manslaughter conviction), it is argued that the reform results in a denial of equality.

### C. *The Relevance of Aboriginality in Sentencing: Sentencing a Person for Who they Are*[38]

This article shifts the focus of critique to the sentencing process and sentencing principle. It considers the extent to which Indigenous experience can and is being taken into account in the sentencing of Indigenous offenders. The article argues that taking Aboriginality, or Indigenous experience,[39] into account in sentencing is essential to the realisation of equality. In so doing, it will be argued that the article engages explicitly with the equality question.

The publication commences with a discussion of the principle of equality in sentencing, generally, which generally requires 'that like should be treated alike but that, if there are relevant differences, due allowance should be made for them'.[40] It goes on to consider the myriad ways that Indigenous experience may be relevant to the exercise of the sentencing discretion, illuminating 'material facts which exist only by reason of the offender's membership of an ethnic or other group' which must be taken into account to ensure equality in sentencing.[41]

The article goes on to consider the extent to which decisions in various Australian jurisdictions have taken Aboriginality into account. In particular, it considers restrictions imposed on when and how Indigenous experience is to be taken into account and argues that these restrictions amount to a denial of equality.

It then moves to consider the difficulties inherent in ensuring that evidence and information is put before sentencing courts that identify the material facts existing in the life of Indigenous offenders by reason of their experience as Indigenous Australians. Drawing upon Canadian jurisprudence, it argues that equality cannot be achieved without processes designed to shed light on the 'unique systemic and background

[36] *Criminal Code 1899* (Qld) s 304B(1)(a).
[37] *Criminal Code 1899* (Qld) s 304B(1)(b); (c).
[38] Anthony Hopkins, 'The Relevance of Aboriginality in Sentencing: Sentencing a Person for Who They Are,' (2012) 16(1) *Australian Indigenous Law Review* 37.
[39] Here, and elsewhere, 'Aboriginality' is used as synonymous with Indigenous experience, denoting the Indigenous identity of the offender and the experiences the offender has had as a consequence of being Indigenous. 'Aboriginality' is therefore used to encompass the identity and experience of the First Australians, whether Aboriginal or Torres Strait Islander.
[40] *Postiglione v The Queen* (1997) 189 CLR 295, 301 (Dawson and Gaudron JJ).
[41] *Neal* (1982) 149 CLR 305, 326 (Brennan J).

factors which may have played a part in bringing the particular offender before the court'.[42]

Finally the article argues that equality in sentencing requires consideration of the extent to which Indigenous collective experience can provide culturally appropriate pathways to healing, rehabilitation and reform.

### D *The Relevance of Aboriginality in Sentencing: Findings from Interviews in the ACT*[43]

In a similar vein, this chapter in *Justice Connections* is concerned with the promotion of equality in sentencing for Indigenous Australians. It, too, argues that engaging with and understanding Indigenous experience in the sentencing process is fundamental to the equal application of the sentencing discretion.

The chapter considers sentencing principle as it relates to taking Indigenous experience and circumstance into account. It rejects the application of sentencing principle that restricts such consideration and argues for a broad understanding of the relevance of Aboriginality in sentencing.

Then, taking that point to the local level, the chapter publishes and considers responses of a small-scale study of Aboriginal Legal Service lawyers practicing in the Australian Capital Territory (ACT). Based on these responses, the chapter argues that outside of the ACT Galambany Indigenous Circle Sentencing Court, limited consideration is given by sentencing courts to Indigenous experience and circumstance. Of particular note were the respondents' views that pre-sentence reports in the ACT give little or no consideration to Aboriginality and the relevance of Indigenous circumstance and experience. The chapter argues that addressing this lack would promote understanding of how an individual offender's Aboriginality may be relevant to the sentencing discretion, thereby promoting the realisation of equality by enabling relevant differences to be taken into account.

### E *Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice*[44]

This article has been submitted for publication, and is being reviewed for publication in 2015. It maintains a focus on the equality question in relation to the sentencing of Indigenous offenders. The article compares Canadian and Australian jurisprudence with respect to application of the principle of equality and individualised justice in sentencing Indigenous offenders. It argues that the High Court of Australia (the High Court) in *Bugmy v The Queen* (*'Bugmy'*)[45] missed an opportunity to grapple with the complex interrelationship between individualised justice, equality and Indigenous

[42] *R v Gladue* [1999] 1 SCR 688, [69].
[43] Christina Lewis, Anthony Hopkins and Lorana Bartels, 'The Relevance of Aboriginality in Sentencing: Findings from Interviews in the ACT' in Patricia Easteal (ed) *Justice Connections* (Cambridge Scholars, 2013) 37.
[44] Thalia Anthony, Lorana Bartels and Anthony Hopkins, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' (2015) 39(1) *Melbourne University Law Review* (advance).
[45] (2013) 249 CLR 571.

circumstance; an opportunity that had previously been embraced by the Supreme Court of Canada.

The article first considers the principles and processes adopted in Canada for taking Indigenous circumstance into account in sentencing, and explores the reasons given by the Supreme Court of Canada to justify different treatment of Indigenous offenders in the pursuit of individualised justice and equality. It then considers the Australian position in the light of *Bugmy*, arguing that the High Court's dismissal of the Canadian approach on the basis that it offends the principle of individualised justice was misconceived. This, it is argued, resulted from a failure to consider the Supreme Court of Canada's founding premise, namely, that differential consideration was necessary to remedy systemic inequality and the historic failure in that country to engage with Indigenous circumstance and experience.

The article maintains that the High Court's refusal to acknowledge a similar historic failure to accord equality in sentencing in Australia resulted in a missed opportunity to consider innovation in the sentencing process, especially, in relation to ways to bring evidence of unique Indigenous circumstance before sentencing courts to ensure that 'all material facts' existing by reason of an offender's experience as an Indigenous person are considered in sentencing.

### F. *Cross-examination of Child Sexual Assault Complainants: Concerns About the Application of s 41 Evidence Act*[46]

This article shifts location and focus to consider the experience of child sexual assault complainants in the witness stand and legal reforms to better protect them from improper cross-examination. In particular, the article examines s 41 of the Uniform Evidence Acts.[47] This is a provision designed to prevent 'improper questions',[48] or 'improper questioning'.[49] In determining whether a question or questioning approach is improper, the section requires the court to take into account certain 'vulnerabilities', such as age, cognitive development and so forth. Accordingly, the section is designed to ensure differential treatment of witnesses, having regard to their particular characteristics – that different is treated differently. The legislation, thus, explicitly engages with the equality question.

The article investigates the efficacy of the legislative provision and considers constraints on the protection of children inherent in the adversarial system. It considers the roles of participants and relationships of power operating within the trial process.

The article commences by considering research on the experience of child sexual assault complainants who face cross-examination, concluding that cross-examination can be productive of both trauma and truth obfuscation. It discusses the various ways in which the child may perceive cross-examination as traumatic or confusing. It then goes on to explore the central role that cross-examination plays in the adversarial

[46] Russell Boyd and Anthony Hopkins, 'Cross-examination of Child Sexual Assault Complainants: Concerns About the Application of s 41 Evidence Act,' (2010) 34 *Criminal Law Journal* 149.
[47] *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2011* (ACT); *Evidence (National Uniform Legislation) Act* (NT).
[48] *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2011* (ACT).
[49] *Evidence Act 2008* (Vic); *Evidence (National Uniform Legislation) Act* (NT).

criminal justice system. In particular, it considers the role and ethical obligations of defence counsel and the relationship between their system-defined objectives and the truth. It also considers the role of judge and prosecutor in the cross-examination process.

Having situated cross-examination within its context, the article considers reforms designed to constrain improper questioning. It discusses the results of a small-scale study of lawyers' attitudes and responses to reforms, canvassing the legal practitioner's perspective. The article goes on to argue that there are competing understandings of the definition of an improper question or questioning, and that these understandings are founded on a difference in perspective. It is argued that these competing understandings indicate a discord between the trial-centred and child-centred interpretations of improper questioning – a discord enshrined in section 41 itself.

Ultimately, the article suggests that if reform efforts fail, serious consideration should be given to a less-adversarial model of discovering the truth which does not pit the defence lawyer against the child sexual assault complainant.

### G. *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*[50]

Although this research output was in fact the first published, it is convenient to consider it last. This is because it focuses on role-play as a method of engaging imaginatively with the criminal trial process and the experience of participants. In so doing, the article engages the equality question by detailing and arguing for an approach that requires students to step into the shoes of 'others'. From this perspective – with an understanding of the adversarial criminal trial process and the roles and responsibilities of its actors – students are in a better position to consider whether witnesses and defendants are being treated equally.

The article commences with a justification for adopting a semester-long simulated trial as the scaffold for teaching evidence law, arguing that it requires students to engage in an integrated experiential learning cycle, explicitly linking theory and practice. It argues that this approach enhances student understanding of core principles of evidence law through active participation in the process of proof. The article documents the design and implementation of this approach to teaching evidence law, and assesses its efficacy.

It then reflects on the equality question by arguing for the value of the 'in-role' experiential learning approach as a platform to enable consideration of the experiences of vulnerable witnesses. The groups chosen for this exercise were child sexual assault complainants and Indigenous witnesses,[51] whose experiences have been documented.[52]

---

[50] 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) *Journal of the Australasian Law Teachers Association* 173.

[51] It should be noted that not all, or even the majority of, Indigenous witnesses will necessarily be 'vulnerable' as a consequence of cultural and language differences.

[52] See, eg, Christine Eastwood and Wendy Patton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System* (Report to the Criminology Research Council, 2002) and

It is argued that the combination of information and imagination furthers an understanding of the position and perspective of 'others'.

For the purposes of this dissertation, the article will be taken as providing an example of ways in which barriers to understanding can be shifted, enabling inequalities to be perceived, considered and addressed. Further, it will be argued that an 'in-role' understanding of relationships of power inherent in the trial process sheds light on the systemic limitations on the pursuit of equality within the context of an adversarial trial.

Diana Eades, 'Telling and Retelling Your Story in Court: Questions, Assumptions, and Intercultural Implications' (2008) 20(2) *Current Issues in Criminal Justice* 209 respectively.

## III MAKING SENSE OF EQUALITY: LOOKING FOR PRINCIPLED GROUND TO STAND ON

### A *The Principle of Equality Before the Law*

The entitlement to equality before the law is a fundamental principle of our criminal justice system, and our legal system more generally. It is enshrined in international and domestic law through declarations, conventions, Acts of parliament and in the common law. For example, Article 7 of the *Universal Declaration of Human Rights*, adopted in 1948, provides that 'All are equal before the law and are entitled without any discrimination to equal protection of the law'.[53]

These words are largely replicated in Article 26 of the *International Convenant on Civil and Political Rights*.[54] Domestically, the principle of equality before the law has been enacted in s 8(3) of both the *Human Rights Act 2004* (ACT) and the *Human Rights and Responsibilities Act 2006* (Vic) with the former providing that '[e]veryone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground'.

The common law also recognises the principle of equality as fundamental to the rule of law.[55] So foundational is the principle that it was described by the Privy Council in *Matadeen v Pointu* as 'one of the building blocks of democracy'.[56] The Privy Council went further to say 'that treating like cases alike and unlike cases differently is a general axiom of rational behaviour'.[57] In *Green v The Queen* the High Court described the foundational nature of the principle of equality before the law as follows:[58]

> "Equal justice" embodies the norm expressed in the term "equality before the law".[59] It is an aspect of the rule of law.[60] It was characterised by Kelsen as "the principle of

[53] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).
[54] *International Convention on Civil and Political Rights*, GA Res 2200A (XXI), 21 UN GAOR Supp No 16 at 52, UN Doc A/6316 (16 December 1966).
[55] *Leeth v The Commonwealth* (1992) 174 CLR 445, 485-6 (Deane and Toohey JJ); Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (McMillan, 10th ed, 1959) 202; Kate Warner, 'Equality Before the Law: Racial and Social Background Factors as Sources of Mitigation at Sentencing' in Julian Roberts (ed) *Mitigation and Aggravation at Sentencing* (Cambridge, 2011) 124-145, 126.
[56] [1999] AC 98, 109.
[57] Ibid.
[58] *Green v The Queen* (2011) 244 CLR 462, 472 (French CJ, Crennan and Kiefel JJ) footnotes in extracted text renumbered but otherwise appearing as in original decision; see also Justice Stephen Rothman, "The Impact of *Bugmy* and *Munda* on Sentencing Aboriginal and Other Offenders" [2014] *New South Wales Judicial Scholarship* 6, 7-9.
[59] A norm said to be traceable to Solon's "isonomia" transported to England in the 16th century as "isonomy" and displaced in the 17th century by "equality before the law", "government of laws" and "rule of law": Friedrich A Hayek, *The Constitution of Liberty: The Definitive Edition*, (University of Chicago Press, 2011) 238.
[60] Albert V Dicey, *Introduction to the Study of the Law of the Constitution*, (McMillan, 7th ed, 1908) 198; William S Holdsworth, *A History of English Law* (Little, Brown, 1938) vol X, 649.

legality, or lawfulness, which is immanent in every legal order."[61] It has been called "the starting point of all other liberties."[62]

Indeed, equality as a principle has deep roots in Western political philosophy spanning far beyond the application of criminal law and criminal process.[63]

But here we are interested not in a bare statement of principle, but the application of principle and with an interrogation of what an equality principle requires for those who come before the adversarial criminal justice system. *The central questions are: Can we make sense of the principle of equality in the application of law and process at various sites in the criminal justice system? And, ultimately, when is differential treatment required by the principle of equality in those sites?* To this end we are concerned with the questions of equality of treatment of human beings in specified circumstances.

In pursuit of the objective of making sense of the application of the principle of equality before the law, it is worth briefly considering our intuition and experience. This is so because the principle of equality, as a principle of justice, is rooted in our pre-argument intuition and experience.[64] According to Aristotle, '[i]f, then, the unjust is unequal, just is equal, as all men suppose it to be, even apart from argument'.[65]

This means we need go no further than our own experience to begin grappling with what equality requires. However, later it will be argued that our subjective experiences and intuitions, so dependent on our enculturation,[66] may also be the greatest barriers to perceiving inequality and injustice, and judging what is just for other people.

### B *The Formation of An Equality Intuition*

Taking the example of siblings born 16 months apart, Jane, and her younger brother, Tom, we can begin considering equality of treatment. As these siblings grow, they receive benefits and take on responsibilities, or burdens within the family, in education, in the social sphere and later in employment. Equality and difference quickly come into the frame. For example, if pocket money is given to each then the sixteen-month gap may or may not be seen as a basis for differential treatment. Almost invariably the younger, Tom, will make a claim to strict equality. The same goes for virtually every

---

[61] Hans Kelsen, *What is Justice?* (University of California Press, 1971) 15, cited in Wojciech Sadurski, 'Equality Before the Law: A Conceptual Analysis', (1986) 60 *Australian Law Journal* 131, 132. The distinction between 'equality before the law' and the substantive 'equality in the law' is usefully described in that article. See also Peter H Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis Butterworths, 2009) 400-423; Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 55-59.

[62] Hersch Lauterpacht, *An International Bill of the Rights of Man* (Columbia University Press, 1945) 115.

[63] Aristotle *Nicomachean Ethics* V 5.3 (D. Ross trans.) http://classics.mit.edu/Aristotle/nicomachaen.5.v.html ; H L A Hart, *The Concept of Law* (Oxford, 1961) 151-180; see discussion and legal application in *Jimmy v The Queen* [2010] NSWCCA 60 [255]-[256] (Rothman J).

[64] Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 1, 5.

[65] Aristotle, above n 63.

[66] The process of enculturation is discussed in detail below. For now it is sufficient to note that enculturation is taken here to mean the process by which each of us learns 'about our culture's way of being, seeing, doing and believing'. Easteal, above n 5, 2.

benefit, down to the size of a slice of cake, or the number of blocks of chocolate each receives. When it comes to chores, further claims for equality of treatment will arise.

Notably, it is the perceived absence of equality – that is, claims of inequality – that will often shape the terrain, governed by 'deeply rooted instinctive reactions of resentment which are aroused by "unequal" treatment'.[67] Thus, equality and justice come to be defined by perceptions of the existence of their opposites, inequality and injustice. As Campbell has noted, 'there is some basis for the belief that it is our sense of *in*justice or grievance that is at the core of our ideas about justice and explain its powerful emotive force'.[68]

Back to our siblings, equality and difference. Age will invariably be used as a justification for differential treatment at various points within the family. A most obvious example is the timing of commencement of schooling. Insofar as this differential treatment is considered by Jane and Tom to be justified, they are likely to accept that they are not being treated unequally in a sense that will provoke claims of unfairness. This line will be drawn and redrawn as they grow. It will be governed by the norms of their family.

Similarly, as these siblings engage in public life they will measure their experience and the allocation of benefits and burdens against their school peers, co-workers, community members and fellow citizens. Claims of equality and inequality will remain central in that comparative exercise, as will considerations of difference, with concepts such as moral desert, effort, merit, achievement and position coming into the picture as justifications for differential allocation.[69]

It is critical to notice here that claims of equality or inequality in these, and any other, contexts require the application of a benefit or burden to more than one person, such that there is both 'treatment' and a 'comparator':[70] According to Fawcett,

> discrimination and non-discrimination are relational terms, so that whether we speak of disadvantage, equality, or advantage, we are speaking of treatment of one person or group as measured by the treatment, or the standard of treatment, of another person or group.[71]

In other words, we cannot take one child in a family and ask whether they are being treated equally. We need to compare this treatment to that of a person who occupies a space that is sufficiently similar to enable claims to be made.[72]

---

[67] Tom Campbell, 'Justice' in Peter Jones and Albert Weale (eds) *Issues in Political Theory* (MacMillan, 1988) 25.
[68] Ibid 1 (emphasis in original).
[69] Michael Walzer, *Spheres of Justice* (Blackwell, 1983) 4.
[70] Sen maintains that '[e]quality is judged by comparing some particular aspect of a person (such as income, or wealth, or happiness, or liberty, or opportunities, or rights, or need-fulfilments) with the same aspect of another person'. Amartya Sen, *Inequality, Re-examined* (Oxford University Press, 1992) 2.
[71] J, E, S, Fawcett, *The Application of the European Convention on Human Rights* (Clarendon Press, 2nd ed, 1987) at 299 (footnote omitted); cited in *Maloney v The Queen* [2013] HCA 28 [323] (Gageler J).
[72] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 164 (McIntyre and Lamer JJ): '[equal justice] is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises'.

The more different we may perceive ourselves to be from the person or the experience of the person we endeavour to compare our situation to, the more difficult it will be to 'intuitively' engage with the equality question. Indeed, it is worth noting now (and returning to later) the problem highlighted by MacKinnon that the deepest inequalities may exist where we cannot readily identify a comparator:

> Those who most need equal treatment will be the least similar, socially, to those whose situation sets the standard as against which one's entitlement to be equally treated is measured. Doctrinally speaking, the deepest problems of sex inequality will not find women "similarly" situated.[73]

Notwithstanding this, claims of inequality, and the intuitive assessment of equality by reference to real and notional comparators, remain central to human existence.

But, whilst an equality intuition may be foundational, it is unlikely to be a sufficient foundation for challenging inequality. Here the question is whether an equality intuition provides a sufficient ground from which to judge or challenge inequality of treatment within the criminal justice system. Two problems quickly become apparent. Firstly, if the intuition becomes less powerful or useful the greater the perceived differences between the 'intuitor' and the comparator, difference becomes a barrier. Secondly, and relatedly, the formation of the equality intuition is inextricably bound to the formation of beliefs that ground differential treatment. These may be justified, or, on the other extreme, they may be productive of gross and unjustified discrimination.[74] History is littered with examples of differences assumed 'intuitively' to justify gross differential treatment or discrimination – the experience of the first Australians and their struggle for full citizenship rights is but one.

Taking the example of the siblings, Jane and Tom, again, it may be that Jane is not simply encouraged by family and society to consider herself a 'girl' and thereby 'different' to Tom, but that Jane is allocated increased burdens because she is a girl. For example, if there is a gendered division of labour in the family in which Jane is raised, it is not unreasonable to presume that she will, with varying degrees of resistance, come to partake in that division. If her mother does the majority of housework, it may well be that Jane is required to do more housework as she grows up than Tom. More subtly, she may come to do so, not as a consequence of strict requirement, but by adoption of a modeled role.[75] Moreover, it may well be that Jane and Tom come to accept this as fair and equal treatment, justified by the gender difference. The limits of intuition and experience as a ground of critique are manifest in both the extremes of discrimination and its ever-present reality. This is a topic that will be returned to below in Part IV in considering the barriers to understanding the experience of 'others'.

---

[73] MacKinnon, above n 13, 44 (endnote omitted).
[74] Fredman, above n 64, 1, 5.
[75] For a real life example of a teenager whose life has been shaped by sex and gender, used as a 'point of departure' for a broad authoritative discussion of power relations between genders, see Connell, *Gender and Power*, above n 14, 1-6.

## C *Equality Amidst Inequality and Difference: Doubting the Very Idea.*

We are interested in equality claims about and between people, and groups of people, who come before the criminal courts as witnesses, complainants and defendants. This discussion cannot proceed without a frank acknowledgement of the extent to which these people are marked by their inequalities and differences. This presents a real problem for making sense of a principle of equality that has utility in the assessment of whether equality of treatment is or is not being accorded.

In identifying inequalities and differences of those who come before the law, further problems of definition arise, namely, what is an inequality and what is a difference and how do these concepts interact?

### 1 *Inequalities*

Taking inequalities first. How do we, for example, ensure or even approach equality of treatment in sentencing an Aboriginal offender whose grandparents were forcibly taken from their parents and their country, raised in an institutional setting without the rights and benefits associated with citizenship; an offender who has himself been removed from family or raised in a community ravaged by disadvantages associated with such historical disenfranchisement and injustice; an offender whose criminal actions are inextricably linked to this background? In short, how do we even approach equality of treatment before the law for a person whose life and life experience has been marked by such gross and intergenerational inequality of treatment? The problem receives concrete illustration in the 1991 report of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC).[76] Tasked to inquire into the deaths of 99 Indigenous Australians who died in custody, the Commissioners found:

> eighty-three were unemployed at the date of last detention; they were uneducated at least in the European sense - or under-educated - only two had completed secondary level; forty-three of them experienced childhood separation from their natural families through intervention by the State authorities, mission or other institutions; forty-three had been charged with an offence at or before aged fifteen and seventy-four at or before aged nineteen; forty-three had been taken into last custody directly for reasons related to alcohol and it can safely be said that overwhelmingly in the remaining cases the reasons for last custody was directly alcohol related … generally speaking the standard of health of the ninety-nine varied from poor to very bad (the average age of those who died from natural causes was a little over thirty years); their economic position was disastrous and their social position at the margin of society; they misused alcohol to a grave extent…[77]

Acknowledgement of the extent of such social inequality prompts consideration of whether, as Ashworth asks, 'it is right to speak of "just" or "fair" sentences in a society riven with inequality and injustice'[78] By extension, we must also ask whether it is meaningful to speak of equality amidst such inequality.

---

[76] Commonwealth Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991), Vol 2.
[77] Ibid vol 1 [1.2.17].
[78] Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5th ed, 2010) 134, 293.

Taking a further example from the published articles that form the body of this thesis, how do we accord equality of treatment for a child sexual-assault complainant; a child whose capacity to resist suggestive questioning, challenge and confusion will be affected by their cognitive and linguistic development, and (assuming truthfulness) by the very events the child is required to testify about? There is no simple answer.

Finally, taking a more generalised example, how does the impoverished offender fare in comparison to the wealthy offender, armed with the best legal team money can buy? The point is that those who come before the law are marked by differences in wealth, education, socio-economic background, age, English language proficiency, physical and mental ability and so forth. These inequalities fundamentally affect the relative level of power, or agency, that can be exercised by those persons coming before the criminal court. Any principle of equality worthy of application must engage with this reality.[79]

## 2. *Differences and Inequalities*

What of differences? Race is a difference rather than an inequality. Yet, as the passage drawn from the RCIADIC report extracted above demonstrates, racial inequality is an historical and present reality. As compared to non-Indigenous Australians, Indigenous Australians have significantly lower rates of educational attainment, employment participation and home ownership.[80] They have significantly higher rates of disability and chronic disease, with average life expectancy approximately 10 years lower than non-Indigenous Australians.[81] In the most striking indicator of continued racial inequality, Indigenous Australians continue to be incarcerated at grossly disproportionate rates. Between 2000 and 2013 Indigenous adults were imprisoned at 13 times the rate of non-Indigenous adults with the rate increasing over the period, as set out in Figure 1:

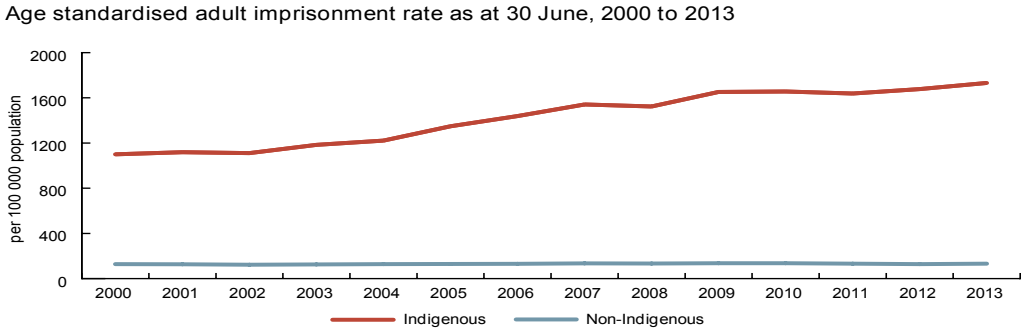



Figure 1.[82]

The current reality and extent of the inequality can be expressed as follows: In the June quarter of 2014, Indigenous adults made up two percent of the Australian adult

[79] The barriers to engaging with the reality of others will be discussed in detail below in Part V.
[80] Steering Committee for the Review of Government Service Provision (SCRGSP) *Overcoming Indigenous Disadvantage: Key Indicators 2014* (Productivity Commission, 2014).
**[81]** Ibid.
[82] Ibid, Figure 4.12.2.

population but an extraordinary 27 per cent of the adult prison population.[83] Worse, Indigenous females account for over a third of the female prison population,[84] whilst Indigenous juveniles in Australia represent over 50 per cent of the youth detention population.[85]

Sex too is a difference not an inequality. Yet sex inequality remains an ever-present reality in terms of employment, political and judicial positions, pay, responsibility for childcare and housework, and welfare dependence.[86] Each reveals both 'institutional' and 'intimate' inequalities of power.[87] Within the 'private' sphere, sex or gender difference is often, or invariably,[88] associated with inequality of power. The experience of a battered woman is a sufficient example. In her relationship a battered woman may be subjected to physical, sexual, emotional and economic violence. Each is a manifestation of power and control, exercised over her by her batterer. And, indeed, each is 'a form of person-to-person violence deeply embedded in power inequalities and ideologies of male supremacy'.[89] A glimpse through the private window into her world reveals that her sex is being used as a basis for gross, crippling inequality of treatment, her agency thereby reduced (perhaps to re-emerge in full force in the killing of her batterer).

Notwithstanding these intersections, what is argued here is that differences in wealth and education are inequalities in and of themselves, being benefits accruing to one person (or group of people) and not another, whereas sex, racial, cultural, sexual or other like differences are not inherently 'inequalities'. They are not of themselves benefits or burdens, though they have historically been treated as such.

Attempts to disentangle difference and inequality are fraught. As MacKinnon forcefully points out, inequality itself is productive of difference: 'hierarchy of power produces real as well as fantasied differences, differences that are also inequalities'.[90] She therefore strongly counsels against essentialising or 'reifying' differences where this 'means to affirm the qualities and characteristics of powerlessness'.[91]

---

[83] Australian Bureau of Statistics (ABS), 'Corrective Services, Australia, September Quarter 2014' (Cat No 4512.0, ABS, 2014) Table 1.
[84] Ibid.
[85] See Australian Institute of Health and Welfare (AIHW), 'Youth Justice in Australia, 2012-13' (Bulletin No 120, AIHW, 2014); SCRGSP, above n 80.
[86] For an excellent recent discussion of the continuing 'gendered landscape' see Anna Carline and Patricia Easteal, *Shades of Grey – Domestic and Sexual Violence Against Women* (Routledge, 2014) 14-15; for up to date on workplace gender equality see Workplace Gender Equality Agency, Australian Government, *Australia's gender equality scorecard* (November 2014) <https://www.wgea.gov.au/sites/default/files/2013-14_summary_report_website.pdf>.
See also, Raewyn Connell, *Confronting Equality: Gender, Knowledge and Global Change* (Allen and Unwin, 2011) 13.
[87] Connell, *Gender*, above n 14, 58.
[88] In relation to difference and inequality between members of a heterosexual couple Connell argues '[t]he members of a heterosexual couple are not just different, they are specifically unequal. A heterosexual woman is sexualized as an object in the way that a heterosexual man is not. The fashion industry, the cosmetics industry, and the content of mass media are tangible proof of this': Connell, *Gender and Power*, above n 14, 113.
[89] Connell, *Gender and Power*, above n 14, 107; Connell, *Gender*, above n 14, 58.
[90] MacKinnon, above n 13, 37.
[91] Ibid 39.

This thesis does not seek to enter the debate about essential and inessential differences, that being debate about whether differences are attributed to biology or social production.[92] What is critical here is the recognition that differences and inequalities, whatever their source, mark those who come before the law. But despite this, appealing again to intuition, we want to say there is an inherent equality between those people, an equality that can give meaning to the principle of equal justice such that it is more than a platitude. The question becomes: how are these people, and groups of people, equal? And, does this understanding of equality provide a foundation to pursue and assess the promotion of equality before the law in the criminal justice system?

### D *Equality as Human Beings*

Those who come before the courts as defendants, complainants or witnesses are equal in an obvious and fundamental sense: they are all human beings. Acceptance that this entails an inherent equality is the foundation of post World War II human Rights instruments. The preamble to the *Universal Declaration of Human Rights* recognises the 'inherent dignity and … the equal and inalienable rights of all members of the human family' and proclaims in Article 1 '[a]ll human beings are born free and equal in dignity and rights'.[93] Such instruments accept as foundational the principle that '[a]ll human beings are by their nature equal'.[94]

The principle of equality as human beings is then often formulated as requiring that all persons be treated with 'equal respect', 'equal concern', as being of 'equal worth' and having 'equal dignity'.[95] It can similarly be formulated as a principle requiring 'that each person's interests are given equal weight'[96] or that 'all persons should be given equal consideration'.[97] Indeed, as Sen argues, 'it is difficult to see how an ethical theory can have general social plausibility without extending equal consideration to all at *some* level'.[98] In what follows, for reasons that will become apparent, the expression 'equal consideration' will be preferred, but it is taken to be reflective of these various formulations.

According to the Stanford Encyclopedia of Philosophy, '[t]his fundamental idea of equal respect for all persons and of equal worth or equal dignity of all human beings is accepted as a minimal standard by all leading schools of modern Western political and moral culture'.[99] In the context of government treatment of its citizens, Dworkin argues,

---

[92] For an overview of the debate see Margaret Davies, 'Unity and Diversity in Feminist Legal Theory' (2007) 2(4) *Philosophy Compass* 650, 652-656.
[93] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).
[94] Aquinas, *In Sent.* D. 44 q. 1 a. 3 ad 1.
[95] Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1978) 273; Ronald Dworkin, *Sovereign Virtue. The Theory and Practice of Equality* (Harvard University Press, 2000) 2; Ronald Dworkin, *A Matter of Principle* (Oxford University Press, 1985) 191; Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) 2; Campbell, above n 65, 51; John Finnis 'Equality and Difference' (2012) 2(1) *Solidarity: The Journal of Catholic Social Thought and Secular* Ethics 1, 9; Will Kymlicka *Contemporary Political Philosophy* (Clarendon Press, 1990) 5, 44.
[96] J S Mill, 'Utilitarianism' (1863) in J.S Mill, *Utilitarianism, Liberty, Representative Government* (JM Dent, 1910) 58.
[97] Campbell, above n 67, 33.
[98] Sen, above n 70, 3-4, 18, 130.
[99] Stephan Gosepath, 'Equality' *Stanford Encyclopedia of Philosophy* (2007)

'[w]hat does it mean for the government to treat its citizens as equals? That is … the same question as the question of what it means for the government to treat all its citizens as free, or as independent, or with equal dignity'.[100]

In this formulation, '[j]ustice involves the right to treatment as an equal, not the right to equal treatment.'[101] That said, it is entirely consistent with the principle that like be treated alike because, in the absence of a relevant difference, inequality of treatment could not amount to treatment as an equal.[102]

If this formulation of the equality principle – as requiring that all persons who come before the law should be given equal consideration – is to be of any value in promoting the realisation of equality, it must do work in answering specific questions. It must assist in enabling an answer to be given to whether or not equality is being accorded to, for example, battered women facing trial for killing their violent partners, Indigenous offenders facing sentence, or child sexual assault complainants facing cross-examination. It will be argued that it is the moral requirement of 'equal consideration', understood as informed, thoughtful and sympathetic regard for 'others' as equals that enables us to render an answer to such equality questions.

### E *The 'Less Than' Question*

Now we come full circle back to intuition and understanding equality through the perception of inequality. What is argued here is that asking the equality question requires giving 'consideration' to the experience of those who come before the criminal justice system as 'equals' and asking whether they are being treated *as less.*[103] This question is a familiar one in feminist thought and scholarship. Indeed, Easteal adopts this question as both the title and a founding premise for her book *Less Than Equal*.[104] She begins with her own experience of being 'placed in certain categories' and being 'labelled "different" and "less than equal" in a world dominated by a masculine way of being and doing'.[105] She then proceeds to consider the ways in which women are treated as less than equal at various sites in the Australian legal system, exploring the how and why this occurs, as well as what can be done in response to it. In doing so, Easteal repeatedly asks 'the woman question'. As Barlett argues:

> In law, asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts may disadvantage women.[106]

---

<http://plato.stanford.edu/entries/equality/#MorEqu>.

[100] Ronald Dworkin, *A Matter of Principle*, above n 95,191.

[101] Campbell, above n 67, 51.

[102] Finnis, above n 95, 9.

[103] This point is taken from MacKinnon, above n 13, 43, though it is acknowledged that MacKinnon was speaking normatively. The original quote is as follows:

> If sex inequalities are approached as matters of imposed status, which are in need of change if a legal mandate of equality means anything at all, the question of whether women should be treated unequally means simply whether women should be treated as less.

[104] Easteal, above n 5, xi.

[105] Ibid.

[106] Bartlett, above n 6, 1116.

This is a 'less than' question insofar as the focus is on disadvantages accruing to, and failures to take into account the experience of, women as compared to men. Answering the question requires close consideration be given to the experiences of women and the laws and processes applied to them. It is argued that this close consideration is required by fidelity to the equality principle.

Furthermore, it is argued that the woman question is a species of equality question, which can itself be subject to greater specification to take into account the fact that '[w]omen are not just women, but also defined in relation to race, sexuality, religion, class, disability and so forth'.[107] This is to recognise the 'intersectionality' of human experience.[108] As Carline and Easteal argue, 'intersectionality requires a critical reflection upon the myriad of factors which construct (but are not determinative of) identity and experience, and how these factors interact with law, policy and society'.[109] Indeed, no equality question is necessarily primary,[110] such that in some contexts and for some people, we may ask how the law fails to take into account women's experience, or Indigenous experience, or the experience of children. Or, for that matter, we may ask how the law fails to take into account the experience of Indigenous women, Indigenous female children, Indigenous female children who speak an Indigenous language as their first language and so forth.[111] Notice that this is a process of social categorisation, which is accepted as 'an indispensible part of human thought' even though 'attributes such as race, sex, and age lie along a continuum, [such that] social labels are never more than approximations'.[112] We must acknowledge too that this may involve a drilling down towards subjective experience. But, to be an empirically and politically valuable platform for reform, sub-categorisation must end somewhere.[113]

---

[107] Margaret Davies, *Asking the Law Question* (Thomson Law Book, 3rd ed, 2008) 17; Drucilla Cornell, *At the Heart of Freedom Feminism, Sex and Equality* (Princeton University Press, 1998) 22.

[108] For a discussion of the need to recognise intersectionality in the context of domestic and sexual violence against women see Carline and Easteal, above n 24, 238-250 citing the work of Kimberlé Crenshaw. 'Mapping the Margins: Intersectionality Identity Politics and Violence Against Women of Colour', (1991) 43(6) *Stanford Law Review* 1241. For consideration of intersectionality in the context of differential treatment of Aboriginal women complainants in sexual assault trials see Anne Cossins, 'Saints, Sluts and Sexual Assault: Rethinking the Relationship Between Sex, Race and Gender' (2003) 12(1) *Social and Legal Studies* 77.

[109] Davies, above n 107, 233.

[110] Ibid 257, 260. See also Cossins, above n 108, 89-90.

[111] Cossins refers to the non-'additive' study of the intersection and overlap of the socially constructed categories of sex and race as 'convergence analysis', being an approach that 'does not treat sex and race as different categories': Cossins, above n 108, 91-92, 96. She argues that,

> convergence evokes an image of a unique cultural space that is created by sex and race – in particular, a space where black and indigenous women are marooned or isolated by the cultural barriers created by these two converging systems of subordination. At the same time it is recognized that cultural barriers are not immutable over time and place and are also subject to change through the influence of other factors, such as class, age, sexuality, disability and religion.

[112] Scott Plous, 'The Psychology of Prejudice, Stereotyping, and Discrimination: An Overview' in Scott Plous (ed) *Understanding Prejudice and Discrimination* (McGraw-Hill, 2003) 3, 7.

[113] Sen reflects on the impracticality of taking full account of diversity in the context of discussing distributive equality, as follows:

> It is not unreasonable to think that if we try to take note of all the diversities, we might end up in a total mess of empirical confusion. The demands of practice indicate discretion and suggest that we disregard some diversities while concentrating on the more important ones. That bit of worldly wisdom is not to be scoffed at, and indeed, no serious study of inequality that is geared to practical reasoning and action can ignore the need to overlook a great deal of our immense range of diversities. The question in each context is: What are the significant diversities in *this* context?

We must, for example, be able to ask of the law of self-defence whether it gives equal consideration to the experience of battered women, having regard to the empirically understood experience of such women as a group, even while allowing for differences of experience within this group. Indeed, if we ask, 'does the law of self-defence give equal consideration to *this* battered woman?', the question is hardly intelligible without an understanding of the dynamics of family violence more generally and the experience of women exposed to such violence. Subjective experience, and understanding this subjective experience, is thus necessarily entwined with group experience.

Returning to the central point: what is argued is that *true* equality may only be approached through the development of an understanding of what it must really be like to be the person before the court – to be a battered woman, an Indigenous offender or a child sexual assault complainant. Equality therefore is fundamentally about understanding difference,[114] and giving equal consideration to those who come before the law understood by references to these differences, which are reflective of the intersecting groups to which the person belongs.[115] This comes very close to a principle of 'equality as respect for difference' as proposed by Bronitt and McSherry,[116] drawing upon Lacey's reconstruction of equality in 'broader pluralistic terms'.[117]

It will be argued that giving equal consideration is both an informed and an imaginative exercise. And, insofar as according equality is concerned, the more distant the decision-maker, be they legislator, judicial officer or juror, in terms of their own experience as compared to the experience of the 'other' under consideration, the greater the level of information and imagination required.

### F *Power*

Before continuing, it must be acknowledged that to speak of 'according' equality to others is to speak in the language of power. To 'accord' implies there is an institution or person in a position to grant or withhold equality. This takes on emotive and practical content if we envisage the granter as, for example, a well-educated, male, non-Indigenous judge from a privileged background, and the receiver as an Indigenous offender whose life has been ravaged by deprivation and disadvantage. It likewise takes on content if we envisage that same judge directing a jury on the application of the law of self-defence in the trial of a battered woman who has killed her violent partner.

---

Sen, above n 70, 117 -118. See, also, Harris, above n 19, 783-784 citing Regina Austin, "The Black Community," Its Lawbreakers, and a Politics of Identification (1992) 65 *Southern California Law Review* 1769, 1775.

[114] In the broader context of distributive justice, Sen maintains that '[t]he pervasive diversity of human beings intensifies the need to address the diversity of focus in the assessment of equality'. Sen, above n 70, 3.

[115] Cossins, above n 108, 98.

[116] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Lawbook, 2nd ed, 2005) 127, 131.

[117] Ibid 127 citing Lacey, above n 18, 239-241, 247-248. Bronitt and McSherry, maintain that '[t]here is considerable scope for the "normative reconstruction" of equality in broader pluralistic terms such as "equality of acceptance" or "equality as respect for difference"'. Harris maintains, in the context of a discussion about Critical Race Theory, that '[t]his claim to equality based not on sameness but rather on difference is at the heart of the politics of difference': Harris, above n 19, 761.

As MacKinnon argues, when it comes to the equality question, the existence and manifestations of power and power differentials must be borne in the forefront of one's mind:

> There is an alternative approach, one that threads its way through existing law and expresses, I think, the reason equality law exists in the first place. It provides a second answer, a dissident answer in law and philosophy, to both the equality question and the gender question. In this approach, an equality question is a question of the distribution of power. [118]

This has significant implications for the potential to realise equality before the law within a system which is founded on an unequal distribution of power amongst groups within society and to a greater or lesser extent, replicates this distribution through the allocation of decision-making positions within. As Connell recognises in the context of the pursuit of gender equality,

> the very gender inequalities in economic assets, political power, cultural authority and the means of coercion that gender reforms intend to change currently mean that men (often, specific groups of men) control most of the resources required to implement women's claims for justice. Men and boys are in significant ways gatekeepers for gender equality.[119]

For Indigenous Australians the necessity to persuade and involve the 'gatekeepers' is even more evident, and at least as intractable. These misgivings aside, what follows is concerned with the task of identifying when a person is being treated as 'less than' before the criminal courts.

[118] MacKinnon, above n 13, 44.
[119] Connell, above n 86, 7.

## IV IDENTIFYING INEQUALITY: WHEN IS A PERSON BEING TREATED AS LESS?

### A *Direct and Indirect Discrimination: The 'difference difference makes'*[120]

As discussed above, a person may be treated as less before the criminal courts if we can say that as a consequence of the law, legal process or a legal decision, there is a failure to give that person equal consideration: that is, if we cannot say that that person is being treated with 'equal respect', 'equal concern', or as having 'equal worth' and 'equal dignity'. It is not sufficient that a person before the law be treated with consideration, respect, concern, worth or dignity. Each must have about it the character of equality. As previously argued, this requires comparison.

The concept of discrimination provides a useful mechanism for considering when a person is being treated as less. According to Plous, '"discrimination" involves putting group members at a disadvantage or treating them unfairly as a result of their group membership'.[121] Here, group membership is central to the question of whether a person is being disadvantaged, or treated as less. This is because discrimination, in a more general sense, is what the law is all about. The law establishes categories and discriminates between those who fall in and outside those categories. As Davies argues, '[t]he distinction between the inside and the outside is one which is absolutely fundamental to law: in fact I think that law *is* this distinction'.[122]

This is taken to mean that law is in essence categorisation, differentiation and discrimination. Accordingly, it would be meaningless to say that a law, legal process or decision infringes the equality principle merely because it allocates a benefit or burden to one person over another.[123] In *Leeth v The Commonwealth*,[124] Deane and Toohey JJ explained the point as follows:

> In one sense, almost all laws discriminate against some people since almost all laws operate to punish, penalize or advantage some, but not all, persons by reference to whether their commands are breached or observed. While such laws discriminate against those whom they punish or penalize or do not advantage, they do not infringe the doctrine of the equality of all persons under the law and before the courts. To the contrary, they assume that underlying legal equality in that they discriminate by reference to relevant differences.

As a consequence, anti-discrimination law operates to prohibit discrimination in a more limited sense, but one that fits with the definition proposed by Plous. It prohibits discrimination, understood as less favourable treatment because of, or as a result of, group memberships such as sex, race, age and so forth, variously described as protected characteristics, attributes or grounds.[125] Other than in the ACT, anti-discrimination law

---

[120] Rhode, above n 4, 1039.
[121] Plous, above n 112, 4.
[122] Davies, above n 107, 14.
[123] Fredman, above n 64, 8-9.
[124] *Leeth v The Commonwealth* (1992) 174 CLR 455, 488-489.
[125] See, eg, Fredman, above n 64, 9; *Discrimination Act 1991* (ACT) s 7; *Anti-Discrimination Act 1977* (NSW) ss 7, 24, 38B, 39, 49B, 49T, 49ZG, 49ZYA; *Anti-Discrimination Act* (NT) s 19; *Anti-Discrimination Act 1991* (Qld) s 7; *Equal Opportunity Act 1984* (SA) ss 29, 51, 66, 85A, 85T; *Anti-*

in Australia also engages a notional comparator, as the yardstick against whom the treatment is measured.[126] Even in the ACT, where the test of discrimination does not directly refer to a comparator, the focus on whether a person is being treated 'unfavourably' necessarily, it is argued, requires a comparison, albeit one that is less rigid.[127] Prohibited discrimination is then broken into two categories – direct and indirect discrimination.[128]

The prohibition against direct discrimination focuses on the decision-maker's grounds or reasons for decision. This may be extended, conceptually, in respect of a law, to consideration of the law's criterion of operation. If the decision-maker treats a woman less favourably because of her status as a woman, then the decision-maker has engaged in direct-discrimination. By analogy, if a law treats a woman less favourably, because of her status as a woman, then it too directly discriminates. As an example, a law permitting men but not women to vote directly discriminates against women. So too do laws preventing women from owning property, inheriting, or accessing education or employment on an equal basis.[129] In relation to Indigenous Australians, a law restricting movement, place of residence, access to employment, and entitlement to vote on the basis of their status as Aboriginal people is directly discriminatory,[130] as is a law permitting children to be taken from their parents because of this status.[131] There can be little dispute that such laws do not treat women or Indigenous Australians as equal to, respectively, men or non-Indigenous Australians. Under such laws there is an obvious absence of equal respect, equal dignity or equal consideration. These laws, and like decisions, most obviously treat those subject to them as less, and barely conceal the power of their authors.

Indirect discrimination, by contrast, is more difficult to identify. This occurs where a decision-maker or law imposes a burden, or denies a benefit, without regard to group membership, but which results in a disproportionate burden, or absence of benefit, accruing to that group (a protected class of persons).[132] Here the focus is on the impact

---

*Discrimination Act 1998* (TAS) s 16; *Equal Opportunity Act 2010* (Vic) s 6; *Equal Opportunity Act 1984* (WA) ss 8, 9, 10, 10A, 35AB, 35A, 35O, 36, 53, 66A, 66V, 67A.

[126] Margaret Thornton, Chapter 8 'Women and Discrimination Law' in Patricia Easteal (ed) *Women and the Law* (LexisNexis, 2010) 131, 135-136 considering the problems of comparison by reference to *Purvis v NSW* (2003) 217 CLR 92 which involves extensive discussion about the correct characterization of the relevant comparator pursuant to *Disability Discrimination Act 1992* (Cth)*;* for a further discussion of the problem of comparison in discrimination law see Suzanne B Goldberg 'Discrimination by Comparison' (2011) 120 *Yale law Journal* 728; Fredman, above n 64, 11-13.

[127] Cf Thornton, above n 126, 135-136 by reference to Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination and 1984 in Eliminating Discrimination and Promoting Gender Equality* (Commonwealth of Australia, Canberra, 2008) [119]-[144] and Recommendation 6. Connell argues that '[i]n every statement about women's disadvantage there is an implied comparison with men as the advantaged group': Connell, above n 86, 10.

[128] Thornton, above n 126, 135-139.

[129] For a brief discussion of the history of women's liberation and historical milestones in the achievement of formal equality see Leiboff and Thomas, above n 12, 415-420.

[130] See, eg, *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) 1897 (Qld) <http://www.foundingdocs.gov.au/resources/transcripts/qld5_doc_1897.pdf>
25-37; McRae et al, *Indigenous Legal Issues Commentary and Materials* (Thomson Reuters, 4th ed, 2009) 35-31.

[131] Human Rights and Equal Opportunities Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

[132] Thornton, above n 126, 137; Fredman, above n 64, 2.

of a law, requirement, policy or practice. For example, a requirement that all employees work full-time may disadvantage women to a greater extent than men, in circumstances where women disproportionately take on caring responsibility for children. The requirement is not, on its face, intended to disadvantage women. It does not exclude women because they are women. But it has as a 'side-effect' a disproportionate impact on women.[133] Thus it is the requirement's blindness to the circumstances and experience of women that is at issue. Similarly, a system of witness examination that permits a cross-examiner to put the same questions, with the same force and in the same language to both a child and adult witness disadvantages the child. So too will a right to legal representation, ostensibly applicable to all who come before the criminal courts, disproportionately disadvantage the poor in the absence of adequately funded legal aid agencies. Anatole France makes the point satirically as follows: 'In its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread'.[134]

Putting it another way, when laws and legal processes are applied equally, without regard for difference, people are often not treated as equals. Expressed more forcefully and without qualification, 'there is no greater inequality than the equal treatment of unequals'.[135] This is where the principle of equality – understood as an entitlement to equal consideration – enables us to grapple with the reality of unequal treatment. It requires us to look at the effect of the law or legal process and ask, having full regard for the differences of and between those coming before the law, 'is this person being treated as less?' This is to accept that the 'equal value' of human beings may require that 'what is different be treated differently'.[136] Or as Sen puts it that '[e]qual consideration for all may demand very unequal treatment in favour of the disadvantaged'.[137]

Two things are apparent from this discussion. Treating people differently because of their difference can result in discrimination. But equally, treating people as the same regardless of their difference can also result in discrimination.[138] Thus the character of the treatment as same or different does not itself determine whether a person is treated as less. *The focus must be on the interaction between treatment and the differences between the people treated.* In this investigation, close consideration must be given to the identification of 'relevant differences' and the nature and effect of these differences.[139] It is this that will enable a determination to be made as to whether same or different treatment is required by the equality principle. As Rhode argues, close consideration must be given to the 'difference difference makes'.[140]

---

[133] Finnis, above n, 95, 9.
[134] Anatole France, *Le Lys Rouge* (The Red Lily) *(1894) Ch 7* cited in an alternate formulation by Bronitt and McSherry, above n 116, 126; discussed in Fredman, above n 64, 1-2, citing Anatole France, *Le Lys rouge* Calmann-Levy, 1927), 1-3.
[135] *Dennis v United States* [1950] 339 US 162, 184.
[136] *South West Africa Case (Liberia v South Africa) (Second Phas*e) [1966] ICJ Rep 6 250, 305-6 (Judge Tanaka).
[137] Sen, above n 70, 1.
[138] Fredman, above n 64, 1-4.
[139] *Postiglione v The Queen* (1997) 189 CLR 295, 301 (Dawson and Gaudron JJ) '[e]qual justice requires that like should be treated alike but that, if there are *relevant differences*, due allowance should be made for them' (emphasis added); see also *Green v The Queen* (2011) 244 CLR 462, 472 (French CJ, Crennan and Kiefel JJ).
[140] Rhode, above n 4, 1039.

> The crucial issue becomes not difference, but the difference difference makes. In legal contexts, the legitimacy of sex-based treatment should not depend on whether the sexes are differently situated. Rather, analysis should turn on whether legal recognition of gender distinctions is likely to reduce or reinforce gender disparities in power, status, and economic security. Since such issues cannot be resolved in the abstract, this strategy requires contextual judgments, not categorical choices.

And, to take the further point from Rhode, in considering the 'difference difference' makes, from a foundation of equal respect, equal worth and equal dignity, it is apparent that answering an equality question cannot be done in the abstract. It *must* be done by giving close consideration to the concrete circumstances of the person before the law, understood by reference to the experience of the intersecting groups to which that person belongs.[141] Thus, answering an equality question is both a comparative and a contextual exercise. As stated by McIntyre and Lamer JJ in *Andrews v Law Society of British Columbia*, equal justice 'is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises'.[142]

It now falls to consider whether the articles and chapters that form the body of this paper ask, and usefully answer, equality questions. In a concrete way, it is necessary to consider whether the application of law and legal process in these sites treats people *as less* by reason of holding them to a sameness standard, or whether the law facilitates, positively or otherwise, the taking into account of relevant differences in ways that promote the realisation of true equality. In doing this it is necessary to remain cognisant of the fact that focusing on whether a person or group is being treated *as less* should not obscure consideration of the opposite; namely, when is a person or group of people being treated *as more*? These are two sides of the same coin, though the privileged side is too often ignored, despite its capacity to maintain and reinforce deep inequalities in society. This point is made by Michelle Fine in a racial context:

> What if we took the position that racial inequities were not primarily attributable to individual acts of discrimination targeted against persons of color, but increasingly to acts of cumulative privileging quietly loaded up on whites? That is, what if by keeping our eyes on those who gather disadvantage, we have not noticed white folks, varied by class and gender, nevertheless stuffing their academic and social pickup trucks with goodies otherwise not as readily accessible to people of color?[143]

Consideration of the reality-obscuring lenses of privilege will be taken up in Part V below under the heading, barriers to engaging with the experience of 'Others'.

### B *Self-Defence and Battered Women*

Taking the example of a battered woman on trial for having killed her violent partner, a key equality question the book chapter[144] and article[145] ask is, 'does the law of self-

[141] Cossins, above n 108, 91-92, 96; Carline and Easteal, above n 24, 238-250; Crenshaw, above n 108.
[142] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 164.
[143] Michelle Fine, 'Witnessing Whiteness' in Michelle Fine, Lois Weis, Linda C. Powell, and L.Mun Wong (eds) *Off White: Readings on Race, Power, and Society* (Routledge 1997) 57.
[144] Easteal and Hopkins, above n 29.
[145] Hopkins and Easteal, above n 32.

defence give battered women equal consideration?' Here we have a concrete site, a specific law or legal doctrine, a defined process, and a specific group of people in mind to which the law is applied. The comparator is a man who kills in response to an immediate threat of serious violence.[146]

In the chapter *Women and Criminal Defences to Homicide*, readers are asked to consider Helen, a battered woman who shot her husband while he was asleep. The equality issue is raised as follows:

> Women who kill after being subjected to prolonged family violence have struggled to have their experience and actions accepted as reasonable, and hence justified … The questions: 'Why didn't she just leave?, 'Why didn't she call the police?', 'Why did she use a weapon?' of 'Why did she make a plan to kill?', no doubt, are amongst those that resonate within the jury room and chambers. Almost invariably those deliberating will resort to assessing the reasonableness of Helen's actions against their own values and experiences, which are for the most part unlikely to accord with those of the woman under judgement.[147]

It is then argued that, by and large, formulations of the test of self-defence enable, but by no means ensure, full consideration of the social and psychological circumstances in which Helen found herself, in the assessment of the genuineness and reasonableness of her belief that it was necessary to kill.[148] It goes on to argue that bringing this promise to fruition requires using evidence, particularly expert evidence about domestic violence, 'to assist the jury to comprehend "what it must really be like to live in a situation of ongoing violence"'.[149]

Put in terms of an answer to an equality question, the chapter concludes that the law of self-defence *can* enable equal consideration. It does this by enabling jurors to engage with the full context of the predicament faced by a battered woman and the reality of her choices. But there is something critical to note here. Most jurors will not need expert evidence to get into the shoes of a man faced with a 'one-off physical attack' who claims he killed in self-defence. His choices can be readily understood – he is the norm, the person against whom other claims of reasonableness are measured. On the other hand, unless jurors understand that Helen has been repeatedly physically, sexually and psychologically assaulted over the course of a decade, that she is socially and economically dependent, that she has unsuccessfully attempted to leave and to rely on the protection of a restraining order, that she lives with an ever-present fear that she will be seriously injured or killed; unless they understand the cycle of violence and the reality of living under the control of a batterer, they cannot understand her choices.[150] This is not a 'normal' picture. It is not the male picture.[151] And so, the promise of equal consideration, even if enabled by the substantive law, remains but a promise without a careful, evidence-based, rendering of the reality of Helen's predicament.

---

[146] Easteal and Hopkins, above n 29, 116.
[147] Ibid 117 (footnotes omitted).
[148] Ibid 117-118.
[149] Ibid 119, 126-128.
[150] Ibid 109; Helen's story is based, loosely, on the facts in *R v Secretary* (1996) 5 NTLR 96 and was used in the chapter to engage the reader with the experience of battered women.
[151] Ibid 116-117.

The experience of battered women and the struggle for consideration of their reality has broader ramifications for efforts to promote equality. It is a concrete illustration of MacKinnon's point that '[t]hose who most need equal treatment will be the least similar socially, to those whose situations sets the standard as against which one's entitlement to be equally treated is measured'.[152] Accordingly, giving equal consideration to those whose situations are not the norm – often far removed from that of most legislators, judicial officers or jurors[153] – requires effort, information and imagination. This theme will be returned to in Part V, where the focus is on the challenge of engaging with the subjective and group experience of those who come before the law.

In the article *Walking In Her Shoes - Battered Women Who Kill in Victoria, Western Australia and Queensland*, the same subject is considered. But the article focuses more closely on the various formulations of the law of self-defence in the chosen jurisdictions. The equality question considered there is, 'which of the formulations enables, or best enables, the giving of equal consideration to the experience of battered women who kill?'

The article considers the reforms in Western Australia that removed the requirement that, in order for defensive action to be justified, it must have been taken in response to an assault, namely, the actual or threatened application of force by the batterer with a 'present ability to effect' his purpose.[154] This is acknowledged to import a requirement of 'imminence', and implicitly defines self-defence by reference to a 'one off physical attack model'.[155] The pre-reform test, therefore, is a good example of a sameness standard operating to deny equality to battered women. Returning to Helen's situation referred to above, a requirement that she was acting in response to an assault may well result in her being unable to rely on self-defence as a justification for killing her sleeping batterer.[156] Insofar as the pre-reform test excludes the experience of battered women, it precludes the achievement of equality of consideration. Conversely, insofar as the reform enables consideration of the full context of a battered woman's predicament, it acts to promote true equality.

Victoria has gone further in the promoting the realisation of equality of consideration. At the time the article was written, Victoria had largely maintained the common law formulation of the test of self-defence as set out in *Zecevic v DPP*.[157] Essentially, this requires that the accused person have a belief based on reasonable grounds that it was necessary do what he or she did.[158] The test was subsequently reformed to focus not on

---

[152] MacKinnon, above n 13, 44.

[153] It is noted that, in Australia at least, the largely randomized jury selection process results in greater social inclusion drawing in those whose experience are not the 'norm'.

[154] Hopkins and Easteal, above n 32, 135 where it is also noted that the reforms went beyond this to make clear that a person may be acting defensively even in relation to a harmful act that is not imminent: *Criminal Code 1913* (WA) s 248(4)(a).

[155] Ibid; Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report* (2007) 97, 167.

[156] It is noted that the definition of assault is to some extent malleable and has been found to encompass a situation of ongoing threat such as experienced by Helen. On appeal in the case of *Secretary* (1996) 5 NTLR 96, from which Helen's case was derived, Angel and Mildren JJ in the majority at 104 found that a threat that was 'current', 'continuing' or 'not completed' could suffice.

[157] *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 661.

[158] *Crimes Act 1958* (Vic) s 9AE; Hopkins and Easteal, above n 32, 134. Having regard to the burden of proof, once the self-defence is sufficiently raised on the evidence in a trial, it is for the prosecution to prove beyond reasonable doubt that the accused did not hold the belief, or that there were no reasonable

the existence of reasonable grounds for the belief, but on whether the 'conduct was a reasonable response in the circumstances as the person perceives them'.[159] However, the focus of the article – at least as far as the Victorian reforms, and moves to promote equality of consideration were concerned – was the now repealed s 9AH of the *Crimes Act 1958* (Vic). This provision has now been largely replicated in ss 322J and 322M.[160] Section 322M(2) provides as follows:[161]

> (2) Without limiting the evidence that may be adduced, in circumstances where self-defence in the context of family violence is in issue, **evidence of family violence** may be relevant in determining whether—
>
> (a) a person has carried out conduct while believing it to be necessary in self-defence; or
>
> (b) the conduct is a reasonable response in the circumstances as a person perceives them.[162]

Section 322J sets out an inclusive definition of 'evidence of family violence', as follows:

> (1) Evidence of family violence, in relation to a person, includes evidence of any of the following—
>
> (a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;
>
> (b) the cumulative effect, including psychological effect, on the person or a family member of that violence;
>
> (c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;
>
> (d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;

---

grounds for it. The test at common law as stated by the majority in *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 661 is as follows:

> It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal.

[159] *Crimes Act 1958* (Vic) s 322K, inserted by *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) commencing operation on 1 November 2014; for a brief discussion of the difference between identical 'reasonable response' formulations and the common law 'reasonable grounds' formulation see Easteal and Hopkins, above n 29, 117-118.

[160] Inserted by *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) commencing operation on 1 November 2014.

[161] *Crime Act 1958* (Vic) s 322M(1)(a) and (b) also make clear that a person may be acting in self-defence even if they are 'responding to a harm that is not immediate' and the 'response involves the use of force in excess of the force involved in the harm or threatened harm'. This was previously contained in s 9AH(1).

[162] *Crimes Act 1958* (Vic) s 322M(2) (emphasis added).

(e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;

(f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.

In combination, these sections direct attention to the reality of the experience of battered women. Though the legal test of self-defence is the same for all accused persons, these provisions relating to evidence relevant to determining whether the test is made out direct attention to what will need to be taken into account in the interests of achieving equality of consideration in circumstances of family violence. As discussed above, this does not by itself achieve equality of consideration, but it does further enable its realisation.

The 2010 Queensland reform, discussed in the article and briefly described above, provides a counterpoint. Section 304B of the *Criminal Code 1899* (Qld),[163] is an example of a law directed specifically to the circumstances of battered persons which denies equality of consideration. It thereby treats battered people who kill as less. The provision provides a partial defence to murder, reducing murder to manslaughter in circumstances where:

(a) the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; **and**

(b) the person **believes that it is necessary** for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes the death; **and**

(c) the person **has reasonable grounds for the belief** having regard to the abusive domestic relationship and all the circumstances of the case.[164]

The equality problem is revealed by the conjunction of the three requirements. The latter two – that the accused believed on reasonable grounds that it was necessary to do what they did – are relevantly identical to the common law formulation of self-defence. But, at common law, this provides a complete defence. Here it is a partial defence directed explicitly, by virtue of the first condition (a), to those who kill their batterer. Killing in these circumstances is not therefore justified, as it would be at common law or indeed under interstate statutory formulations. Instead, it is only partially excused, resulting in a finding of manslaughter and the avoidance of a mandatory life sentence.[165] To make the equality problem even starker, as argued in the article:

> The enactment of s 304B leaves untouched the test of self-defence in Queensland – the last remaining jurisdiction in Australia requiring that defensive action only be taken in response to an assault. Therefore, where a battered woman seeks an acquittal, the reform

[163] *Criminal Code 1899* (Qld) s 304B commenced on 10 February 2010.
[164] *Criminal Code 1899* (Qld) s 304B(1) (emphasis added).
[165] See Hopkins and Easteal, above n 32, 136 where it was noted in the article, that it appears that the introduction of the section was in effect a political compromise to avoid the consequences of a murder conviction and a mandatory life sentence.

> does nothing to ensure that the reasonableness of her actions are assessed by reference to all of the situational and psychological circumstances in which she finds herself.[166]

By retaining a one-off physical attack model of self-defence and creating a partial defence for battered persons, the Queensland reforms both indirectly and directly discriminate. They treat battered women *as less* in part by reference to a sameness standard that excludes the experience of these women and in part by reference to a difference standard that disadvantages battered killers. The Queensland reform therefore fails to promote equality of consideration. In Queensland, Helen would face the hurdle of imminence should she seek acquittal, but might well fit into the 'space' created for her as a person who has committed manslaughter. The less than question can be answered this way: Let us assume that Helen did in fact believe it was necessary to do what she did to save her life, and that there were reasonable grounds for that belief. Then consider Jim who shot his knife-wielding attacker in the head with the same belief, also on reasonable grounds. Their choices are relevantly the same, kill or be killed. Yet Jim acts in justified self-defence while Helen commits manslaughter. This is not equality of consideration.

### C *Aboriginality and Sentencing*

The two articles and the book chapter that address the topic of Aboriginality in the context of sentencing raise the following equality question: 'does sentencing law and practice give Indigenous Australians equal consideration?' [167] In answering this question, the publications draw upon both Australian and Canadian experience and judicial decisions. The location is sentencing, with its applicable practice and principles. The relevant comparator is the non-Indigenous offender who commits a like offence.[168]

Except in cases where a mandatory minimum sentence applies,[169] the sentencing process is an individualised one. A sentencing judge or magistrate must closely consider the particular circumstances of the offence and of the offender by reference to

---

[166] Ibid 135-136 by reference to s 271 and s 272 *Criminal Code 1900* (Qld). As will be explored further below, a mandatory sentence is itself a denial of equality, being a statutory prohibition of considering the individual circumstance of the offence and the offender as they bear upon the purposes of punishment.

[167] Hopkins, above n 38; Anthony, Bartels and Hopkins, above n 44; Lewis, Hopkins and Bartels, above n 43.

[168] It is not possible to more closely identify the non-Indigenous comparator in the abstract. Indeed the Indigenous offender and the non-Indigenous offender may to a greater or lesser extent share experiences of, for example, being raised in an environment characterised by endemic use of alcohol or other drugs, or in foster or institutional care. In many instances the non-Indigenous offender may in fact be more disadvantaged that the Indigenous offender. Nothing in this thesis or the publications it discusses should be taken to mean there is a hierarchy of disadvantage or experience. Any such suggestion would run counter to a principle of equal consideration. However, the Indigenous offender's experience remains distinct as being, in many cases, inextricably linked with their experience as an Indigenous person, and understandable by reference to the common and varied experiences of Indigenous Australians.

[169] Mandatory sentencing is the antithesis of equality and individualised sentencing. A mandatory sentence is one in which a particular penalty, or minimum penalty, follows automatically upon conviction for an offence. It is a sameness standard applicable to all who contravene a law regardless of their particular circumstances or the particular circumstances of their offending. The inequality involved in and resulting from their imposition is discussed in: Martin Flynn, 'Mandatory Sentencing, International Law and the Howard/Burke Deal' (2000) 4(30) *Indigenous Law Bulletin* 7; and Chris Cunneen, 'Mandatory Sentencing & Human Rights' (2002) 13(3) *Current Issues in Criminal Justice* 32.

the purposes of punishment and factors bearing upon aggravation or mitigation.[170] In practice, this means that 'the sentencing court subjectively and intuitively assesses the various sentencing principles and factors to "take account of all relevant factors and arrive at a single result which takes due account of all of them"'.[171] This describes a discretionary process in which the final result is arrived at through a process of 'instinctive synthesis'.[172]

Further, it is accepted in sentencing that '[e]qual justice requires that like should be treated alike but that, if there are *relevant differences*, due allowance should be made for them'.[173] Thus, sentencing in essence requires the reconciliation of equality and difference, where attention is focused on what are taken to be relevant differences. Accordingly, in theory at least, the sentencing task is one that enables fidelity to the principle of equal consideration, ensuring that no offender or group of offenders is treated as less. With respect to taking account of Indigenous circumstance in order to achieve equal justice, Brennan J in *Neal v The Queen* ('Neal') states:

> …in imposing sentences courts are bound to take into account … all material facts including those facts which exist only be reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.[174]

As argued in *The Relevance of Aboriginality in Sentencing: 'Sentencing a Person For Who They Are'* an offender's Aboriginality and experience as an Indigenous person may be relevant in many different ways:

> There are many possibilities. A recognition that rates of Indigenous offending are a consequence of the impact of colonisation, with all the social, economic and psychological dysfunction that it has wrought, provides a strong argument for a claim that an Indigenous offender is less deserving of punishment. In other words, understanding the individual offender's history, and that of the group to which they belong, gives weight to a claim that it is principally the offender's circumstances that have produced the offending, rather than their individual choice. However, this same consideration may demonstrate a greater need to protect the community from the offender, deter them or promote their rehabilitation. An offender's Aboriginality might impact on their motive to offend, providing an explanation. It might provide clues about the likelihood of future offending and the circumstances that contribute to this potential. Or, it may tell upon the appropriateness of certain punishment, presenting options where strength of community, reintegration and pride can be harnessed to achieve individual reform and deterrence. These are but examples. The point is that an offender's Aboriginality, and their experience of Aboriginality, might conceivably bear upon the appropriateness of a particular sentence in myriad different ways.[175]

---

[170] Engert (1995) 84 A Crim R 67, 68 (Gleeson CJ); Anthony, Bartels and Hopkins, above n 44, 4-5.
[171] Anthony, Bartels and Hopkins, ibid, 4 quoting *Wong v The Queen* (2001) 207 CLR 584, 611; *Williscroft* [1975] VR 292 at 300.
[172] *Wong v The Queen* (2001) 207 CLR 584, 611.
[173] *Postiglione v The Queen* (1997) 189 CLR 295, 301 (Dawson and Gaudron JJ) (emphasis added), citing *Lowe v The Queen* (1984) 154 CLR 606, 610-611.
[174] *Neal v The Queen* (1982) 149 CLR 305, 326 (Brennan J) (*Neal*); approved in *Bugmy v The Queen* (2013) 249 CLR 571, [39] (*Bugmy*).
[175] Hopkins, above n 38, 39 (footnotes omitted).

The decision of Murphy J in *Neal*, while not yielding any statement of general principle, provides an excellent example of engaging with Indigenous circumstances and experience in the pursuit of equality of consideration. In that case Percy Neal had been sentenced to two months' imprisonment for spitting at the manager of the store at the Yarrabah Aboriginal Community Reserve. As explained in the 2012 article:

> In famously holding that 'Mr. Neal is entitled to be an agitator', Murphy J places the conduct of the offender in the context of colonial history, exploring both a personal and general 'sense of grievance … developed over the two hundred years of white settlement in Australia'. He considers colonisation, dispossession, powerlessness, paternalism, thwarted desires for self-determination, gross overrepresentation of Indigenous persons in custody and race relations, all as they bear upon the offender before the court. Each of these considerations is seen to exist in the lived experience of Percy Neal, constituting a part of him that is fundamentally relevant to the proper exercise of the sentencing discretion.[176]

In the judgement of Murphy J these considerations directly affect the moral culpability of the offender. Percy Neal can be seen to have 'snapped' as a consequence of his experience of colonial oppression and his identification with the experience of oppression faced by Indigenous Australians as a group. Here, the individual and the group experience are inseparable. Neal is an Aboriginal man who exists in a post-colonial context. It can immediately be seen that the non-Indigenous offender does not share these circumstances and experiences. Furthermore, the underlying premise of Murphy J's judgment is that understanding Neal, and according him equality in the sentencing process, requires a particular focus on Indigenous circumstance.

Similarly impressive examples of Australian judges giving close consideration to Indigenous circumstance can be found in *R v Fernando*,[177] *R v Smith* and *R v Fuller-Cust.*[178] But the fact that these cases stand out is important. It is a testament to the difficulties involved in reaching across an experiential divide: just as 'a battered woman's experiences are generally outside the common understanding of the average judge or juror', [179] so too are the experiences of many Indigenous offenders. Here again is a location within the criminal justice system at which MacKinnon's point remains apposite; namely, that '[t]hose who most need equal treatment will be the least similar socially'.[180]

The experience of Canada and its legislative approach draws this equality problem into stark relief. [181] In response to the failure of Canadian courts 'to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process', the Canadian Parliament enacted s 718.2(e) of the *Criminal Code RSC* which came into force on 3 September 1996. This recognition of failure came at a time when Aboriginal Canadians made up 10 percent of the federal prison population, whilst constituting only

---

[176] Ibid 40.

[177] *R v Fernando* (1992) 76 A Crim R 58, 62 (Wood J); see discussion in Hopkins, above n 38, 40-42.

[178] *R v Smith* [2003] SASC 263 [62] (Lander J) 134 (Gray J); *R v Fuller-Cust* (2002) 6 VR 496 (Eames J in dissent), subsequently approved in *DPP v Terrick* (2009) 24 VR 45, 468-469; see discussion in Hopkins above n 38, 45-48.

[179] *R v Malott* [1988] 1 SCR 123, [43 (L'Heureux-Dube J); *Lavallee* [1990] 1 SCR 852, 871-872; *Osland v The Queen* (1998) 197 CLR 316, 337 (Gaudron and Gummow JJ), 376-377 (Kirby J).

[180] MacKinnon, above n 13, 44.

[181] The Canadian approach is discussed in Hopkins, above n 38, 48-50 and Anthony, Bartels and Hopkins, above n 44.

two percent of the total population (as compared with 28 % and 2% respectively in Australia, as discussed above). Section 718.2(e) provides:

> All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, *with particular attention to the circumstances of aboriginal offenders* (emphasis added).

On its face, a provision requiring sentencers to pay 'particular attention' to Indigenous circumstance appears to offend the principle of 'equal consideration'. After all, how can equal consideration be realised where particular attention is being paid to one group within society? There are differences of opinion.

In *Bugmy* the High Court of Australia had cause to consider, all too briefly, this legislative provision. In doing so the Court raised the spectre that the provision is racially discriminatory and contrary to the principle of individualised justice and equality in sentencing.[182] Specifically, French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ expressed the view that:

> s 5(1) of the [NSW] Sentencing Act does not direct courts to give particular attention to the circumstances of Aboriginal offenders. The power of the Parliament of New South Wales to enact a direction of that kind does not arise for consideration here here.[55]….There is no warrant … to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender. Nor is there a warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender. Were this a consideration, the sentencing of Aboriginal offenders would cease to involve individualised justice.[183]

Footnote 55 in the judgment refers to s 10 of the *Racial Discrimination Act 1975* (Cth). This thesis will not address the question of whether, as a matter of statutory interpretation, the *Racial Discrimination Act 1975* does in fact preclude states and territories from legislating to require that sentencing judges and magistrates pay particular attention to Indigenous circumstance.[184] Rather, the focus is on whether, at a

---

[182] *Bugmy v The Queen* (2013) 249 CLR 571 *('Bugmy').*

[183] Ibid [34] (eference omitted).

[184] It is noted that if the analysis of the Supreme Court of Canada is accepted, then it is doubtful that section 10 of the *Racial Discrimination Act 1975* (Cth) is contravened. Further, even if this was the case, a strong argument exists for such a direction to be considered a 'special measure' under s8(1): see *Gerhardy v Brown* (1985) 159 CLR 70 and the criticism leveled at the High Court's analysis of racial discrimination therein by Wojciech Sadurski, '*Gerhardy v Brown* versus the Concept of Discrimination: Reflections on the Landmark Case that Wasn't (1986) 11 *Sydney Law Review* 5; *Western Australia v Commonwealth* (1995) 183 CLR 373, 483-484 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Maloney v The Queen* [2013] HCA 28 [303] – [310], [324] – [348] (Gaegler J) *('Maloney')*. Of the fundamental objectives of eliminating racial discrimination Gaegler J said in *Maloney* at [327]:

> Whatever uncertainty may have existed at the time *Gerhardy* was decided, the repeated pronouncements of the Racial Discrimination Committee in its recommendations to the General Assembly of the United Nations can be taken to reflect what is now a clear and consistent international understanding of what is required to eliminate racial discrimination and to guarantee racial equality before the law in the enjoyment of human rights. What is required is the removal of all differential treatment that impacts on the equality of enjoyment of a human right by persons of different races save for differential treatment that can be judged, in light of the Convention principles of dignity and equality and in light of the Convention objective of securing substantive racial equality in the enjoyment of human rights, to result from the application of criteria that are both applied in pursuit of a legitimate aim and proportionate to the achievement of that aim.

more fundamental level, a requirement to pay particular attention to Indigenous circumstance might in fact be required by the principle of equal consideration. The Supreme Court of Canada has taken this position.[185]

In *R v Gladue*, the Supreme Court of Canada held that s 718.2(e) is a 'direction to sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case'. [186] It requires sentencers to 'pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique'.[187] In essence, this approach finds that particular attention to Indigenous circumstances is required by the principle of individualised justice. Justification for this position flows from a systemic failure to give equal consideration to Indigenous offenders in sentencing decisions. According to the Court, 'it must in every case be recalled that the direction to consider these unique circumstances flows from the staggering injustice currently experienced by aboriginal peoples with the criminal justice system'.[188]

The finding that the requirement to pay particular attention to Indigenous circumstances in order to remedy a historic failure to give sufficient attention, and by extension equal consideration, to Indigenous circumstance was confirmed and reinforced by the Court in the 2012 case of *R v Ipeelee*.[189] In that case, the Court noted:

> Section 718.2(e) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has been, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process.[190]

On this analysis, particular consideration for the different experiences of Aboriginal Canadians is required by fidelity to the principle of equality before the law. That is, the justification for giving *particular* attention is a systemic failure to give *sufficient (or equal)* attention to these experiences. Further, it is the existence of this failure that founds the necessity to pay particular attention, not the fact that this failure was recognised in a legislative provision. If this is borne in mind, then a requirement to pay particular attention to Indigenous circumstance is capable of recognition in Australia in the absence of an equivalent legislative provision. As argued in *Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice:*

---

[185] Anthony, Bartels and Hopkins, above n 44, 20.
[186] *R v Gladue* [1999] 1 SCR 688 (Gladue) [33].
[187] Ibid [37].
[188] Ibid [88].
[189] *R v Ipeelee* [2012] 1 SCR 433 [118] ('*Ipeelee'*).
[190] Ibid [75].

> The High Court did not consider whether an equivalent systemic judicial failure exists in Australia. If it does, then it is appropriate to consider whether the Canadian approach should be adopted as promoting equality before the law, rather than undermining it.[191]

The charge that can be leveled against the High Court, and legislators in Australia, is that by refusing to acknowledge that giving particular attention to the circumstances of Indigenous offenders is required by the principle of equality, Indigenous offenders are being treated *as less*. Just as equality is promoted by requiring engagement with the reality of battered women who kill, so too is equality promoted by requiring engagement with the reality of Indigenous experience in sentencing.

The question of how to pay particular attention to Indigenous circumstances in sentencing, and thereby give equal consideration, will be considered in Part V below. There it will be argued that developments in Canada and decisions of the Supreme Court of Canada in *Gladue* and *Ipeelee* shine a light on the path towards equality. That is, they speak to the pursuit of equality in both principle and practice. However, before considering ways of overcoming the challenge of engaging with the experience of 'others', what follows is a discussion of the principle of equal consideration as it manifests in the cross-examination child sexual assault complainants.

### D *Cross-examination of Child Sexual Assault Complainants*

The equality question asked by this article is quite specific,[192] namely, 'is s 41 of the *Evidence Act*, a provision designed to control improper questions asked in cross-examination, likely to result in equal consideration being given to child sexual assault complainants in the witness stand?'[193] Section 41 engages directly with the equality problem. It requires judicial officers to intervene to prevent improper questions being asked of witnesses. [194] In assessing whether a question or questioning is improper judicial officers must give consideration to the particular characteristics, or 'vulnerabilities' of the witness. Section 41 is intended, at least in part, to prevent the trauma and truth obfuscation of cross-examination that is not tailored to take account of linguistic, cognitive and positional differences between witnesses.[195]

The location here is the trial, with the particular trial event the defence lawyer's cross-examination of the child complainant. At this stage of the trial, the child is giving evidence of having been sexually assaulted by the accused and the defence barrister, acting on the instructions of the accused, is seeking to question the child in order to persuade the jury that the child is not telling the truth. The relevant comparator is the rational adult witness.

---

[191] Anthony, Bartels and Hopkins, above n 44, 20 (footnote omitted).
[192] Boyd and Hopkins, above n 46.
[193] *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2011* (ACT); *Evidence Act 2008* (Vic), *Evidence (National Uniform Legislation) Act* (NT).
[194] *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2011* (ACT); *Evidence Act 2008* (Vic), *Evidence (National Uniform Legislation) Act* (NT); noting that the Victorian and Northern Territory sections impose a *requirement* to intervene only where a witness is initially categorised as vulnerable, in other cases in those jurisdictions the power to intervene is discretionary. See discussion in Boyd and Hopkins, above n 46, 160.
[195] See Boyd and Hopkins, above n 46, 157-160 for a full discussion of the legislative history of s 41; see, also, Anne Cossins, 'Cross Examination in Child Sexual Assault Trials: Evidentiary Safeguard Or An Opportunity To Confuse?' (2009) 33(1) *Melbourne University Law Review* 68.

To engage with the equality question in this context, it is necessary to understand the central role cross-examination occupies in the adversarial criminal justice system. It is also necessary to engage with the system defined purpose and ethical responsibilities of the cross-examiner. This is because, ultimately, the dynamics of the system and the roles and responsibilities of its actors may preclude equality of consideration, or severely hamper its achievement.

Cross-examination has been touted as 'the greatest legal engine ever invented for the discovery of truth'.[196] Yet, whilst there are real questions about whether the purpose of a criminal trial is the discovery of truth,[197] there is little doubt that the purpose of the defence lawyer in cross-examining the child is *not* to discover the truth:

> Though defence lawyers are bound by evidential, procedural and ethical rules which may facilitate discovery of the truth, their purpose is not to uncover truth. That is, unless the truth happens to coincide with their clients' instructions.[198]

If we assume that the child is telling the truth about the sexual assault (an assumption entirely inconsistent with the presumption of innocence, but one that may well be warranted) then the defence lawyer's purpose will in fact run counter to the truth. This is because a defence lawyer's duty is to 'promote and protect fearlessly and by all lawful means the client's best interests to the best of [his or her] skill and diligence',[199] with 'the maximum zeal permitted by law'.[200] This invariably requires challenging the child and his or her narrative. In this respect, the defence lawyer's task is to persuade the jury to doubt the child. This means that clear communication with the child is *not* the focus of the linguistic engagement. Further, this persuasive purpose determines the content and form of the questions, as well as the manner in which they are asked. And, through questioning, the 'powers of the cross-examiner must be brought to bear to undermine the credibility of the complainant, and the complainant's evidence'.[201] In short, the cross-examiner is 'obliged to pit their wits, their learning and experience, against the child'.[202] This is the 'theatre' in which the equality question is asked: a theatre in which the power disparity arguably warrants the claim that 'victory for the cross-examiner is too often the work of the trained curial assassin ambushing an easy target'.[203]

At trial, the judge supervises this unequal contest between lawyer and child. At common law, judicial officers have always had a capacity to control and disallow questions put to a witness[204], though 'interventions in the progress of the case are

---

[196] John Henry Wigmore, *Evidence in Trials at Common Law* (Chadbourne, revised ed, 1974) Vol 5, 32.
[197] See, eg, discussion in Boyd and Hopkins, above n 46, 154-155.
[198] Ibid 156 (reference omitted).
[199] See, eg, NSW Bar Council, *The New South Wales Barristers' Rules* (consolidated 6 January 2014) r 37.
[200] David Luban, 'Twenty Theses on Adversarial Ethics' in Michael Lavarch and Helen Stacy (eds), *Beyond the Adversarial System* (Federation Press, 1999) 140.
[201] Boyd and Hopkins, above n 46, 156-157.
[202] Ibid 157.
[203] Jill Hunter, 'Battling a Good Story: Cross-examining the Failure of the Law of Evidence' in Paul Roberts and Mike Redmayne (eds) *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (Hart Publishing 2007) 271.
[204] *Libke v The Queen* (2007) 230 CLR 559, 597-604 (Heydon J).

normally minimal'.[205] In New South Wales (NSW) the introduction of section 41 of the *Evidence Act 1995* (NSW) ended total reliance on the common law, bringing in what was then a *discretionary* power to disallow improper questions. It included a non-exhaustive list of characteristics of the witness to be taken into account in determining whether a question was improper. This, it is argued, amounted to:

> a direct exhortation to the judge or magistrate to consider the impropriety of questions from the perspective of the particular witness, rather than from the perspective of the hypothetical 'normal' witness. To ask, for example, is this question intimidating for *this* child?[206]

In other words, the provision directs judicial officers to pay particular attention to the characteristics and experience of the particular witness, to ensure that questions put to him or her are properly tailored to their circumstances. It acknowledges, explicitly, that equal consideration requires different treatment.

Five years into the operation of s 41, in its original form, the NSW Legislative Council Standing Committee on Law and Justice was damning in its assessment: 'These provisions should have prevented the distressing experiences of child witnesses … but clearly they have often failed to do so'.[207] In effect, the NSW Legislative Council accepted that there was a continuing judicial failure to consider the cognitive and linguistic development of children and their relative power in the witness box. Children continued to be treated *as less* because the questioning they faced was insufficiently different from the questioning that adults faced. In terms of difference, evidence has established that the content, form and manner in which questions are put to child witnesses must be altered to minimise trauma, prevent confusion and avoid the corruption of their evidence.[208]

To address what was seen as a judicial reluctance to interfere,[209] s 41 was amended to, amongst other things, make judicial intervention *mandatory*. The NSW precursor provision, upon which the amended s 41 was modeled, was designed to set a 'new standard for cross-examination of witnesses'.[210] Section 41(1), of the NSW, Commonwealth and ACT provision now provides as follows:

> The court *must* disallow a question put to a wintess in cross-examination, or inform the witness that it need not be answered, if the court is of the *opinion* that the question…
>
> (a) is misleading or confusing, or
>
> (b) is *unduly* harassing, intimidating, offensive, oppressive, humiliating or repetitive, or

[205] *Doggett v The Queen* (2001) 208 CLR 343, 346 (Gleeson CJ).
[206] Boyd and Hopkins, above n 46, 158.
[207] Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Report on Child Sexual Assault Prosecutions* (2002) 79.
[208] Boyd and Hopkins, above n 46, 150-153; see, eg, Cossins, above n 195, which provides an excellent overview of the literature establishing the ways in which child sexual assault complainants may be (re)traumatised by cross-examination and the truth obfuscated.
[209] Boyd and Hopkins, above n 46, 159.
[210] For a discussion of the legislative history of s 41 *Evidence Act 1995* (NSW) see ibid 159-160. This latter quote relates to the NSW precursor to s 41 on which s 41 was modeled, *Criminal Procedure Act 1986* (NSW) s 275A; NSW Legislative Assembly, *Parliamentary Debates*, Bob Debus, Attorney General (23 March 2005) 14.900.

(c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or

(d) has no basis other than a stereotype …' (emphasis added).

Section 41(2) makes clear that in assessing whether a question is improper, the court may take into account:

(a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality, and

(b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is appears to be subject, and

(c) the context in which the question is put, including:

(i) the nature of the proceeding, and

(ii) in a criminal proceeding-the nature of the offence to which the proceeding relates, and

(iii) the relationship (if any) between the witness and any other party to the proceeding.

The article *Cross-examination of Child Sexual Assault Complainants: Concerns About the Application of s 41 of the Evidence Act* published the results of a small scale survey of NSW defence and prosecution barristers designed to determine whether the introduction of the precursor provision upon which s 41 was modeled had achieved its purpose. In other words, the survey sought to establish whether s 275A *Criminal Procedure Act 1986* (NSW) had increased judicial intervention or otherwise changed defence barristers' approaches to cross-examination in the four years since its introduction. As the title suggests, the results were concerning. While respondents to the survey pointed to a gradual change over the preceding two decades consistent with efforts to ameliorate child trauma in the witness box, in the final analysis, s 275A was found to have had little if any impact.[211]

The explanation for this was that, from the perspective of the barristers surveyed, the way cross-examination was conducted both before and after the introduction of the provision was not improper.[212] This position apparently contradicts the empirical research on the experience of child sexual assault complainants,[213] but clearly explains why there was no reported change. From the barristers' perspective, and no doubt that of the judges who did not intervene, questions put were not, and had not been, misleading, confusing, or *unduly* harassing, intimidating, offensive and so forth. Thus intervention was not required. For whilst intervention is mandatory, it is predicated on

[211] Boyd and Hopkins, above n 46, 160-162.
[212] Ibid 162-163.
[213] See, eg, Eastwood and Patton, above n 52; Judy Cashmore and Lily Trimboli, *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot* (New South Wales Bureau of Crime Statistics and Research, 2005).

the formation of an 'opinion' by the judicial officer that the question is improper for one or more of the reasons set out above.[214] Accordingly, the power to intervene will not be enlivened if judicial officers do not perceive the questioning to be improper.

The article argues that the absence of change is explicable on the basis of a 'trial-centred', rather than 'child-centred', interpretation of what amounts to an improper question. Under this interpretation, a measure of oppression and humiliation, for example, may be *due* by the rules and norms of the adversarial trial.[215] In terms of the principle of equal consideration, provided this level of oppression and humiliation is meted out in proportion to the child's cognitive and linguistic capacity, there may be no conflict. But this raises a deeper question of whether a system that warrants any measure of oppression and humiliation is one under which the pursuit of equality should be an end in itself.[216]

The systemic problem is eloquently put by one of the defence barristers, who responded to the survey, as follows:

> Many child sexual assault complainants are real victims of horrific crimes … Anyone who has compassion could not help [but] be pained by the prospect of causing distress to a child sexual assault complainant who is a real victim, or even to a child witness who is so dysfunctional that s/he has resorted or been pressured into making a false complaint. This does make me uncomfortable, but is outweighed by my belief in the centrality [in] a civilised society of the rule of law and the entitlement of a person accused of crime to defend such charges. Child sexual assault complainants must be able to be challenged.

The point made here is that there are competing objectives and a balance is being struck between the importance of ensuring innocent people are not convicted, whilst at the same time reducing trauma and truth obfuscation.[217]

Another fundamental explanation for the likely failure of s 41 to produce change is the difficulty involved in understanding what it is like to be a child sexual assault complainant facing a particular question. That is, the difficulty involved in crossing the experiential divide to engage with the child's experience. This explanation looms because there can be no 'trial-centred' interpretation of whether a question is 'misleading or confusing':

> Whether a question is or is not confusing cannot be answered by reference to the adversarial system of trial … Disallowing a question that is misleading or confusing does not require the balancing of the child's interests against those of the accused in securing a fair trial.[218]

---

[214] Boyd and Hopkins, above n 46, 163.
[215] Ibid.
[216] See Campbell, above n 67, 25-26 where he argues '… the consistent application of rules is not a matter of justice, formal or otherwise, unless the rules are rules of justice'.
[217] This is a more difficult equality problem, yet still an equality problem. The question is whether the adversarial trial system is capable of giving equal consideration to the experience of accused persons as compared to the experience of child sexual assault complainants. Making the comparison is demanding. However, strong arguments have been made that the scales are unbalanced, prompting calls for deeper reform: see, eg, Patricia Easteal, 'Beyond Reform', Patricia Easteal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture*, *Balancing the Scales* (Federation Press, 1998) 208; Easteal, above n 5, 231.
[218] Boyd and Hopkins, above n 46, 164.

Thus, insofar as misleading or confusing questions are not being disallowed, the failure is one of perception and judicial appreciation of the linguistic and developmental capacity of children who appear before the court as complainants. This is more clearly a failure to accord equality of consideration; a failure that *may* be remedied, it will be argued, through information, education and imagination. But system and perception failures interact. There is a concern that judicial officers and trial lawyers have 'lived, breathed and absorbed the norms of the adversarial system', such that 'their lens has become the adversarial lens, to the virtual exclusion of other perspectives'.[219] This means they are not well equipped to consider and engage with the perspective of the child. In the final analysis, it is hard to escape the conclusion that despite the fact that s 41 directs attention to the particular circumstances of a child witness, the barriers to giving equal consideration to the experience of child witnesses remain.

[219] Ibid.

## V ENGAGING WITH THE EXPERIENCE OF 'OTHERS': EQUALITY AS UNDERSTANDING

In this section, we turn to consider the barriers to engaging with the experience of 'others' and approaches to overcoming these barriers.

### A *Barriers to Engaging with the Experience of 'Others'*

As has been argued above, the pursuit of equality before the law requires commitment to a principle of equal consideration for those who come before the law. And, giving equal consideration requires engaging with the experience of 'others'. This has proved to be a serious challenge – one which should prompt us to ask why? Why do 'we' have trouble understanding and engaging with the experience of Indigenous offenders, battered women and child sexual assault complainants? As we have seen, even where there is a legislative direction to give particular attention to the experience of 'others' the problem remains. To a large extent, the answer is contained in the question. The 'we' here is not the Indigenous offender, the battered woman, or the child sexual assault complainant. Insofar as a legislator, judicial officer or juror is a member of one (or more) of these groups, they will share a common experience and not need to reach across an experiential divide to understand the other. They *are* the 'other'. However, such individuals are likely to be the minority. The challenge for most of us, therefore, is to understand the experience of others with whom we do not share a common 'social category'.

As humans, we are socialized or enculturated to see the world from a particular perspective and from the confines of social categories. The human mind cannot think without the aid of categories.[220] Categories are essential to survival and to linguistic and social engagement in the world. Indeed, '[t]he distinction between the inside and the outside … which is absolutely fundamental to law' is itself a function of the categorical thinking inherent in our engagement with the physical and social world.[221] These categories extend not just to objects in the world but to categories of people. As Plous argues, '[s]ocial categories form an indispensible part of human thought'.[222] He cites research on gender recognition, which establishes that 'children typically form social categories within the first year of life' and are, for example, 'often able to discriminate between female and male faces by the age of 9 months, and sometimes as early as 5 months'.[223] Returning to our siblings, Jane and Tom, this means that each will quickly learn to discriminate male from female. They will come to understand that they fit into one or the other category, and then begin a process of receiving social and cultural signals about what it means to be male or female. According to Barrett:

> The process begins at birth, as infants are molded to conform to the standards of the family and society into which they are born … infants are subjected to a barrage of cultural influences that are designed to make them think, act and feel like the adult member of the society. Each individual can be thought of as a receptor of a constant flow

[220] Gordon Allport, *The Nature of Prejudice* (Addison Wesley, 1954) 20.
[221] Davies, above n 107, 14.
[222] Plous, above n 112, 3, 7.
[223] Ibid 25 citing Mary D Leinbach and Beverly I Fagot 'Categorical habituation to male and female faces: Gender schematic processing in infancy' (1993) 16 *Infant Behaviour and Development* 317-332.

> of impalpable cultural signals from these various sources, all of which combine to form attitudes, values, and conceptions about the surrounding world.[224]

As explained by Easteal, this process then acts to obscure our efforts to understand the experience of others.[225] She uses a kaleidoscope metaphor to explain how our enculturation comes to filter the way we perceive reality:

> when we look at anything or anybody, say, a woman in a police uniform, our perception is the outcome of our own individual experiences and knowledge which blends to produce 'filters' or mirrors that create or reflect or distort a picture at the end of the kaleidoscope cylinder.[226]

The process is inexorable, subtle and complicated by the intersecting nature of our experience. None of us views the world through a single lens. To bring this understanding to a concrete example: a socio-economically privileged, well-educated, white middle-class male (as I am) views the world through very different lenses to most Indigenous offenders, battered women or child sexual assault complainants. Similar lenses of race and socio-economic privilege likely distort the perceptions of most legislators, judicial officers and legal practitioners; that is, those who have the power, in large or small ways, to promote equality before the law, through according equal consideration to those who come before the law. Further, few of them will have been the victims of serious domestic violence. But regardless of the lenses we are looking through, the fundamental point, as Bartlett argues, is that truth is both situated and partial: situated because 'it emerges from particular involvements and relationships'; and partial because 'individual perspectives that yield and judge truth are necessarily incomplete'.[227] In short, the way we perceive reality, and the reality of others, is a function of our limited experience.

As Easteal further points out, it is not simply the lenses of our experience that undermine or distort our efforts to understand the experience of others. It is the fact that we are often not aware that we are looking through 'kaleidoscopes in the first place'.[228] This means that we assume that the view through our lenses provides an image of the truth, rather than an image mediated by the lenses. Through a process of cultural amnesia, we forget that our 'thoughts, behaviours and way of looking at the world were learned', and learned in our particular context.[229]

Bringing the focus back to equality, MacKinnon's point – that 'those who most need equal treatment will be the least similar, socially, to those whose situations set the standard against which one's entitlement to be equally treated is measured' – can also be understood in kaleidoscopic terms.[230] By and large, the lenses of legislators, judicial officers and legal practitioners (and jurors) are so different to those of battered women, Indigenous offenders and child sexual assault complainants, that each group's reality is

---

[224] Richard A Barrett, *Culture and Conduct: An Excursion in Cultural Anthropology* (Wadsworth 1984) 54, 64 cited in Easteal, above n 5, 2.
[225] Easteal, above n 5, 1-3.
[226] Ibid 1-2.
[227] Bartlett, above n 6, 1132.
[228] Easteal, above n 5, 2; a similar point is made in relation to the invisibility of whiteness and the study of whiteness, see eg, Margaret Davies, above n 107, 310-316.
[229] Easteal, above n 5, 2.
[230] MacKinnon, above n 13, 44 (endnote omitted).

all but obscured. And, significantly, while this obfuscation may work both ways (that is, for example, the Indigenous offender may have little understanding of the world of the judicial officer before whom s/he appears), in the context of 'according' equal justice, it is the view of the criminal justice decision-maker that defines the legal terrain and determines the outcome. The distribution of power, and responsibility for its exercise, never leaves the frame.[231]

But the challenge of understanding is not insurmountable. The experiential divide *can* be bridged. What follows is a general discussion of a standpoint for, and approaches to, engaging with the experience of others.

### B *Bridging the Divide – Adopting a Positional Stance*

Reaching across the experiential divide in pursuit of equality requires us to understand the bounded nature of our own experience and actively seek to engage with the experience of others. It requires us to acknowledge the barriers to understanding and act positively to surmount them. For Bartlett, this deliberate act of extending our own perspectives follows from an acceptance that knowledge is 'positional'. As she explains,

> Because knowledge arises within social contexts and in multiple forms, the key to increasing knowledge lies in the effort to extend one's limited perspective. … I cannot transcend my perspective; by definition, whatever perspective I currently have limits my view. But I can improve my perspective by stretching my imagination to identify and understand the perspectives of others.[232]

On this analysis, extending our perspective to engage with and understand the perspective of others requires a combination of information and imagination. For example, in the context of extending our perspective to engage with the reality of a battered woman, it requires *information* (or evidence) about her experience, the experience of battered women generally and the dynamics of family violence. From this platform, it then requires *imagining* 'what it must really be like to live in a situation of ongoing violence'.[233] Bartlett describes this as a process of 'stretching'; this is apt because stretching or extending our perspective to engage with the experience of others requires conscious effort. Moreover, it is an unlimited and often uncomfortable process. In a criminal justice context, the perspectives we must engage with may at times be repugnant. For example, in the context of sexual assault, Bartlett notes:

> And (can it get worse?) when feminists urge drastic reform of rape laws, positionality compels consideration of the position of men whose social conditioning leads them to interpret the actions of some women as 'inviting' rather than discouraging sexual encounter.[234]

However, giving equal consideration – understood as the process of informed and imaginative 'stretching' to understand the perspectives of others – does not require us to adopt those perspectives. Instead,

---

[231] Ibid.
[232] Bartlett, above n 6, 1132.
[233] Bradfield, above n 30, 135.
[234] Bartlett, above n 6, 1132-1133.

> [a]lthough I must consider other points of view from the positional stance, I need not accept their truths as my own. Positionality is not a strategy of process and compromise that seeks to reconcile all competing interests….it sets an ideal of self-critical commitment whereby I act, but consider the truths upon which I act subject to further refinement, amendment, and correction.[235]

Essentially, what is argued here is that Bartlett's concept of a 'positional stance' is not simply a standpoint from which we come to know about the world, but a position that *must* be adopted if fidelity to a principle of equality is sought. In other words, giving equal consideration requires information, imagination and effort to enable the 'stretching' of our understanding to engage with others. And, following from what has been argued above, the more different the reality of the person to whom we seek to give equal consideration, the greater the stretch, and the greater the information, imagination and effort required.

### C *Bridging the Divide – Informed Imagining*

Before considering the value of informed imagining in the pursuit of equality, it is worth reflecting on its opposite. That is, ignorance and the failure to imagine what it is like to be in the shoes of others, together with the dreadful discriminatory consequences that can flow. In his famous Redfern speech, delivered in 1992, Paul Keating powerfully decried this failure of imagination, and the consequent denial of equality:[236]

> And, as I say, the starting point might be to recognise that the problem starts with us non-Aboriginal Australians.
>
> It begins, I think, with that act of recognition.
>
> Recognition that it was we who did the dispossessing.
>
> We took the traditional lands and smashed the traditional way of life.
>
> We brought the diseases. The alcohol.
>
> We committed the murders.
>
> We took the children from their mothers.
>
> We practised discrimination and exclusion.
>
> It was our ignorance and our prejudice.
>
> And our failure to imagine these things being done to us.
>
> With some noble exceptions, we failed to make the most basic human response and enter into their hearts and minds.

[235] Ibid 1133.

[236] Paul Keating, *Redfern Speech* (10 December 1992) <http://antar.org.au/reports/paul-keatings-redfern-speech>.

We failed to ask - how would I feel if this were done to me?

This same failure of imagination has been reflected in the history and development of the law of self-defence and its exclusion of the experience of battered women. It is recognised in law reform efforts designed to take jurors to a point of understanding the reality of choice in the context of family violence. The failure of imagination is reflected in the treatment of child sexual assault complainants in the witness stand, and acknowledged in reform efforts to protect them. The failure is also reflected in the history of sentencing Indigenous Australians and Canadians, and acknowledged in Canada in the form of the requirement to 'give particular attention' to Indigenous circumstance. In summary, the experience of each group, in the location of analysis, reveals a history of less than equal treatment closely linked to this failure of imagination.

Against this backdrop, it is argued that imagining is critical to giving equal consideration. Why? Appealing once again to intuition, there is something powerful in asking the question, as Keating does, 'how would I feel if this were done to me?'[237] The question is a reflection of what has been termed the 'golden rule'. That is, the principle that *we should do unto others as we would have them do to us.* This is a principle of moral action based in reciprocity 'found in some form in almost every ethical tradition'.[238] It requires us to imagine what it would be like to be in the shoes of others. The fact that asking such questions of ourselves has the capacity to shift our deeply held beliefs about others, facilitating an empathic engagement, has been established by psychological research.[239] Plous maintains, in the context of addressing prejudice, stereotyping and discrimination, that in order '[t]o become more empathic toward the targets of prejudice, all one needs to do is to consider questions such as *How would I feel in that situation?, How are they feeling right now?,* or *Why are they behaving that way?'*[240]

The use of imagination as a device for achieving justice receives concrete and detailed formulation by Rawls in *A Theory of Justice*.[241] The 'original position' therein described is a thought experiment, 'a purely hypothetical situation characterized so as to lead to a certain conception of justice'.[242] The central idea is that principles of distributive justice are those chosen by equals from behind a 'veil of ignorance'. Those behind the veil do not know their place in society, their 'class position', 'social status', 'natural assets and abilities' and so forth.[243] Thus, they must choose principles that will

[237] Ibid.
[238] Simon, Blackburn, *Ethics: A Very Short Introduction*. (Oxford University Press, 2001) 101.
[239] Plous, above n 112, 36.
[240] Ibid.
[241] John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 1; Rawls details a theory of distributive justice of broad scope drawing upon social contract theory, stating explicitly: 'My aim is to present a conception of justice which generalises and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant'.
[242] Ibid 12.
[243] Ibid 12, 137; though Okin notes that 'sex' does not receive a mention in the 'list of things unknown by a person in the original position'. Susan Moller Okin, 'John Rawls: Justice as Fairness – For Whom?' in John Perry and Michael Bratman eds *Introduction to Philosophy: Classical and Contemporary Readings* (Oxford University Press, 2nd ed, 1993) 680-691, 681.

be fair, no matter what their place may in fact be. This necessarily requires them to imagine that they are one of the 'least advantaged members of society'.[244]

Okin strongly critiques Rawls' failure to engage with gender, and with the family as a social institution to which principles of justice must be applied.[245] Nonetheless she recognises the radical potential inherent in the original position, stating:

> The significance of Rawls's central, brilliant idea, the original position, is that it forces one to question and consider traditions, customs, and institutions from all points of view, and ensures that the principles of justice are acceptable to everyone, regardless of what position "he" ends up in.[246]

However, the idea that we may enter a decontextualised 'original position' suggests, contrary to the enculturation thesis, that we can 'transcend' our perspective. As has been argued above, this cannot in fact be done, or at least not completely. The trap, which Okin suggests Rawls falls into, is that a male perspective, for example, may be claimed to constitute the decontextualised perspective.[247] This limitation does not undermine the importance of imagining ourselves into the shoes of others in pursuit of justice, but it does require us to be reflective about the process. Further, acknowledging the limits of our ability to decontextualise ourselves highlights another problem with imagining, that being, the limits on our ability to recontextualise ourselves into the shoes of others. Again, this does not devalue imagination as a device for understanding the experience of others, and thereby facilitating the realisation of equality. But it does require us to understand this as a real positional challenge, one that requires the 'stretching' of our perspective.[248] Accepting this challenge starts, for most of us, with a recognition, that we *don't* understand what it is really like to be a battered women, an Indigenous offender or child sexual assault complainant in the witness stand.

The point here is that being properly informed about the experience of others is a necessary component of any equality project. We cannot usefully imagine what it would be like to be in another's shoes without information about their experience and the experience of the relevant group to which they belong. Moreover, given the history of failure discussed above, the provision of information must be actively sought and the flow of information facilitated. To take an example, bringing us back to the lenses that filter experience, a non-Indigenous judge who has not been informed about the post-colonial experience of Indigenous Australians cannot understand the Indigenous offender in this context. That experience remains unknown. The same is true with respect to the experience of battered women and child sexual assault complainants. We have all been children, so perhaps understanding what it would be like to be a child in

---

[244] Rawls, above n 241, 302; That this is required is evident from the principles that Rawls says will emerge, for example 'inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society'.

[245] Okin, above n 243, 680-686.

[246] Ibid 686. Cornell maintains that feminists 'should find an ally in Rawls'. Drawing upon Rawls, she argues for an 'imaginary domain' as a place of 'prior equivalent evaluation that must be imagined no matter what historical and anthropological researchers tell us is "true" about women's nature' stating that '[t]he moral demand lies at the heart of the hypothetical situation of the imagination, and it is out of this hypothetical situation that a fair proceduralist conception of justice can be developed': Cornell, above n 107, 13-17.

[247] Okin, above n 243, 688.

[248] Bartlett, above n 6, 1132.

the witness stand should not require a base of information beyond our own experience. Unfortunately, however, the experience of child witnesses, as discussed above, gives the lie to this supposition. What is necessary, in each instance, is a process of consciousness raising, a familiar strategy of the feminist movement. As described by Cain:

> consciousness raising is the cornerstone of feminist method. Consciousness raising is about giving voice to the unknown in women's experience. Consciousness raising makes available stories that are personal and private. Consciousness raising brings new understanding by making known the unknown. [249]

Adopting strategies for making the unknown known is central to the pursuit of equality before the law, understood as giving equal consideration. Here we are particularly concerned with *targeted* consciousness raising. That is, at issue are strategies for making the unknown known for criminal justice decision-makers at particular sites within the adversarial criminal justice system. As examples of this, we again turn to the published outputs that form the body of this thesis.

### D *Facilitating Understanding*

#### 1 *Battered Women Who Kill*

As discussed above, the Victorian reforms go furthest towards facilitating the flow of information about the experience of battered women who kill. Section 322M of the *Crimes Act 1958* (Vic) directs attention to the potential relevance of evidence of family violence in the application of the test of self-defence. Section 322J then broadly defines 'evidence of family violence' to enable the full context of a battered woman's experience to be taken into account. But, although the specific inclusion of such a direction itself has a consciousness raising potential, the sections are largely facilitative. The task of raising the consciousness of the jurors – and quite possibly trial judges – falls to defence lawyers (and possibly judges). Ultimately, it is defence lawyers who must marshal and present evidence of the history of the battered woman's experience and expert evidence placing this experience in its proper context.

To this end, the chapter *Women and Criminal Defences to Homicide* devotes a section to 'How to Help the Judge and Jury to Hear Women's Stories'.[250] This gives particular emphasis to the choice of an appropriate expert who will be in a position to describe to the court what it is *really* like to live under the constant shadow of abuse, and bring jurors to an understanding of why, for example, the woman could not 'just leave'.[251]

Another impediment to realising equality of consideration for battered women is the capacity of defence lawyers, entrusted with defending the case and marshaling evidence, to themselves understand the experience of battered women. Unless defence lawyers themselves are conscious of the reality of family violence and how this may affect the presentation of their client and their capacity to tell their story,[252] there is no prospect that the court will be informed of this reality. To this end, the publication was

[249] Cain, above n 8, 1114.
[250] Easteal and Hopkins, above n 29.
[251] Ibid 127.
[252] Ibid 113-114.

expressly directed to those lawyers and non-lawyers who may take on an advocacy role for women who kill where family violence is an issue.

2. *Indigenous Offenders*

As noted above, section 718.2(e) of the Canadian *Criminal Code* directs sentencing courts in Canada to pay 'particular attention to the circumstances of aboriginal offenders'. Again, by itself, this is largely facilitative. However, in the interests of realising the goal of equal consideration, the Supreme Court of Canada was clear about what paying particular attention to Indigenous circumstance requires. It requires taking:

> judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower education attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.[253]

These matters do not of themselves justify a different sentence, but 'provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel'.[254] The Court was clear that there must be some evidence of a link between the group and the individual experience, holding that 'systemic and background factors' need to be 'tied in some way to the particular offender and offence'.[255] As the Court noted,

> Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.[256]

However, taking a facilitative stance, the Court also made clear that there is no requirement to strictly prove a 'direct causal link' between circumstance and offending, as these 'interconnections are simply too complex'.[257]

On this analysis, paying particular attention requires courts to take judicial notice of the group circumstance and then considering whether there is a link between that group circumstance and the individual experience that should be actualised in the sentencing disposition. Further, in pursuit of understanding this link, and considering its impact on the exercise of the sentencing discretion, the Court was clear that *Gladue* reports were 'indispensible'.[258] *Gladue* reports are 'a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders'.[259] As explained in *Aboriginality in Sentencing: Sentencing a Person for Who They Are*:

> *Gladue* reports are distinct from pre-sentence reports in that their fundamental purpose is to identify material facts which exist only by reason of the offender's Aboriginality. And, critically, *Gladue* reports are written by Aboriginal Canadians employed by Aboriginal organisations. Accordingly, the authors of the reports exist within the same

[253] *R v Ipeelee* [2012] 1 SCR 433 [60].
[254] Ibid (emphasis in original).
[255] Ibid [83].
[256] Ibid.
[257] Ibid. For discussion see Anthony, Bartels and Hopkins, above n 44, 11, 22-24.
[258] *R v Ipeelee* [2012] 1 SCR 433 [60].
[259] Ibid.

> collective experience as the offender before the court. But like pre-sentence reports, *Gladue* reports provide an independent source of evidence from which facts material to sentencing can be established and acted upon. As a consequence, identification of the relevance and importance of an offender's Aboriginality is not left solely to the defence lawyer. Nor does it depend on the resources that lawyer has available to them. In a mark of extent to which the Canadian judiciary values these reports, they are now accepted in, and sought by, *Gladue* and non-*Gladue* courts alike, faced with the task of sentencing Aboriginal Canadians.[260]

The approach of the Supreme Court of Canada acknowledges the historic failure to give equal consideration. It also acknowledges the failure of information and imagination, and critically, it directs sentencing courts with respect to the process of paying particular attention to Aboriginal experience and the evidence required to do so. This is a thoroughgoing analysis of what equality in sentencing requires for Aboriginal Canadians in principled and practical terms.

Finally, in terms of crossing the experiential divide, the Supreme Court of Canada in *Gladue* recognised something critical about the experience of the 'other' that is dismissed whenever considerations of Aboriginality are confined as being relevant only to establishing 'the social disadvantage that frequently…precedes the commission of crime'.[261] The Supreme Court recognised that engaging with Indigenous experience is to understand that experience 'not simply as a yoke of collective disadvantage, but as offering the collective potential for positive change and uplift in the lives of Indigenous offenders'.[262] As argued in *The Relevance of Aboriginality in Sentencing: 'Sentencing A Person For Who They Are',* 'critically the Court also recognised that the same collective experience offers the potential for innovation in sentencing process and uniquely Aboriginal pathways for punishment, healing and reform'.[263]

Embracing this potential requires engaging with Indigenous developed rehabilitation and healing programs which seek individual change, by drawing on the strength of collective experience.[264] What is argued here is that if the experience of the 'other' is confined to its negative aspects, then equality of consideration remains lacking. Indeed, if Indigenous experience is viewed as simply an experience of disadvantage, then the cultural strength inherent in post-colonial survival is ignored. Indigenous offenders and Indigenous Australians are once again being treated *as less.*

### 3. *Child Sexual Assault Complainants*

As argued above, despite the presence of a provision in the *Evidence Act* to disallow improper questions – which in effect contains a direction to pay particular attention to the circumstances of vulnerable witnesses – concerns exist that child sexual assault complainants continue to be insufficiently protected. Insofar as this is a result of a

---

[260] Hopkins, above n 38, 49 (references omitted).

[261] *Kennedy v The Queen* [2010] NSWCCA 260 [53] (Simpson J), quoted with approval in *Bugmy v The Queen* (2013) 249 CLR 571 [37]. The full quote is as follows:

> Properly understood, *Fernando* is a decision, not about sentencing Aboriginals, but about the recognition, in sentencing decisions, of social disadvantage that frequently (no matter what the ethnicity of the offender) precedes the commission of crime.

[262] Hopkins, above n 38, 50.

[263] Hopkins, above n 38, 48 citing *R v Gladue* [1999] 1 SCR 688 [74].

[264] Hopkins, above n 38, 48; Anthony, Bartels and Hopkins, above n 44, 24-26.

judicial lack of understanding of the linguistic and cognitive development of children, information is a critical part of the remedy. The experience of child witnesses is well documented and targeted consciousness raising tools exist in the form of documents such as the *Bench Book for Children Giving Evidence in Australian Courts.*[265] Yet the existence of these sources does not compel the judicial officer to read, absorb and act on them, particularly in a trial environment in which a judge is both overloaded with information and tasked with ensuring a fair trial for the accused. To combat this, the Judicial College of Victoria runs workshops for judicial officers on child cognitive and linguistic development, age appropriate language and controlling improper questioning.[266] Significantly, these workshops engage presenters who are experts in the field of child cognitive and linguistic development. They also require judicial officers to put their learning directly into practice in child witness cross-examination simulations, wherein the judicial officer must intervene to control improper questioning.[267] This is a laudable example of a strategy that enables engagement with the experience of others that requires judicial participants to 'stretch' their perspective in the interests of equality.

However, if these efforts continue to fail, more radical options to ensure equality of consideration for child sexual assault complainants in the witness stand will need to be considered and implemented. This might involve introducing court-appointed intermediaries who are trained in the linguistic skills and cognitive development of children to monitor or interpret the questions put to them.[268] Or, going a step beyond this, equality of consideration may in fact require 'a less-adversarial model of discovering the truth; a model that does not pit the defence lawyer against the child sexual assault complainant and yet does not compromise the protection provided to the innocent accused'.[269] Such a model might well involve questioning by a judicial officer or expert entrusted with the dual objective of discovering truth and avoiding conviction of the innocent. That is, it may be that what is required is an inquisitorial, rather than adversarial, process. As will be argued in the concluding section of this linking dissertation, the pursuit of equal consideration in a particular site does not require acceptance of the present systemic limitations at that site. Before moving to concluding thoughts, however, we turn to a closer consideration of role-play as a strategy for engaging with the experience of others that combines both information and imagination.

### E *Role-play – Combining Information and Imagination*

According to Plous, research on role-play suggests that a 'reversal of perspective can reduce prejudice, stereotyping, and discrimination'[270] In line with this understanding, the final article that forms the body of this thesis makes the argument that having

---

[265] Australian Institute of Judicial Administration Committee, *Bench Book for Children Giving Evidence in Australian Courts* (Australian Institute of Judicial Administration, 2012).
[266] Judicial College of Victoria, *2015 Prospectus* (9 December 2014)
< http://www.judicialcollege.vic.edu.au/college-prospectus> 10.
[267] Knowledge gained from personal attendance as presenter at a workshop at the request Judicial College of Victoria.
[268] Cossins, above n 195, 'Recommendation 5'.
[269] Boyd and Hopkins, above n 46, 166; Annie Cossins, 'Prosecuting Child Sexual Assault Cases: To Specialise or Not, That is the Question' (2006) 18(2) *Current Issues in Criminal Justice* 318, 330-334; *R v D* [2002] QCA 445 [46] (Jerrard JA).
[270] Plous, above n 112, 36.

students adopt the roles of witness and questioner in a simulated trial environment enables them to better engage with the experiences of vulnerable witnesses. It also enables them to better understand courtroom and trial dynamics that bear upon these experiences.[271] The article details the use of an experiential approach to teaching evidence law which engages students in a progressive semester-long trial, designed to foster 'a capacity for critique and challenge, as the complexities and shortcomings of the trial process are directly revealed'.[272]

Each student brought their own lenses of experience to the class. Obviously, none were (still) children, and whether or not they had had experience as victims of sexual assault was unknown. The allegation that was the subject of the trial involved a robbery, rather than child or adult sexual assault, and adult witness 'characters'. Yet, each student who took the role of witness experienced the linguistic event of being questioned and each student taking the role of lawyer experienced the event of being the questioner, with an understanding of their adversarial purpose. Despite the absence of apparent specific vulnerabilities, the power imbalance was evident in the roles.

After the trial was complete – towards the end of the semester – and students had come to understand evidence law in action, they were asked to consider the experiences of vulnerable witnesses. The groups chosen for this exercise were child sexual assault complainants and Indigenous witnesses, [273] whose experiences have been documented.[274] It was argued that the voices of these witnesses, to a greater or lesser extent, remained unheard within the trial process. In essence, in terms of the equality question, the argument was that the chosen witness groups are denied equality of consideration in the courtroom. Students then received targeted consciousness raising material in the form of lectures, articles and other resources, and their knowledge was then assessed as a component of the exam. [275] This approach to teaching and assessment was specifically designed to combine information and imagination. The relevant assessment was described as requiring '[t]he critical discussion of the experience of a vulnerable witness group by reference to assigned readings and the student's own experience in the trial, and the evaluation of law reform approaches to enabling all voices to be heard'.[276]

While it is not known to what extent the teaching approach enabled students to reach across the experiential divide and stretch their perspective, the article details an approach designed to do this. It is an approach designed to promote and foster equality, understood as equal consideration of 'others' experiences, in circumstances where equality has clearly been denied.

Having made an argument for how each of the research outputs and approaches contained in them seek to promote engagement with the experience of others, we now turn to some concluding thoughts. In particular, to acknowledging the limitations on the equality projects described in this thesis, for the pursuit of equality is an endless and

[271] Hopkins, above n 50.
[272] Ibid 173.
[273] Noting that not all, or even the majority of, Indigenous witnesses will necessarily be 'vulnerable' as a consequence of cultural and language differences.
[274] See, eg, Eades, above n 52; Eastwood and Wendy Patton, above n 52.
[275] Hopkins, above n 50, 181.
[276] Ibid.

almost certainly unrealisable task, but one that is nonetheless both pressing and worthy.

## VI CONCLUSION – THE POTENTIAL OF EQUAL CONSIDERATION

In this linking dissertation, it has been argued that each of the publications squarely engages with the equality question at various sites in the criminal justice system. That is, the question of whether defined groups of people who come before the criminal courts are being given equal consideration. Each identifies a site in which particular groups of defendants or witnesses have been or continue to be denied equal consideration, and are thereby denied equality before the law. Each engages with the complexity of determining when and how battered women, Indigenous offenders or child sexual assault complainants in the witness stand are being treated as less. Each, in effect, makes an argument that equal consideration, almost paradoxically, requires paying particular attention to the experiences of these groups because of historic and continuing failures to accord them equal consideration – failures that are by no means restricted to these groups. And, in pursuit of equality, each publication considers reforms and strategies designed to 'stretch' the perception of judges, magistrates, legal practitioners and jurors to enable them to engage with the reality of battered women, Indigenous offenders or child witnesses, as the case may be.[277] In doing so, each is grounded in an acceptance that the knowledge of criminal justice decision-makers – whose consideration matters most in these sites – is both situated and partial, arising from their enculturation in the social world, with the reality filters or 'lenses' that result.[278] Finally, each engages with the challenge of understanding and imagining what it is really like to be the 'other' before the law.

Central to each publication is the question of what equality requires and the search for a foundation that enables the pursuit of equality in specific sites within the adversarial criminal justice system. It has been argued that that foundation is the inherent equality and value of all human beings and the corresponding entitlement to equal respect, equal concern and equal consideration. The entitlement to equal consideration has been adopted as representative of these various formulations. It has also been argued that a principle of equal consideration best enables answers to be given to equality questions because of its capacity to focus our attention on the need to take relevant differences into account, and engage with the different experiences of others. That is 'equal consideration' necessarily involves recognition and understanding of difference.

Ultimately, this thesis argues that each publication rests on a principled and defensible footing, and that, consistent with the exegesis of the entitlement to equal consideration, answering an equality question requires a close contextual focus on the experience of those who come before the law. The upshot is that the pursuit of equality before the law is an unending task that requires us to repeatedly ask of ourselves, 'what would it be like to be in the shoes of others?', all the while acknowledging the limitation of our capacity to do so.

These limitations and barriers cannot be underestimated, nor can they be cause for despair. To adopt a further metaphor from Easteal, the inequality and injustice we see is only the tip of the iceberg.[279] Indeed the structures of the law, for example the

[277] Bartlett, above n 6, 1132.
[278] Ibid; Easteal, above n 5, 1-2.
[279] Patricia Easteal, 'Setting the Stage: The "Iceberg" Jigsaw Puzzle', in Patricia Easteal (ed) *Women and the Law in Australia* (Lexisnexis Butterworths, 2010) 1.

gladiatorial features of dispute resolution;[280] its language,[281] and its definitions of determinative concepts such as credibility,[282] exclude difference and different perspectives. Even the language of equality, based on a liberalist account of an autonomous and atomised human existence is potentially exclusionary.[283] However, we can only work with what we see, acknowledging the limit of our vision and stretching to perceive the ice beneath the water. But in doing this, we should notice that something exciting happens. Our perception sharpens and does not remain restricted to the location of analysis. We become open to the broad and ongoing equality conversation. Bringing the iceberg metaphor to bear in the contexts considered in this thesis, the point can be explained as follows. When we engage with the experience of battered women who have killed their violent partners, the iceberg of male violence and domination of women is revealed, together with the resultant power differentials. Equality in the application of the law of self-defence is seen for what it is, part of a much larger goal of gender equality. When we engage with the experience of Indigenous offenders facing sentencing, the iceberg of colonial oppression, Indigenous struggle and survival comes into view, as do the power differentials inherent in a society founded on racial difference. Equality in the application of the sentencing discretion is seen for what it is, part of a much larger goal of respecting and uplifting Indigenous Australians. And, finally, when we engage with the experience of child sexual assault complainants in the witness stand, the iceberg of our society's failure to protect our most vulnerable is revealed. Equality for child sexual assault complainants in the witness stand is seen for what it is, pursuit of the larger goal of a society in which children can be raised in a world in which their inherent dignity as human beings can be realised. It is with widening eyes that we perceive and then act on these imperatives.

Each publication in this thesis adds a voice to calls for reform, for equal consideration of difference. This linking dissertation has sketched an ethical argument to ground this voice – an argument founded on our inherent equality and shared humanity. Its purpose has been to make explicit that which was implicit, or loosely sketched, within the publications, and provide a foundation for continuing engagement in progressive legal scholarship that encourages an approach towards 'an ethical law'. As Lacey argues:

> Whilst the idea of an ethical law may be impossible – utopian in a deep sense – the idea that there are ethical arguments which bear on law and its reform, and indeed that law could be less unjust and unethical than it is, remains central to progressive legal scholarship.[284]

Much of this thesis can be read as an argument designed to persuade criminal justice decision-makers of the moral necessity to actively engage with the differences of those who come before the court – to adopt a 'stance' of equal consideration, aimed at promoting equality. For the legislator, the judge, the magistrate, the legal practitioner and the juror, this may be a weighty burden. Insofar as it is, it is a burden carried by all those who have the capacity to impact on the treatment of those who come before the law. To accept this burden is to accept 'an ethical responsibility to respond to those in the *present*, to try to find ways within the existing system to bring about some level of

[280] Ibid 17, citing Graycar and Morgan, above n 15, 410.
[281] See, eg, Easteal, above n 5, 17.
[282] Ibid, citing Scutt, above n 17, 89-90.
[283] See, eg, West, above n 18, 1076.
[284] Lacey, above n 18, 247-248.

justice, however difficult that may be'.[285] But whilst it may be a burden, it is also an opportunity. Acknowledging the capacity to act in the *present* to promote equality empowers and invigorates that action, enabling deliberate steps to be taken, in the here and now, towards an ethical law.[286]

[285] Carline and Easteal, above n 24, 256 (emphasis added).

[286] McNamara is taken to be making a similar point where he argues that reconstructing criminal law values to take account of multicultural difference requires a focus on the agency of 'criminal justice decision-makers'. McNamara, above n 1, [54]-[55], states: 'Revelation of the full implications of multiculturalism for the legitimacy of criminal law values and standards will be facilitated by consideration of the agency of criminal justice decision-makers'.,.

# BIBLIOGRAPHY

## A *Articles/Books/Reports*


Allport, Gordon, *The Nature of Prejudice* (Addison Wesley, 1954)

Anthony, Thalia, Lorana Bartels and Anthony Hopkins, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' (2015) 39(1) *Melbourne University Law Review* (advance).

Aquinas, *In Sent.* D. 44 q. 1 a. 3 ad 1

Aristotle *Nicomachean Ethics* V 5.3 (D. Ross trans.)

Ashworth, Andrew, *Sentencing and Criminal Justice* (Cambridge University Press, 5th ed, 2010)

Austin, Regina, 'The Black Community.' Its Lawbreakers, and a Politics of Identification (1992) 65 *Southern California Law Review* 1769

Australian Bureau of Statistics (ABS), 'Corrective Services, Australia, September Quarter 2014' (Cat No 4512.0, ABS, 2014)

Australian Institute of Health and Welfare, 'Youth Justice in Australia, 2012-13' (Bulletin No 120, AIHW, 2014)

Australian Institute of Judicial Administration Committee, *Bench Book for Children Giving Evidence in Australian Courts* (Australian Institute of Judicial Administration, 2012).

Bailey, Peter H, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis Butterworths, 2009)

Barrett, Richard A, *Culture and Conduct: An Excursion in Cultural Anthropology* (Wadsworth 1984)

Bartlett, Katherine T, 'Feminist Legal Method' (1990) 103 *Harvard Law Review* 829

Bingham, Tom, *The Rule of Law* (Allen Lane, 2010)

Blackburn, Simon, *Ethics: A Very Short Introduction*. (Oxford University Press, 2001)

Boyd, Russell and Anthony Hopkins, 'Cross-examination of Child Sexual Assault Complainants: Concerns About the Application of s 41 Evidence Act,' (2010) 34 *Criminal Law Journal* 149

Bronitt, Simon and Bernadette McSherry, *Principles of Criminal Law* (Thomson Lawbook, 2nd ed, 2005)

Cain, Patricia A, 'Feminism and the Limits of Equality' (1990) 24 *Georgia Law Review* 803

Campbell, Tom, 'Justice' in Peter Jones and Albert Weale (eds) *Issues in Political Theory* (MacMillan, 1988)

Carline, Anna and Patricia Easteal, *Shades of Grey – Domestic and Sexual Violence Against Women* (Routledge, 2014)

Cashmore, Judy and Lily Trimboli, *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot* (New South Wales Bureau of Crime Statistics and Research, 2005)

Commonwealth Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991), Vol 2

Connell, R W, *Gender and Power* (Allen and Unwin, 1987)

Connell, R W, *Gender* (Polity Press, 2002)

Connell, Raewyn, *Confronting Equality: Gender, Knowledge and Global Change* (Allen and Unwin, 2011)

Cornell, Drucilla, *At the Heart of Freedom Feminism, Sex and Equality* (Princeton University Press, 1998)

Cossins, Anne, 'Saints, Sluts and Sexual Assault: Rethinking the Relationship Between Sex, Race and Gender' (2003) 12(1) *Social and Legal Studies* 77

Cossins, Annie, 'Prosecuting Child Sexual Assault Cases: To Specialise or Not, That is the Question' (2006) 18(2) *Current Issues in Criminal Justice* 318

Cossins, Anne, 'Cross Examination in Child Sexual Assault Trials: Evidentiary Safeguard Or An Opportunity To Confuse?' (2009) 33(1) *Melbourne University Law Review* 68

Crenshaw, Kimberlé, 'Mapping the Margins: Intersectionality Identity Politics and Violence Against Women of Colour' (1991) 43(6) *Stanford Law Review* 1241

Cunneen, Chris, 'Mandatory Sentencing & Human Rights' (2002) 13(3) *Current Issues in Criminal Justice* 32

Davies, Margaret, 'Unity and Diversity in Feminist Legal Theory' (2007) 2(4) *Philosophy Compass* 650

Davies, Margaret, *Asking the law Question* (Thomson Law Book, 3rd ed, 2008)

Dicey, Albert Venn, *Introduction to the Study of the Law of the Constitution*, (McMillan, 7th ed, 1908)

Dicey, Albert Venn, *Introduction to the Study of the Law of the Constitution* (McMillan, 10th ed, 1959)

Dworkin, Ronald, *Taking Rights Seriously* (Duckworth, 1978) 273

Dworkin, Ronald, *A Matter of Principle* (Oxford University Press, 1985)

Dworkin, Ronald, *Sovereign Virtue. The Theory and Practice of Equality* (Harvard University Press, 2000)
Dworkin, Ronald, *Justice for Hedgehogs* (Harvard University Press, 2011)

Eades, Diana 'Telling and Retelling Your Story in Court: Questions, Assumptions, and Intercultural Implications' (2008) 20(2) *Current Issues in Criminal Justice* 209

Easteal, Patricia (ed), *Women and the Law*, (Australian Institute of Criminology, 1993)

Easteal, Patricia, 'Beyond Reform', in Patricia Easteal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture, Balancing the Scales* (Federation Press, 1998)

Easteal, Patricia, *Less than Equal – Women and the Australian Legal System* (Butterworths, 2001)

Easteal, Patricia, 'Setting the Stage: The "Iceberg" Jigsaw Puzzle', in Patricia Easteal (ed) *Women and the Law in Australia* (Lexisnexis Butterworths, 2010) 1.

Easteal, Patricia and Anthony Hopkins, Chapter 7 'Women and Criminal Defences to Homicide' in Patricia Easteal (ed) *Women and the Law* (LexisNexis, 2010) 109

Eastwood, Christine and Wendy Patton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System* (Report to the Criminology Research Council, 2002)

Fawcett, J E S, *The Application of the European Convention on Human Rights* (Clarendon Press, 2nd ed, 1987)

Fine, Michelle, 'Witnessing Whiteness' in Michelle Fine, Lois Weis, Linda C. Powell, and L.Mun Wong (eds) *Off White: Readings on Race, Power, and Society* (Routledge 1997)

Finley, Lucinda M, 'Breaking Women's Silence in law: the Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *Notre Dame law Review* 886

Finnis, John 'Equality and Difference' (2012) 2(1) *Solidarity: The Journal of Catholic Social Thought and Secular* Ethics 1

Flynn, Martin, 'Mandatory Sentencing, International Law and the Howard/Burke Deal' (2000) 4(30) *Indigenous Law Bulletin* 7

Fredman, Sandra, *Discrimination Law* (Oxford University Press, 2nd ed, 2011)

Freeman, M D A, *Lloyd's Introduction to Jurisprudence* (Sweet and Maxwell, 6th ed, 1994)

Goldberg, Suzanne B, 'Discrimination by Comparison' (2011) 120 *Yale law Journal* 728

Gosepath, Stephan, 'Equality' *Stanford Encyclopedia of Philosophy* (2007)

Graycar, Regina and Jenny Morgan, *The Hidden Gender of the Law* (Federation Press, 1990)

Harris, Angela, 'The jurisprudence of Reconstruction' (1994) 82 *California Law Review* 741

Hart, H L A, *The Concept of Law* (Oxford, 1961)

Hayek, Friedrich A, *The Constitution of Liberty: The Definitive Edition*, (University of Chicago Press, 2011)

Heath, Mary 'Women and Criminal Law: Rape' in Patricia Easteal (ed) *Women and the Law in Australia* (Lexisnexis Butterworths, 2010) 88

Holdsworth, William S, *A History of English Law* (Little, Brown, 1938)

Hopkins, Anthony, '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) *Journal of the Australasian Law Teachers Association* 173

Hopkins, Anthony and Patricia Easteal, 'Walking in Her Shoes: Battered Women Who Kill in Victoria, Queensland and Western Australia' (2010) 35(3) *Alternative Law Journal* 132

Hopkins, Anthony, 'The Relevance of Aboriginality in Sentencing: Sentencing a Person for Who They Are,' (2012) 16(1) *Australian Indigenous Law Review* 37

Human Rights and Equal Opportunities Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997)

Hunter, Jill, 'Battling a Good Story: Cross-examining the Failure of the Law of Evidence' in Paul Roberts and Mike Redmayne (eds) *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (Hart Publishing 2007)

Kelsen, Hans, *What is Justice?* (University of California Press, 1971)

Kymlicka, Will, *Contemporary Political Philosophy* (Clarendon Press, 1990)

Lacey, Nicola *Unspeakable Subjects – Feminist Essays in Legal and Social Theory* (Hart Publishing, 1998)

Lauterpacht, Hersch, *An International Bill of the Rights of Man* (Columbia University Press, 1945)

Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report* (2007)

Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Report on Child Sexual Assault Prosecutions* (2002)

Leiboff, Marett and Mark Thomas, *Legal Theories: Contexts and Practices* (Thomson Reuters, 2009)

Leinbach, Mary D and Beverly I Fagot 'Categorical habituation to male and female faces: Gender schematic processing in infancy' (1993) 16 *Infant Behaviour and Development* 317

Lewis, Christina, Anthony Hopkins and Lorana Bartels, 'The Relevance of Aboriginality in Sentencing: Findings from Interviews in the ACT' in Patricia Easteal (ed) *Justice Connections* (Cambridge Scholars, 2013) 37

Luban, David, 'Twenty Theses on Adversarial Ethics' in Michael Lavarch and Helen Stacy (eds), *Beyond the Adversarial System* (Federation Press, 1999)
MacKinnon, Catharine A, 'Difference and Dominance' in Catharine A MacKinnon *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987)

McRae et al, *Indigenous Legal Issues Commentary and Materials* (Thomson Reuters, 4th ed, 2009)

McNamara, Luke, '"Equality before the Law" in Polyethnic Societies: The Construction of Normative Criminal Law Standards" (2004) 11(2) *Murdoch University Electronic Journal of Law* 1

Mill, J S, 'Utilitarianism' (1863) in J.S Mill, *Utilitarianism, Liberty, Representative Government* (JM Dent, 1910)

Okin, Susan Moller, 'John Rawls: Justice as Fairness – For Whom?' in John Perry and Michael Bratman eds *Introduction to Philosophy: Classical and Contemporary Readings* (Oxford University Press, 2nd ed, 1993) 680-691

Plous, Scott 'The Psychology of Prejudice, Stereotyping, and Discrimination: An Overview' in Scott Plous (ed) *Understanding Prejudice and Discrimination* (McGraw-Hill, 2003)

Rawls, John, *A Theory of Justice* (Harvard University Press, 1971)

Rhode, Deborah L, 'Feminist Critical Theories' (1990) 42 *Stanford Law Review* 617

Rothman, Stephen, 'The Impact of *Bugmy* and *Munda* on Sentencing Aboriginal and Other Offenders' [2014] *New South Wales Judicial Scholarship* 6

Sadurski, Wojciech, 'Equality Before the Law: A Conceptual Analysis', (1986) 60 *Australian Law Journal* 131

Sadurski, Wojciech, '*Gerhardy v Brown* versus the Concept of Discrimination: Reflections on the Landmark Case that Wasn't (1986) 11 *Sydney Law Review* 5

Scutt, Jocelynne 'The Incredible Woman: A Recurring Character in Criminal Law' in Patricia Easteal (ed), *Women and the Law,* (Australian Institute of Criminology, 1993) 9

Sen, Amartya, *Inequality, Re-examined* (Oxford University Press, 1992)

Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination and 1984 in Eliminating Discrimination and Promoting Gender Equality* (Commonwealth of Australia, Canberra, 2008)

Smart, Carol, *Feminism and the Power of Law* (Routledge, 1989)

Steering Committee for the Review of Government Service Provision (SCRGSP) *Overcoming Indigenous Disadvantage: Key Indicators 2014* (Productivity Commission, 2014)

Thornton, Margaret, Chapter 8 'Women and Discrimination Law' in Patricia Easteal (ed) *Women and the Law* (LexisNexis, 2010) 131

Walzer, Michael, *Spheres of Justice* (Blackwell, 1983)

Warner, Kate, 'Equality Before the Law: Racial and Social Background Factors as Sources of Mitigation at Sentencing' in Julian Roberts (ed) *Mitigation and Aggravation at Sentencing* (Cambridge, 2011)

West, Robin 'Jurisprudence and Gender' (1988) 55 *Univ. Chicago Law Review* 1

Wigmore, John Henry, *Evidence in Trials at Common Law* (Chadbourne, revised ed, 1974) Vol 5

Workplace Gender Equality Agency, Australian Government, *Australia's Gender Equality Scorecard* (November 2014)

B *Cases*

*Andrews v Law Society of British Columbia* [1989] 1 SCR 143

*Bugmy v The Queen* (2013) 249 CLR 571

*Dennis v United States* [1950] 339 US 162

*DPP v Terrick* (2009) 24 VR 45

*Doggett v The Queen* (2001) 208 CLR 343

Engert (1995) 84 A Crim R 67

*Gerhardy v Brown* (1985) 159 CLR 70

*Green v The Queen* (2011) 244 CLR 462

*Jimmy v The Queen* [2010] NSWCCA 60

*Kennedy v The Queen* [2010] NSWCCA 260

*Lavallee* [1990] 1 SCR 852

*Leeth v The Commonwealth* (1992) 174 CLR 445

*Libke v The Queen* (2007) 230 CLR 559

*Lowe v The Queen* (1984) 154 CLR 606

*Maloney v The Queen* [2013] HCA 28

*Matadeen v Pointu* [1999] AC 98

*Neal* (1982) 149 CLR 305

*Osland v The Queen* (1998) 197 CLR 316

*Postiglione v The Queen* (1997) 189 CLR 295

*Purvis v NSW* (2003) 217 CLR 92

*R v D* [2002] QCA 445

*R v Fernando* (1992) 76 A Crim R 58

*R v Fuller-Cust* (2002) 6 VR 496

*R v Gladue* [1999] 1 SCR 688

*R v Ipeelee* [2012] 1 SCR 433

*R v Malott* [1988] 1 SCR 123

*Lavallee* [1990] 1 SCR 852

*R v Secretary* (1996) 5 NTLR 96

*R v Smith* [2003] SASC 263

*South West Africa Case (Liberia v South Africa) (Second Phas*e) [1966] ICJ Rep 6 250

*Zecevic v DPP (Vic)* (1987) 162 CLR 645

*Western Australia v Commonwealth* (1995) 183 CLR 373

*Williscroft* [1975] VR 292 at 300

*Wong v The Queen* (2001) 207 CLR 584, 611

C *Legislation*

*Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld)

*Anti-Discrimination Act 1977* (NSW)

*Anti-Discrimination Act* (NT)

*Anti-Discrimination Act 1991* (Qld)

*Anti-Discrimination Act 1998* (TAS)

*Crimes Act 1958* (Vic)

*Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic)

*Criminal Code Canada RSC*

*Criminal Code 1899* (Qld)

*Criminal Code 1913* (WA)

*Criminal Procedure Act 1986* (NSW) NSW

*Disability Discrimination Act 1992* (Cth)

*Equal Opportunity Act 1984* (SA)

*Equal Opportunity Act 2010* (Vic)

*Equal Opportunity Act 1984* (WA)

*Evidence Act 1995* (Cth)

*Evidence Act 1995* (NSW)

*Evidence Act 2008* (Vic)

*Evidence Act 2011* (ACT)

*Evidence (National Uniform Legislation) Act* (NT)

*Racial Discrimination Act 1975* (Cth)

D *Treaties*

*International Convention on Civil and Political Rights*, GA Res 2200A (XXI), 21 UN GAOR Supp No 16 at 52, UN Doc A/6316 (16 December 1966)

*Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948)

E *Other*

Bradfield, Rebecca, Submission No 17 to Victorian Law Reform Commission, *Defences to Homicide*, 13 December 2003, cited in Victorian Law Reform Commission *Defences to Homicide*, Final Report (2004) 135

Judicial College of Victoria, *2015 Prospectus* (9 December 2014)

Keating, Paul, *Redfern Speech* (10 December 1992)

New South Wales Bar Council, *The New South Wales Barristers' Rules* (consolidated 6 January 2014)

New South Wales Legislative Assembly, *Parliamentary Debates*, Bob Debus, Attorney General (23 March 2005) 14.900

Pearson, Noel 'Eulogy for Gough Whitlam' (Speech delivered at Gough Whitlam's State funeral, Sydney Town Hall, 4 November 2014)

# APPENDIX A

UNIVERSITY OF CANBERRA
AUSTRALIA'S CAPITAL UNIVERSITY

# Doctor of Philosophy (by Publication)
# PUBLICATION DETAILS FORM

## INSTRUCTIONS FOR THE APPLICANT

- Please complete **ONE** of these forms for **EACH** publication that you wish to submit in support of your application. Copy additional forms for each publication, as necessary.
- Download the form at http://www.canberra.edu.au/research-students/apply/internal-staff/phd-by-pub under the heading 'Full Application'.
- The form is divided into two sections: Section A and Section B. Only complete Section B for publications that are co-authored.
- Section A – If the publication is in press, provide evidence of acceptance for publication, and/or date of publication.
- Section A – If the manuscript has been submitted pending acceptance, provide evidence of the date of submission.
- Section B – For each co-authored publication, detail your contribution and that of all other co-authors and/or co-editors in the appropriate section of this form. This statement of contribution must be signed by all co-authors listed on the published research output.

## SECTION A – PUBLICATION DETAILS

**1. Author(s) (in order listed on publication):**

Easteal, Patricia and Hopkins, Anthony

**2. Type of Publication:**

- ☐ Research book
- ☐ Journal article in refereed, scholarly journal
- ☐ Original creative work
- ☐ Recorded creative work
- **X** Book chapters in a research book
- ☐ Full, refereed conference paper
- ☐ Live performance of creative work
- ☐ Curated or produced substantial public exhibition or event

**3. Publication Title:**

"Women and Criminal Law: Defences to Homicide"

**4. Journal/ Book Title:**

Women and the Law in Australia

**5. Page no/s.:**

109-129

**6. Publisher (if applicable):**

Lexis Nexis Butterworths

**7. Place of Publication:**

Chatswood NSW

**8. Year of Publication:**

2010

**not yet published:**

**9. (a) Date of Submission:**

**9. (b) Date of Acceptance:**

**10. Is this an eligible research output under the Excellence in Research for Australia (ERA) submission guidelines?**

X Yes ☐ No

**11. What is the publication's ERA ranking (if applicable)?**

## SECTION B – STATEMENT OF CO-AUTHORSHIP*

***Please only complete this section if the publication referred to is co-authored.***

The nature and extent of my contribution to the work was the following:

| Nature of contribution | Extent of contribution (%) |
|---|---|
| I was a co-author and collaborated with Patricia Easteal in relation to the planning, content and writing of the chapter. | 50% |

The following co-authors contributed to the work *[insert additional rows as needed]*:

| Name | Nature of contribution | Extent of Contribution (%) |
|---|---|---|
| **Patricia Easteal** | Co-author: collaborated in relation to the planning, content and writing of the chapter. | 50% |
| **[name 2]** | | |
| **[name 3]** | | |

| **Candidate's Signature** | | **Date** 9/3/2011 |
|---|---|---|

## DECLARATION BY CO-AUTHORS

The undersigned hereby certify that:

(1) the above declaration correctly reflects the nature and extent of the candidate's contribution to this work, and the nature of the contribution of each of the co-authors.
(2) they meet the criteria for authorship in that they have participated in the conception, execution, or interpretation, of at least that part of the publication in their field of expertise;
(3) they take public responsibility for their part of the publication, except for the responsible author who accepts overall responsibility for the publication;
(4) there are no other authors of the publication according to these criteria;
(5) potential conflicts of interest have been disclosed to (a) granting bodies, (b) the editor or publisher of journals or other publications, and (c) the head of the responsible academic unit; and
(6) the original data are stored at the following location(s) and will be held for at least five years from the date indicated below:

| **Location(s)** | |
|---|---|

[Please note that the location(s) must be institutional in nature, and should be indicated here as a Faculty, centre or institute, with specific campus identification where relevant.]

| | | |
|---|---|---|
| **Signature 1** | Patricia Easteal | **Date** 22-03-11 |
| **Signature 2** | | |
| **Signature 3** | | |

*[Insert additional rows as needed]*

**PLEASE NOTE:** All co-authors must certify the above information is correct. If you are unable to obtain an original signature (due to the geographic location of a co-author, etc.), an electronic signature or an email from the co-author, certifying the above information, will suffice. Please attach any necessary email correspondence to this statement in your application submission.

UNIVERSITY OF CANBERRA
AUSTRALIA'S CAPITAL UNIVERSITY

# Appendix A

**This appendix has been removed due to copyright restrictions.**

This appendix is available as:

Easteal, P. and Hopkins, A. (2010) Women and criminal defences to homicide. In Patricia Easteal (ed), *Women and the Law* (pp. 109-130). Chatswood, N.S.W.: LexisNexis Butterworths.

**Links to this appendix:**

| | |
|---|---|
| **Print** | http://webpac.canberra.edu.au/record=b1523423~S4<br>http://webpac.canberra.edu.au/record=b1871864~S4 |

**Abstract**

This chapter addresses women who commit homicide and their defences. It includes three fictitious case studies, one about a woman who shot her de facto husband, another who drowned her three-month-old child and another who ran over her married lover. The article discusses pleas of: post-partum depression (PPD); premenstrual dysphoric disorder (PMDD); self defence; excessive self defence; killing in an abusive domestic relationship; provocation; automatism; insanity; diminished responsibility; infanticide. The role of expert advice in evidence is also explored. Advice for legal practitioners defending these women is given.

# APPENDIX B

UNIVERSITY OF CANBERRA
AUSTRALIA'S CAPITAL UNIVERSITY

# Doctor of Philosophy (by Publication)
# PUBLICATION DETAILS FORM

## INSTRUCTIONS FOR THE APPLICANT

- Please complete **ONE** of these forms for **EACH** publication that you wish to submit in support of your application. Copy additional forms for each publication, as necessary.
- Download the form at http://www.canberra.edu.au/research-students/apply/internal-staff/phd-by-pub under the heading 'Full Application'.
- The form is divided into two sections: Section A and Section B. Only complete Section B for publications that are co-authored.
- Section A – If the publication is in press, provide evidence of acceptance for publication, and/or date of publication.
- Section A – If the manuscript has been submitted pending acceptance, provide evidence of the date of submission.
- Section B – For each co-authored publication, detail your contribution and that of all other co-authors and/or co-editors in the appropriate section of this form. This statement of contribution must be signed by all co-authors listed on the published research output.

## SECTION A – PUBLICATION DETAILS

**1. Author(s) (in order listed on publication):**

Hopkins, Anthony and Easteal, Patricia

**2. Type of Publication:**

| | | | |
|---|---|---|---|
| ☐ | Research book | ☐ | Book chapters in a research book |
| **X** | Journal article in refereed, scholarly journal | ☐ | Full, refereed conference paper |
| ☐ | Original creative work | ☐ | Live performance of creative work |
| ☐ | Recorded creative work | ☐ | Curated or produced substantial public exhibition or event |

**3. Publication Title:**

Walking in Her Shoes: Battered women who kill in Victoria, Western Australia and Queensland

**4. Journal/ Book Title:**

Alternative Law Journal

**5. Page no/s.:**

132-137

**6. Publisher (if applicable):**

**7. Place of Publication:**

**8. Year of Publication:**

2010

**If not yet published:**

**9. (a) Date of Submission:**

**9. (b) Date of Acceptance:**

**10. Is this an eligible research output under the Excellence in Research for Australia (ERA) submission guidelines?**

X Yes ☐ No

**11. What is the publication's ERA ranking (if applicable)?**

This publication receives a "B" ranking.

## SECTION B – STATEMENT OF CO-AUTHORSHIP*

***Please only complete this section if the publication referred to is co-authored.***

The nature and extent of my contribution to the work was the following:

| Nature of contribution | Extent of contribution (%) |
|---|---|
| I was a co-author and collaborated with Patricia Easteal in relation to the planning, content and writing of the chapter. | 30% |

The following co-authors contributed to the work *[insert additional rows as needed]*:

| Name | Nature of contribution | Extent of Contribution (%) |
|---|---|---|
| **Patricia Easteal** | Co-author: collaborated in relation to the planning, content and writing of the chapter. | 30% P.E |
| **[name 2]** | | |
| **[name 3]** | | |

| **Candidate's Signature** | | **Date** 9/3/2011 |
|---|---|---|

## DECLARATION BY CO-AUTHORS

The undersigned hereby certify that:

(1) the above declaration correctly reflects the nature and extent of the candidate's contribution to this work, and the nature of the contribution of each of the co-authors.
(2) they meet the criteria for authorship in that they have participated in the conception, execution, or interpretation, of at least that part of the publication in their field of expertise;
(3) they take public responsibility for their part of the publication, except for the responsible author who accepts overall responsibility for the publication;
(4) there are no other authors of the publication according to these criteria;
(5) potential conflicts of interest have been disclosed to (a) granting bodies, (b) the editor or publisher of journals or other publications, and (c) the head of the responsible academic unit; and
(6) the original data are stored at the following location(s) and will be held for at least five years from the date indicated below:

| **Location(s)** | |
|---|---|

[Please note that the location(s) must be institutional in nature, and should be indicated here as a Faculty, centre or institute, with specific campus identification where relevant.]

| | | |
|---|---|---|
| **Signature 1** | Patricia Easteal | **Date** 22.03.11 |
| **Signature 2** | | |
| **Signature 3** | | |

*[Insert additional rows as needed]*

**PLEASE NOTE:** All co-authors must certify the above information is correct. If you are unable to obtain an original signature (due to the geographic location of a co-author, etc.), an electronic signature or an email from the co-author, certifying the above information, will suffice. Please attach any necessary email correspondence to this statement in your application submission.

UNIVERSITY OF CANBERRA
AUSTRALIA'S CAPITAL UNIVERSITY

# Appendix B

**This appendix has been removed due to copyright restrictions.**

This appendix is available as:

Hopkins, A. and Easteal, P. (2010) Walking in her shoes: battered women who kill in Victoria, Queensland and Western Australia. *Alternative Law Journal*. 35(3): 132-137.

**Links to this appendix:**

| | |
|---|---|
| **Print** | http://webpac.canberra.edu.au/record=b1871864~S4 |
| **UC Online subscribed content** | http://search.informit.com.au/fullText;res=AGISPT;dn=20105122 |

**Abstract**

Concepts of reasonableness and self-defence in the context of the battered woman who kills her partner - legislative reforms in Victoria, Western Australia and Queensland - extent to which they require judges and juries to consider a battered woman's circumstances - common law test for reasonableness - overview of reforms - relevant case law.

# APPENDIX C

UNIVERSITY OF CANBERRA
AUSTRALIA'S CAPITAL UNIVERSITY

# Appendix C

**This appendix has been removed due to copyright restrictions.**

This appendix is available as:

Hopkins, A. (2012) The relevance of Aboriginality in sentencing: 'sentencing a person for who they are'. *Australian Indigenous Law Review*. 16(1): 37-52.

**Links to this appendix:**

| | |
|---|---|
| **Print** | http://webpac.canberra.edu.au/record=b1871864~S4 |
| **UC Online subscribed content** | http://search.informit.com.au/fullText;res=AGISPT;dn=20131385 |

**Abstract**

Overrepresentation of Indigenous people in custody - judicial consideration of Aboriginality focused on equal justice rather than addressing overrepresentation - principle of equality - consideration to relevance of offender's Aboriginality and experience of Aboriginality in sentencing - Indigenous programs of healing rehabilitation and reform.

# APPENDIX D

## PART A: Suggested Declaration for Thesis Publication

### University of Canberra

## Declaration for Thesis Publication (Appendix D)

Christina Lewis, Anthony Hopkins and Lorana Bartels, 'The Relevance of Aboriginality in Sentencing: Findings from Interviews in the ACT' in Patricia Easteal (ed) *Justice Connections* (Cambridge Scholars, 2013) 37.

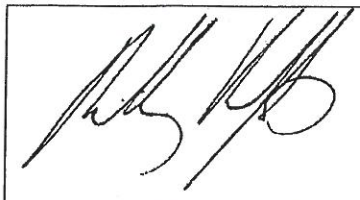
**Declaration by candidate**

In the case of the publication referred to above, the nature and extent of my contribution to the work was the following:

| Nature of contribution | Extent of contribution (%) |
|---|---|
| The publication was the result of a collaboration between Christina Lewis who was then an honours student, her supervisor, Lorana Bartels, and myself. I was involved with assisting Christina with initial planning for her honours dissertation, particularly in relation to the design of the survey questions. The publication itself combined research, ideas and arguments drawn from Anthony Hopkins, 'The Relevance of Aboriginality in Sentencing: Sentencing a Person for Who They Are,' (2012) 16(1) *Australian Indigenous Law Review* 37 with the empirical work of Christina. Lorana supervised the thesis, motivated and guided the final publication and was central to planning the overall work and seeing it through to completion. Each of us was engaged in the process of conceptualizing and writing the final paper. I regard the contributions of each of us as equal. | 33% |

The following co-authors contributed to the work.

| Name | Nature of contribution | Extent of contribution (%) | Contributor is also a student at UC Y/N |
|---|---|---|---|
| Christina Lewis | As stated above the final publication reported results of an empirical survey that was the foundation of Christina's honours paper. | 34% | Y (at the time) |
| Anthony Hopkins | As stated above the final publication drew heavily the research, ideas and argument of a previous sole authored publication. I was involved in the initial survey design, the conceptualisation of the publication and writing it up. | 33% | |
| Lorana Bartels | As stated above, Lorana supervised Christina's honours paper and the empirical work that was its foundation. She motivated and co-ordinated the production of the publication and central to its conceptualisation and bringing it to fruition. | 33% | |

| Candidate's Signature |  | Date<br>28 January 2015 |
|---|---|---|

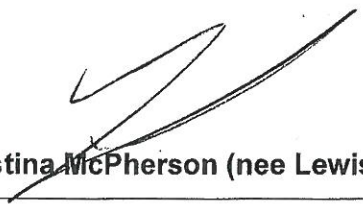
**Declaration by co-authors**

The undersigned hereby certify that:

(1) the above declaration correctly reflects the nature and extent of the candidate's contribution to this work, and the nature of the contribution of each of the co-authors.
(2) they meet the criteria for authorship in that they have participated in the conception, execution, or interpretation, of at least that part of the publication in their field of expertise;
(3) they take public responsibility for their part of the publication, except for the responsible author who accepts overall responsibility for the publication;
(4) there are no other authors of the publication according to these criteria;
(5) potential conflicts of interest have been disclosed to (a) granting bodies, (b) the editor or publisher of journals or other publications, and (c) the head of the responsible academic unit; and
(6) the original data are stored at the following location(s) and will be held for at least five years from the date indicated below:

| Location(s) | |
|---|---|

[Please note that the location(s) must be institutional in nature, and should be indicated here as a department, centre or institute, with specific campus identification where relevant.]

| Signature 1 | <br>Christina McPherson (nee Lewis) | Date<br>29 January 2015 |
|---|---|---|
| Signature 2 | <br>Lorana Bartels | 3/2/15 |

UNIVERSITY OF CANBERRA
AUSTRALIA'S CAPITAL UNIVERSITY

# Appendix D

**This appendix has been removed due to copyright restrictions.**

This appendix is available as:

Lewis, C., Hopkins, A. and Bartels, L. (2013) The relevance of Aboriginality in sentencing: findings from interviews in the ACT. In Patricia Easteal (ed), *Justice Connections* (pp. 37-58). Newcastle upon Tyne: Cambridge Scholars.

**Links to this appendix:**

| | |
|---|---|
| **Print** | http://webpac.canberra.edu.au/record=b1871864~S4 |
| **Online** | http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2295815 |

**Abstract**

This chapter explores the way in which Aboriginality is taken into account in the sentencing process to shed light on an offender's background, reasons for offending and prospects for rehabilitation. It examines the approach taken by courts in the ACT and the impact of pre-sentence reports. The paper concludes that, though pre-sentence report writers are in a unique position to explore and illuminate the relevance of post-colonial Aboriginal identity in the sentencing process, present experience in the ACT indicates this is not being done. It is argued that this exploration and illumation should be undertaken in the interests of ensuring equal justice.

# APPENDIX E

## PART A: Suggested Declaration for Thesis Publication

**University of Canberra**

## Declaration for Thesis Publication (Appendix D)

Anthony Hopkins, Lorana Bartels and Thalia Anthony, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice', *Melbourne University Law Review* (under review).

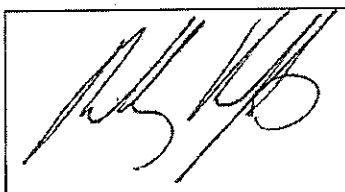
**Declaration by candidate**

In the case of the publication referred to above, the nature and extent of my contribution to the work was the following:

| Nature of contribution | Extent of contribution (%) |
|---|---|
| The publication was the result of collaboration between the authors. Each of us was engaged in the process of conceptualizing, drafting and producing the final paper. I regard the contributions of each of us as equal. | 34% |

The following co-authors contributed to the work.

| Name | Nature of contribution | Extent of contribution (%) | Contributor is also a student at UC Y/N |
|---|---|---|---|
| Anthony Hopkins | Equal contribution to conceptualising, drafting and production of final publication. | 34% | |
| Lorana Bartels | Equal contribution to conceptualising, drafting and production of final publication. | 33% | |
| Thalia Anthony | Equal contribution to conceptualising, drafting and production of final publication. | 33% | |

| Candidate's Signature | Date |
|---|---|
|  | 28 January 2015 |

**Declaration by co-authors**

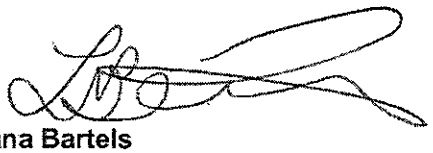
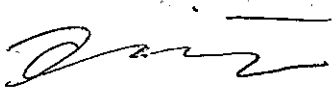
The undersigned hereby certify that:

(1) the above declaration correctly reflects the nature and extent of the candidate's contribution to this work, and the nature of the contribution of each of the co-authors.
(2) they meet the criteria for authorship in that they have participated in the conception, execution, or interpretation, of at least that part of the publication in their field of expertise;
(3) they take public responsibility for their part of the publication, except for the responsible author who accepts overall responsibility for the publication;
(4) there are no other authors of the publication according to these criteria;

(5) potential conflicts of interest have been disclosed to (a) granting bodies, (b) the editor or publisher of journals or other publications, and (c) the head of the responsible academic unit; and
(6) the original data are stored at the following location(s) and will be held for at least five years from the date indicated below:

| **Location(s)** | **N/A** |
|---|---|

[Please note that the location(s) must be institutional in nature, and should be indicated here as a department, centre or institute, with specific campus identification where relevant.]

| | | **Date** |
|---|---|---|
| **Signature 1** |  **Lorana Bartels** | 3/2/15. |
| **Signature 2** |  **Thalia Anthony** | 4/2/15. |

UNIVERSITY OF CANBERRA
AUSTRALIA'S CAPITAL UNIVERSITY

# Appendix E

**This appendix has been removed due to copyright restrictions.**

This appendix is available as:

Anthony, T., Bartels, L. and Hopkins, A. (2015) Lessons lost in sentencing: welding individualised justice to indigenous justice. *Melbourne University Law Review*. 39(1): 47-76.

**Links to this appendix:**

| | |
|---|---|
| **Print** | http://webpac.canberra.edu.au/record=b1871864~S4 |
| **UC Online subscribed content** | http://search.informit.com.au/fullText;dn=504510460202754;res=IELAPA |

**Abstract**

Indigenous offenders are heavily over-represented in the Australian and Canadian criminal justice systems. In the case of R v Gladue, the Supreme Court of Canada held that sentencing judges are to recognise the adverse systemic and background factors that many Aboriginal Canadians face and consider all reasonable alternatives to imprisonment in light of this. In R v Ipeelee, the Court reiterated the need to fully acknowledge the oppressive environment faced by Aboriginal Canadians throughout their lives and the importance of sentencing courts applying appropriate sentencing options. In 2013, the High Court of Australia handed down its decision in Bugmy v The Queen. The Court affirmed that deprivation is a relevant consideration and worthy of mitigation in sentencing. However, the Court refused to accept that judicial notice should be taken of the systemic background of deprivation of many Indigenous offenders. The High Court also fell short of applying the Canadian principle that sentencing should promote restorative sentences for Indigenous offenders, given this oft-present deprivation and their over-representation in prison. In this article, we argue that Bugmy v The Queen represents a missed opportunity by the High Court to grapple with the complex interrelationship between individualised justice and Indigenous circumstances in the sentencing of Indigenous offenders.

# APPENDIX F

UNIVERSITY OF CANBERRA
AUSTRALIA'S CAPITAL UNIVERSITY

# Doctor of Philosophy (by Publication)
# PUBLICATION DETAILS FORM

## INSTRUCTIONS FOR THE APPLICANT

- Please complete **ONE** of these forms for **EACH** publication that you wish to submit in support of your application. Copy additional forms for each publication, as necessary.
- Download the form at http://www.canberra.edu.au/research-students/apply/internal-staff/phd-by-pub under the heading 'Full Application'.
- The form is divided into two sections: Section A and Section B. Only complete Section B for publications that are co-authored.
- Section A – If the publication is in press, provide evidence of acceptance for publication, and/or date of publication.
- Section A – If the manuscript has been submitted pending acceptance, provide evidence of the date of submission.
- Section B – For each co-authored publication, detail your contribution and that of all other co-authors and/or co-editors in the appropriate section of this form. This statement of contribution must be signed by all co-authors listed on the published research output.

## SECTION A – PUBLICATION DETAILS

**1. Author(s) (in order listed on publication):**

Boyd, Russell and **Hopkins, Anthony**

**2. Type of Publication:**

| | | | |
|---|---|---|---|
| ☐ | Research book | ☐ | Book chapters in a research book |
| X | Journal article in refereed, scholarly journal | ☐ | Full, refereed conference paper |
| ☐ | Original creative work | ☐ | Live performance of creative work |
| ☐ | Recorded creative work | ☐ | Curated or produced substantial public exhibition or event |

**3. Publication Title:**

Cross-examination of child sexual assault complainants: Concerns about the application of s41 Evidence Act

**4. Journal/ Book Title:**

Criminal Law Journal

**5. Page no/s.:**

149-166

**6. Publisher (if applicable):**

Thomson Reuters

**7. Place of Publication:**

**8. Year of Publication:**

2010

**If not yet published:**

**9. (a) Date of Submission:**

**9. (b) Date of Acceptance:**

**10. Is this an eligible research output under the Excellence in Research for Australia (ERA) submission guidelines?**

X Yes ☐ No

**11. What is the publication's ERA ranking (if applicable)?**

The journal has an "A" ranking

## SECTION B – STATEMENT OF CO-AUTHORSHIP*

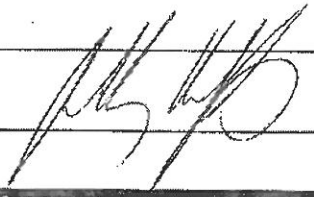
***Please only complete this section if the publication referred to is co-authored.***

The nature and extent of my contribution to the work was the following:

| Nature of contribution | Extent of contribution (%) |
|---|---|
| I was co-author of the paper, which involved me revising material from Russell Boyd's honours thesis and incorporating extensive new sections, including analysis and theoretical material to support this analysis. I was Russell's supervisor for the honours paper which involved extensive collaboration with him to prepare ethics applications and closely define the scope and purpose of the paper and the empirical work to be done. | 50% |

The following co-authors contributed to the work *[insert additional rows as needed]*:

| Name | Nature of contribution | Extent of Contribution (%) |
|---|---|---|
| **Russell Boyd** | Russell conducted empirical work and wrote an honours paper which was the foundation for the final published work. He also assisted in the process of revision and editing for publication. | 50% |
| **[name 2]** | | |
| **[name 3]** | | |

**Candidate's Signature**  **Date** 9/3/2011

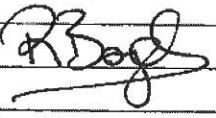
## DECLARATION BY CO-AUTHORS

The undersigned hereby certify that:

(1) the above declaration correctly reflects the nature and extent of the candidate's contribution to this work, and the nature of the contribution of each of the co-authors.
(2) they meet the criteria for authorship in that they have participated in the conception, execution, or interpretation, of at least that part of the publication in their field of expertise;
(3) they take public responsibility for their part of the publication, except for the responsible author who accepts overall responsibility for the publication;
(4) there are no other authors of the publication according to these criteria;
(5) potential conflicts of interest have been disclosed to (a) granting bodies, (b) the editor or publisher of journals or other publications, and (c) the head of the responsible academic unit; and
(6) the original data are stored at the following location(s) and will be held for at least five years from the date indicated below:

**Location(s)** FACULTY OF LAW, UC BRUCE CAMPUS, ACT

[Please note that the location(s) must be institutional in nature, and should be indicated here as a Faculty, centre or institute, with specific campus identification where relevant.]

| | | |
|---|---|---|
| **Signature 1** |  | **Date** 10/8/11 |
| **Signature 2** | | |
| **Signature 3** | | |

*[Insert additional rows as needed]*

**PLEASE NOTE:** All co-authors must certify the above information is correct. If you are unable to obtain an original signature (due to the geographic location of a co-author, etc.), an electronic signature or an email from the co-author, certifying the above information, will suffice. Please attach any necessary email correspondence to this statement in your application submission.

UNIVERSITY OF CANBERRA
AUSTRALIA'S CAPITAL UNIVERSITY

# Appendix F

**This appendix has been removed due to copyright restrictions.**

This appendix is available as:

Boyd, R. and Hopkins, A. (2010) Cross-examination of child sexual assault complainants: concerns about the application of s 41 Evidence Act. *Criminal Law Journal*. 34(3): 149-166.

**Links to this appendix:**

| | |
|---|---|
| **Print** | http://webpac.canberra.edu.au/record=b1871864~S4 |
| **UC Online subscribed content** | http://www.westlaw.com.au/maf/wlau/app/document?docguid=Ie14d9949cfee11e08eefa443f89988a0&tocDs=AUNZ_AU_JOURNALS_TOC&isTocNav=true&startChunk=1&endChunk=1 |

**Abstract**

Section 41 of the Evidence Act 1995 (NSW), the Evidence Act 1995 (Cth) and the Evidence Act 2008 (Vic) now requires judges to intervene to protect vulnerable witnesses, thereby reducing trauma, encouraging participation in the criminal justice system and ensuring that such witnesses have the opportunity to tell their stories. Some of the most vulnerable witnesses are child sexual assault complainants. For them and for others, the provision is intended to set a new standard for cross-examination. However, a study of experienced prosecution and defence barristers from the Sydney metropolitan region suggests that the provision could fail to meet its objectives. Whilst cross-examiners are required to take to their feet and pit their wits against child sexual assault complainants, the line between acceptable and unacceptable cross-examination will be difficult to draw.

# APPENDIX G

UNIVERSITY OF CANBERRA
AUSTRALIA'S CAPITAL UNIVERSITY

# Appendix G

**This appendix has been removed due to copyright restrictions.**

This appendix is available as:

Hopkins, A. (2012) 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. *Journal of the Australasian Law Teachers Association*. 2(1&2): 173-184.

**Links to this appendix:**

| | |
|---|---|
| **Print** | http://webpac.canberra.edu.au/record=b1871864~S4 |
| **Online** | http://www.austlii.edu.au/au/journals/JlALawTA/2009/15.pdf |