

LAW AND EXCLUSION

IAIN STEWART

In the call for papers for this volume, the theme 'Law and Exclusion' was not closely defined. It was thought that the topic could be understood in so many ways, as to both subject matter and perspective or standpoint, that contributors should be encouraged to approach it as they thought fit. Accordingly, only a general guide was offered:

The editors have in mind ideological exclusion, factual exclusion and their combination through law. For instance: ideological exclusion through denial of legal personality, biased assumptions about the content of a legal category or failure to include alternative viewpoints in discussion of law; factual exclusion through legal barriers to power, wealth, social services, legal processes and legally related employment; and the role of legal denials and biases in establishing or maintaining modes of factual exclusion. For example (but only example): ideological exclusion might be shown to occur in terms of gender, 'race', class or disability; factual exclusion might be identified in the fields of migration, employment, welfare, imprisonment or political participation.

The papers that follow cover almost all of this range. It is appropriate not to try to sum the volume up but to indicate its coverage and multidimensionality.

Margaret Davies argues that exclusion is not just one of the things that law does but is intrinsic to the identity of law. 'Law defines the spaces of insides and outsides and in many respects is an exercise in social line-drawing.' Hence exclusion 'is widespread and seemingly fundamental to law'. Drawing on structuralist and post-structuralist theories of meaning, as well as from psychoanalysis, she examines how identities in general are formed by exclusion of the different, while at the same time the excluded persists as a challenge. She then traces how this operates with regard to law as an object of knowledge, whose limits may be both sharp and fuzzy, and as to the figure of the legal subject, through which law addresses people by way of including and excluding them. Finally she explores how law and the legal subject might be 're-invented' (as Drucilla Cornell says) as more inclusive – differently limited and therefore differently identified, no longer with a fixed 'core' identity but open to varieties of participation.

Alisoun Neville examines the classificatory and interpretive practices of the law to show the privileging of particular voices and narratives and the exclusion of others through the categorisation of texts and voices in *Cubillo v Commonwealth* (2000). It argues that the hearings and judgment function as hybrid genres through which the organisation of knowledge produces key effects, which can be understood in terms of Lyotard's differend. The violence of the law as a system of classification is linked to the violence of the law as interpretive practice, extending and legitimating the violence of the past.

Paul Havemann takes us to the continuing brutality of Australian's treatment of its Indigenous peoples – excluded from their lands and denied identities linked with those lands, through two centuries of genocidal atrocities that are themselves denied (in Stanley Cohen's sense) in being 'neutralised, normalised, legitimated or rendered invisible by being blocked out of consciousness and conscience'. The First Australians are made placeless *homines sacri* (Giorgio Agamben) through the lie of *terra nullius* and the refusal, until relatively recently, of citizenship. And such wasting of lives is not aberrant to modernity but intrinsic to it. These themes are traced through rates of Indigenous suicide, low life expectancy, low birth weight and life expectancy, and homelessness and vagrancy. The first and necessary step forward is to end the denial. That step is evaded, Lynda Crowley-Cyr goes on to show, when state functions are 'contractualised' – as in the outsourcing of migration detention. Exclusion is then legitimated by 'limiting its process to the purchase of outputs rather than the delivery of outcomes'.

But sometimes the modern state makes a special effort to call itself to account. On the basis of interviews with 48 people who were associated with the Royal Commission into Aboriginal Deaths in Custody, 1987-1991, Elena Marchetti argues that, partly owing to the narrowness and conservatism of lawyer's understandings, quasi-judicial inquiries are inappropriate instruments for investigating such issues as Indigenous deaths in custody, since the inquiries themselves tend to exclude non-orthodox perspectives. Which is not, however, for them to be valueless. Marchetti concludes that this Commission's extensive survey and 339 recommendations, though more of those could have been implemented, remain a key record and resource for Indigenous peoples.

Nicola Howell and Therese Wilson examine how lack of access to consumer credit produces 'financial exclusion' and in its train a more general social exclusion. They explore how lack of access to bank credit drives people to non-bank lenders, either community-based or 'fringe', those on the fringe being more expensive as well as risky to deal with. Making international comparisons, the authors recommend changes to Australian law: that regulation of fringe providers go beyond requirements for cost disclosure and embark upon control, that community providers no longer be burdened by one-size regulation of the financial sector, and that bank directors' obligations to their shareholders be modified so as to allow and require the banks to become more of a community service.

The socially excluded can be difficult neighbours. Caroline Hunter, Judy Nixon and Michele Slatter compare English and Australian experiences. They question the relevance of a confiscatory legal regime for tenants of social housing, find ‘a confusion inherent in any attempt to control behaviour through property rights’ and conclude that the construction of anti-social behaviour as a housing issue is a ‘fundamental distortion’ of the picture and ‘inevitably results in a flawed response’.

Lesley-Anne Petrie begins up-market. Through the example of South Australia, she examines how the perspective of the upper socio-economic classes upon heritage value of the built environment has led to laws and practices that exclude the values placed upon particular buildings by other groups. Then she explores the development of a more inclusive, communal ‘philosophy of heritage’ that recognises ‘more than architecture, fabric and age’ and is open to intangible values, such as spiritual significance, of a site. An ‘emerging purpose of heritage regimes’, she notes and supports, is ‘social inclusion through the creation of meaningful environments’.

Exclusion through law is of classes, groups and individuals. Tracing how a tribunal and then the courts handled the case of Daniel Hoggan, a boy suspended from attendance at an ordinary public school owing to his violent behaviour due to a disability, Jacob Campbell finds and contrasts ‘legal’ and ‘social’ conceptualisations of individual disability. The ‘social model’ distinguishes physical ‘impairment’ from ‘disability’, conceiving the latter as ‘the socially imposed restriction which is imposed on the impaired by an abled society’. ‘Disability’ in this sense is a form of social oppression, similar to the category of madness as Foucault describes it. The Australian courts, Campbell argues, have yet to reach this kind of understanding of any form of discrimination.

The individual, however, is increasingly recognised as a subject of international law. Liam Burgess and Leah Friedman trace the history of this emergence, then consider a recent Australian case in which the majority rejected an argument that a nation’s obligations under the Refugee Convention are owed directly to individuals. The authors show that this is for Australia to remain out of step with the recognition – or at least non-denial – of individual international legal personality by courts of other common-law jurisdictions, including those of the UK and the USA.

Mabel Freer was a white British woman born in India. In 1936 she sailed to Australia and was twice refused entry after being set a dictation test – in Italian. Kel Robertson, with Jessie Hohmann and myself, examine this neglected tale as a symptomatic event in the history of the dictation test, the central tool of the White Australia Policy. We also find that this apparatus of exclusion for a well known reason, race, was hijacked in this case to exclude for different and hidden reasons. These appear to have been the opposition of both families to her planned marriage to her travelling companion, an army lieutenant, and fear by officers of the imperial army that their womanising in India (where adultery and enticement were crimes) would be revealed. This is also a story of governmental inertia, its defeat by some

good lawyers combined with a press campaign for a white lady, and of changing Australian identity.

Finally, Russell Hogg's review of Findlay, Odgers and Yeo, *Australian Criminal Justice*, takes off from the book's final chapter 'And Justice for All?' to place a firm question mark after the word 'justice' wherever found in this country's criminal law.