Legal Tweaks

that would change NSW and the nation.

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Our Mission

The New South Wales Society of Labor Lawyers aims, through scholarship and advocacy, to effect positive and equitable change in substantive and procedural law, the administration of justice, the legal profession, the provision of legal services and legal aid, and legal education.

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Acknowledgements

Our thanks goes to all those who contributed to this publication, and to the lawyers before them who built the modern Australian Labor Party and embedded social justice in our national identity. We especially thank our sponsors, Maurice Blackburn Lawyers, who carry on the inspiring legacy of Maurice McRae Blackburn, a champion lawyer and a federal Labor MP.

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Legal Tweaks

Foreword

MARK DREYFUS QC MP

I would like to congratulate NSW Labor Lawyers for their work producing this new edition of Legal Tweaks, and for their ongoing support for law reform more generally.

It has been a difficult several months since the shock election result in May that returned the Liberal Party to a third term of government. For some seven years now we have seen very little in the way of positive law reform from the governments of Tony Abbott, Malcolm Turnbull and now Scott Morrison. To the contrary, we have seen a number of very poorly conceived and drafted laws put through the Parliament, often with only the most desultory pretence of consultation with those most directly impacted, and with legal experts and the wider community.

However, while Labor deeply regrets that we will be in Opposition for another term, we have not lost heart. We will continue to fight to ensure that the laws passed by this 46th Federal Parliament are fit for purpose, and we will maintain pressure on the Liberal Government to introduce legal reforms that it would prefer to leave in the 'too hard' basket.

Advocacy by members of the Australian legal community, including through publications such as *Legal Tweaks*, help Labor, on behalf of the whole Australian community, in this important task.

I would like to thank the NSW Labor Lawyers once again for their ongoing advocacy for reforms to build a more just Australia.

Mark Dreyfus QC MP
Federal Shadow Attorney-General
Member for Isaacs

Foreword

PAUL LYNCH MP

As always I'm pleased to provide a Foreword for an edition of the NSW Society of Labor Lawyers publication *Legal Tweaks*.

Legal Tweaks has over a number of years made a valuable contribution to the culture of discussion and debate that is essential for the Labor movement to be successful. It has always attracted a commendably wide range of contributions.

Successful Labor Governments have always regarded progressive law reform as central to their agenda. That can only really develop from a movement engaged in discussion and debates around policy. *Legal Tweaks* has a useful role in this.

I would like to congratulate the Editor, the contributors, and all those involved in the production of this year's edition.

Paul Lynch MP
NSW Shadow Attorney-General
Member for Liverpool

Editor's Note

Kieran Fitzgerald

I am pleased to present this year's edition of *Legal Tweaks*, the annual publication of the NSW Society of Labor Lawyers.

It is not an easy time to be a Labor supporter, with successive election defeats at a state and federal level frustrating the hopes of so many of us who believe in what can be achieved through the election of Labor governments. As Labor legend - and life member of NSW Labor Lawyers - Gough Whitlam put it, *"The way of the reformer is hard in Australia"*. These words are as apt now as ever.

Members and supporters can draw inspiration from Labor history, and also from the spirit of our fellow travellers. We are part of a movement that has survived for almost 130 years in the face of often tremendous adversity, and gone on to introduce so many progressive legal reforms that have stood the test of time.

It is in that spirit that *Legal Tweaks* plays an important role. It presents a diverse range of contributions from across the legal spectrum, and I have no doubt some of these contributions will ultimately be debated on the floor of Parliament.

I thank all contributors for their submissions to this year's edition, and for playing their part in furthering the cause of progressive law reform. It is as important as ever that we keep fighting to make our country a more prosperous, egalitarian and just place for all those call Australia home. It has been a pleasure to edit this year's edition.

Kieran Fitzgerald
2019 Legal Tweaks Editor

Katie Green

YOUTH SOLICITOR, MARRICKVILLE LEGAL CENTRE

If you could change one particular section or regulation, what would it be?

I would expand s 21A(3) of the *Crimes (Sentencing Procedure Act) 1999* (NSW) to explicitly include the age of an offender as a mitigating factor in sentencing.

Why does this section or regulation need to be changed?

In NSW, offenders under the age of 18 are sentenced according to the *Children (Criminal Proceedings) Act 1987*. Offenders aged 18 and older are sentenced under the *Crimes (Sentencing Procedure Act) 1999*.

The principles embedded within the children's Act emphasise that children are inherently vulnerable, and that sentencing decisions should seek to maintain links with education and community.

The adult Act provides only a limited scope for considering the age of an offender - regarding capacity for rehabilitation, and whether the offender was aware of the consequences of their actions.

I would tweak this section to provide the more expansive view that being under the age of 25 should be a mitigating factor in and of itself.

A number of the non-violent offences that young people are commonly charged with, such as trespass, possession, property damage and larceny, are less likely to be repeated in adulthood once higher levels of maturity and social security are attained.

A recorded conviction can completely change a young person's trajectory. They should be offered diversion at every opportunity.

The adult Act provides only a limited scope for considering the age of an offender...

Stephen Dametto
BARRISTER, BANCO CHAMBERS

If you could change one particular section or regulation, what would it be?

Amend ss 97(1)(b) and 98(1)(b) of the *Evidence Act 1995* (NSW) by removing the word "significant" before probative value, and remove s 101 in its entirety.

Why does this section or regulation need to be changed?

These changes would facilitate greater admissibility of tendency and coincidence evidence as part of the prosecution case in criminal proceedings. This importance is clearly illustrated in child sexual abuse prosecutions where juries should be able to consider evidence of multiple complainants. Tendency and coincidence evidence should not be treated any different to any other piece of evidence as long as it is relevant. There is no purpose served by excluding evidence for lacking significant probative value if its probative value outweighs its prejudicial risk.

Further, why should probative value "substantially" outweigh prejudicial risk? This potentially leaves scope for evidence to be excluded even though its benefit (probative value) outweighs its cost (prejudicial risk). In criminal trials, fairness to the accused is already protected by s 137 where the probative value needs to outweigh prejudicial risk. Any risk that the jury will use tendency or coincidence evidence in an unfair way can also be ameliorated through jury directions.

These changes would facilitate greater admissibility of tendency and coincidence evidence as part of the prosecution case in criminal proceedings.

Camilla Pandolfini

PRINCIPAL SOLICITOR, PUBLIC INTEREST ADVOCACY CENTRE

If you could change one particular section or regulation, what would it be?

Amend ss 229 and 230 of the *Criminal Procedure Act 1986* (NSW) to ensure that warrants are only issued for domestic violence complainants in exceptional circumstances, and that NSW police officers have the power to grant them bail.

Why does this section or regulation need to be changed?

Survivors of domestic violence should not be re-traumatised by being arrested and detained in custody. In NSW, if domestic violence complainants fail to attend court to give evidence after being subpoenaed, a warrant can be issued for their arrest. Once police arrest the complainant, only a Registrar or Magistrate can grant that person bail. This may result in a domestic violence complainant being held in custody overnight.

Section 229 of the *Criminal Procedure Act 1986* (NSW) should be amended to require the Court to consider whether issuing a warrant is in the interests of justice, and to only issue warrants for domestic violence complainants in exceptional circumstances. In addition, the Court should be given the power to endorse a warrant with a direction to release the person on bail. Section 230 should also be amended to give police the power to grant an individual bail, rather than just a Registrar or Magistrate. These recommendations should also be supported by systemic change to ensure that domestic violence complainants receive holistic support at every stage of the criminal justice process.

Survivors of domestic violence should not be re-traumatised by being arrested and detained in custody.

Amanda Do

LAW GRADUATE, MAURICE BLACKBURN

If you could change one particular section or regulation, what would it be?

Amend the *Crimes Act 1900* (NSW) to criminalise deliberate and systematic wage theft.

Why does this section or regulation need to be changed?

Civil remedy provisions imposed by the *Fair Work Act 2009* (Cth) ('FW Act') inadequately deter employers from exploiting and underpaying vulnerable workers. This inadequacy has allowed wage theft to grow in prevalence, with approximately half of hospitality, retail, beauty and fast food sector workers paid illegally. In contrast, an employee who steals from his or her employer in NSW is liable to imprisonment for ten years.

The FW Act enables underpaid workers to recover compensation and seek pecuniary penalty orders, with a maximum penalty of $63,000 for each corporation or a maximum of $12,600 for each individual. However, most workers claiming compensation for loss of wages are confronted with a complex, lengthy and costly court process - a deterrent to pursuing an underpayment claim. The worker also faces the risk of pursuing a claim against an employer which may later fall outside of the reach of the Courts, upon liquidation or deregistration.

In the absence of criminalisation, wage theft will continue to be a norm and ineffectively addressed in New South Wales.

...most workers claiming compensation for loss of wages are confronted with a complex, lengthy and costly court process - a deterrent to pursuing an underpayment claim.

Dr Julia Quilter

ASSOCIATE PROFESSOR, UNIVERSITY OF WOLLONGONG SCHOOL OF LAW

If you could change one particular section or regulation, what would it be?

I would decriminalise the use of offensive language in public places by repealing s 4A of the *Summary Offences Act 1988* (NSW).

Why does this section or regulation need to be changed?

In all the recent noise about threats to 'freedom of speech' there has been silence about laws that make the simple act of swearing a crime – with a $660 fine ($500 on-the-spot). Thousands are punished annually.

Even if some still regard public airings of the 'F' word as distasteful, should it be a crime? It is hypocritical that words abundantly used on popular Netflix shows (among others) warrant criminal punishment if used in public. Worse than hypocrisy is the problem of how s 4A operates. The concept of 'offensive' is ill-defined, leaving too much room to police discretion. This produces unfairness particularly as police are often victim, enforcer, and judge. Offensive language laws are justified as maintaining the amenity and safety of public places. However, s 4A is mainly used by police when swearing is directed at them – and their motivation is not community protection, but asserting authority. These laws disproportionately impact Aboriginal people. With over-incarceration of Aboriginal people remaining a national disgrace, it is time to remove this pathway to the criminal justice system.

Offensive language laws are justified as maintaining the amenity and safety of public places. However, s 4A is mainly used by police when swearing is directed at them...

Jane Sanders

PRINCIPAL SOLICITOR, THE SHOPFRONT YOUTH LEGAL CENTRE

If you could change one particular section or regulation, what would it be?

Amend s 21 of the *Law Enforcement (Powers and Responsibilities) Act* ('LEPRA') so police can no longer search for small quantities of drugs.

Why does this section or regulation need to be changed?

The section currently allows police to stop and search a person who they reasonably suspect of possessing a prohibited plant or drug. Police are also empowered to use drug detection dogs in a wide range of public places. As we have seen recently, police are enthusiastically embracing this power - at railway stations and music festivals in particular. Occasionally they catch a suspected supplier, but mostly they sweep up young people with small quantities of drugs for their own personal use.

Apart from the public health concerns, and the impact on young people's lives, isn't there a better way to use police resources and court time? The threshold for a search should be raised to *"possession of a traffickable quantity of a prohibited drug"* or *"possession of a prohibited drug in connection with the commission of an indictable offence."*

Here's an idea - why don't we stop tweaking our criminal laws in such haste?

Tweaking (a bit like tweeting or twerking) is best left to the experts. In recent years we have seen way too many ill-considered tweaks to the criminal law – for example, the introduction of "show cause" into the *Bail Act* (a factor behind the burgeoning remand population), the tightening of section 18 of the *Evidence Act* (putting parents in the invidious position of having to give evidence against their children, and vice versa), and the watering-down of the principle of arrest as a last resort in section 99 of the *Law Enforcement (Powers And Responsibilities) Act*. While these "tweaks" may have had a legitimate aim, the consultation process has been inadequate and the consequences have been unjust. The volume and pace of change should be slowed down and more consultation needs to take place.

Kieran Fitzgerald

SOLICITOR

If you could change one particular section or regulation, what would it be?

Amend s 112 of the *Crimes Act 1900* (NSW) ('Crimes Act') to remove the concept of "breaking" and replace it with the concept of "trespass" when someone enters a building for the purpose of committing a criminal offence.

Why does this section or regulation need to be changed?

Currently, the Crimes Act contains no definition of a "break" and multiple fine distinctions have been drawn between what does, and does not, constitute a "breaking" for the purposes of s 112. For example, opening a closed but unlocked door is a "break" while further opening a partly ajar door is not a "break".

The fine distinctions are unnecessary and outdated: a person should be subject to the same criminal sanctions if they enter a premises to commit an offence, regardless of their method of entry. Little purpose is served by maintaining the distinction between ss 111 (enter dwelling with intent) and 112 (break and enter dwelling with intent).

In other jurisdictions such as England and Victoria, the concept of "breaking" has been replaced with the concept of trespass. This avoids arguments over the method of entry and whether it constitutes a "break" – arguments unrelated to the essential criminality of the conduct. It would simplify and clarify this aspect of a very common criminal offence.

> **...a person should be subject to the same criminal sanctions if they enter a premises to commit an offence, regardless of their method of entry.**

Jill Hunter

PROFESSOR, UNSW LAW FACULTY

If you could change one particular section or regulation, what would it be?

Abolish peremptory challenges under s 42 of the *Jury Act 1977* (NSW).

Why does this section or regulation need to be changed?

In criminal proceedings, s 42 provides 3 challenges, without restriction, to potential jurors for each accused, and the same for the Crown for each accused.

The peremptory challenge is well overdue for abolition. England and Wales (1988), Scotland (1995) and Northern Ireland (2007) have abolished it. In 2019 Canada followed suit, recognising that peremptory challenges are too often tools of race, gender and age discrimination - grossly offensive bases for disenfranchising citizens from jury participation. In the United States the practice of prosecutors' discriminatory peremptory challenges is sufficiently common that objecting to it carries its own name, the Batson Challenge, after *Batson v. Kentucky* (1986). Closer to home, a 2014 Victorian Report found that women were challenged at twice the rate of men.

The peremptory challenge is more often than not guesswork founded on myth. It does not advance justice, nor enhance confidence in the jury or its empanelment process. Public confidence in jury adjudication is more likely to be enhanced by removing this impediment to fair and impartial adjudication.

> **The peremptory challenge is more often than not guesswork founded on myth.**

Aloysius Robinson

SOLICITOR

If you could change one particular section or regulation, what would it be?

Insert provisions into the *Criminal Procedure Act 1986* (NSW) requiring the disclosure to an accused person of the Criminal Histories and any information relevant to the credibility or reliability of prosecution witnesses

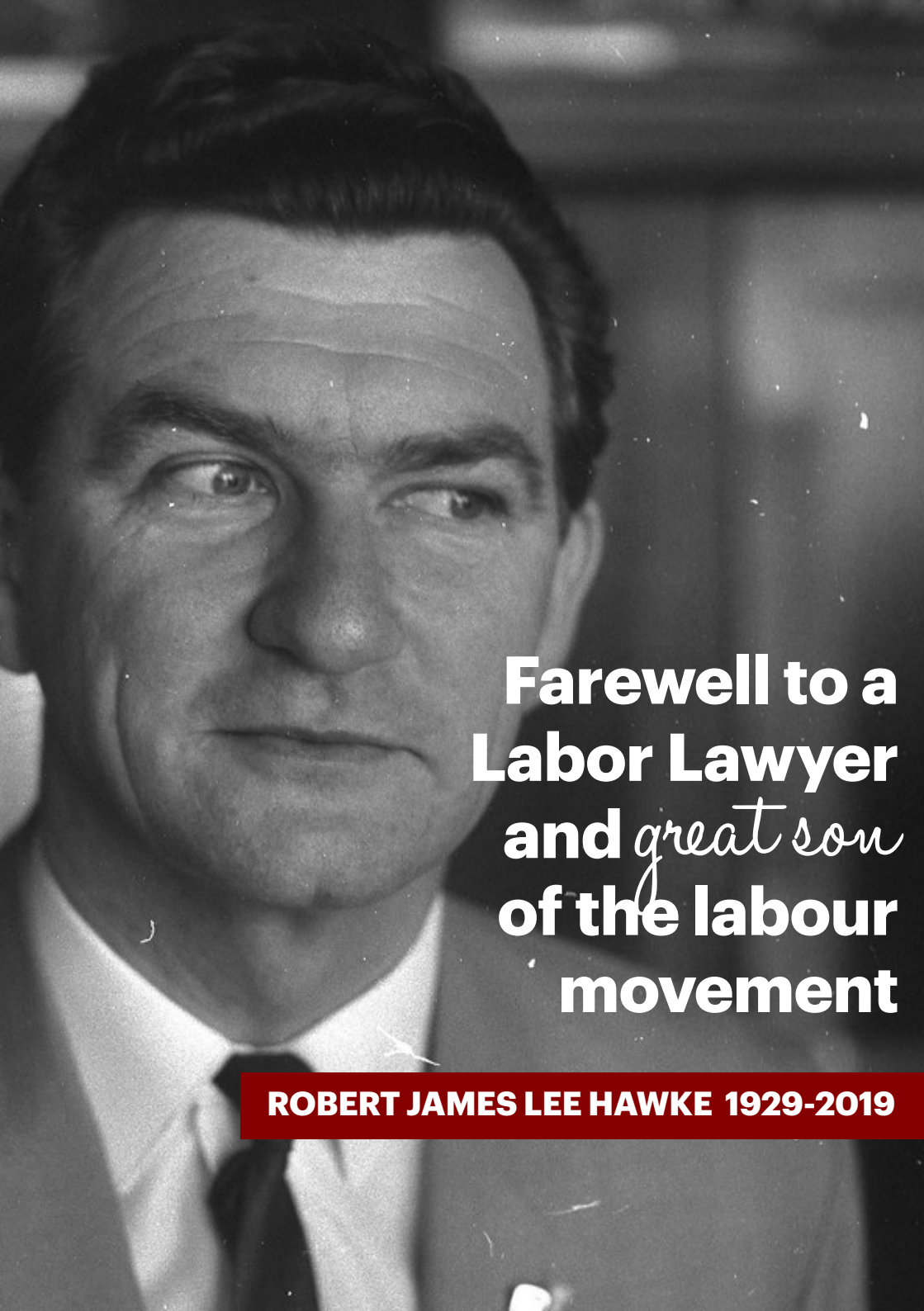
Why does this section or regulation need to be changed?

Prosecution disclosure of material in relation to criminal histories and credibility and reliability of prosecution witnesses should be part-and-parcel of the accused being able to fairly prepare and present their case. It ensures that the court is apprised with an ability to assess the evidence without artificial distortion.

It is the current experience of many defence practitioners that the disclosure of this information is now actively being resisted by the NSW Police and the DPP. This creates additional and often wasteful subpoena litigation. Seemingly asinine requests for the "legitimate forensic purpose" or whether "it is on the cards" that the criminal history of the star witness would assist the accused are far too common from solicitors representing the police.

> **[Prosecution disclosure] ensures that the court is apprised with an ability to assess the evidence without artificial distortion.**

In our state more people are coming before the courts as witnesses who are not of "good character" – the natural consequence of regularly prosecuting more citizens. Without full and proper prosecution disclosure, the perceived injustice is that someone becomes unimpeachable just because they are giving evidence for the Crown.



Farewell to a Labor Lawyer and *great son* of the labour movement

ROBERT JAMES LEE HAWKE 1929-2019

Neil Jackson

BARRISTER, FREDERICK JORDAN CHAMBERS

If you could change one particular section or regulation, what would it be?

Restructure the Family Law Courts by transferring Family Law powers to the states, with the Commonwealth retaining appellate jurisdiction.

Why does this section or regulation need to be changed?

I would ensure that both the Family Court of Australia and the Family Law-related matters from the Federal Circuit Court were transferred to the states, thereby permitting the Family Law forums to freely exercise both State and Commonwealth jurisdictions.

Consequently, we would have for example the creation of "the Family Court of NSW". There would be two divisions, one being for "complex cases" and the other being deemed as "standard cases". The Appeal Court would remain with the Commonwealth, with the traditional name of the "Family Court of Australia" remaining.

Currently, neither the Commonwealth nor the states and territories have exclusive legislative competence in the area of family law. This has resulted in a fragmented system, particularly with relation to areas such as child protection and family violence. The Australian Law Reform Commission recommended in its recent report Family Law for the Future that family law disputes be returned to the states and territories.

Currently, neither the Commonwealth nor the states and territories have exclusive legislative competence in the area of family law.

Erasmus Lovell-Jones

SENIOR FEDERAL PROSECUTOR, OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS (CTH)

If you could change one particular section or regulation, what would it be?

Amend s 51 of the *Native Title Act 1993* (Cth) ('Native Title Act') to expressly enable international decisions to inform the approach to calculating the compensation payable for the loss, diminution or impairment of native title rights.

Why does this section or regulation need to be changed?

There ought to be scope for the developing body of case law in Australia to derive guidance from the existing body of international jurisprudence when calculating the value, via an instinctive synthesis, of the non-pecuniary loss resulting from the loss, diminution or impairment of native title rights under the Native Title Act.

In *Northern Territory of Australia v Griffiths* [2017] FCAFC 106, the Full Court of the Federal Court referred to three decisions of the Inter-American Court of Human Rights ('IACHR'), which has developed a considerable body of jurisprudence surrounding the right to property contained in Article 21 of the American Convention on Human Rights as it relates to the compensation payable for non-pecuniary damages resulting from the separation of indigenous people from their traditional lands. The High Court was less receptive to the references to the IACHR in *Northern Territory v Griffiths* [2019] HCA 7 at [234].

> **...enable international decisions to inform the approach to calculating the compensation payable for...native title rights.**

By amending s 51 to expressly refer to international decisions it would enable, without requiring, guidance to be derived from a considerable body of international jurisprudence, and unambiguously put parties on notice that regard may be had to such materials.

Lisa Stone

PRINCIPAL SOLICITOR, LISA STONE LAWYER

If you could change one particular section or regulation, what would it be?

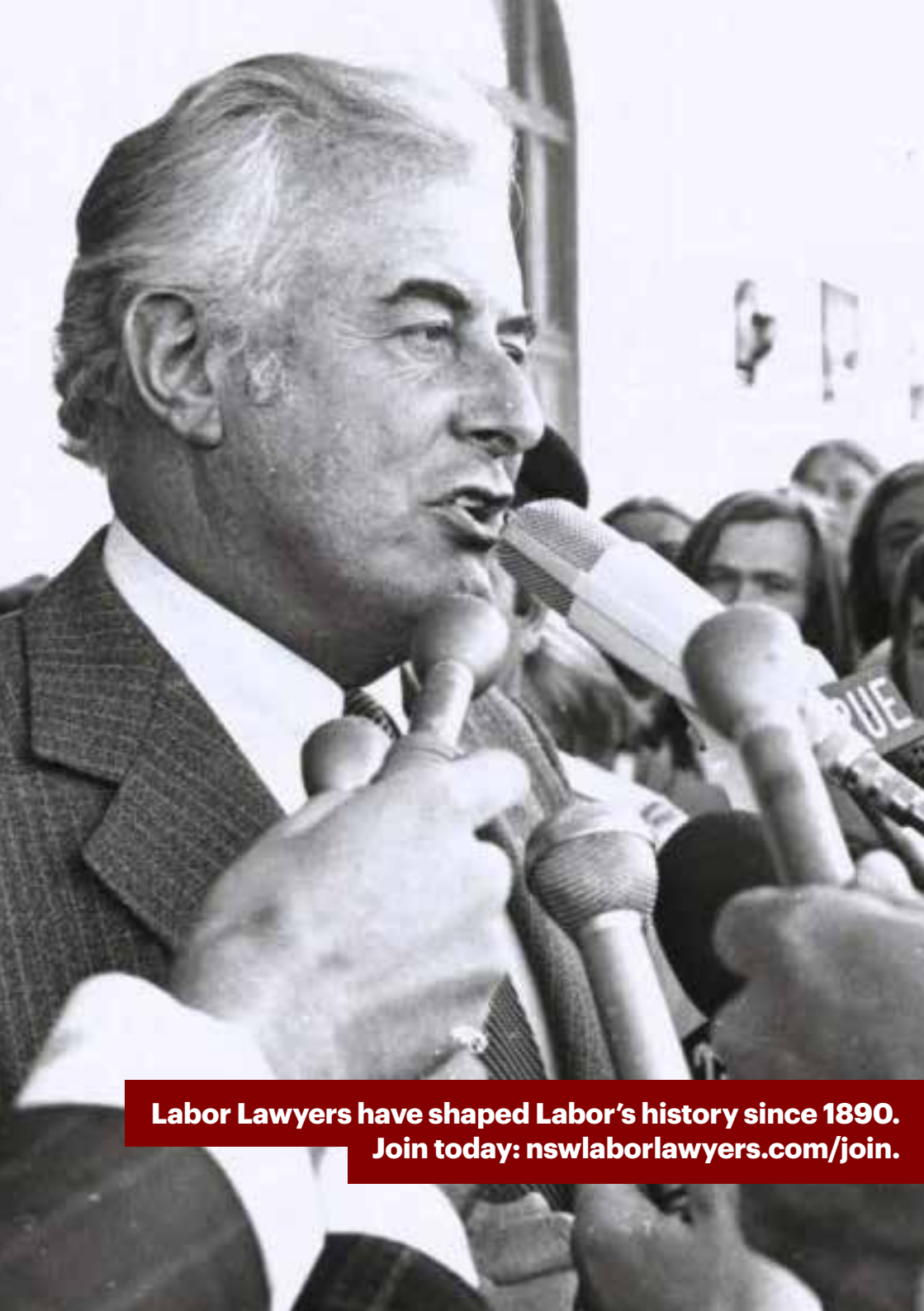
Section 69ZA of the *Forestry Act 2012* (NSW) needs to be repealed.

Why does this section or regulation need to be changed?

Since 1998 matters may not be brought under a provision of an Act or law that gives a right to institute proceedings to remedy or restrain a breach in integrated forestry operations approval areas. In this way, s 69ZA creates an almost total prohibition on any court, including the Supreme Court, from exercising jurisdiction to adjudicate, remedy or restrain a breach of the statutory law, including by the executive government or agencies. This comes close to the State-run logging agency Forestry Corporation NSW possessing absolute legal power.

The operation of the provision effectively leaves the decision on whether to bring action on the executive, to the executive. It takes away litigation by any other person. It takes away the power of the courts to hear a matter. It makes a determination about pre-existing legal rights and takes away those rights. This is something that only the judiciary should undertake. The Court is compelled to deny standing. This is repugnant to the judicial process to a fundamental degree. Thus, s 69ZA should be repealed.

The operation of the provision effectively leaves the decision on whether to bring action on the executive, to the executive.



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Harry Stratton

STUDENT, MAGDALEN COLLEGE, OXFORD

If you could change one particular section or regulation, what would it be?

Repeal Subdivision 118B of the *Income Tax Assessment Act 1997* (Cth), which creates the main residence exemption from Capital Gains Tax.

Why does this section or regulation need to be changed?

Subdivision 118B was meant to help the less well-off own their own homes and move up the property ladder. It provides that you can ignore a capital gain or capital loss you make from a CGT event that happens to a dwelling that is your main residence.

Instead of achieving its aim of increasing home ownership across the community, it has worked as a $46 billion handout to those wealthy enough to buy rather than rent, and increased house prices to the point of locking whole classes of people out of the market entirely. It also artificially encourages taxpayers to invest in home ownership rather than in greater superannuation contributions. This is a bad outcome, because unlike superannuation, home ownership doesn't produce any income for the taxpayer to live off in their retirement, and the equity in the home can't easily be unlocked without selling it entirely.

> **[Subdivision 118B] has worked as a $46 billion handout to those wealthy enough to buy rather than rent...**

The provision has not achieved its stated aims and instead has been counter-productive to creating a society in which all Australians can aspire to own their own homes.

Gilmour Chimbetete

LAW STUDENT, UNIVERSITY OF SOUTHERN QUEENSLAND

If you could change one particular section or regulation, what would it be?

Expand the defence of "fair dealing" in Division 3 of the *Copyright Act 1968* (Cth).

Why does this section or regulation need to be changed?

Division 3 of the *Copyright Act 1968* (Cth) details acts not constituting an infringement of copyright in works. This section is commonly referred to as "Fair Dealing" and provides for the defence of fair dealing for the categories listed in the Act.

Fair dealing provides exemptions only for those categories stated in the Act, thereby restricting all other defences. The defence ignores changes to the way people communicate and interact, creating a misalignment between the law and society. This has the potential to incriminate unsuspecting citizens who may be using copyrighted material in ways that were not conceived of when the Act was drafted. For instance, a video posted on social media containing copyright protected imagery or music constitutes an infringement of copyright under the law, however such practices have become a part of daily life for most Australians. Fair Dealing is a narrow and rigid approach in a rapidly evolving culture. A more general defence may serve to open up creative spaces in Australia and allow the law to catch up with society.

A more general defence may serve to open up creative spaces in Australia and allow the law to catch up with society.

Ben Slade

NSW MANAGING PRINCIPAL, MAURICE BLACKBURN LAWYERS

If you could change one particular section or regulation, what would it be?

I would amend Part IVA of the *Federal Court of Australia Act 1976* (Cth) to expressly enable the Court to order a *'common fund for a litigation services fee, on application by a representative plaintiff, whereby the fee is calculated as a percentage of any recovered amount and liability for payment is shared by all class members if the litigation is successful'*. This was recommended by the Victorian Law Reform Commission last year as a means of reducing total costs in representative proceedings.

Why does this section or regulation need to be changed?

A 'litigation services fee' is substantively and structurally the same as a contingency fee. The fee would allow the lead applicant in a representative proceeding to make an application for a court-approved fee, whereby a percentage of any amount recovered in the proceeding (by way of settlement or judgment) is paid in legal fees to the plaintiff law firm.

The introduction of a 'litigation services fee' would serve three key advantages. First, it would allow plaintiff law firms to conduct time-intensive and costly representative proceedings without the need to engage litigation funders who charge commissions on the final recoverable amount. Second, and related to the first advantage, class members would see the costs of representative proceedings decrease because of the absence of commissions. Finally, a 'litigation services fee' would be, like common fund orders, entirely overseen by the Court and subject to its approval – this would require plaintiff law firms to prove the reasonableness of the fee against the financial risk borne by the firm conducting the case.

Joseph Kennedy
PRINCIPAL, HALL PAYNE LAWYERS

If you could change one particular section or regulation, what would it be?

I would amend s 570 of the *Fair Work Act 2009* (Cth) ('FW Act') to allow an applicant to elect to either invoke that costs protection or not.

Why does this section or regulation need to be changed?

At present, it is not commercial for most employees to bring employment claims under the FW Act due to the s 570 costs shield. This is an obstacle to many prospective claimants. It also leads to employers opposing claims with obvious merit purely because of that issue. I would make the costs shield optional for applicant employees, to allow employees with strong claims to utilise a costs jurisdiction where they so desire.

This would allow proceedings under the FW Act to be conducted on the usual 'costs follow the event' basis, if an applicant so desires.

At present, it is not commercial for most employees to bring employment claims under the FW Act due to the s 570 costs shield.

Nicole Cini

EMPLOYMENT RELATIONS LAWYER AND SPECIALIST

If you could change one particular section or regulation, what would it be?

Expand the anti-bullying provisions within the *Fair Work Act 2009* (Cth) to more explicitly regulate sexual harassment to create an important emphasis on the continuation of the complainant's employment relationship.

Why does this section or regulation need to be changed?

Sexual harassment is prevalent in Australia with the Australian Human Rights Commission's 2018 survey reported that in the previous 12 months, 23% of women and 16% of men in the Australian workforce had experienced sexual harassment. Sexual harassment is federally regulated through the *Sex Discrimination Act 1984* (Cth) with limited redress for those who wish to make a claim and remain within the workplace. Generally speaking, due to the lengthy nature of litigation, it is unlikely that the claimant will remain employed during this period.

> **...expanding the provisions to specifically deal with sexual harassment... will create an invaluable area of redress...**

The anti-bullying provisions of the Fair Work Act are focused on addressing complaints in a timely manner and continuing the employment relationship. Whilst the current anti-bullying provisions do not prohibit a complaint as long as the conduct meets the criteria of being repeated, unreasonable, and creating a risk of health and safety, expanding the provisions to specifically deal with sexual harassment, which does not have to be repeated, will create an invaluable area of redress that fosters the continuation of the employment relationship rather than forcing it to an end.

A recommendation they'll remember.

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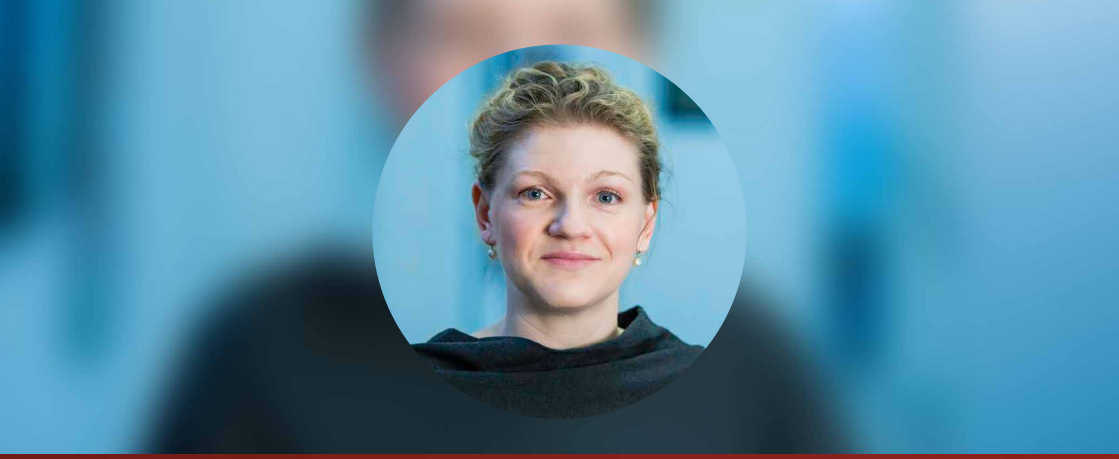

Claire Pullen

PROJECT OFFICER, PUBLIC SERVICE ASSOCIATION

If you could change one particular section or regulation, what would it be?

Amend s 483AA of the *Fair Work Act 2009* (Cth) ('FW Act') to allow a permit holder to access relevant non-member records when investigating a suspected contravention.

Why does this section or regulation need to be changed?

Under s 481 of the FW Act, a permit holder (in practice, a union official or staff member) is required to give notice before they are allowed to access premises to inspect records of a member of their union if they suspect a contravention. While there, they are able to inspect the records of members (where appropriate notice is given) but not non-members who are employed by the same employer. The Act prevents union officials from accessing non-member records without an order from the Fair Work Commission.

This hinders the ability of union officials to establish the full context of contraventions affecting their members and the workplace, for example denying access to records that would allow it to be established if the contravention has taken place (for example) because of a systematic underpayment and/or the gender, sexuality, race, or disability of the workers in question. Section 483AA should be amended to allow such records to be accessed by a permit holder, with these records described in their notice as prescribed in s 518.

> **This hinders the ability of union officials to establish the full context of contraventions affecting their members and the workplace...**

Cassandra Taylor

ASSOCIATE, MAURICE BLACKBURN LAWYERS

If you could change one particular section or regulation, what would it be?

The *Fair Work Act 2009* (Cth) (ss 570 and 611) should adopt the costs regime of private sector whistleblower laws, so that a worker may be awarded their costs if they win but will not be required to pay costs if they lose (except if they acted vexatiously or unreasonably).

Why does this section or regulation need to be changed?

In the current no-costs jurisdiction, many workers are deterred from pursuing their rights since the legal costs they would incur outweigh the damages they seek and cannot be redeemed even if they win.

It doesn't take a rocket scientist to figure out whether someone has been underpaid, yet the amount that an individual worker is owed can be confined. Similarly certain breaches, like refusing unpaid personal leave, are obvious but may not result in economic loss. These are claims that employers should see a lot of risk in. However, many employers choose to take the risk because of the unlikelihood that workers can afford to pursue them. And when workers do, employers often engage in tactics to rack up costs so that the worker is forced to settle or discontinue.

The Fair Work Ombudsman plays an important role in employer compliance. However, the FWO does not have the resources to assist everyone and so it makes sense to empower workers to pursue claims themselves, at the cost of noncompliant employers rather than taxpayers.

...the FWO does not have the resources to assist everyone and so it makes sense to empower workers to pursue claims themselves...

Jamila Gherjestani

NATIONAL WORKPLACE HEALTH AND SAFETY DIRECTOR, AUSTRALIAN WORKERS' UNION

If you could change one particular section or regulation, what would it be?

Amend the Workplace Health and Safety ('WHS') legislation in each state so that a union official's WHS right of entry permit in one state is recognised in all states.

Why does this section or regulation need to be changed?

To enter a worksite to investigate suspected breaches of WHS laws, union officials need to obtain a WHS entry permit in accordance with the WHS legislation in each state. The application process for attaining a WHS permit in each state is generally the same - requiring a thorough character check, a statutory declaration, productions of passport photos and completion of a comprehensive training program.

However, despite the application process for attaining a WHS permit being significantly similar in each state, it is not recognised outside of the state in which it is undertaken. This means to investigate suspected breaches of WHS in companies who operate in different states, a union official needs to undergo the application process for WHS entry permit in each state that the company operates in. The duplication of this process is not only costly and time consuming for unions and state authorities but also creates a delay in investigating WHS breaches and improving health and safety in worksites.

> **"The duplication of this process is not only costly and time consuming for unions and state authorities but also creates a delay in investigating WHS breaches...**

Luke Maroney

SOLICITOR AND INDUSTRIAL OFFICER, HEALTH SERVICES UNION

If you could change one particular section or regulation, what would it be?

I would repeal s 146C of the *Industrial Relations Act 1996* (NSW) ('IR Act') and the associated regulations.

Why does this section or regulation need to be changed?

An independent umpire to determine minimum conditions of employment has been a fundamental part of the Australian industrial relations system for more than a century. Alongside the strength of the Australian union movement, the independence of the umpire has been key to guaranteeing the living standards and working conditions of generations of Australian workers. The independent umpire in New South Wales is the Industrial Relations Commission. However, s 146C of the IR Act and the associated regulations constituting the public sector wages policy, require the Commission to 'give effect to' government policy when determining minimum pay and conditions for public sector employees. This undermines the Commission's ability to independently assess claims for increased work value and the ability of workers to obtain pay increases commensurate with changes to skills and qualifications. The repeal of s 146C of the IR Act would reinstate the Commission's independence and allow for public sector employees' claims for pay and conditions to be determined fairly and on their merits.

The repeal of s 146C of the IR Act would reinstate the Commission's independence...

Nikhil Mishra

ASSOCIATE IN EMPLOYMENT LAW

If you could change one particular section or regulation, what would it be?

I would amend s 235 of the *Fair Work Act 2009* (Cth) ('Fair Work Act') regarding serious breach declarations in relation to proposed enterprise agreements.

Why does this section or regulation need to be changed?

In theory, s 235 enables trade unions who have sought multiple Fair Work Commission or court orders to break the bargaining stalemate with a serious breach declaration. A consequence of a serious breach declaration is that the Commission can make a workplace determination imposing an enterprise agreement on employers and employees.

The past decade has seen a decrease in bargaining and stagnant wage growth. Additionally, no s 235 applications have been successful. The criteria that must be satisfied before the Commission may make a declaration is virtually impossible to satisfy.

To make serious breach applications effective and achievable, s 235 must be amended in two ways. Firstly, the Commission's discretion in making a declaration should be eliminated. Secondly, the criteria that defines a serious breach should be watered down to make an application achievable. Section 235(2)(b) and (c) should be deleted entirely and the word "should" must be replaced with "could" in subsection (d).

> **To make serious breach applications effective and achievable, section 235 must be amended...**

These amendments would result in employers being encouraged to collectively bargain in the spirit of the Fair Work Act.

Amy Zhang

EXECUTIVE COUNSEL AND TEAM LEADER, HARMERS WORKPLACE LAWYERS

If you could change one particular section or regulation, what would it be?

Section 94 of the *Sex Discrimination Act 1984* (Cth) and/or s 46PO of the *Australian Human Rights Commission Act 1986* (Cth) to clarify that Federal Courts have jurisdiction to deal with victimisation claims as civil claims.

Why does this section or regulation need to be changed?

Although the legislative framework is clear that victimisation claims under the *Sex Discrimination Act 1984* (Cth) can be pursued as civil claims (notwithstanding that victimisation can also constitute a criminal offence under the Act), and there is Full Federal Court authority supporting this position (see *Dye v Commonwealth Securities Limited* (No 2) [2010] FCAFC 118 at [71]); a number of recent cases have confused the situation by erroneously following obiter remarks which suggest otherwise, resulting in confusion and uncertainty in the case law about the correct position.

The anti-victimisation provisions are an important safeguard, particularly in the #metoo era, as it is unfortunately commonly the case that those who raise allegations of sex discrimination and sexual harassment are the subject of victimisation.

> **...it is vital that the law is clarified so that the correct position is clear, and the protections against victimisation are safeguarded...**

In those circumstances, it is vital that the law is clarified so that the correct position is clear, and the protections against victimisation are safeguarded and can be easily utilised and pursued by complainants (without the additional burden and cost of having to clarify the correct position/jurisdiction).

Penny Parker
LAWYER, MAURICE BLACKBURN LAWYERS

If you could change one particular section or regulation, what would it be?

Section 106(2) of the *Sex Discrimination Act 1984* (Cth) ('SD Act'), should be amended so that rather than the obligation to take 'all reasonable steps' to prevent sexual harassment being cast a defence, there should be a positive obligation on employers to take 'all reasonable steps' to prevent sexual harassment from occurring in the first place. The failure to adhere to the positive obligation should attract a civil penalty.

Why does this section or regulation need to be changed?

Perhaps surprisingly, in many cases employers are still failing to implement comprehensive policies, procedures and training to prevent sexual harassment occurring in the workplace. The result of this is that sadly, instances of sexual harassment in the workplace continue to occur.

Section 106(2) of the SD Act, is currently only relevant where a victim of sexual harassment takes the brave step of filing a complaint with the Australian Human Rights Commission alleging the vicarious liability of their employer. It is only after a victim takes this step, an employer is obliged to demonstrate that they have taken all reasonable steps to prevent the conduct from occurring, in an effort to defeat the claim. Whilst the onus to make out the defence rests on the employer, placing a positive obligation on employers to take all reasonable steps would more effectively incentivise employers to take greater steps toward preventative action. This in turn, is likely to create cultural change within workplaces on a broader level.

> **...there should be a positive obligation on employers to take 'all reasonable steps' to prevent sexual harassment...**

Stephen Lawrence

DEPUTY MAYOR AND COUNCILLOR, DUBBO COUNCIL & BARRISTER, BLACK CHAMBERS

If you could change one particular section or regulation, what would it be?

I would repeal s 501(3A)(a)(i) of the *Migration Act 1958* (Cth).

Why does this section or regulation need to be changed?

This pernicious provision is cutting a swathe through vulnerable immigrant families.

It mandates the cancellation of a visa of anyone in custody who has been sentenced to a term of imprisonment of 12 months or more.

This pernicious provision is cutting a swathe through vulnerable immigrant families.

There is no discretion and therefore no consideration of whether the person is a community risk.

Introduced in 2014, its effect has been dramatic. Cancellations have increased by more than tenfold.

Cancellations can be revoked upon application and some are. Others lead to protracted judicial review proceedings. The administrative burden is high and the impact disproportionate.

Thousands of long-term residents of Australia, including Indigenous people, have been its victims. Many have lived in Australia since they were children, some believing wrongly they were citizens.

The law is even damaging our international relations, with New Zealand a harsh critic of the scheme.

Sean Stimpson
SOLICITOR, REDFERN LEGAL CENTRE

Adrian Rook
FORMER PLT STUDENT, REDFERN LEGAL CENTRE

If you could change one particular section or regulation, what would it be?

Amend the eligibility criteria under s 10(1)(g) of the *Fair Entitlement Guarantee Act 2012* (Cth) to incorporate temporary visa holders, including workers on 457 visas and international students.

Why does this section or regulation need to be changed?

In the event that a company is bankrupted or liquidated, the Fair Entitlements Guarantee ('FEG') exists to ensure that workers can access any employment entitlements they are owed. However, these protections apply only to domestic workers. Under current arrangements, migrant workers – including international students – are not afforded any protections under FEG.

The high-profile collapse of Swan Services Cleaning Group in 2013 brought FEG's inadequacies into sharp relief. The majority of the company's employees were temporary visa holders, and therefore were excluded from protections under the FEG.

In 2019, the limitations of FEG have become somewhat of a business model for unscrupulous employers. Redfern Legal Centre's International Student Legal Service continues to see a steady stream of workers on temporary visas who are denied access to any entitlements when their employer is bankrupted or liquidated.

International students contribute significant economic and social benefits to Australia, but are at greater risk of exploitation during their stay. Greater protections will make Australia a fairer society and protect our third-largest export: education.

> **International students...are at great risk of exploitation during their stay.**

Gregory Rohan
SOLICITOR

If you could change one particular section or regulation, what would it be?

Amend s 500 of the *Migration Act 1958* (Cth) to address the significant disadvantages applicants face in character cancellation or refusal matters in the Administrative Appeals Tribunal.

Why does this section or regulation need to be changed?

Section 500 deals with merits review of character decisions. It disadvantages the applicant and advantages the Minister on review.

Sections 500(6H) and (6J) prevent the applicant adducing oral or documentary evidence unless the evidence was given to the Minister at least two days before a hearing. Applicants are further disadvantaged by s 500(6L) which deems a cancellation or refusal affirmed if the AAT has not made a decision within 84 days of notification of the original decision.

Practically, the 84-day rule prevents applicants seeking an adjournment to give the Minister new and relevant information that emerges late in the case or to consider and respond to a 'document drop' from the Minister (who is not subject to the 2-day rule) just before or on the day of the hearing.

Character cancellation or refusal can mean the permanent removal of long-term residents of Australia to places they have no real connection with...

Character cancellation or refusal can mean the permanent removal of long-term residents of Australia to places they have no real connection with, separation of families and the refoulement or indefinite detention of refugees. These decisions demand the highest standards of scrutiny and fairness.

Niamh Joyce
SOLICITOR

If you could change one particular section or regulation, what would it be?

I would remove subregulation 050.212 (8)(b)(i) of the *Migration Regulations 1994* (Cth) requiring "acceptable reasons for delay" as a factor in a Protection Visa applicant receiving the right to work and therefore access to Medicare.

Why does this section or regulation need to be changed?

This requirement only applies to Protection Visa applicants on an associated Bridging Visa E. The "delay" must be caused by circumstances beyond their control, and are sufficiently proven.

Department policy indicates that this subregulation is targeted at people who have intended *"to live unlawfully in the community for as long as possible"* before applying - e.g. particularly vulnerable people who are unlawful for some time and are subsequently detained.

It is not unexpected that asylum seekers remain in the community for as long as possible out of fear of refoulement.

This policy further punishes people who have experienced trauma. Strong feelings of helplessness and inaction, fear or distrust of authorities, isolation and language barriers are all recognized as particular problems for asylum seekers, however, are not accepted by Department policy for reasons of delay.

> **This policy further punishes people who have experienced trauma.**

By allowing this cohort of protection visa applicants in the community the right to work and access to Medicare, it would empower them to address their health needs and engage with the community during the often protracted period until visa grant.

Joe Blackshield
SOLICITOR, LEVITT ROBINSON

If you could change one particular section or regulation, what would it be?

I would amend s 9 of the *Law Reform (Vicarious Liability) Act 1983* (NSW) by replacing the word "tort", whenever it appears, with the phrase "civil wrong".

Why does this section or regulation need to be changed?

At common law, a police officer is regarded not as an employee or agent of the Crown, but rather as an independent office holder (*Enever v The King* (1906) 3 CLR 969 at 977 and *New South Wales v Briggs* (2016) 95 NSWLR 467 at 481). This means that, at common law, the NSW Government cannot be held vicariously liable for the actions of police officers.

This common law position has been altered by s 9 of the *Law Reform (Vicarious Liability) Act 1983* (NSW), however, that section, in its current form, only alters the position with regards for "torts", but not for "civil wrongs" more generally.

The effect of this is that the NSW Government cannot be held to account for breaches of the *Racial Discrimination Act 1975* (Cth) by police officers, as breaches of the RDA are not torts, they are statutory wrongs.

> **The effect of this is that the NSW Government cannot be held to account for breaches of the Racial Discrimination Act...**

The phrase "civil wrongs" would encompass both torts and statutory wrongs which would enable individuals to hold the NSW Government to account for racist behaviour by police officers.

David Fitzgerald
PARALEGAL (ABUSE LAW), MAURICE BLACKBURN LAWYERS

If you could change one particular section or regulation, what would it be?

Section 26A of the *Civil Liability Act 2002* (NSW) ('CLA'), which contains the definitions relevant to Part 2A of the CLA.

Why does this section or regulation need to be changed?

Part 2A of the CLA significantly restricts the damages available to those who have suffered a personal injury where the Defendant is the Crown. The Part applies to all individuals who were "offenders in custody" at the time of their injury.

Section 26A specifies that "offender in custody" includes detainees under the *Children (Detention Centres) Act 1987* (NSW) ("CDCA"). The CDCA specifies that a detainee includes all individuals on remand under that Act.

Any damages that are awarded to an individual who falls into the above category are held in a victim trust fund, to which any victims of crimes committed by the injured person can apply for compensation themselves.

> **...these provisions unnecessarily restrict [an abused child's] access to compensation, despite other legislative efforts to make compensation more readily available...**

These provisions lead to perverse outcomes. If a child is detained under the CDCA and is abused, either directly by a staff member or as a result of negligence on the part of the State, these provisions unnecessarily restrict their access to compensation, despite other legislative efforts to make compensation more readily available for those who have been the victim of childhood abuse.

Elija Perrier

SENIOR LEGAL COUNSEL, CHALLENGER

If you could change one particular section or regulation, what would it be?

Amend s 1224C of the *Social Security Act 1991* (Cth) ('SSA') to require details of all data and methods used to determine so-called 'robodebts' to be provided to alleged debtors in a clear, understandable format

Why does this section or regulation need to be changed?

Robodebts arise via an interplay of the SSA with the *Data-matching Program (Assistance and Tax) Act 1990* (Cth) ('DMA'). The DMA provides that Commonwealth agencies may use data-matching procedures to determine if debts are owed. Section 1224C of the SSA then makes such amounts recoverable by the Commonwealth. The volume of erroneous debt claims has sparked a parliamentary inquiry, legal action and calls for reform.

Ensuring welfare payments are made properly is an important feature of fiscal responsibility. However, the probity of the system requires accuracy, transparency and understandability.

Although usual administrative appeals' mechanisms provide opportunity for recourse, the time delay, expense and complexity in challenging departmental decisions can be prohibitive for many recipients of robodebt notifications. Such barriers to justice disproportionately affect vulnerable or underprivileged recipients of welfare payments.

In lieu of more comprehensive reform of data-matching and robot-debt methods, such changes would assist recipients and their advocates to understand the exact methods and data giving rise to the debt claims, thereby making it easier for them to challenge or explain where mistakes are.

Blake Osmond

LAWYER, CORRS CHAMBERS WESTGARTH

If you could change one particular section or regulation, what would it be?

Amend the *Commonwealth Electoral Act 1918* (Cth) and *Electoral Funding Act 2018* (NSW) to mandate real-time disclosure for all political donations and campaign expenditure for elections at a local, state and federal level.

Why does this section or regulation need to be changed?

Confidence in our electoral system is vital to the long-term health of our democracy and its institutions.

Over recent years, political parties of all persuasions have let the community down. Opinion polls now show the public's confidence in democracy is at an all-time low, falling dramatically over the last decade.

The current disclosure system means voters can wait up to 18 months before learning who has donated to political parties at a federal level. While this has recently been reduced to 21 days in NSW during election periods, a lack of transparency still underpins the disclosure regime by only requiring donations above $1000 be disclosed. This approach makes it difficult for voters to understand before voting who is donating to political parties and potentially seeking to influence policy and political outcomes. Requiring all political donations and campaign expenditure to be disclosed in real-time would increase transparency and accountability in our electoral system - and go some way towards rebuilding public faith in democracy.

> **Confidence in our electoral system is vital to the long-term health of our democracy and its institutions.**

Lewis Hamilton

PRESIDENT, NSW LABOR LAWYERS

If you could change one particular section or regulation, what would it be?

I would repeal the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth) ('CI Act') and replace it with a statute nullifying s 46 of the Constitution. I would also extend the period in the *Commonwealth Electoral Act 1918* (Cth) ('Electoral Act') within which a petition can be brought challenging the outcome of an election (where special leave is granted by the Court of Disputed Returns).

Why does this section or regulation need to be changed?

Since the decision in *Alley v Gillespie* (2018) 353 ALR 1 the CI Act has been a nullity. In that case, the High Court of Australia found that the CI Act, which displaced s 46 of the Constitution, could not allow an ordinary citizen to seek a penalty against a Member of Parliament for sitting while disqualified where there had been no prior finding of disqualification by the Court of Disputed Returns. The practical consequence of this decision is that the CI Act serves no purpose other than to allow a citizen to bring an unnecessary action against an MP to recover a penalty after an MP has been ruled ineligible. The other consequence is that beyond the 40-day period set aside for a petition (Part XXII, Div 1, Electoral Act), or a referral from the relevant House of Parliament (Part XXII, Div 2, Electoral Act), ineligibility cannot be tested, leading to a situation where facts may arise late in the session of Parliament showing an MP may be ineligible with little recourse to the eligibility requirements in s 44 of the Constitution.

There are two ways to mitigate the Alley decision. Firstly, I would repeal the CI Act and replace it with a statute that nullifies s 46 of the Constitution. Secondly, I would extend the period in which a person may bring a petition challenging the outcome of an election under s 355 of the Electoral Act beyond 40 days, but require that any petition beyond 40 days only be permitted with special leave of the Court of Disputed Returns whereby the petitioner would need to prove that their petition is in the public interest and reasonably arguable.

Kirk McKenzie

SOLICITOR & MEMBER OF THE LCA HUMAN RIGHTS COMMITTEE

If you could change one particular section or regulation, what would it be?

I would amend s 18(3) of the *Director of Public Prosecutions Act 1983* (Cth) to ensure that the Commonwealth DPP is independent of the executive government.

Why does this section or regulation need to be changed?

Currently, the sub-section reads :

> *"(3) The Director shall be appointed for such period, not exceeding 7 years, as is specified in the instrument of his or her appointment, but is eligible for re-appointment."*

The provision contemplates short-term appointments and reappointments of the Commonwealth DPP. It therefore results in an occupant of the position being possibly susceptible to pressure by an incumbent government or subsequent governments, because of the short term of the position and the occupant's possible need or desire for re-appointment.

The reason for the creation of the position federally and in each of the states was to create an independent prosecutor of serious offences after the experience in the 1960s and 70s of interference in prosecution decisions by government ministers and police officers.

The position should be given the same independence as that of a federal Justice...

The position should be given the same independence as that of a federal Justice, and could adopt the wording contained in s 72 of the *Constitution*, providing that the Director be appointed until they turn 70, and that they can only be removed by a vote of both houses of Parliament.

Greg Jones
FORMER BARRISTER

If you could change one particular section or regulation, what would it be?

Amend s 1190 of the *Social Security Act 1991* so that the maximum basic rate payable to a single age pensioner (subject to specific conditions being satisfied) is equivalent to the minimum wage.

Why does this section or regulation need to be changed?

Social justice requires an overhaul of social security benefits payable to our senior citizens. An appropriate starting point is to raise the maximum rate payable to a single aged pensioner, currently $933.40 per fortnight. For a pensioner who is paying market rent, has limited assets and does not own his or her own home, the amount should be equivalent to the minimum wage, currently $1,481.60 per fortnight.

Most pensioners who fall within the above category find it difficult to make ends meet. Apart from meeting the above criteria an aged pensioner, who is medically assessed as being fit to work, would need to demonstrate that he or she has performed 20 hours voluntary work per fortnight offered to him or her.

This proposed system of increasing the age pension to eligible applicants fulfils a social compact between the State and society's members, by the State in affording eligible aged pensioners a sizeable pension increase and in return, obliges them where necessary to make a productive contribution to the community.

> **"This proposed system for increasing the age pension to eligible applicants fulfils a social compact between the State and society's members...**

Linda Burney MP's Annual Frank Walker Lecture 2019: 'The way forward on Uluru'

I think there are three things we can learn from Frank Walker's life and legacy.

First, his willingness to make personal sacrifices for fairness and justice. Second, his pragmatism – to know the best possible outcome when you see it, and to not let it go. Third, to be able to provide a calm and sensible voice in the midst of emotion and hysteria. These lessons are no more relevant than to the current national discussion about the Uluru Statement, constitutional recognition and an Indigenous Voice to Parliament.

When the prime minister appointed the first Aboriginal person to the portfolio of Indigenous Australians, he sent a clear message that he was prepared to act on the Uluru Statement – that he intended to use his election win to make history. We were all overjoyed – Ken Wyatt is a good and thoroughly decent human being.

The Uluru Statement called for three things. A constitutionally enshrined Voice to Parliament, Truth Telling, and agreement making – through a 'Makarrata' commission. Agreement making is, of course, code for a treaty.

It is five minutes to midnight on this issue.

The prime minister recently backgrounded the media – ruling out a constitutionally enshrined Voice to Parliament. He is now saying, I think, that he would support a referendum to recognise First Australians symbolically, but not enshrine a Voice in the Constitution.

We still don't know how the co-design process will work. There is still no Parliamentary working group. And we don't yet know what the Government plans to do to take the next step on truth telling.

Along with my Labor colleagues I continue to offer bipartisanship and collaboration. But we are running out of time – especially if the Government is to deliver on their commitment to a referendum this term. And there is a real risk the Uluru Statement will fade into the pages of history. That it will be remembered as a noble moment, but not a turning-point. It really is five minutes to midnight.

The next federal election is due in the first half of 2022. And a referendum would most likely take place by the second half of 2021. Before holding a referendum, there would need to be time for a successful campaign. This will take months and would need to start in 2020.

Prior to a campaign, time needs to be allowed for the co-design of a Voice, consultation and agreement on a question. This can't be unreasonably rushed. And there must be time to pass an Act of Parliament to set the referendum question. It is now the final quarter of 2019 and the window

of time we have is narrowing.

Bipartisanship is still on the table – contingent on the broad support of First Nations people. We will work with the Government, but we will not wait for them.

I say to the prime minister very directly: this could be your moment. A great legacy. Something to be truly remembered by.

If we cannot acknowledge the injustices of the past we cannot heal the pain.

If a proper process of co-design is not started by early next year, Labor will start our consultations with communities across Australia on the way forward. We will listen to First Nations people.

Labor has already stated the principles on which we think a Voice should be based. Security of the Voice is paramount – that is why the Uluru Statement called for it to be constitutionally enshrined. Because we have seen before how easily the institutional voice of First Nations people has been taken away by the Government of the day. We all know what happened to ATSIC.

In the spirit of bipartisanship I have set out a starting point for the co-design process the Government has promised. Its basis must be regional – a reflection of the great diversity in First Nations peoples and cultures.

The national Voice to Parliament could be elected from regional bodies. At the national level, the Voice could provide the Parliament with advice on legislation and programs that impact First Nations Australians. It would be a point of accountability of government effort. But it could also deliver annual statements of priorities, and respond to requests from the Parliament for advice and direction.

The Voice could also scrutinise the effectiveness of programs from a First Nations perspective, something that is fundamental to practical self-determination. And it could work in partnership with other organisations, like the Productivity

Linda Burney MP delivers the Annual Frank Walker Lecture at the Sydney Mechanics School of Arts, 8 October 2019.

Commission, universities and departments and peak First Nations organisations. Without openly talking about the past, and understanding it, it is almost impossible to understand some of the barriers, the intergenerational trauma and how to move forward. The recognition of Myall Creek massacre in the Gwyder region of News South Wales is a powerful example of the transformative power of truth. On the 10th of July 1838, a group of Wirrayaraay people were attacked by convicts and settlers when they were preparing a meal. They were slaughtered and their bodies burned. One boy survived. Myall Creek was the first time in Australia that perpetrators were brought to justice – they were hung.

But now, the descendants of those who murdered, and the descendants of those who were killed come together each year. It is an incredibly raw, moving and brave acknowledgement that is pulling together the edges of the great tear that has occurred in that community.

If we cannot acknowledge the injustices of the past we cannot heal the pain. The laws may have changed but the game has very much stayed the same. We still see First Nations People being pursued by the authorities. We still see First Nations People being locked up and removed at record rates.

Truth telling is difficult. But it can build for Australia a stronger, collective national pride. We are all custodians of the oldest continuing culture in the world. It is for everyone.

The Uluru Statement also called for agreement making – for a treaty.

This will require long-term commitment, with the first step being communities and governments getting treaty-ready. Ultimately, there will probably be many treaties.

It is critical we remember that the Federal Government does not need a referendum to establish a Makaratta commission, to begin the very long and complex process in establishing a National Treaty.

Without being prescriptive I have made some suggestions about how to bring the Uluru Statement to life. I have put forward a tangible proposal for a Voice with a clear regional basis, an electoral process and gender parity.

The stars are aligned, now, in this moment. There are advocates within conservative politics, Labor is absolutely on-board with the Uluru Statement, business is ready and willing, states are leading, and eminent legal minds have also lent their support.

But we are running out of time to deliver on the Uluru Statement.

This could be Scott Morrison's greatest legacy. It could indeed be Gladys Berejiklian's too. Both leaders have just won elections, and both have enormous political capital. I encourage them to do what Frank Walker would have done and use some of that capital to make a long-overdue and long-lasting change for the better.

About Frank Walker

Frank possessed a profound sense of fairness and justice. But he was also pragmatic – able to navigate the structures of power to deliver tangible real-world outcomes. And he was able to inject a sense of calm and reason in the big ticket items of reform which too often are subsumed by the hysteria of reactionaries.

At six years old, Frank travelled with his father and brother to Papua New Guinea – his father had been black listed as a communist and was unable to find work in Australia. Perhaps it was this early experience of persecution that added to Frank's layered sense of fairness and justice.

There, Frank and his brother were raised among local Indigenous children, and learned the local Indigenous dialect.

So it must have seemed very strange – incomprehensible even – that when Frank and his family moved back to Australia at the age of 12, to the Coffs Harbour region that local Aboriginal people would be subjected to such discrimination and hatred. The removal of Indigenous children from their families and country remained common practice. Aboriginal people were prohibited from practicing culture or speaking language.

Frank possessed a profound sense of fairness and justice. But he was also pragmatic - able to navigate the structures of power to deliver tangible real-world outcomes.

It is little wonder then at the age of 13 he was incensed by the practice of segregating Aboriginal people in the local Coffs Harbour picture theatre, and many other picture theatres. His first political act was simple, pacifist and straight to the point – he sat in the segregated section of the theatre.

Frank became involved in more 'sit-ins' throughout the region, including at the notorious Bowraville Theatre, as well as theatres in Moree and Walgett. At the Bowraville Picture Show he was beaten by the police for this simple and peaceful act of solidarity.

What particularly outraged Frank however, was the theft of Aboriginal land. He witnessed local Indigenous people being moved off their land to make way for a golf course. An experience which played a significant part in Frank's determination to deliver land rights.

Frank participated in the famous 'Freedom Rides' of February 1965. While protesting outside the segregated Moree Municipal Baths, Frank was again beaten by the police. So severely that he suffered broken ribs. But Frank was not deterred. This experience made him even more determined.

Frank would eventually be appointed the first ever NSW Minister for Aboriginal Affairs. His most significant legacy was as the driving force behind land rights legislation in New South Wales.

In 1990 Frank was elected the Federal Member for Robertson. For Frank, Federal Parliament represented another, wider, sphere through which to advance the cause of Indigenous land rights. The High Court handed down the Mabo decision in 1992 and the Keating Labor Government shortly after sought to implement the Native Title Act of 1993. Frank was responsible for coordinating Labor's response to the High Court decision.

This is an edited extract of Linda Burney MP's speech for the 2019 Annual Frank Walker Lecture. The Society thanks Linda Burney MP for delivering the lecture, Laurie Patton for the edited speech and the NSW Aboriginal Land Council for sharing with attendees the last recorded interview with Frank Walker on his reforming Aboriginal land rights legislation.

Farewell the Honourable Jim Macken OA

By Sean Macken

That my father touched the lives of thousands of people was readily apparent to me throughout my life.

I was regularly asked by strangers if I was related to "Big Jim" or "Judge Jimmy", and when I confirmed that I was, would be regaled with stories of how my dad had helped them. How he had taught them the basics of Law at University, won them danger pay for flying the Qantas planes moving troops in and out of Vietnam, or saved them from a life of alcoholism and despair. None - even people who hated his politics, his religion, his legal judgments or his wry sense of humour - ever said a bad word about my dad.

James Joseph Macken (Jim) was born 23rd December 1927 to John Christian (Bud) Macken and Estelle (nee. McDermott). He grew up in Sydney with three younger brothers, John, Robert and Tony. His parents were from very wealthy families. Bud was part of a large and extended family that claimed ownership of Mark Foys' retail emporium and a number of hotels and pubs, including the Hydro Majestic. His mother was part of the large McDermott family which owned some of the grandest houses of Glebe Point and Ormond Hall in Vaucluse. But the family wealth soon floundered on the iceberg of the Great Depression. What wealth his parents had was soon gone in the collapse of the share market that left my grandparents with nothing but an old Rolls Royce, a family crypt at South Head and a bitter hatred of the banks.

Dad was educated by the Jesuits at Riverview. Academically he wasn't a high

achiever and he tried twice to matriculate but failed. But at everything else at School he excelled. In his final year he was Stroke of the first Eight, Captain of Boats, played in the First XV, led the debating team and ran the sodality and the St Vincent de Paul Society. More significantly, he was Senior Cadet Officer, a very important position to hold in an Australia mobilised for war.

The Jesuits had a profound impact on my father and their brand of intellectually curious and activist based Catholicism was one he adhered to throughout his life.

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On graduating, his ambitions for a military career were dashed by an AIF with a surfeit of soldiers and no war to fight, so he took a job with his uncle as a clerk at Mark Foys. He joined the Clerks Union around this time and joined the Labor Party. Why Labor? While the family had lost their fortune in 1929, dad was not working class. His father, my grandfather, had expressed a deep admiration for Ben Chifley but had also flirted with the Country Party, including an ill-fated tilt as an MLC. I suspect dad joined Labor for a mixture of reasons. In a sectarian riven Australia, a young Irish Catholic would identify more with Labor's Curtin or Chifley, than a Menzies. The party's socialisation pledge, especially the nationalisation of the hated Banks, would also resonate with dad. But the main reason, I think, was dad's strong sense of social justice, instilled by his parents and the Jesuits, which drove him to a life of political activism. His first election campaign was 1949, and while he always grieved Chifley's loss, it was the defeat of the referendum allowing the nationalisation of finance that burned the most.

While developing a commitment to democratic socialism and the Labor programmes, he was also anxious about the rise of Communism in Australia. He saw the "Comms" as sectarian, anti-religious, undemocratic and un-Australian. He was particularly appalled at their orchestration of the coal miners' strike to bring down a good Labor Government. On advice from a Jesuit teacher, he hitchhiked to Melbourne to work for Bob Santamaria's National Catholic Rural Movement. Long-time readers of this newsletter will recall dad's different view of both the history of this time and the motivations of 'Santa' and his Movement, and I will mostly let his own writings of the time tell his story. But in a recent interview he described it thus.

"Bob Santamaria was one of the most radical thinkers I have ever met. Most people can't see that because they get caught up on his socially conservative values – and as a Roman Catholic in the 1950's and 60's he was very socially conservative. But his political world view was an exciting one."

"Bob was actually agnostic to political parties, unions and co-ops in one sense. For him the important thing was the objective - which was the protection and advocacy of the vulnerable - which in turn informed the strategy, which in turn informed the suite of tactics used to achieve the objective."

"Bob was a Labor bloke all his life, the only party he would not countenance was the Liberal Party because he thought they were incapable of supporting working families."

After a year in Melbourne he returned to Sydney to work in the Movement's Sydney office and to strategise against the Comms and re-join the Clerks union.

In 1951, he went to New Guinea to working as a clerk for the Steamships Trading Company. A year later he was joined by his girlfriend, Ann Daniel, an Arts student from Newcastle and they married. He described this time as his "Lord Jim" phase and he was there to carry the white man's burden. Eighteen months later he was told he'd actually become the white man's burden and was ordered to leave. His bosses, learning from ASIO spies of dad's aspirations to unionise the Port Moresby docks, sacked him and sent him and mum packing. But he never forgot his time in Moresby. A few years later he teamed up with another young activist, Bob Hawke and established the ACTU's Friends of New Guinea to provide support for that fledging nation's nascent unions.

He saw the battle against the Communists as a battle for the heart and soul of the Australian working class.

Back in Sydney, he and mum set about having a family and over the next 15 years would raise ten kids - five girls and five boys.

He also renewed his activity in the Unions and Labor Party. He saw the battle against the Communists as a battle for the heart and soul of the Australian working class. A battle between competing visions for Australia. His vision being of social and economic equality, tolerance, and national self-determination. The Comms vision he saw as undemocratic, intolerant, atheistic, and internationalist: that they were just using the working class for their own war against capitalism and western democracy. Dad also disliked and distrusted capitalism but his sense of social justice would have no truck with their totalitarianism.

Throughout the 1950's he held many important positions in the Unions. He was Secretary of the Motor Drivers and Coxswains Union as well as the all-important Secretary of the Combined Waterfront Unions Committee, that represented the 14 waterfront unions affiliated to the ALP, against the communist-controlled Seamen's Union and Waterside Workers Federation. But while ideological battles raged, and there were plenty of punch ups, union solidarity never failed. Dad happily shut down the Sydney ferries in a sympathy strike with picketing stevedores.
Unions then where not like the large monolithic bureaucracies of today but were based on trades or worksites. If there were more than a dozen workers you could form a union right there and then, and the Labor Council would back you. Seeing a need to unionise the new and emerging industries of the time dad was instrumental in establishing the Flight Stewards and Stewardess Unions, the Pilots Federation, the Airline Flight Engineers Association, and several others.

To help with his union advocacy, he studied law through the Barristers Admission Board and in 1963 gained admission in a wig borrowed from his friend and future Governor General, Bill Deane. To my knowledge, in Australia there have only ever been two people appointed judges without a law degree: dad and Justice Michael McHugh.

The late 1960's and early 70's was a challenging and bewildering time for both society and for dad. He was deeply shaken by the cultural revolutions of '68 and his

later books on politics, the Unions and even the law, would explore the impact this revolution was having on society. He was appalled by the dissolution of the certainties of life; the primacy of family, religion and democracy as well as the undermining of so many important institutions like unions.

With the election of Whitlam in 1972, mum seized the opportunity of free education to complete her degree which New Guinea and ten kids had stalled decades earlier. In 1974 she also seized the opportunity of a no-fault divorce and they separated. Dad, needing a steady income, accepted an appointment as a judge of the NSW Industrial Commission.

The 1970's where a period of enormous turmoil in workplaces and industries across Australia and dad was thrown in to arbitrate some difficult strikes. He was instrumental in resolving the Caltex dispute which had seen petrol rationing introduced for the first time since the war. He was loved by doctors for his determination on the VMO pay dispute and hated by retailers for his decision on trading hours.

Following a campaign by the Murdoch press into racketeering and waste at the Eveleigh Railway yards, the Wran Government appointed him to conduct a Commission of Inquiry, hoping a union loving judge would do the right thing by the workers, while also getting the Sun newspaper off the Government's back.

Dad held six weeks of hearings and interviewed hundreds of workers. He uncovered a worksite wracked with cronyism and inefficiency and with management having lost control. His report cited one worker who'd spent years in the workshop making knifes which he sold at Paddy's Markets. Another worker bullied terribly for working too hard. But most damning of all, his examination of worker's compensation claims (of which there were many) showed that in the previous decade there had not been one compo claim made after 11:00am, for the simple reason that the workshops only operated for three hours a day. He recommended that the Eveleigh yard be closed and a new one, with better equipment and work practices, be built at Chullora.

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The decision shocked the Government. The Murdoch press immediately demanded the Macken report be implemented but how could a Labor Government do that? Eveleigh was a sacred site for the Party, a crucible for dozens of our finest parliamentarians. For several days the Parliament debated, and the Government dithered. Finally, after several hours of debate the Labor Council resolved the issue by voting to endorse the Macken report. They couldn't stomach the rorting either.

Dad briefly remarried in 1977 and was blessed with another child, Sandra, bringing the tally of his kids to eleven! He retired from the bench in 1989, after the Greiner Government introduced dramatic union-busting laws which he wanted no part in enforcing.

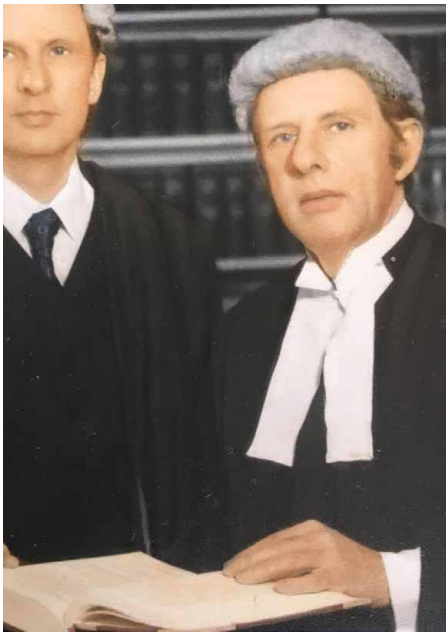
But retirement was not a time of rest. Dad threw himself into a myriad of organisa-

tions and causes. He became a volunteer ranger at the Ku-ring-gai Chase National Park, leading bush walks and documenting areas of Aboriginal heritage. Following the 1994 bush fires he founded the Coaster Retreat Fire Service; an organisation he remained active in till his last days. He founded the Bush University which later became the Kimberley Foundation helping preserve indigenous culture. He wrote ten local histories of the Pittwater area and joined the Australian Historical Society, serving as President. He wrote several books on unions and politics, despairing at the direction of each, and was particularly proud of his rallying call for unions – 'Australia's Unions: A Death or a Difficult Birth'? He worked pro bono for both public institutions and individuals in trouble. He must have written hundreds of references for people. Perhaps most importantly he worked tirelessly helping people struggling with the scourge of addiction.

He despaired at the loss of those important social institutions which the cultural upheaval of the 60's had swept away but which had been replaced by nothing.

He renewed his activism in the union movement, providing advice and counsel to any worker in need. He was active in the MUA lock-out addressing picket lines across the east coast. He was appointed a trustee of the CFMEU and has been awarded Life Membership of fourteen unions as well as the Labor Council.

In 2003, he was awarded the Order of Australia. He is a life member of many unions and organisations, including the ALP. He was awarded a Doctor of Laws for his services to the legal education, not bad for a kid who didn't matriculate.



Contrary to some opinion in the Labor Party, dad was never anything but a democratic socialist. Being anti-communist doesn't make you right wing. His social conservatism did slowly evolve over the years and he proudly voted yes in the same sex marriage plebiscite. But he was increasingly lamenting of Australian society, the union movement and the Labor Party. He despaired at the loss of those important social institutions which the cultural upheaval of the '60s had swept away, but which had been replaced by nothing. He worried about the emergence of top-down unionism. Solidarity, he saw was between worker and worker, not between a worker and an increasingly remote union bureaucracy. Labor, he saw as captured by a political class with little connection or relevance to working people.

His last public role was his offer to swap places with a refugee on Manus Island. His body failing, he believed the least he could was to offer it in the cause of someone in need. Australia's treatment of refugees broke his heart.

He survived two bouts of cancer and two decades of lung disease. Till the end, he was active and giving – giving his time and expertise, his humour, his compassion, his contacts, wisdom and money.

The faith of his parents and the Jesuits were a continuing presence throughout his life. While he despaired at the conduct of the Catholic Church, he never lost his faith in Jesus. He always said he was on earth only to do Gods will, and he did.

Jim Macken OA died on September 19, surrounded by family and survived by eleven children – Mary, Wendy, Deirdre, James, Julie, Paul, Hugh, Robert, Sean, Lucy and Sandy Macken – 23 grandchildren and brothers John and Tony. He is buried in the family crypt at South Head Cemetery.

He is sorely missed.

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