politicians have argued that the matter is one for regulation by local councils. The Frankston Council, however, claims to have no power to do so. Clearly, a co-ordinated response, rather than continual buck-passing and legal quibbling, is required.

The Victorian Government has now established a working party on topless trading, under the direction of the Women's Policy Co-ordination Unit in the Premier's Department. The Working Party comprises representatives from the Attorney-General's Department, Department of Consumer Affairs, Department of Labour, Department of Planning, Ministry of Police and Emergency Services, Office of Local Government and the Commissioner for Equal Opportunity.

The Working Party will issue an options paper in late January 1992, which will be followed by a short consultation period. WASET will be trying to ensure that the industrial, public space, and local trading issues identified above are adequately addressed by any reform proposals.

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EVIDENCE

Battered woman syndrome

IAN FRECKELTON looks at expert evidence relating to syndromes.

The unholy trio of 'rape trauma syndrome', 'molested child syndrome' and 'battered woman syndrome' have at last surfaced in Australian courts. In a radical judgment in a remarkable case the South Australian Court of Criminal Appeal has ruled battered woman syndrome evidence admissible for the defence of duress: *Runjancic & Kontinnen v R* (1991) 53 A Crim R 362.

Evidence of syndromes, which have been described as sets of characteristics identifying a particular 'condition', beset United States courts throughout the 1980s and continues to in the 1990s. Attempts have been made to introduce rape trauma syndrome, battered child syndrome, parent abuse syndrome, premenstrual syndrome, XYZ chromosone sysndrome, post-traumatic stress syndrome, pathological gamblers' syndrome and Vietname Veterans' syndrome, as well as battered woman syndrome, into the courts to explain different forms of violent behaviour. What all of these have in common is a categorisation of forms of behaviour that arise from stressors identified as 'standard' or 'general' among certain sub-groups in the population. Expert evidence in relation to the syndromes has met with mixed success, varying from case to case and issue to issue, with many courts rejecting evidence on the basis that it has not achieved general acceptance within the discipline of psychology, that it usurps the function of the court, that it is more prejudicial than probative and that it does not assist the tribunal of fact.

Runjancic and Kontinnen v R

In *Runjancic and Kontinnen v R* the two appellant women had lived as part of a menage a trois with a man whose conduct was described by King CJ as 'domineering and marked by habitual violence' (at 363). He had prevailed on both to work for him as prostitutes. He organised them to lure the female victim to a designated spot where he beat her savagely with a shotgun and inflicted other forms of violence on her. The events that followed the initial beating remain unclear and the involvement of the appellants in further acts of violence on the victim somewhat hazy. They explained their apparent cooperation with the man by stating that it was to avoid violence at his hands if they disobeyed him.

They sought at their trial to lead expert evidence relating to 'battered woman syndrome' to assist their defence of duress but such evidence was ruled inadmissible by the trial judge. They appealed on this ground, among others, and were successful.

King CJ presiding in the Court of Criminal Appeal surveyed a range of literature to which the Court had been referred[1] and concluded that 'battered woman syndrome' 'appears to be a recognised facet of clinical psychology in the United States and Canada' (at 366) and to have 'a wide acceptance ... as having a valid existence' (at 367):

> It emerges from the literature that methodical studies by trained psychologists of situations of domestic violence have revealed typical patterns of behaviour on the part of the male batterer and the female victim. It has been revealed, so it appears, that women who have suffered habitual domestic violence are typically affected psychologically to the extent that their reactions and responses differ from those which might be expected by persons who lack the advantage of an acquaintance with the result of those studies.
>
> Repeated acts of violence, alternating very often with phases of kindness and loving behaviour, commonly leave the battered woman in a psychological condition described as 'learned helplessness'. She cannot predict or control the occurrence of acute outbreaks of violence and often clings to the hope that the kind and loving phases will become the norm. This is often reinforced by financial dependence, children and feelings of guilt. The battered woman rarely seeks outside help because of fear of further violence. It is not uncommon for such women to experience feelings for their mate which they describe as love. There is often an all pervasive feeling that it is impossible to escape the dominance and violence of the mate. There is a sense of constant fear with a perceived inability to escape the situation. [at 366]

King CJ specifically employed the language of the notorious *Frye* standard, so-called because it comes from

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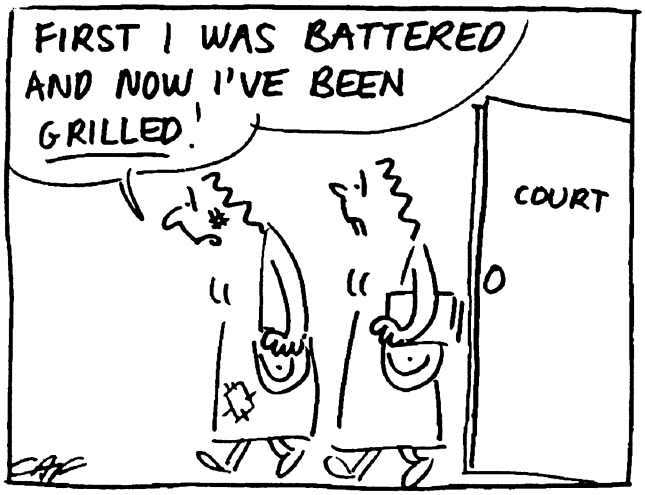
the 1923 case of *United States v Frye*, 293 F 1013, which prescribed that expert testimony may be permitted only if it has crossed the line from the experimental to the demonstrable, a state reached when the thing from which the deduction is made is sufficiently established to have gained general acceptance in the particular field in which it belongs. However, Bollen J did not explore this aspect of the syndrome's admissibility, reflecting simply on the fact that it was an area beyond the ken of the average juror, that it was an organised branch of knowledge and that it was necessary for the expert to be suitably qualified.

King CJ found the evidence relevant to the case against the two women on the basis that it related squarely to two questions the jury needed to determine: was the will of the women actually overborne; and would the will of a person 'of reasonable firmness' in their situation have been overborne?

His Honour agreed with the prosecution submission that not all knowledge which forms part of an organised field of endeavour may be admissible simply because it is relevant to the determination of a fact in issue. The 'common knowledge rule' prevents the admission of evidence on areas which it is within the province of the jury to understand without expert assistance — this acts as a means of restricting the amount of expert evidence admitted and the role of experts within the court system.[2] However, King CJ found that a just judgment of the actions of women such as those before him required that a jury have the benefit of the insights into the position of battered women available from expert witnesses, insights which 'would not be shared or shared fully by ordinary jurors'.

Significance of the decision

Runjancic and Kontinnen v R is a landmark case for many reasons: it is the first time that 'battered woman syndrome evidence' has been permitted by a superior court in Australia; King CJ employed the Frye test as the criterion for determining admissibility of an area of 'novel scientific evidence'; the flexible interpretation of the common knowledge rule was adopted to focus on the need of the jury for assistance; and the objective and subjective components of the defence of duress were affirmed.



However, the decision is probably most remarkable for the degree of understanding exhibited by the Court of Criminal Appeal of the hapless lot of women trapped in lifestyles of domestic violence. The developing understanding of what has become known as 'battered woman syndrome' provides an extremely useful tool to facilitate such understanding within the community generally as well as within our trial and appellate courts.

Dangers of syndrome evidence

Nonetheless, dangers are attendant on any form of rigidity in categorisation of 'injured' persons' reactions to their experiences. For this reason, there have been years of legal controversy in the United States surrounding the appropriateness of admitting 'rape trauma syndrome' evidence.[3] This syndrome postulates that women are likely to behave in a set way if they have been sexually assaulted. The problem is that it simply is not possible to generalise about the reactions of victims of rape to their violation. It may well be that statistically speaking a majority will exhibit certain forms of behaviour but there will always be a significant minority, at the least, who will not. The danger is that in respect of a woman who genuinely has been sexually assaulted, the defence will lead evidence of rape trauma syndrome and will highlight the discrepancies between this 'alleged victim's' symptoms and behaviour and those displayed by the 'normal' rape victim as postulated by the sufferer of rape trauma syndrome. Thus, it can be used to assert that the victim in fact consented to the act of intercourse. Realisation of the variability of sexual assault victim's reactions to their ordeal led many State courts in the United States to reject 'rape trauma syndrome' evidence as more prejudicial than probative, as usurpisng the task of the tribunal of fact or as not constituting a sufficiently accepted area of psychological theory for admissibility as expert evidence.

Many of the same arguments can and have been put in respect of 'battered woman syndrome'. In fact, there is no unanimity at all among United States courts about the admissibility or even for the criteria for admissibility of expert evidence relating to 'battered woman syndrome'.[4] It may be that the Court of Criminal Appeal did not have a fully representative range of the voluminous North American literature on the subject before it.

The danger is that if women who are the subject of domestic violence come to be expected to exhibit 'classic signs' of 'battered woman syndrome' and in fact, because of their particular personality or background do not fit the mould (for instance because of their cultural background), their attempts to mount defences of self-defence, provocation and duress will be undermined. While the long awaited open-mindedness demonstrated by the South Australian Court of Criminal Appeal in *Runjancic &*

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Kontinnen v R is a welcome initiative in the domestic violence context, it may be that many of those for whose benefit syndrome evidence might be led would be better served by its exclusion.

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1. See, in particular, Brodsky, D.J., 'Educating Juries: the Battered Woman Syndrome Defence in Canada' 25(3) *Alberta Law Review* 461; Thar, A.E., 'The Admissibility of Expert Testimony on Battered Wife Syndrome: An Evidentiary Analysis' 77(3) *Northwestern University Law Review* 348.
2. See Freckelton, I., *The Trial of the Expert*, Oxford University Press, Melbourne, 1987; Freckelton, I., 'Novel psychological evidence', in Freckelton I. and Selby, H., Expert *Evidence: Practice and Advocacy*, Law Book Co., Sydney, 1992 (forthcoming).
3. See, for instance, Massaro, T.M., 'Experts, Psychology, Credibility and Rape: the Rape Trauma Syndrome Issue and its Implications for Expert Psychological testimony', (1985) 69 *Minnesota Law Review* 395; Bristow, A., '*State v Marks*: An Analysis of Expert Testimony on Rape Trauma Syndrome', (1984) 9 *Victimology* 273.
4. See, for instance, R Brown, 'Limitations on Expert Testimony on the Battered Woman Syndrome in Homicide Cases: The Return of the Ultimate Issue Rule', (1990) 32 *Arizona Law Review* 665; Ensign, D.J., 'Links Between the Battered Woman Syndrome and the Battered Child Syndrome: An Argument for Consistent Standards in the Admissibility of Expert Evidence in Family Abuse Cases', (1990) 36 *Wayne law Review* 1619; McCord, D., 'Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases', (1987) 66 *Oregon Law Review* 19; McCrord, D., 'Expert Psychological Testimony about Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility Novel Psychological Evidence', (1986) 77 *Journal of Criminal Law and Criminology*1.

PROSTITUTION

'Regulating morality'?

LINDA BANACH reports on the fate of proposals to decriminalise some forms of prostitution in Queensland.

Prostitution law reform is slow to come in Queensland, and although public support for decriminalisation is high following the revelations of the Inquiry into Official Corruption (Fitzgerald Report) government opposition to progressive reform is strong. The three major political party leaders have all aligned to publicly express opposition to decriminalisation or legalisation of the sex industry.

The Fitzgerald Inquiry provided the impetus for prostitution law reform following revelations of police corruption and control of the sex industry. The newly established Criminal Justice Commission (CJC) was given the task of conducting research into the industry and providing a report to the Parliamentary Criminal Justice Committee with recommendations for legislative reform. The newly elected Labor Government made a commitment to uphold CJC findings and act swiftly on reports — a position it now distances itself from increasingly by reaching for the 'elected governments should not be dictated to by independent, non-elected commissions' cliche.

In February 1991 the CJC released an issues paper for public comment. Sex worker and other community organisations became increasingly worried at the CJC process. The sex worker organisation in Queensland, Self-Health for Queensland Workers in the Sex Industry (SQWISI), was highly critical of both the CJC process and quality of research. The paper failed to identify relevant issues or outline potential legal models, reflecting its lack of research and consultation with sex workers.

It was imperative that if reform was to be relevant in Queensland then legislation needed to be framed around the needs of workers in the industry. It was frustrating that under-resourced agencies had to spend limited funds on resourcing a well-funded commission which did not consult with worker representatives and consequently failed to identify relevant issues.

Meanwhile the policing of prostitution had become a nightmare. Remaining quiet about prostitution policing policy and referring all matters to the CJC, the Government repeatedly refused any requests for an amnesty on prosecution for prostitution-related offences. The old system of prearranged arrests by police was being challenged by workers through the courts. The media, obsessed with exposing prostitution as evidence of continued police corruption, demanded police crackdowns as proof that they were no longer corrupt. They consistently failed to recognise that forcing the industry further underground by persistent calls for police raids set the conditions for the re-emergence of police corruption.

Internal police policy was confused, and varied month by month from crackdowns to low priority. Between 25 and 30 October 1991, Brisbane papers reported a 'police vice blitz . . . as part of a major war against prostitution' (*Sun* 25.10.91) whilst the Commissioner of Police considered 'life threatening crimes . . . must take a higher priority' (*Courier-Mail* 30.10.91) and was allocating resources accordingly. The then Police Minister, Mr Terry MacEnroth, repeatedly stated the law had not changed and demanded prostitution continue to be policed. He seemed oblivious to the difficulties of policing the industry legally when this had never been tried before.

Gradually police refused to vigorously police prostitution, and maintained that they should not have to set policy or enforce unworkable laws. The Police Commissioner, Mr