

Six months in the Wildflower West

Nuala Keating

A new era or deja vu? The future directions of State Government policy in Western Australia are becoming clearer.

Six months ago, Western Australia's conservative Coalition partners buried Aboriginal issues in an election policy called *Lifestyle*. At the time, retrospective legislation did not rate a mention.

Today, Premier Richard Court has achieved a national profile for his extreme efforts to overturn the High Court's decision in *Mabo v The State of Queensland* (1992) 109 ALJR 408. And Western Australians have seen several examples of retrospective legislation, the most prominent relating to the erosion of workers' common law rights. Lawyers across the political spectrum have united in a campaign against it.

Shortly after 2 p.m. on 30 June 1993, Labour Relations Minister Kierath read a Ministerial Statement to Parliament, outlining changes to laws governing work-related accidents. These changes, he said, meant that from 4 p.m. that day no-one could sue for common law damages unless there had been total bodily impairment of at least 30% and claims above 30% would have a threshold of \$15,000. The inequity of this is exemplified by the actions of a new Liberal MP/lawyer rushing to the phone after the announcement to advise his legal firm of the change. It, alone, filed nine writs in less than an hour. Significantly, no legislation was produced.

The changes ignored the warning of the conservative MP whom many thought would be Attorney-General – Peter Foss – that 'It is certainly clear that retrospective legislation is open to abuse . . .'¹

The *Acts Amendment (Ministry of Justice) Bill* 1993 also contains a clause legalising retrospectively actions by the already established Ministry of Justice: the significance of such retrospective legislation has not appeared to trouble the person responsible – the highest law officer in the State – the Attorney General. There has also been no public evidence that she has intervened regarding the reprehensible retrospective disentanglement of injured workers.

That the Coalition would take Western Australian politics to the right was never really in question. But in this era of consensus politics its *modus operandi* – failing to consult or to canvass opinions of interest groups – raises ghosts of the 1970s.

The new Attorney-General, Cheryl Edwardes, is politically aligned with Premier Court's views. She became No. 1 law officer after 10 years of Labor governments, with Attorney-General Joe Berinson. Edwardes is tough, active and a prolific media performer. Her political agenda may, however, conflict with her role of Attorney-General which one of her predecessors described as 'the ethical conscience of Cabinet.'²

While in Opposition, the Coalition capitalised on vigorous community criticisms and media campaigns about juvenile justice against Labor Governments and the courts. Ironically, then, the Coalition's 'Law and Order: Justice for All' election policy was less extreme than Labor's and its promises were mainly a continuation of Labor's programs. Of the 95 law and order promises, Berinson identified 81 that had already been implemented, were almost identical to existing programs or had been committed to by the Government (Media Statement, 24.1.93). Edwardes' agenda for law reform was not as substantial as it first appeared.

Nuala Keating is a Perth lawyer and policy officer.

After the 6 February State election, she also outlined a 'vision for law and justice' to improve access to justice, reduce legal costs, promote a better understanding of law and improve the 'service delivery' of justice.³

So what has been achieved?

Ministry of Justice

A Ministry of Justice has been established by media announcement, and combines Crown Law, Corrective Services and the Youth Justice Bureau.

Though such a format is common in Europe, it was rejected by the *Report of the Official Visit to Europe to Examine Criminal Justice Policies*, the result of an extensive 1991 European tour which included Berinson, the Chief Justice, Solicitor-General and Chief Stipendiary Magistrate.

Despite Edwardes' worthy rationale for the Ministry – to develop a more co-ordinated approach to criminal justice policies and services – there is potential for conflict when the body responsible for courts and judges is the same as that responsible for imprisoning people. Integration could be perceived as interfering with the independence of the courts, as could abolition of the position of Under Secretary of Law. Edwardes exacerbates this concern with comments like '... the prosecution, punishment and rehabilitation of an offender will be the responsibility of one ministry. Basically the left hand will know what the right hand is doing ...'.⁴ Also, Edwardes will establish an executive committee under her ministerial control. As there will be judicial representation on that committee, Edwardes will be able to direct them, creating a potential for ministerial interference with the judiciary.

The Ministry, which will have administrative links with the Director of Public Prosecutions, will share databases and currently there are no guidelines or legislation protecting privacy. Amalgamation may give administration of the courts a greater criminal focus to the detriment of other areas of law. There is also concern that juvenile justice policy will be unduly influenced by Corrective Services. Many top positions in the Ministry, including the chief executive officer's (Edwardes' husband is his assistant), seem to have been filled by people from the Department of Corrective Services. Prison officers will be used in juvenile detention centres, which may influence the way they are run, and more juveniles could end up in adult gaols.

Law and order: juvenile justice

Before the election the Coalition 'promised' a number of programs which already existed. For example, a Juvenile Justice Bureau, a 30-year sentence for wilful murder, conditional dismissal for juveniles, *ex gratia* criminal injuries compensation payments, diversionary schemes and early intervention for juveniles and measures to reduce the rate of imprisonment.⁵

A juvenile parole system is planned, as is automatic cancellation of bail if a juvenile commits a serious offence. This is a superficial cure, discriminates against juveniles and, being mandatory, could apply unfairly. A young offenders act will be introduced. Despite a passing reference to family group conferences it is unlikely to replicate the *Children and Young Persons and their Families Act 1989* (NZ). This legislation, along with the new Ministry of Justice, is part of Edwardes' plan to reduce juvenile crime.

The State Government Advisory Committee on Young Offenders, an effective body, has been replaced by a Juvenile Justice Advisory Council, replacing agency and judicial involvement with community involvement.

The Police Department and the Youth Justice Bureau are reviewing the *Crime (Serious and Repeat Offenders) Act 1992*,⁶ despite the numerous reviews of this draconian legislation, the nadir of Labor's justice program.

Edwardes has also publicly committed herself to reforms, many of which were commenced by the previous administration. She appears to recognise that diversion and rehabilitation are crucial. Time will tell how she will respond to any concerted public outcry for tougher sentences.

Law and order: adults

The much criticised adult parole system where a prisoner serves only a third of a sentence in gaol, with the final third cancelled if parole is successful, will not be abandoned. However 10% remissions will be abolished, as recommended by the Joint Select Committee on Parole.

Victims' rights have been highly politicised and given priority since the late 1980s. Edwardes will continue programs giving victims both greater input into the justice system and crisis support. She has promised to enshrine in legislation the existing Charter of Victims' Rights, thus recognising victims' input into sentencing and parole.

A sentencing act, providing for guidelines by the Court of Criminal Appeal for all judges and magistrates, will be introduced: Edwardes sees this as ensuring consistency and improved community confidence.⁷ However, like the *Crime (Serious and Repeat Offenders) Act*, it is another example of erosion of judicial sentencing discretion.

Edwardes espouses concerns about high Aboriginal charging and imprisonment rates, and supports Labor's programs to hold Aboriginal offenders in their communities rather than traditional gaols. Surprisingly, she has signalled a major sentencing change which would impact on high Aboriginal imprisonment rates: 'I would like to perhaps abolish sentences of six months or less except in exceptional circumstances'.⁸ She ought also consider the sentencing powers of JPs (she has told at least one group she wants to abolish these) and abolition of the meals allowance (often paid to police officers' spouses for providing meals to lockup prisoners), long recognised as a major cause of the high incarceration and charging rates of Aborigines in northern Western Australia. However, the Coalition left open the possibility of future abuses by promising to 'formally recognise the role of police spouses who currently act as unpaid assistants at country stations and examine the means of providing compensation'.⁹

The Coalition's election policy promised to consider giving an accused the right to elect trial by judge alone. This could lead to an erosion of a person's right to trial by jury. For example, after several years of piloting the idea, a government looking for savings might abolish the right to trial by jury altogether.

Election promises do not come without their cynical moments: the Coalition, which vehemently opposed lowering the blood alcohol limit for drivers to 0.05, promised to substantially increase penalties for drink drivers causing death or serious injuries.

Edwardes' rhetoric suggests that she sees her major tasks as reducing juvenile crime and high rates of imprisonment. Latest research from the Crime Research Centre shows crime rates are falling anyway: juvenile arrests, court appearances and convictions have dropped. This suggests previous administrations' rehabilitation and diversion programs are working.¹⁰ Ironically, given the Coalition's law and order mentality in opposition, Edwardes has embraced these directions.

Police powers

The Coalition promised an independent police complaints tribunal. But, instead, it will establish an independent police complaints review panel (with the same composition of Ombudsman, community representative and retired judge) as a final 'house of review'. Its 'independence' involves the Ombudsman reviewing his own actions. Also, the Government has rejected the Royal Commission into Western Australian Government Business Dealing's recommendation for an ICAC-type body, which could have dealt with the more serious complaints about police.

Labor's interim police board will be made permanent, and a *Police Force Administration Bill* will also streamline and separate administrative functions from summary offences in the *Police Act*. Edwardes has committed to '... substantial amendments being made'.¹¹ to this Act, following the *Law Reform Commission Report on Police Act Offences*, which recommended abolition of numerous obsolete offences and clarification and extension of people's rights.

Legal Aid Commission vs community justice/law centres

The Coalition is committed to more community justice/law centres. This commitment is aimed at that middle group of people who miss out on legal services due to expense or ineligibility for legal aid.

Funding of such centres is to be increased rather than legal aid. However, this will not satisfy the real need for the traditional services of a lawyer and the High Court's pronouncements in *Dietrich v The Queen* (1993) 67 ALJR 1 have compelled the Attorney to develop a policy to help those charged who cannot afford defence lawyers.¹² A public defender is a possibility.

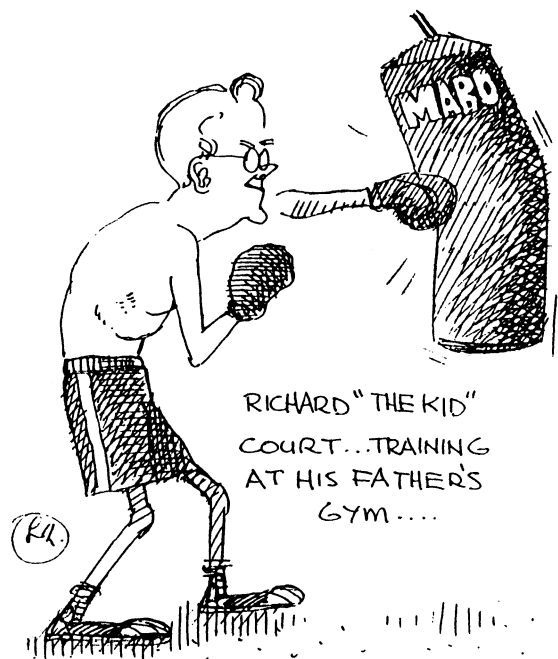
Edwardes also plans to encourage price competition within and price advertising by the legal profession.

Queen's Counsel

The Attorney-General's commitment to affordability of justice is inconsistent with the decision to appoint more QCs. Also as New South Wales and the Northern Territory have abolished the practice, this is against the trend towards national unification of the practice of law by breaking down entry barriers and mutual recognition legislation.

Aborigines

The Coalition's election policy, curiously titled *Lifestyle*, lumped together the disabled, youth, women, seniors and Aborigines. It failed to mention the Royal Commission into Aboriginal Deaths in Custody. However, the Aboriginal Legal Service, questioning Labor's commitment to the Royal Commission's 339 recommendations, will be seeking clear undertakings from the Government.



Lifestyle and the Coalition's mining and heritage policies also failed to mention *Mabo*, land development, amendments proposed to the *Aboriginal Heritage Act 1972* by the Labor Government, or reconciliation.

It is history that the Burke Government failed in its bid to enact the *Aboriginal Land Bill 1984*. However, Labor achieved a marked increase in Aboriginal occupation, use and ownership of land. All the indications are that this will not continue easily under the Coalition.

Mabo has made Court a national figure. He has naively railed against the High Court's law making function, thus undermining the independence of the judiciary, and has called for a national referendum. The call for a referendum on equality of rights is dishonest: Court will not recognise what he calls 'special rights' for Aborigines, but he will protect existing titles of miners at all costs.

Court proposes legislation to go beyond Victorian Premier Kennett's Bill and not only validate all titles post-1975 but probably not compensate for extinguishment of native title. He expects the legislation to be challenged, giving him the opportunity to fight the *Mabo* ruling in the High Court, arguing that it was flawed and discriminatory.¹³

Court sees no connection between land and social justice for Aborigines, although he clearly recognises the link with farmers:

We do not want to get bogged down with *Mabo*. There are many social justice issues which need addressing and we want to concentrate our efforts on improving the position of Aboriginal people in our society.¹⁴

Relations between Aborigines and the Coalition were not enhanced by Transport Minister Eric Charlton's demands, when in Opposition, for the Aboriginal Legal Service to disclose its financial affairs in response to an Upper House motion. Charlton's rationale was that the ALS does not properly service all Aborigines. The National Party's pre-election policy was for the Legal Aid Commission to subsume the ALS. An unsuccessful Supreme Court challenge to the motion could see warrants being issued to bring members of the ALS before the House to answer contempt charges. Aboriginal Affairs Minister Minson has recently reneged on a promise not to pursue the matter.¹⁵

Royal Commission

Though the Royal Commission into Western Australian Government Business Dealings and Other Matters was instrumental in the Court Government achieving office, Court has little commitment to the recommendations of its Second Report (covering administrative, institutional, parliamentary and electoral reform). But his Government is committed to pursuing any prosecutions arising out of the First Report.

Court's reluctance to endorse the Second Report may be mainly due to the recommendation for review of the Legislative Council electoral system by a Commission on Government. This House has always had Australia's most unequal voting system and the National Party vehemently opposes equal voting values.

Recommendations in the Second Report were divided into those recommending either immediate action or reference to a Commission on Government, an Electoral and Administrative Review Commission copy. Court's *Commission on Government Bill* 1993 offends the spirit, at least, of the Report, for apart from referring for further enquiry recommendations for immediate action, it limits the enquiry to matters relevant to the prevention of corrupt, illegal or improper conduct by or involving public officials. This restriction caused Michael Barker, a counsel assisting the Royal Commission, to accuse the Government of limiting the Commission on Government's enquiry, thereby precluding consideration of electoral reform.¹⁶

Though the Royal Commission recommended legislation for administrative law reforms, the Coalition has not committed itself to them, despite constant calls for greater accountability of government. Instead, after numerous enquiries, the issue of an Administrative Appeals Tribunal has been referred to the Commission on Government, further delaying any reforms.

Court has also rejected the recommendation for an ICAC type body and opted to extend the powers of the Official Corruption Commission, basically a post box for allegations of corruption.

Privacy

The Coalition has not made any commitment to privacy. But former Liberal MLA Bill Hassell's *Data Protection Bill* 1989 was the first attempt to legislate for privacy protection in Western Australia and, as State President of the Liberal Party, he is actively involved in the Coalition Government. Also, the National Party's 1989 election policy supported extensive privacy protection across the private and public sector.

The *Freedom of Information Act* 1992, which is not yet operational allows an individual to amend their own record, but ICAC's *Report On Unauthorised Release of Government Information* indicates that greater protection of privacy is needed. The Law Reform Commission has a standing reference on privacy: currently specific issues like the *Report on Confidentiality of Medical Records* are investigated. The general reference could be revived, as could the work done on Labor's promises of privacy guidelines and legislation, both only for the public sector.

Freedom of Information

Labor's *FoI Act* is set to become operational on 1 September 1993. It is arguably the strongest in Australia and unique in

that it provides for total retrospectivity. However, its introduction has not been without controversy: the position of information commissioner was filled by a police superintendent – Bronwyn Keighley-Gerardy – after the Coalition readvertised (she failed in her first application). There is concern because, apart from the Police Department and Corrective Services being the most vociferous opponents of the legislation, it is expected that many of the most sensitive requests will concern those areas.

Workers' Compensation

Kierath's announcement to alter, dramatically and retrospectively, common law rights for work injuries, resulted in the Law Society demanding his resignation.¹⁷

Anger has centred on the retrospective disentitlement of workers to common law claims, and the likelihood that workers will be worse off. Of course, lawyers have a vested interest in the status quo and Kierath has cleverly used 'greedy, double dipping, entrepreneurial' lawyers as the scapegoat, whilst alleging that workers and employers will be better off. However, a major effect of the changes, confirmed by the timing of the announcement on 30 June, it to make the State Government Insurance Office more saleable.

Kierath says the new legislation will provide for a non-adversarial dispute resolution system for workers' compensation. Lawyers will be excluded from the system and entitlements will be determined by a panel of doctors.

Alternatives may have been a rigid scale of fees for lawyers acting in both workers compensation and common law matters, offsetting of legal fees against damages only by court order, mandatory dispute resolution, and possible cross-vesting of jurisdiction.

Though Kierath has now indicated that he will listen to lawyers, his public pronouncements demonstrate intransigence.

Industrial Relations

Kierath is also the Minister seeking to change the face of industrial relations in Western Australia. His policies and legislation are currently receiving national media attention.

Motor Vehicle Accident Claims

Damages for pain and suffering arising from motor vehicle accidents will be severely limited by a \$15,000 threshold and a \$200,000 cap on claims arising from accidents occurring from 1 July 1993. Further awards up to \$55,000 will be scaled down. Noticeably, retrospectivity has not been applied to disentitle people but it is another example of the Government having to introduce retrospectively legislation to enact changes announced by press release on 29 June 1993.

The changes sparked speculation they were aimed at making third party motor vehicle insurance more attractive thereby increasing the selling price of the State Government Insurance Office.

Equal opportunity

The Government's commitment to employment equality took a tumble when Education Minister Norman Moore queried the Equal Opportunity Commissioner's role regarding the Ministry of Education. Moore said:

I would not be happy to have the Education Ministry jumping to the tune of the Equal Opportunity Commissioner in respect of its employment practices . . . The Commissioner has a fairly privileged position. She is also part of the Tribunal – it is a funny arrangement we will be looking at in Government.¹⁸

Though Edwardes says she has no intention of abolishing the jurisdiction, she intends to review it.

Law Reform Commission

Despite the demise of the Victorian Law Reform Commission, Edwardes has publicly stated that Western Australia's Commission will get more work by reviewing and simplifying major legislation. However, six months on, the Commission is still awaiting its first brief.

Conclusion

Like any new Government – particularly one coming out of a 10-year wilderness – the Coalition began with a bag of promises. It initially embraced many of Labor's programs.

It took six months, but Coalition actions perhaps indicate future directions: diminishing the power of Western Australia's independent environmental watchdog, delaying enactment of the *FoI Act*, criticising the common law making powers of the High Court and refusing to accept the *Mabo* decision, retrospectively legislating to erode workers' rights and change future third party entitlements, overriding recommendations of the Royal Commission into Western Australia Government Business Dealings, retaining silk, and taking a crash through approach to creation of the Ministry of Justice.

Mabo clearly demonstrated the powerful influence on the Premier of the conservative old guard headed by former Minister and parliamentary leader, and now Liberal Party President, Bill Hassell.

There have been positives: moves toward improving access to justice, cutting legal costs and promoting a greater understanding of law. Edwardes has adopted, so far, the diversionary approach for juvenile offenders and programs aimed at reducing the rate of imprisonment.

But it is 1993, not 1974. Nineteen years on, everything's changed yet everything's the same in the Wildflower State. Court is on the radio, there is no consensus, no consultation and people are marching (*Mabo* march on 13 August 1993 and workers' compensation march on 19 August 1993). It looks and feels like *deja vu*. Perhaps it is.

References

1. Foss, Hon. Peter, Debate on a Motion, *Hansard*, 15.5.91, p.1872.
2. Foss, Hon. Peter, Debate on Interpretation Amendment Bill 1991, *Hansard*, p.1872.
3. Edwardes, Cheryl, 'Law Week Address', Press Club, 3 May 1993, pp.1-56.
4. Edwards, above, p.45.
5. The Government of Western Australia, *The Social Advantage: Decisions to Support Communities, Families and Children*, May 1992; *Into the 90s: A Strategy Statement on Juvenile Crime*, August 1991; *A Stake in the Future: A Youth Strategy for Western Australia*, November 1992; Berinson, Hon. J., Ministerial Statements on Reducing the Rate of Imprisonment, 28 October 1987; on Prison Reconstruction Program and Rate of Imprisonment, 29 May 1991; on Criminal Justice Systems in Europe – Study Group Visit, 3 December 1991; on Imprisonment Rate, Unacceptably High – Reduction Measures, 23 September 1992.
6. See White, R., 'Tough Laws for Hard-Core Politicians' (1992) 17(2) *Alt.L.J.*, pp.58-60.
7. Edwardes, above, p.51.
8. Interview with Cheryl Edwardes, 'Hello Cheryl, Goodbye Joe', (1993) 20 (4) *Brief May*, pp.8-11. at 10.
9. Coalition, Law and Order Policy, *Law and Order: Justice for All*, January 1993, p.1.
10. See ref. 5 above.
11. Edwardes, Press Club, above, p.41.
12. *West Australian*, 27.3.93.
13. Premier Richard Court, Media Statement, 20.7.93.
14. Premier Richard Court, Media Statement, 22.6.93.
15. *West Australian*, 12.8.93.
16. *West Australian*, 9.7.93.
17. Heath, M., 'Workers' Rights up in Smoke', (1993) 20 (7) *Brief*, pp. 6-10.
18. *West Australian*, 17.2.93.

Law students help school students

The *Schools Legal Education Group (SLEG)* was formed by law students at the University of NSW in 1979, with the primary goal of educating school students in the locality of the university about some of their basic legal rights. SLEG continues today as an important part of both the Law School and high school students' broader legal education. SLEG provides a valuable community service and increases young peoples' awareness of their rights.

The topics taught by SLEG volunteer law students are all relevant to young people who are about to leave school. The topics covered include Crime, Family Law, Credit and Debt, Employment, and Discrimination. Equally, if not more importantly, SLEG aims to inform students of agencies that can assist them should they have legal problems. Rather than lecturing to students, small group discussions are preferred. This facilitates participation and allows students the opportunity ask questions and to learn in an informal atmosphere. Students have always been receptive and enthusiastic when SLEG has visited their school and school teachers have found the classes beneficial. Additionally, SLEG participants are able to put their knowledge to good use by teaching others about the law.

The largest and most comprehensive project SLEG Coordinators have embarked on, a legal handbook, has recently been published. Jane Cook and Lester Fernandez, SLEG Co-ordinators and co-authors of *The Law and You: A Young Persons' Guide*, have been writing and producing the book for the last eight months. Jane and Lester, fourth and fifth year law students at the University of NSW, believe the handbook will be a beneficial reference for Sydney school students when confronted with a legal problem. The book is in a 'user friendly' format and encompasses the broad areas of law most likely to benefit high school leavers. The chapters cover access to the legal system, crime, and family and children's rights, consumer law, debt, jobs and training, and discrimination. While the handbook is by no means a definitive statement of legal principles or legal rights, the emphasis is on agencies and contact points available to assist students if they encounter legal problems. The handbook also includes a glossary and resources list, where books are listed which may be useful for a more detailed coverage of certain areas of law.

The handbook has been produced with assistance from the Dean of the Faculty of Law, Professor Michael Chesterman, who made funds available for the project. The project has been supported by school teachers, academics in the Law Faculty and community legal centre solicitors.

We are confident that this project will be beneficial to a wide range of individuals and groups. The Schools Legal Education Group will be happy to speak to anyone interested in our activities and the book. We are contactable through the Law Faculty at the University of NSW, PO Box 1, Kensington, NSW, 2033.