her life she lost. She sought financial compensation from the very beginning in an endeavour to regain some of this loss. Third, there is no anti-discrimination legislation in Tasmania: it is the only jurisdiction left in Australia without such laws. The *Sex Discrimination Act* 1984 (Cth) has no application to employees of local government.

In retrospect, making a civil claim had a number of advantages. First, Ms Barker was in control of the conduct of the litigation from the very beginning, deciding who her witnesses would be and what tactics she would adopt in the course of the trial. Second, had she chosen a criminal trial it is unlikely she would have achieved the same result. The majority verdict on the rape (in a civil jury of seven) on the civil standard of the balance of probabilities was unlikely to have translated to a majority verdict of proof beyond reasonable doubt in the criminal court.

The decision has not only condemned the behaviour of these men and vindicated Ms Barker, it will surely act as a catalyst to prevent sexual harassment occurring in the workplace. Insurance companies are likely to compel their clients to stamp out harassment on economic grounds as it is potentially very costly. In this case the Council's insurance company, C.E. Heath (who indemnified Barratt and Gentile for damages and costs) will be paying most of Ms Barker's damages ($105,000), her legal costs (approximately $200,000), the legal costs of Barratt and Gentile (approximately $100,000) and the costs of the Council's solicitors (approximately $150,000). Similarly, men in Tasmania will be on notice that they are accountable for their behaviour, and that their misdeeds can be very costly to them.

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## COURTS

# Judicial 'habits' and other curious tales

## SIMON RICE takes a tongue-in-cheek look at the judiciary.

The perennial and almost populist pursuit of 'access to justice' has concentrated, understandably, on process, structures and costs. All manner of barriers are in the way of ready access to the just resolution of disputes, the just allocation of resources, and the just balancing of power and interests in society. The recent move to introduce some form of training or continuing education of judges should be seen as part of the whole push towards 'access to justice'.

While the issue of the education of judges has arisen principally from the manner in which judges have handled sexual assault matters, questions about the role of judges as interpreters of the law, and therefore as deliverers of justice, are implicit in the proposals for training. No number of structural or procedural reforms will assist a party who, given ready access to the courts, is confronted by a judge whose very perception of the judicial role is itself a barrier to a just resolution of a dispute.

Understanding what 'the law' is, is a challenge for everyone, including lawyers. Judges, according to their office rather than to innate ability, are charged with being the arbiters, for disputing parties, of what the law is. I do not address the extent to which a basic tenet of the democratic process – that judges do not make law, they merely apply it – is a fiction. My curious tale is about the very function judges do indubitably have: to interpret the law.

Justice Meagher of the NSW Court of Appeal recently found himself in agreement with the President of the Court, Justice Kirby. That itself could be a curious tale. In any event, the case of *Monier Ltd v Szabo* (1992) 28 NSWLR 53 involved the interpretation of a section of the *Workers Compensation Act* (NSW), and it was on this interpretation that Justice Meagher agreed with Justice Kirby. He went on, however, to give his view on how ambiguities in an Act might best be, or not be, clarified. He referred to reliance on second reading speeches as a means of resolving legislative ambiguities, and said: 'The habit should cease'. Although he considered it 'needless to say', he nevertheless said that such material does 'not in any way resolve the ambiguity in the Act'.

That may have been so, in that case, but in calling the practice 'a habit' that must cease, His Honour was clearly speaking beyond that case. In fact, he referred to the practice as one that vexes him, and to which he wants to 'draw the profession's attention'.

Justice Meagher would not, of course, be ignorant of the *Interpretation Act* 1987 (NSW). Section 34 of that Act provides that if any material, including a second reading speech, is capable of assisting in interpreting the meaning of an ambiguous provision, consideration may be given to it. In the light of this, Justice Meagher could not really be attacking the 'counsel [who] flood the courts with various Second Reading Speeches'; they are, after all, only offering the court what the *Interpretation Act* invites them to. His Honour must be sending a message, as judges do, to the legislature, saying: 'The licence you give to counsel to perpetuate the habit should cease'.

The 'habit' has been otherwise unremarkable for some time, and the *Interpretation Act* was relied on in this way most recently by the High Court in *Saraswati v R* (5 June 1991) and by Justice Meagher's fellow (I *can* say brother) judges in the Court of Appeal in *Promenade Investment Pty Ltd v NSW* (18 February 1992).

Perhaps what Justice Meagher meant to highlight is not the right of a party to rely on the material (to flood the courts), but the discretion he as a judge has to disregard it – the wording of the Act is that 'consideration *may* be given', and 'if the material is capable of assisting'. That is a decision, and perhaps an appellable one, for a judge; parties ought not be criticised for relying on rights the legislature gives them, let alone for trying to ensure that judges apply the law as the legislature intended it.

The respect due to judges ought not derive from any perceived (or self-perceived) distinction between the role of judges and the legal process. Judges, though independent, are a part of the process of justice – neither at the beginning nor the end of it, nor somehow separate from it in some sort of custodial or consultative fashion.

Respect is due to judges as it is due to all professionals for the responsible and responsive manner in which they discharge their duties and perform their role within a larger system. Judges, as much as a host of other features of the legal system, sit between the community and justice; judges as much of the rest of the legal system must respond to change.

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