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EDITORIAL

It is with some sadness that I will be stepping down as editor of the *Nottingham Law Journal* after the publication of this issue, having been a member of the Editorial Board for a decade (for three years as General Editor and for seven years as Book Review Editor before that). Jane Jarman, the Assistant Editor will also be stepping down from her role and I should especially like to thank her for her immense contribution to the production of the *Journal* over the last few years. I should also like to thank the editorial team, especially Carole Vaughan, Kay Wheat and Andrea Nicholson, as well as all those stalwart colleagues who have contributed to the *Journal* during my editorship.

These are "tough times" for everyone. It is clear that universities are no exception. At the time of writing these words the *Browne Review of Higher Education Funding* has just been published, and the results of the Coalition Government's *Comprehensive Spending Review* have been announced. By the time these words are read there will doubtless be writing on many walls. The *Nottingham Law Journal* has already felt the pinch of financial belt tightening. To cite but one example, the pure, physical distribution of the *Journal* has become a challenge of Everest like proportions, resulting in long delays (as recipients can testify: my sincere apologies!). Indeed, as a result of such factors, it is likely that the *Journal* will be published in a single issue per year from now on, rather than, as has hitherto been the case, in two issues.

Academic research is central to the very essence of what it is to be a university. Indeed, for a university *to be* a university its academic staff, those teaching its students (or a goodly proportion of them at least), need to drink from, and contribute to, the source waters of their subject, and not (to press an already straining metaphor) merely turn on the tap many miles downstream. The *Nottingham Law Journal* has played a role in this process: a stall, albeit a modest one, in the "free market of ideas". Colleagues, former colleagues, and academics from institutions worldwide, as well as students and practitioners, have contributed to its pages. It has provided a forum for neophyte researchers to try their hand and for more experienced scholars to disseminate their work. It is to be hoped that this noble tradition will be able to continue for many years to come, and I am sure that my successor will perform their duties with aplomb.

TOM LEWIS

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ARTICLES

THE PRISONS AND PROBATION OMBUDSMAN: A REVIEW

*MARY SENEVIRATNE**

In 1994, a scheme was established to investigate complaints from prisoners in England and Wales. Known then as the Prisons Ombudsman, the need for such an office had been expressed in the 1980s,[1] but it was Lord Justice Woolf's[2] report into prison disturbances in 1990 that was pivotal in the creation of the scheme.[3] The remit was extended in 2001 to complaints from those supervised by the probation service, when the office was renamed the Prisons and Probation Ombudsman (PPO). In 2006 there was a further extension, to include complaints from those in immigration removal centres. A new function was added to the office in 2004; the investigation of deaths in prisons and immigration removal centres, and of residents in probation accommodation. The PPO has also conducted ad hoc inquiries into various incidents in prisons and immigration removal centres.[4] The office was established as a non-statutory scheme, but there have been commitments to place the office on a statutory footing,[5] and two attempts to do so.

The purpose of this article is to review the work and role of the Prisons and Probation Ombudsman in England and Wales, drawing on publicly available information supplemented by empirical research.[6] The review draws on criteria established by the British and Irish Ombudsman Association (BIOA), an organisation set up in 1993, on a self-regulatory basis, following concern that the title ''ombudsman'' was being used inappropriately. The core role of an ombudsman, according to BIOA criteria, is to ''investigate and resolve, determine or make recommendations with regard to complaints''. Within this core role, ombudsman schemes must conform to four key

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[1] See, for example, P Birkinshaw, ''The closed society: complaints mechanisms and disciplinary proceedings in prisons'' (1981) 32(2) NILQ 117; P Birkinshaw, ''Legal order and prison administration'' (1983) 34(4) NILQ 268; G Douglas, ''Dealing with prisoners' grievances'' (1984) 24 BJC 150; J E Hall Williams, ''The need for a prisons ombudsman'' (1984) 31 CLR 87; P Birkinshaw, ''An ombudsman for prisoners'' in M Maguire, J Vagg and R Morgan (eds), *Accountability in Prison: opening up a closed world* (London: Tavistock, 1985); Justice, *Justice in Prison* (1983); G Wener, *A Legitimate Grievance? A Report on the Role of the Ombudsman in the Prison System* (London: Prison Reform Trust, 1983).

[2] H Woolf and S Tumin, *Prison Disturbances April 1990*, Report Cm 1456 (1991).

[3] See R Henham, ''Some Alternative Strategies for Improving the Effectiveness of the English Prisons Ombudsman Scheme'' (2000) 39(3) *Howard Journal* 290, at 290.

[4] See, Prisons and Probation Ombudsman *Annual Report 2003–2004*, at 39, 35.

[5] Prisons and Probation Ombudsman *Business Plan 2008–09*, at 6.

[6] The empirical research was conducted by the author over a six-month period from November 2008. It comprised interviews with the Prisons and Probation Ombudsman, the Prisoner Ombudsman for Northern Ireland (previous and present), the Scottish Prisons Complaints Commissioner, the Parliamentary and Health Service Ombudsman, the Northern Ireland Ombudsman, the Scottish Public Services Ombudsman, Her Majesty's Inspector of Prisons (previous and present), the Prison Reform Trust, and three civil servants, two from the Ministry of Justice and one from the Cabinet Office. The author would like to record her thanks to those who agreed to be interviewed, for their frankness and co-operation.

criteria: independence from those over whom there is the power of investigation; effectiveness; fairness and public accountability.[7] Within BIOA, the status of "voting member" is only accorded to schemes which meet the criteria, and the PPO only enjoys "associate" rather than "voting" membership.[8] There have been previous reviews of the office,[9] but the most recent of these was over seven years ago. The office has evolved over the years, and there have been major changes to its role, functions and practices. The article also explores the reasons for, and consequences of, the recent failure to put the office on a statutory footing.

THE ESTABLISHMENT OF THE OFFICE

The arguments for the establishment of the office have been well documented.[10] Briefly, they reflected concerns about the inadequacy of the existing mechanisms for prisoners' grievances: the Prison Inspectorate, which had been established in 1982 following the May Report,[11] did not investigate individual complaints; the courts were not deemed to be suitable; and there was no independent element in the prison complaints process. The Strangeways prison riots in 1990 brought these concerns into sharp focus, and the subsequent inquiry identified the lack of independent redress for grievances as one of the causes of the disturbances.[12] The report of the inquiry recommended an independent element in the prisons complaints system, with provision in the grievance and disciplinary procedures for final access to an independent, legally qualified complaints adjudicator. The adjudicator's remit was to be two-fold: to make recommendations, advise and conciliate at the final stages of the grievance procedure; and to be the final tribunal of appeal in disciplinary proceedings.[13]

The Government accepted the need for change,[14] and in January 1993, the Home Office announced its intention to create an independent person to consider grievances from prisoners who had failed to obtain satisfaction from the internal prison complaints system. This person was to be called the Prisons Ombudsman. The first office holder, Sir Peter Woodhead, was appointed in May 1994, and began to receive complaints in October 1994. He retired in October 1999, and was replaced by Stephen Shaw, who was formerly the Director of the Prison Reform Trust, and was the post-holder at the time of this research.[15] When the office was established in 1994, it had a staff of 13, a budget of less than £700,000, and completed 363 investigations in its first year of operation.[16] It now has over 100 staff, a budget of £5.6 million, and completed 1,515 complaint investigations and 181 investigations into fatal incidents in 2008–09.[17]

The office of the PPO was not created by statute; its origins can be found in an announcement by the Home Secretary in January 1993, and its status and terms of

[7] See BIOA website: www.bioa.org.uk.

[8] See M Seneviratne, "The Prisons Ombudsman" (2001) 23(1) JSWFL93.

[9] See P Morris and R Henham, "The Prisons Ombudsman: A Critical Review" (1998) 4(3) EPL 345; R Henham, n 3 above; M Seneviratne, n 8 above; M Seneviratne, *Ombudsmen: Public Services and Administrative Justice* (London: Butterworths, 2002).

[10] See, for example, G Wener, n 1 above; M Ryan and T Ward, "A Prison Ombudsman of Sorts: The Long Road to Reform" in N Hawk (ed), *The Ombudsman – Twenty Five Years On* (London: Cavendish, 1993).

[11] *Committee of Inquiry into the United Kingdom Prison Services,* Report Cmnd 7673 (1979).

[12] H Woolf and S Tumin, n 2 above, para 1.143.

[13] *Ibid*, paras 1.167, 1.209, 14.249.

[14] *Custody, Care and Justice: The Way Ahead for the Prison Service in England and Wales* Cm 1647 (1991).

[15] It was announced in March 2010 that Stephen Shaw would be standing down from the post at the end of April 2010.

[16] Prisons and Probation Ombudsman *Business Plan 2008–09*, 6.

[17] Prisons and Probation Ombudsman *Annual Report 2008–2009*, 49, 51.

reference were set out in prison service documents.[18] New terms of reference were agreed in 1997, and updated in June 2009 mainly to consolidate the changes since the office was established.[19] Responsibility for the PPO has now been transferred from the Home Office to the Ministry of Justice.

ROLE AND REMIT

The PPO's office has two separate functions: complaints handling and the investigation of deaths in custody. The PPO has also conducted ad hoc inquiries, at the request of the Secretary of State.[20]

COMPLAINTS HANDLING

The original role of the PPO was complaints handling, and this is traditional ombudsman territory. The remit here is to investigate complaints from prisoners, those supervised by the probation service, and those in immigration removal centres, who remain dissatisfied by their respective internal complaints systems.[21] The office thus sits at the apex of the internal grievance systems of prisons, probation and, for immigration detainees, the UK Border agency. The issues that can be investigated include decisions and actions relating to the management, supervision, care, and treatment of prisoners, offenders and detainees, by staff of the relevant service, those acting as agents or contractors of the relevant service, and members of Independent Monitoring Boards in prisons and immigration removal centres.[22] The remit extends to contracted-out prisons and contracted-out services. The PPO can consider the merits of decisions, as well as procedural issues.[23] This is a much wider remit than that envisaged by the Woolf Report, which considered that the complaints adjudicator would have a more supervisory role, primarily involving scrutinising the decision making process.[24]

The remit is subject to some exceptions.[25] The PPO cannot investigate ministerial policy decisions or the merits of ministerial decisions. Complaints about conviction, sentence, and immigration status are outside the remit, as are complaints about cases that are currently the subject of civil litigation or criminal proceedings. The decisions and recommendations of the judiciary, the police, the Crown Prosecution Service, and the Parole Board and its Secretariat cannot be investigated. Complaints concerning the clinical judgement of medical professionals are also outside remit. Healthcare services in prisons and detention centres are contracted by the National Health Service, and these complaints are the responsibility of Primary Care Trusts, with the possibility of referral to the Health Service Ombudsman.

The PPO's complaint handling function conforms to the ''core role'' of an ombudsman, identified by the BIOA criteria; that of investigating, resolving and determining complaints. However, it only relates to half of the PPO's remit, the other half being devoted to investigating fatal incidents.

[18] These are: Proposal for Ministerial Consideration, December 1992; Note of Arrangements for the establishment of the post, April 1994.

[19] See Prisons and Probation Ombudsman *Annual Report 2008–2009*, 6, 58. These new terms of reference are available on the website (www.ppo.gov.uk).

[20] Prisons and Probation Ombudsman *Annual Report 2003–2004* 39, 35).

[21] Prisons and Probation Ombudsman Terms of Reference, para 10.

[22] *Ibid*, para 12.

[23] *Ibid*, para 13.

[24] H Woolf and S Tumin, n 2 above, para 14.361.

[25] See, Prisons and Probation Ombudsman Terms of Reference, para 14.

Fatal incidents

The other role of the PPO is fatal incidents investigations, where the remit is to investigate the circumstances of the deaths of prisoners (including those in young offender institutions and secure training centres), residents in probation approved premises, and those in immigration removal centres. It also includes deaths in court premises where the deceased has been sentenced to custody or remanded in custody. The jurisdiction includes those temporarily absent from the institution, for example, at court, in hospital or under escort. Normally the remit does not apply to those permanently released from custody, although there is discretion to investigate deaths after release, where there may be issues which relate to the care provided while in custody.[26] Fatal incident investigations are not triggered by complaints; the PPO becomes involved when notified of a death by the relevant authority.[27]

The purpose of these investigations is to establish the circumstances surrounding the death, provide explanations for bereaved relatives, and to try to prevent future deaths, by examining whether appropriate changes in operational methods, policy, practice or management arrangements could be made. An important function is to assist the Coroner's inquest fulfil the investigative obligation arising under Article 2 (''the right to life'') of the European Convention on Human Rights. The PPO decides on the extent of the investigation, taking into account the circumstances of the death.

The PPO can also examine the relevant health issues and assess clinical care, in conjunction with the NHS.[28] Where there is a criminal investigation into a death, the PPO can defer the fatal incidents investigation while this is concluded. If the PPO's investigation reveals evidence that a crime may have been committed, the police are informed.[29] The PPO will also inform the relevant authority if it appears that there should be a disciplinary investigation. The relevant authorities will also be informed if immediate action is needed at any time during the PPO's investigation.[30]

The fatal incidents remit is not triggered by a complaint, but a death. When the office was originally established, the PPO was unable to investigate these matters, as complaints could not be accepted from third parties. Its inclusion in the remit occurred after the PPO had conducted two investigations into fatal incidents in 2003 at the request of the Secretary of State. Subsequently, it was announced that from 1 April 2004, the PPO would be able to investigate all deaths of prisoners, residents of probations hostels, and immigration detainees.[31]

The fatal incidents remit now accounts for around half of the resources and work of the office, with around half of the investigators dealing with fatal incidents,[32] working as ''two operational teams''.[33] The two functions (complaints and fatal incidents) of the office appear to be parallel services, although under the PPO's overall control, with a collective senior management team, serviced by common central services, and with learning and staff moving between the two functions.

There is no doubt that the fatal incidents remit is very important and necessary work. Over the last five years, there have been almost 1,000 investigations, with 831

[26] *Ibid*, para 29.

[27] *Ibid*, para 30.

[28] *Ibid*, para 31.

[29] *Ibid*, para 34.

[30] *Ibid*, para 35.

[31] Prisons and Probation Ombudsman *Annual Report 2003–2004*, at 24.

[32] Prisons and Probation Ombudsman *Business Plan 2008–09*, at 6. Out of a total of 102 staff, 46 are involved in complaints investigations, and 45 in fatal incidents investigations. The remaining 11 are the PPO, secretary and corporate services (Prisons and Probation Ombudsman *Corporate and business plan 2009–2012*, at 18.

[33] Prisons and Probation Ombudsman *Corporate and business plan 2009–2012*, at 18.

draft reports issued, 762 final reports published, and over 5,000 recommendations made.[34] Before this function was given to the PPO, investigations were conducted by the Prison Service, by operational staff alongside their other duties. Such investigations did not provide sufficient independence to conform to Article 2 requirements. The work is, in the words of the PPO, ''a significant development in public policy'', which could ''enhance confidence in the process on the part of bereaved relatives and the public at large''.[35] The investigations have provided necessary information for bereaved families, and important information about systems defects and individual mistakes. This information may help to prevent future deaths, particularly where they are self-inflicted.[36] The majority of deaths in custody are due to natural causes, most of which are unavoidable.[37] In some of these cases, the PPO investigations have highlighted the questionable use of restraints and surveillance, and resulted in recommendations for prisons to review their bedwatch and escort instructions. This will hopefully ensure that prisoners die with dignity, and with appropriate medical care.

Assessment

Evaluation of the remit of the PPO is complicated by the fact that the office has two distinct roles. Each must be evaluated in turn, and then some assessment made about whether they make up a coherent whole.

In relation to the complaint handling function, there can be little doubt that it is essential to have an external complaints handling mechanism for those in custody, to sit at the apex of the internal grievance system. This was the original remit of the PPO, established in response to the Woolf report. This part of the PPO's work is clear and focussed. It forms a necessary complement to the work of the Prisons Inspectorate, which inspects prisons as a whole, but which cannot investigate individual cases. The logic of the extension of the remit to probationers was raised by an interviewee, on the basis that these complainants are not in custody, and thus not subject to prison discipline. They are however within the ''offender management'' system, and there is one National Offender Management Service that encompasses both prisons and probation. The equivalent offices in Northern Ireland and Scotland do not have the probation service within their respective remits.[38] Again, those in immigration removal centres are not in custody or subject to a prison disciplinary regime. They do however need an independent and effective means to resolve their complaints, given that they, like prisoners, are deprived of their freedom.

The fatal incidents remit is not typical of the work performed by other ombudsmen in the UK. Given that it comprises half of the work of the office, there is the question of whether the ''core role'' of the PPO is any longer the investigation and resolution of complaints. There is no doubt that this function is carried out competently, humanely and with sensitivity by the PPO, and that important lessons have been learned, and hopefully future deaths prevented by these investigations. However, some interviewees thought the PPO should not be investigating these deaths, that it was not really an ombudsman remit, or that it was at least an ''ambivalent role''. There was

[34] Prisons and Probation Ombudsman *Annual Report 2008–2009,* at 10.

[35] Prisons and Probation Ombudsman *Annual Report 2003–2004*, at 23, 25.

[36] Prisons and Probation Ombudsman *Annual Report 2008–2009*, at 7, 51.

[37] Prisons and Probation Ombudsman *Annual Report 2008–2009*, at 13.

[38] In May 2009, the Prisoner Ombudsman for Northern Ireland (PONI) and the Probation Board in Northern Ireland agreed a protocol for a pilot to enable the PONI to handle, for a 12-month period, complaints from prisoners in relation to probation service in prisons. Under the protocol, the PONI has authority to investigate eligible complaints by prisoners and former prisoners about issues that are the responsibility of the Probation Board. The protocol applies to the operation of probation services within the prison context. It does not apply to probation services in the community.

even a suggestion that it may be more appropriate for the Prisons Inspectorate to have this role, but this would be problematic, as the Inspectorate does not investigate individual cases, and there is a distinction between the process of inspection and that of investigation. The Inspectorate's role is to examine suicide and self-harm statistics in prisons, and assess whether there are gaps and deficiencies in suicide prevention work. The PPO's remit complements this, with the Inspectorate looking at systems, and the PPO looking at an individual death. The PPO and the Inspectorate do share information as appropriate, and prison inspections are helped by the fact that the PPO does investigate individual deaths. There are complicated relationships between the roles of the PPO, the police, the healthcare authorities and coroners in relation to fatal incidents, and the PPO has memoranda of understanding and detailed guidance in order to clarify these.

The PPO has also conducted ad hoc inquiries, at the request of the Secretary of State, one such inquiry being a review into the way some of the provisions of a recent Act of Parliament were introduced and their impact on prisoners.[39] Some interviewees felt that these inquiries did not sit well with an ombudsman function, given that the person making the request was responsible for the service being investigated. Moreover, it is not clear how the remit in relation to ad hoc inquiries fits with the role of the Prisons Inspectorate, as HM Inspector of Prisons can also conduct such inquiries.

EFFECTIVENESS

Ombudsmen need to be effective. Effectiveness is a function of a number of factors, including the resources available, the ease in which the process can be accessed, and the adequacy of the remedies afforded.

The PPO's workload

Any assessment of the effectiveness of the PPO should be seen within the context of the remit and workload of the office. Complaints from prisoners form the bulk of the PPO's complaints work. In 2008–2009, there were 4,288 complaints, 89 per cent from prisoners, 9 per cent from probationers, and 2 per cent from immigration detainees.[40] Most complaints from prisoners relate to general prison conditions and property issues. These are areas which have a big impact on the quality of life of individual prisoners, and it is not surprising that they are the categories most likely to generate complaints. Some complaints relate to decisions to transfer prisoners against their wishes, which the Woolf report noted was ''one of the most resented actions that the Prison Service can take'', particularly where there is no satisfactory explanation, and where the new prison is further from home.[41]

More recently, there has been a rise in the number of complaints about delays and omissions in delivering sentence plans, and about the content of reports. This is a result of the increase in the numbers of prisoners serving longer sentences, and indeterminate sentences.[42] The Parole Board decides about release dates, relying on assessments of risk and information about a prisoner's achievements. The timeliness and accuracy of

[39] Prisons and Probation Ombudsman *Annual Report 2007–2008,* at 7.

[40] Prison and Probation Ombudsman *Annual Report 2008–09*, at 49.

[41] H Woolf and S Tumin, n 2 above, para 9.34.

[42] In the year ending August 2008 there was an 18 per cent increase from the previous year in the numbers serving indeterminate sentences (H M Chief Inspector of Prisons *Annual Report 2007–08,* HC118 (London; Stationery Office), at 57).

assessment reports are essential if prisoners are to demonstrate the necessary progress in their behaviour and commitment to addressing their offending, both of which are necessary to achieving early release on licence.[43] Delays in providing the board with information, and lack of opportunity to demonstrate progress, can therefore have serious consequences for prisoners. The PPO cannot examine the Parole Board's decisions about release and recall, but can look at administrative delays that may have occurred in submitting information required for assessment to the Board.

There are also a significant number of complaints about discipline and sanctions. Prisoners are subject to prison rules, and adjudications are held where these are breached. Serious allegations are heard by district judges, and the PPO plays no role in this process. For most adjudications, prisoners can complain to the PPO in relation to the findings of guilt (which have to be proved beyond reasonable doubt), and the penalty imposed. In 2008–09, the PPO received just over 200 complaints about adjudications. This is a small number, bearing in mind that there are over 100,000 adjudications every year. In fact the numbers of prisoners appealing to the PPO from adjudications has decreased, as a result of the new system for dealing with serious cases,[44] and the fact that governors can no longer impose a punishment of added days to the sentence.[45]

As indicated above, half the workload of the office is the investigation of fatal incidents. In 2008–09, there was an 11 per cent reduction in these investigations, and the PPO investigated 181 deaths. Of these 181 cases, 65 were self-inflicted deaths, and 107 were deaths by natural causes.[46]

Access to the PPO

Complainants cannot access the PPO until they have exhausted the appropriate internal grievance systems operated by the Prison Service, Probation Service or UK Border Agency. Access to the PPO can be a problem for some prisoners, who find it difficult to negotiate the internal system.[47] There is also a lack of knowledge about the process of complaining. A survey in 2006–07[48] found that only 37 per cent of prisoners in local prisons knew how to apply to the PPO, a figure that increased to 54 per cent in training prisons and 49 per cent in open prisons. This lack of knowledge was even more telling for young prisoners, where only 27 per cent knew how to access the PPO. Many prisoners also have reading and writing difficulties, which has implications for accessibility,[49] although the PPO does not require complaints to be put in writing.

Access and awareness are issues for all ombudsmen, and the PPO is well aware of these problems, and is endeavouring to improve accessibility particularly from underrepresented groups.[50] A report, commissioned by the PPO in order to address these issues, confirmed that many prisoners do not know of the existence of the PPO, and found the complexity of the process and time taken for complaints to be dealt with difficult to understand.[51] The PPO is determined to improve awareness among staff and

[43] Prisons and Probation Ombudsman *Annual Report 2008–2009*, at 26, 36.

[44] Prison and Probation Ombudsman *Annual Report 2008–2009*, at 31, 49.

[45] Prison and Probation Ombudsman *Annual Report 2003–2004,* at 18.

[46] Prison and Probation Ombudsman *Annual Report 2008–2009*, at 7, 51. The other nine were caused by homicides/attacks, illicit drugs overdose, accident, or unclassified.

[47] J Talbot, *Prisoners' Voices: experiences of the criminal justice system by prisoners with learning disabilities and difficulties* (London: Prison Reform Trust, 2008), at 3, 46–47.

[48] H M Inspectorate of Prisons *Annual Report 2006–07: Survey Summaries,* at 6, 12, 18, 24, 31, 37, 47, 53, 59, 65, 71, 77, 88.

[49] J Talbot, n 47 above, at 3.

[50] Prisons and Probation Ombudsman *Corporate and business plan 2009–2012*, at 10.

[51] J Warrior, *Consultant report on PPO publicity materials* (London: PPO, 2008), at 1.

prisoners. Presentations about the office are given to groups of prisoners, and the PPO contributes to training courses for prison staff. Another way of raising awareness is by means of the quarterly newsletter, *On the Case*, which publicises some of the PPO's case findings. The PPO has also issued DVDs, explaining the work of the office, and how to make complaints. One source of publicity, the PPO's website, is of limited direct use to complainants, as there is no internet access in prisons or probation hostels.[52] At present, the largest group of complainants is long term prisoners, and the PPO would like the office to be relevant to all prisoners, including young offenders,[53] remand prisoners, and women.[54]

There are no issues in relation to accessibility and awareness for fatal incidents investigations, as the PPO is always notified by the relevant authority when a death occurs.

Fairness and process

The majority of complaints received by the PPO are not eligible for investigation. This has been the experience since the inception of the office, although the proportion of ineligible complaints has reduced (58 per cent in 2008–2009),[55] and the indications are that in 2009–2010 the majority of complaints will be eligible for investigation. Complaints are ineligible mainly because the correct procedures have not been followed, usually because the internal complaints system has not been completed. Complaints are accepted if the complainant is dissatisfied with the response of the internal procedure, or if there is no final response within six weeks.[56] Complainants then have three months in which to submit their complaints. The PPO has discretion whether or not to accept complaints, and the manner of resolving them, which could be by investigation or by mediation.[57] In 2008–09, around one-third of cases were decided in favour of the complainant, many involving mediated settlements.[58] The desirability of pursuing ''more of a conciliation-oriented policy geared towards the prompt local settlements of complaints'' has been noted.[59] However, it is sometimes important for prisoners to have their complaint investigated, with the rights and wrongs on both sides established, and the balance between mediating and adjudicating complaints needs to acknowledge the vast difference in the power situation between the two parties to a mediation in the prison context.

The time taken to deal with complaints has implications for the effectiveness of the office. The PPO's target is for complaints to be completed within 12 weeks from the time it is assessed to be eligible for investigation. In fact, just over half of them are completed within this timescale, and the average time for a complaint to be completed in 2008–09 was 16 weeks.[60] Given these timescales, and given that the complaint is only eligible after it has been through the internal process, it is not difficult to understand why there are few complaints from short-term prisoners. In a recent survey of

[52] *Ibid*, at 6, 9.

[53] Under 21 year olds are 14 per cent of the prison population, but only 2 per cent complaints are from this age group (Prisons and Probation Ombudsman *Annual Report 2008–2009*, at 50).

[54] Women represent 5 per cent of the prison population, but only generate 2 per cent of the complaints (Prisons and Probation Ombudsman *Annual Report 2008–2009*, at 50).

[55] Prisons and Probation Ombudsman *Annual Report 2008–2009*, at 49.

[56] The six week timescale is for prisoners. For complaints against the probation service, the final response has to be within 45 working days.

[57] Prisons and Probation Ombudsman Terms of Reference, para 24.

[58] In 2008–09, 436 (29 per cent) complaints were found in favour of the complainant, 117 of which were mediated settlements.

[59] R Henham, n 3 above, at 293.

[60] Prisons and Probation Ombudsman *Annual Report 2008–2009*, 51.

stakeholders by the PPO,[61] 66 per cent of respondents felt that the time taken for the investigation process for complaints was reasonable. For fatal incident inquiries, less than 60 per cent thought that they were conducted in a reasonable timeframe, and 10 per cent felt that the time taken was never reasonable.

The terms of reference of the PPO provide for access to premises and documents, in order to conduct investigations, as well as provisions for interviewing employees and others.[62] Despite the lack of statutory authority for the PPO, the relevant authorities do co-operate with investigations, and there have been no recent reports of difficulties in this area. Confidential access is assured for complainants, and at the end of the investigation, complainants are advised of any recommendations made.[63] The PPO's recent survey of stakeholders found that 80 per cent of respondents felt that the PPO's investigations into complaints and fatal incidents were thorough, transparent and unbiased.[64] The vast majority of stakeholders (80 per cent) felt that the fatal incidents reports were concise, balanced, and contained the right level of detail, although some thought that they could be shorter in cases where there were natural causes of death.[65] Coroners in the survey said that they used the PPO's fatal incidents reports to identify witnesses, to establish the key issues, and to help understand the concerns of the bereaved family. Coroners considered the PPO's reports as integral to the inquest, and sometimes call the PPO investigators as witnesses to the inquests.[66]

Remedies

In order to be effective, the system must provide adequate remedies. The PPO makes wide ranging recommendations to the relevant service as a result of the investigation into complaints. Many recommendations are of relevance only to the individual complainant, including, for example, receiving compensation for lost or damaged property, or written apologies when mistakes have been made, or process delays have impacted on a prisoner's rights or well-being. Recommendations have also been made about the appropriate security categorisation of prisoners. Sometimes the recommendations are more generalised. For example, the PPO has recommended that policies be made more consistent, or that practices and procedures be changed, including reviewing staffing levels and performance. Even where a complaint is not upheld, the PPO can make a recommendation where the complaint highlights a more general problem that needs to be addressed. There are however cases where complaints are upheld, but the PPO does not feel that any practical recommendations can be made. This can arise where the complaints are about delays or lack of facilities, where the relevant service is deemed to be doing all it can to address the issue.[67]

As discussed above, the PPO acts as an appeal body for disciplinary hearings by governors. The PPO can review the record of the hearing, assess if there have been procedural flaws that could make the conviction unsafe, and if so, recommend that the findings are quashed.[68] Where the finding is that the sanction imposed is disproportionate, recommendations are made about appropriate sanctions, including the restoration of lost earnings.

[61] S Gauge *Stakeholder Feedback 2008*, at 4, 9, 10 (accessed on PPO website: www.ppp.gsi.gov.uk/download/corporate/ppp_stakeholder_feedback_2008.pdf

[62] Prisons and Probation Ombudsman Terms of Reference, para 9.

[63] *Ibid*, paras 18, 25.

[64] S Gauge, n 61 above, 4, 9.

[65] *Ibid*, at 11.

[66] *Ibid*, at 12–13.

[67] Prisons and Probation Ombudsman *Annual Report 2008–2009*, at 26–47.

[68] Prisons and Probation Ombudsman *Annual Report 2008–2009*, at 31.

The PPO has no means of enforcing the recommendations, which is normal practice for UK public sector ombudsmen. However, almost all recommendations in recent times have been accepted, and there is evidence that recommendations are taken seriously.[69] Respondents to the PPO's stakeholder survey felt that the PPO's conclusions and recommendations were reasonable and fair, although, disappointingly, only 53 per cent of governor respondents thought that the PPO's recommendations resulted in systemic changes.[70]

The PPO does not produce "remedies" in relation to fatal incidents investigations, because that is not the purpose of this remit. The purpose is to establish the facts about the death, in order to provide explanations for the bereaved family, and to prevent future deaths where possible. The outcome of the investigation is a written report, which is available for the bereaved family, the relevant authority, the Coroner and the appropriate primary care trust. The important result is information, and the lessons that can be learnt, particularly in relation to self-inflicted deaths. Where appropriate, there will be recommendations, and the relevant authority must let the PPO know how these recommendations will be implemented.[71] The reports are variable in length and detail, depending on the circumstances of the case. Individual reports are also published in an anonymised form on the PPO's website, after the inquest has taken place, with suitable safeguards for data protection and privacy and taking into account the views of the parties. The website now contains over 450 reports,[72] and this provides an important element of accountability for the prison system. Disappointingly, only 60 per cent of respondents to the PPO's stakeholder survey felt that reports on fatal incidents led to changes in practice, and 40 per cent felt that they made little difference.[73]

Resources

Unless ombudsman offices are provided with sufficient resources, they cannot be effective, despite their remit and powers. Since its inception, the PPO's office has had more functions and bodies to be investigated added to its remit. There does not appear to have been much extra resource to accompany these additions, and indeed the remark of a judge in one case is particularly telling: "Then in October 2006. . .(the PPO) was given responsibility (though apparently without additional resources) for investigating complaints by immigration detainees".[74] The office functions on a modest budget, which is currently £5·6 million.[75] The PPO has, for a number of years, expressed concern about the resources allocated to the office, noting that they are "the poor relations of virtually any other organisation with whom we could sensibly be compared",[76] and that the "resources available to us are very limited".[77]

This lack of resources inhibits the PPO's ability to publicise and promote the office, preventing its "ability to take a more proactive role".[78] The addition of special

[69] D Eady, "Prisoners' Rights since the Woolf Report: Progress or Procrastination?" (2007) 46 (3) Howard Journal 264, at 269.

[70] Prisons and Probation Ombudsman *Annual Report 2008–2009*, at 52.

[71] Prisons and Probation Ombudsman Terms of Reference, paras 36–41.

[72] Prison and Probation Ombudsman *Annual Report 2008–09*, at 7, 51.

[73] Prisons and Probation Ombudsman *Annual Report 2008–2009*, at 52.

[74] *R (on the application of AM & others)* v *Secretary of State for the Home Department* [2009] EWCA 219 at [26], Lord Justice Sedley.

[75] Prisons and Probation Ombudsman *Annual Report 2008–2009*, at 54. The Independent Police Complaints Commission's budget is £35 million (*IPCC Annual Report and statement of accounts 2008/09*, 64).

[76] Prisons and Probation Ombudsman *Annual Report 2007–2008,* at 5.

[77] Prisons and Probation Ombudsman *Corporate and business plan 2009–2012*, at 11.

[78] *Ibid*.

inquiries to the remit has also placed "some strain upon mainstream business".[79] The PPO has noted that the office does not have sufficient staff resources to meet service targets, which has resulted in frequent backlogs of work.[80] Any further attempts to improve access would be pointless, as there is not enough capacity in the office "to handle a substantially greater volume of complaints".[81]

Many public services and many ombudsmen offices may complain about a lack of resources, and would urge for more funding. However, it does seem that this is a particularly critical problem for the PPO. The incremental additions to the remit do not appear to have attracted sufficient additional resources. It has been noted that there are problems in relation to access, particularly as there is a lack of knowledge among prisoners about the PPO. Although the numbers of complaints are steadily rising, they principally emanate from only a small proportion of the prison population. However, outreach work itself is resource-intensive, and it appears that if there were an increase in the number of complaints, the office would not have the resources to deal with them in a timely manner. This would cause frustration, and call into question the effectiveness of the office.

Assessment

There was general agreement among the interviewees that the PPO has been a tremendous improvement on the pre-1994 system, and that the office has been effective in making prisons better places. In the PPO's stakeholder survey, the majority of respondents judged the office to be very professional, with clear reports and letters, and reasonable and fair recommendations after investigations. However, it was not judged to be very efficient, and had only limited effect in changing practice in the system.[82] It is acknowledged that access to the PPO is problematic for some prisoners, but any attempts to address this would need additional resources, which are unlikely to be forthcoming. Moreover, any attempts to tackle the problems of access to the PPO, would also need to address the whole complaints process in prisons, as the internal, pre-PPO stage also needs to be more accessible.[83]

The office has gone beyond the original rationale, as envisaged by the Woolf Report, which was to make recommendations, advise and conciliate at the final stages of the prison grievance procedure, and to be the final tribunal of appeal in disciplinary proceedings.[84] Grievances from prisoners do form a large part of the PPO's work, despite the addition of complaints from probationers and immigration detainees, but the PPO now deals with fewer disciplinary complaints, as governors can no longer impose added days to sentences (and thus the incentive to appeal against punishments is reduced), and as the most serious cases are decided by district judges. Some interviewees felt that the PPO's focus should be prisoner complaints, but there was general agreement about the "massive improvement" to the system as a result of the establishment of the PPO, and the "absolute necessity" of the office.

INDEPENDENCE AND ACCOUNTABILITY

The PPO is a non-statutory body, funded and appointed by the Ministry of Justice (and before that the Home Office). It is accountable to, and submits annual reports to,

[79] *Ibid.*

[80] Prisons and Probation Ombudsman *Corporate and business plan 2009–2012*, at 12.

[81] *Ibid*, at 10.

[82] Prisons and Probation Ombudsman *Annual Report 2008–2009*, at 52.

[83] J Warrior, n 51 above, 1.

[84] H Woolf and S Tumin, n 2 above, paras 1.209, 14.249.

the Secretary of State for Justice, who then lays them before Parliament. Additional reports about investigations can also be laid before Parliament by the Minister at the PPO's request.[85] The budget of the office is set by the Ministry of Justice, its staff are civil servants, and its premises are provided by the Ministry. The office does therefore seem to be entrenched in the departmental system, rather than outside it. It is not able to make strategic decisions that would increase its effectiveness; it is not free to invest in IT that suits its needs, but is obliged to use the IT processes within the department.[86] The office has no independent status. It is not a creature of statute; it is not a non-departmental public body. It is simply an administrative arrangement with the department.

Despite its lack of status, the present and previous post-holders have worked hard to establish the operational independence of the office, and it has a good reputation in this respect.[87] The PPO is clear that his office is "not like any other 'unit' in the Ministry of Justice", emphasising that it is "a specialist organisation whose whole purpose is to conduct comprehensive, professional investigations that command public respect".[88] A new Framework Document for the Office has been agreed with the Ministry of Justice, which sets out the respective roles and responsibilities, and the new terms of reference emphasise that the PPO is "wholly independent" of those bodies within its remit, and is "operationally independent of, though it is sponsored by, the Ministry of Justice".[89] The office has also invested in training its staff, in order to enhance its "independent professionalism in other ways".[90]

All of this is commendable, and no one can fault the past and previous PPOs for their efforts in making the office as practically independent as is possible, and for their autonomy, high calibre and personal integrity. Nevertheless, the fact is that the office is not independent from the Ministry of Justice, the department which is responsible for establishments investigated by the PPO. Its independence is therefore problematic, and although the office is no longer dogged by the level of political interference that troubled its early years,[91] it lacks the "conspicuous independence"[92] necessary to be a voting member of the BIOA. It has no statutory basis for its investigations and recommendations, and has no legal guarantees to prevent political interference.

One mechanism for ensuring independence is to place the office on a statutory footing. The commitment to do this is long standing, and there have been two attempts to achieve this. Before discussing the proposed legislation, and the reasons for its failure, it is necessary to examine the remit of the Parliamentary Ombudsman in relation to prison complaints, as the proposed legislation had implications for this.

THE PPO AND THE PARLIAMENTARY OMBUDSMAN

An independent mechanism for investigating complaints about the Prison Service, including complaints from prisoners, had existed since 1967, with the establishment of the Parliamentary Ombudsman, a point acknowledged in the Woolf report.[93] The

[85] Prisons and Probation Ombudsman Terms of Reference, paras 3, 4.
[86] Prisons and Probation Ombudsman *Annual Report 2008–2009*, at 5.
[87] Prisons and Probation Ombudsman *Corporate and business plan 2009–2012*, at 10.
[88] Prisons and Probations Ombudsman *Annual Report 2008–2009*, at 5.
[89] Prisons and Probation Ombudsman Terms of Reference, paras 1, 2.
[90] Prisons and Probations Ombudsman *Annual Report 2008–2009*, at 5.
[91] S Shaw, Evidence to Public Bill Committee, Criminal Justice and Immigration Bill, 18 October 2007.
[92] See note from Sir Edward Osmotherly, then Chair of the Association (2000) 14 The Ombudsman, at 5.
[93] H Woolf and S Tumin, n 2 above, para 14.292.

Home Office, which administered prisons when the PPO was established, is within the jurisdiction of the Parliamentary Ombudsman, as is the Ministry of Justice, which is now responsible for prisons. However, complaints from prisoners never formed a major part of the Parliamentary Ombudsman's workload, unlike the experience in many other jurisdictions.[94] This was partly a result of the requirement for complaints to the Parliamentary Ombudsman to be filtered through a Member of Parliament, which can be a strong disincentive for prisoners. In addition, the Parliamentary Ombudsman investigates allegations of maladministration, and thus cannot be used as an independent mechanism for appeals against the merits of decisions, which is commonly what prisoners are seeking.

During the 1970s and 1980s there was concern that the small number of complaints from prisoners could not possibly reflect the extent of maladministration and injustice within the prison system.[95] Justice, in particular, noted that there were areas of prison life barely touched on by the Parliamentary Ombudsman. Although the strong deterrent of the MP filter was said to be to blame,[96] the preferred option was to establish a separate prisons ombudsman, rather than make the Parliamentary Ombudsman directly accessible.[97] This was because the Parliamentary Ombudsman, being limited to investigating maladministration, would not be able to investigate the merits of decision affecting prisoners' rights, which was seen as fundamental to the reform of the system. Justice also wanted own-motion investigations, which again were outside the remit of the Parliamentary Ombudsman.

The establishment of the PPO does not affect the Parliamentary Ombudsman's remit. It still includes prison and immigration matters, and other matters within the jurisdiction of the Ministry of Justice and Home Office. Prisoners can approach the Parliamentary Ombudsman through an MP, if the matter is one of alleged maladministration. During the 1990s, the practice developed of encouraging the use of the PPO, and the Parliamentary Ombudsman referred any complaints received from prisoners to the PPO for initial investigation. If the prisoner were dissatisfied with PPO's decision, there was the option of referring the case back to the Parliamentary Ombudsman, although it was felt unlikely that there would be a different outcome.[98] It would seem that these arrangements have fallen into disuse, and there is little collaboration between the two schemes, although the Parliamentary Ombudsman does refer any relevant complaints considered "premature" to the PPO.

The Parliamentary Ombudsman's remit extends beyond prisoners, to complaints from prisoners' families, and third parties who allege injustice from deficiencies in the actions of those administering prisons and immigration facilities in England, Wales and Northern Ireland. It also includes the actions of those who administer immigration facilities in Scotland. The Parliamentary Ombudsman does not normally investigate complaints about the provision of health services in prisons.[99] This is the role of the Health Service Ombudsman for England,[100] although in fact the same person holds both offices.

The Parliamentary Ombudsman continues to receive a small number of complaints from prisoners, in addition to complaints about other aspects of the criminal justice system. In 2008–09, the office received 37 complaints about the Prison Service, eight

[94] J E Hall Williams, n 1 above, at 89.

[95] See A W Bradley, "Sachsenhausen, Barlow Clowes – and then" (1992) PL 353, at 355.

[96] Justice *Our Fettered Ombudsman* (1977), at 20–21.

[97] Justice, n 1 above.

[98] P Morris and R Henham, n 9 above, at 354.

[99] For privately managed prisons, where the health care is not normally commissioned by the NHS, the Parliamentary Ombudsman deals with complaints about such health services.

[100] For prisons in Wales, these complaints are within the remit of the Public Service Ombudsman for Wales.

complaints about individual prisons, and one complaint each about the Parole Board and Youth Justice Board for England and Wales. There were also 517 complaints about the UK Border Agency, which deals with immigration matters, although there is no information about the proportion of these, if any, that were from immigration detainees. Interestingly, the Parliamentary Ombudsman also received 13 complaints about the PPO,[101] none of which were upheld, the office being subject to the Parliamentary Ombudsman's remit, as it is part of the Ministry of Justice.

There are clearly overlaps between the PPO, the Parliamentary Ombudsman and the Health Service Ombudsman. Both the PPO and Parliamentary Ombudsman have jurisdiction in relation to complaints from prisoners that relate to the administration of the service. Arguably, many complaints come within this description, as they are concerned with the prison regime, rather than the merits of decisions. There is some potential for overlap between the PPO and the Health Service Ombudsman, where complaints about health matters relate to the prison regime and administration.[102]

Statutory status for the PPO will need to address these overlapping jurisdictions. Civil servants interviewed agreed that it was confusing to have two ombudsmen for the same service, and government is of the view that there should not be overlapping jurisdictions between ombudsman schemes and that dual systems should be avoided. One commentator in the 1980s recommended that the jurisdiction of the Parliamentary Ombudsman over complaints by prisoners should cease on the establishment of a special prison ombudsman, ''after the necessary transitional arrangements had been settled''.[103] On the other hand, Woolf, having considered whether the establishment of an independent adjudicator would make ''otiose'' an application to the Parliamentary Ombudsman, concluded that the possibility of complaining to the Parliamentary Ombudsman should not be closed for prisoners where it was alleged that the Prison Service had been guilty of maladministration.[104]

At present the PPO's status is in effect that of an ''independent'', internal, departmental adjudicator.[105] In this, it is similar to other ''intermediate'' complaints handlers, which have been established by government departments to provide an independent element to departmental complaints mechanisms.[106] There is no doubt that these ''arms-length departmental complaints handler[s]''[107] have formed a useful intermediary stage for complainants, and many issues are resolved at this level, without the necessity to involve the Parliamentary Ombudsman. Indeed, the Parliamentary Ombudsman refers complaints back to these ''local complaints'' systems for resolution.[108] Similarly, these systems, including the PPO, refer complainants who remain dissatisfied to the Parliamentary Ombudsman.

[101] Parliamentary and Health Service Ombudsman *Annual Report 2008–09,* HC 786 (London: The Stationery Office), 56–57.

[102] There is similar potential for overlap between the PPO and Parliamentary Ombudsman where health services are provided in the setting of privately managed prisons. See n 99 above.

[103] P Birkinshaw in Maguire *et al*, n 1 above, at 175.

[104] H Woolf and S Tumin, n 2 above, para 14.353.

[105] P Morris and R Henham, n 9 above, 352–353; P Collcutt and M Hourihan, Review of the Public Sector Ombudsman in England (Cabinet Office, 2000), para 4·7; T Heal, *Strategic positioning options for a small government organisations in the context of sector restructuring: a case study of the Prisons and Probation Ombudsman* (unpublished MBA dissertation, University of Durham, 2002).

[106] For example, the Adjudicator, established in 1993, deals with complaints about the Inland Revenue, Customs and Excise, the Valuation Office Agency, the Public Guardianship Office, and the Insolvency Service. The Independent Case Reviewer handles complaints against the Land Registry, Audit Commission, National Archives, Charity Commission and Housing Corporation. The Independent Case Examiner deals with complaints from a number of businesses within the Department for Work and Pensions, including the Child Maintenance and Enforcement Commission.

[107] PHSO *Annual Report 2008–09*, n 101 above, at 8.

[108] *Ibid.*

STATUTORY STATUS

The solution to the problematic status of the PPO, and the remedy for the office's lack of independence, has always been seen to be statutory status. Such status would reduce the vulnerability of the office to political interference, and promote confidence in the impartiality of the system. Some argue that the lack of statutory status undermines the ability of the office to be considered sufficiently independent in relation to the fatal incidents remit, and calls into question whether there is full compliance with Article 2 of the European Convention on Human Rights in relation to deaths in custody.[109] The PPO has noted that for most of the time the absence of statutory status has made no practical difference to the work of the office, or how its business is conducted.[110] Indeed, there have been positive consequences, in that the lack of legislation has allowed the office "to take on new tasks with the minimum of fuss".[111] This has been particularly the case in relation to the fatal incidents remit, where the lack of statutory authority has enabled the office to "iron out the methodology" in advance of any proposed legislation.[112] Despite this, the PPO is clear that this lack of statutory status can no longer be justified "given the public significance" of the role.[113]

Statutory status for the office has been a government commitment for many years, and there have been promises that this would be done at the earliest opportunity.[114] The first attempt, in January 2005, was the inclusion of proposals about the PPO in the Management of Offenders and Sentencing Bill. That Bill fell with the calling of the general election in May 2005, and when it was resurrected after the election, the part dealing with the PPO was omitted. The more recent attempt was in 2007, where Part 4 of the Criminal Justice and Immigration Bill contained provisions to establish a Commissioner for Offender Management and Prisons, to perform the functions currently being performed by the PPO.[115] In a surprise move by the Government, and after the Bill had been through all its stages in the House of Commons, Part 4 of the bill was withdrawn in the House of Lords Second Reading.[116] This unexpected move meant that once more the PPO had failed to achieve statutory status.

Given that the proposals in the main reproduced in statutory form the remit and processes of the PPO; given that they replicated the proposals in the Management of Offenders and Sentencing Bill; and given the long standing and apparently unanimous commitment to statutory status, it is interesting to examine the reasons for the withdrawal. These relate to the independence of the office, the relationship of the new office to the Parliamentary Ombudsman, and to the remit. What had originally been seen as unproblematic, in fact lacked consensus, and turned out to be contentious in relation to the detailed proposals. Concern had been expressed by both the PPO and

[109] See Prisons and Probation Ombudsman *Annual Report 2008–2009*, 5. One of the interviewees pointed out that the government's legal advice is to the contrary.

[110] S Shaw, Evidence to the Public Bill Committee, Criminal Justice and Immigration Bill, 18 October 2007. See also Prisons Ombudsman *Annual Report 2000–2001*, at 2.

[111] Prisons and Probation Ombudsman *Annual Report 2005–06*, at 14.

[112] Prisons and Probation Ombudsman *Annual Report 2003–04*, at 12.

[113] Prisons and Probation Ombudsman *Annual Report 2008–2009*, at 5.

[114] See Prisons Ombudsman *Annual Report 1998–1999*; S Shaw, Evidence to the Public Bill Committee, Criminal Justice and Immigration Bill, 18 October 2007; Prisons and Probation Ombudsman *Annual Report 2008–2009*, 5; Prisons and Probation Ombudsman *Corporate and business plan 2009–2012*, at 12.

[115] The Prisoner Ombudsman in Northern Ireland was also to be placed on a statutory footing, and provisions for this were in Part 5 of the Bill.

[116] HL Deb col 127 22 January 2008 (Lord Hunt). Part 5 of the Bill, which was to put the Prisoner Ombudsman in Northern Ireland on a statutory footing, was also withdrawn.

the Parliamentary Ombudsman,[117] and the provisions had been criticised in both the House of Commons and House of Lords.

Independence

The major cause of concern was in relation to the independence of the office. The new Commissioner for Offender Management and Prisons (COMP), although appointed by the Queen, was to be accountable to, and report to, the Secretary of State, and it would be for the Secretary of State to lay the COMP's reports before Parliament. The Secretary of State was to determine issues of remuneration, expenses, allowances and pensions, and was to provide the staff and IT. The Government's rationale was that the Bill adopted "a pragmatic approach", which was based on what was considered the most efficient way of staffing the office. Similarly, the fact that the department was to provide finance and administrative support, including IT systems, was to avoid additional administrative burden to the COMP.[118] It was evident to some in both Houses of Parliament[119] that these provisions were inimical to the creation of a truly independent ombudsman. Critics noted the importance of ensuring that the office would be visibly independent, which included independence in relation to budgets, staffing, investigatory powers, and the way reports were laid in the public domain.[120] It was pointed out that other ombudsman systems are funded by money supplied directly by Parliament, or by a levy on those investigated, and it was considered unacceptable, and a challenge to the independence of the new office, for funding to be determined by the Secretary of State.[121]

The Bill also provided for the Secretary of State to have the power by order to exclude matters from the COMP's remit, and to add and amend the remit. The government's rationale for this power was so that the matters within jurisdiction of other public services ombudsmen could be excluded, to ensure there was "a clear boundary between the remits of the various ombudsmen".[122] However, it is a wide power that had serious implications for the new COMP's independence.

Another area of concern was the power given to the Secretary of State to request that the COMP conduct investigations. The Bill provided that it was the "duty of the Commissioner to investigate any matter" requested, and that the Secretary of State could give "directions" about how such investigations were carried out. The rationale for the inclusion of these provisions was to replicate the existing practice of the PPO in conducting these ad hoc inquiries. The PPO was clear that provisions about a "duty" to do what the Secretary of State requests and to follow "directions" from the Secretary of State were "inappropriate measures to apply to a statutory ombudsman".[123] Such provisions are anathema to the concept of an independent ombudsman, as it means that there is "no independence of action, discretion or conduct".[124] Moreover, the COMP's ability to conduct investigations under the complaints remit could be constrained, because resources were being channelled to into these ad hoc

[117] HL Deb col 128 22 January 2008 (Lord Hunt). The then Prisoner Ombudsman for Northern Ireland also expressed concern.

[118] HL Deb cols 954 5 February 2008 (Lord Hunt).

[119] HC Deb cols 421–423 7 November 2007 (Mr Garnier, Mr Heath); HL Deb 128 22 January 2008 (Lord Hunt).

[120] HL Deb col 955 5 May 2008 (Baroness Falkner).

[121] HL Deb col 957 5 February 2008 (Lord Kingsland).

[122] HC Deb cols 426–427 7 November 2007 (Maria Eagle).

[123] S Shaw, Evidence to the Public Bill Committee, Criminal Justice and Immigration Bill, 18 October 2007.

[124] HC Deb cols 453–455 7 November 2007 (Mr Garnier). See HL Deb col 957 5 February 2008 (Lord Kingsland) and HL Deb col 955 5 May 2008 (Baroness Falkner).

inquiries. The Government view was that there was no desire to seek to fetter the COMP,[125] but in fact, that would appear to be the obvious result of these provisions.

Given that the rationale for statutory status is to endorse independence, these provisions would have defeated this major objective. Indeed, rather than provide the necessary and conspicuous independence that the office lacked, the provisions of the statute would have enshrined its dependence within the department, and placed it clearly within the departmental remit. The PPO acknowledged that the COMP would be ''operating within a structure determined by the Secretary of State'' and would in a sense be a ''departmental ombudsman''.[126] One MP summed up the concerns: ''either we have an independent commissioner or we do not, and on the face of the Bill we do not''.[127]

Remit

As outlined above, the Parliamentary Ombudsman has jurisdiction in relation to complaints about the Prison Service and the UK Border Agency. One of the Government's stated aims was that there should be a clear boundary between the remit of the new COMP and other statutory ombudsmen, with no duplication or disputed territory.[128] In addition, unlike the present position where the PPO is subject to the jurisdiction of the Parliamentary Ombudsman, the Government wanted to ensure that there was to be no oversight of the COMP.[129] The Bill therefore contained proposals which would have in effect excluded anything within the new COMP's remit from the remit of the Parliamentary Ombudsman. This would appear to be unproblematic, in that it would have ensured a clear delineation between the two ombudsmen. However, given the concerns about the independence of the COMP, the effect would have been that prison, probation and immigration detainee complaints and the investigation of deaths would have been removed from an independent statutory ombudsman (the Parliamentary Ombudsman), to be dealt with by a system which was not truly independent.[130]

Moreover, the Bill contained provisions whereby the Secretary of State could by order add to the COMP's remit. Any addition to the COMP's remit would result in a corresponding exclusion from the Parliamentary Ombudsman's remit. This is a serious consequence, with wider implications than a mere prevention of overlapping remits. The Parliamentary Commissioner Act 1967 provides for exemptions to the remit to be removed by order.[131] However, there is no provision to add to the exemptions (and thus remove part of the remit) by order. The effect of the new provisions would have been that the Secretary of State could, by order, remove matters from the jurisdiction of the Parliamentary Ombudsman.

This presented a challenge to the basis of the 1967 Act, with the possibility of further categories of complaint and grievance being removed from the Parliamentary Ombudsman, as the remit of the COMP was incrementally expanded. This is not to suggest any malign intent; it is simply to highlight the (unintended) consequences of setting up parallel ombudsman systems, where the two systems are not equivalent in status, and

[125] HC Deb col 457 7 November 2007 (Maria Eagle).

[126] S Shaw, Evidence to the Public Bill Committee, Criminal Justice and Immigration Bill, 18 October 2007.

[127] HC Deb col 458 7 November 2007 (Mr Garnier).

[128] HC Deb col 424 7 November 2007 (Maria Eagle); HL Deb col 954 5 February 2008 (Lord Hunt).

[129] HL Deb col 954 5 February 2008 (Lord Hunt).

[130] One interviewee noted that the Ministry of Justice's advice was that: in relation to the investigation of deaths, this could only partly be seen to fall within the Parliamentary Ombudsman's remit; in relation to probation, the PPO's remit would only cover complaints that were not within the Parliamentary Ombudsman's remit.

[131] Section 5(4).

where there are differential rules for altering remits. The Bill highlighted the problems that can occur when there is a proposal to remove some of the Parliamentary Ombudsman's remit, the first attempt to do so in the Parliamentary Ombudsman's 40-year history. Whatever the rationale and stated intentions of the Government, the proposals in the Bill would have weakened the independence of the complaints system, and future administrations could have exploited this.

The provisions of the Bill replicated the current remit of the PPO, which has grown incrementally, and there seemed to be little thought as to how this growth related to the overall complaints system. The Bill would have given statutory authority to the existing position in relation to health care, where the PPO does not investigate, as these complaints are matters for the Health Service Ombudsman. It was argued by some that a ''one-stop shop approach'' would be better for prisoner complaints,[132] and that therefore health complaints should have been part of the COMP's remit. However, the prevailing view was that this could have led to ''duplication, confusion and rather invidious competition,[133] and that it was appropriate for prisoners to have access to the NHS complaints system. The COMP would not have covered all situations of involuntary custody for children; local authority secure accommodation is not within the PPO's remit, and would not have been within the COMP's remit. This reflects the PPO's view that it would have been inappropriate to include these institutions, as many children in local authority care are not offenders, and it would have been confusing to have jurisdiction over some children in these institutions, but not others.[134] The proposed legislation would not have extended jurisdiction to prisoners'' families, nor to third parties complaining about the actions of the Prison Service. Despite the Government's aim to ensure that the Parliamentary Ombudsman would not have had oversight of the COMP, the Parliamentary Ombudsman's remit would have extended to the Secretary of State's actions in requesting that the COMP conduct an inquiry, and the manner in which the inquiry was handled.

The way forward

The Government remains committed to statutory status for the PPO,[135] but on the basis that consensus must be reached about its provisions, and to this end it entered into a period of consultation with ''interested parties'',[136] with the hope of reintroducing fresh legislation at ''an early opportunity''.[137] Although statutory status is important, ''it has to be the right statutory basis''.[138] Statutory status is not an end in itself; it should be a means of achieving independence. It seems that for many, statutory status has been equated with independence, whereas the Bill would not have achieved this, and would have had the detrimental effect of enshrining in law, for the long term, the lack of independence for this office.

Before there is any future legislation, there must be clarity about what the PPO is and what the COMP is to be, and what statutory status will bring to the role. The office is much more than the original concept: an independent body for complaints from prisoners, and a necessary corollary to the work of the Prisons Inspectorate. Thus, the incremental additions to the office need to be assessed, in order to establish

[132] HC Deb col 424 7 November 2007 (Mr Heath).

[133] HC Deb col 424 7 November 2007 (Maria Eagle).

[134] S Shaw, Evidence to the Public Bill Committee, Criminal Justice and Immigration Bill, 18 October 2007.

[135] See, Prisons and Probation Ombudsman *Annual Report 2008–2009*, at 5.

[136] HL Deb col 129 22 January 2008 (Lord Hunt).

[137] HL Deb col 954 5 February 2008 (Lord Hunt).

[138] HL Deb col 957 5 February 2008 (Lord Kingsland).

how they fit into the overall complaints system in the public sector, including the role of the Parliamentary and Health Service Ombudsman. Clear guidelines need to be established about further additions to the remit, and a commitment to ensuring that these will assist in bringing coherence to the public sector complaints system. There must be the necessary guarantees of independence, in the same way that Her Majesty's Inspector of Prisons has statutorily guaranteed independence.

Moreover, decisions need to be made about what model the COMP is to follow. Is it an ''intermediate'' complaints handler, albeit with statutory status, or is it to be a more wide ranging commission, modelled on the Independent Police Complaints Commission or the (now abolished) Healthcare Commission? Is it to be a special mandate, ''niche'' ombudsman, with a defined remit clearly delineated from the Parliamentary Ombudsman, but with the same status and powers?

In other countries throughout the world, the national ombudsman deals with complaints from prisoners, and such complaints form a large part of the workload. Only Canada has a separate national prisons ombudsman. In most countries, the national ombudsmen tend to cover all public services. This is not true of the UK. When the Parliamentary Ombudsman was established, complaints about the National Health Service were not included in the scheme. This omission was rectified in 1973, when the Health Service Ombudsman was established.[139] This is a ''special mandate'' ombudsman, who sits at the apex of the complaints scheme for the NHS. Local government is also outside the remit of the Parliamentary Ombudsman, a separate scheme for local government being established in 1974.[140] There is also a separate system for police complaints.

It could be argued therefore that the UK has precedents for the establishment of dedicated ombudsmen for particular services, and to establish a separate prisons ombudsman would be in line with this tradition. However, the approach is now to integrate rather than fragment ombudsman services. In 2000, a review of the ombudsman system recommended that the three public sector ombudsman systems should be joined up, to form an integrated service.[141] Although these proposals have not resulted in a new, combined legislative framework for these three schemes, these ombudsman do have powers to enable joint working, and joint reports.[142] In addition, despite the separate legislative framework for health service complaints, the posts of Health Service Ombudsman and Parliamentary Ombudsman have always been held by the same person, and indeed, the office is now known by the title of Parliamentary and Health Service Ombudsman (PHSO). The PHSO publishes a joint annual report on both schemes, and there is legislative power for both schemes to conduct joint investigations.[143] The Local Government Ombudsmen work closely with the PHSO, and conduct joint investigations when necessary and appropriate.[144]

Unlike the proposals in relation to the PPO, the creation of niche ombudsmen for the health service and local government were designed to fill a gap in the Parliamentary Ombudsman's remit. There is no gap in relation to complaints from prisoners, which are already within the Parliamentary Ombudsman's jurisdiction, albeit that in practice the number of such complaints has always been very low. Similarly, the system

[139] National Health Service Reorganisation Act 1973.

[140] Local Government Act 1974, part III.

[141] P Collcutt and M Hourihan, n 105 above.

[142] The Regulatory Reform (Collaboration etc between Ombudsmen) Order 2007 (SI 2007/1889).

[143] *Ibid.*

[144] *Ibid.*

established for dealing with police complaints also filled a gap in ombudsmen's jurisdictions. The Home Office, which has responsibility for policing, is within the remit of the Parliamentary Ombudsman, but there is no power to investigate the actions of police officers themselves. The administrative activities of police authorities are within the remit of Local Government Ombudsmen, but there is no power to investigate complaints about the conduct of police officers. Separate systems were established to deal with these complaints, and the relevant body is now the Independent Police Complaints Commission.[145]

The mechanisms established for joint working among the ombudsman, and the rationale in the Cabinet Office review of public sector ombudsman schemes[146] indicate that the direction of travel for ombudsman schemes is towards integration, not fragmentation and proliferation. Integration provides a ''one-stop shop'' for complainants, which avoids confusion, and duplication. To establish a dedicated ombudsman for prisons in England and Wales would go against the principle of integration. Calls for a dedicated ombudsman/independent complaints handler arose because of the small number of complaints to the Parliamentary Ombudsman. There is no doubt that a dedicated, independent complaints handler for prisoners is needed, as such complaints need a more immediate response, and some issues require special expertise, technical knowledge, and skill. This is the rationale for the establishment of departmental, intermediate, ''independent'' complaints handlers, which have proved very effective, but which have not obviated the need for the Parliamentary Ombudsman. This is probably the model that should be adopted for the PPO, which is more integrated within the criminal justice system[147] and Ministry of Justice structures than within the ombudsman and administrative justice system.

If a case were to be made for a dedicated ''niche'' ombudsman for prisoners, probationers, immigration detainees, and fatal incidents inquiries, this should be implemented by creating a system with equivalent powers and status as the Parliamentary Ombudsman. This would mean conspicuous independence for appointment, staffing, and funding, with clearly delineated accountability mechanisms, a comprehensive remit, and full operational discretion. It would also of course require the unambiguous delineation of the respective remits, and the same mechanisms for additions and exclusions from remit. This would be no easy task. Indeed, the recent failed attempt at legislation gives some indication of the problems of defining the boundaries of a dedicated prisons ombudsman. It does seem that a niche ombudsman may create more problems than it would solve. However, there is now time for re-assessment, providing an opportunity to establish a system that provides an independent and effective complaints system for offenders, and respects established constitutional arrangements for ombudsmen in the UK.

CONCLUSION

The establishment of the PPO's office in 1994 was necessary and overdue, and the research has illustrated the clear support for its work, and the acknowledgement that the office has been and continues to be a tremendous improvement on the pre-1994 system. It has lost some of its original rationale, as it no longer plays a role in proceedings for serious breaches of prison discipline, but over the last 15 years it has

[145] Established by the Police Reform Act 2002.

[146] P Collcutt and M Hourihan, n 105 above.

[147] See S Shaw, ''Ombudsman's Office Launched'' (2002) 2 *On the Case*.

provided an external mechanism for prisoner complaints, and acquired new areas of complaint handling. It has also provided a mechanism for the investigation of fatal incidents. Overall, it has clearly been a success, providing legitimacy to the prison complaints system, and remedies for hundreds of prisoners. The fatal incidents remit is not standard ombudsman territory, but this is clearly important work. Despite the name, the PPO is not an ombudsman in accordance with established criteria, mainly because of its lack of independence from departmental structures. This has been a major issue for the office since its inception, and the remedy has been seen to be statutory status. However, the recent attempts at putting the office on a statutory footing illustrate that legislation does not of itself ensure independence. In fact, the legislative provisions set out very clearly that this was not to be an independent office, and certainly not one on a par with a traditional ombudsman system. It will be interesting to see what legislative proposals do emerge for the PPO in the future.

LEGAL PRACTICE COURSE TEACHERS: WHAT CAN THEIR STORIES TELL US?

*JUDITH WILLIS**

PART 1 – INTRODUCTION

Law Teachers are no more homogeneous than the students they teach. Although the onus is rightly on us to adapt our teaching and accommodate students' differences to enhance learning, unnatural contortions or aiming to be indistinguishable from each other is not a sustainable or serious option. Perhaps our differences could be used to some effect and by bringing these to our work, law teachers could positively affect the learning not only of our students but also of ourselves.

Using semi-structured interviews to produce biographical narratives as its research method, this work focuses predominantly on the implications for learning by shedding light on teaching, careers, self-actualisation and socialisation for teacher and student and what it means to be a Higher Education (HE) teacher with a non-traditional background. It examines the career trajectories of teachers on a legal vocational course that prepares trainee solicitors for supervised practice (the Legal Practice Course, LPC).

The LPC is a post-graduate, vocational course for those seeking to qualify as solicitors in England and Wales. It combines elements of law, practice and legal skills as well as including an implied, significant element of socialisation into the profession, preparing students for the final period of their training, which takes place in the workplace. Such vocational education seeks to imitate communities of practice by creating practice fields where authenticity becomes an important element, with the goal of adding relevancy, to assist learning.

The LPC being a leader in the field of vocational education, the knowledge gained from this study has wider implications for Higher Education as a whole. The study has implications for the significance of artificiality in the creation of this particular practice field. It also has implications relating to the perceptions and practice of non-traditional entrants to Higher Education teaching.

The large majority of LPC teachers are required by the body that regulates solicitor training (the Solicitors Regulation Authority) to have been practising lawyers before they teach this course; their background is not necessarily that of academic lawyers. All such teachers have decided to leave legal practice and are now preparing those who seek to enter it, instead. Although it was not the purpose of the research to examine in depth the reasons why teachers leave practice, there undoubtedly emerged echoes of the views of practice contained in the research of Boon, with young lawyers.[1]

Those interviewed had largely non-traditional family backgrounds; this led to consideration of issues of impostor complex and passing in their own education, practice and teaching and also their position as role models for the students they teach.

The work will *not* reprise the well-known literature on learning from such as Chomsky, Marton and Saljo, Pavlov, Piaget, Skinner, Vygotsky or Watson (not a comprehensive list). It uses the different perspective of law vocational teachers, revealed through their own voices, to investigate how they progressed to teach in HE, their

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[1] A Boon, "From public service to service industry: the impact of socialisation and work on the motivation and values of lawyers", (2005) 12 (2) *International Journal of the Legal Profession* 229.

conscious or unknowing influences and considers implications for learning, both theirs and their students. It is important to state that the work is interpretive, *not* seeking answers but richer, deeper knowledge within this area.

The sometimes contested terms ''traditional'' and ''non-traditional'' are used loosely. Briefly, traditional is used here to describe those whose backgrounds are relatively privileged, previous education good, parents supportive (emotionally and financially) and usually educated to at least degree level, ''old'' university graduates; non-traditional may have one or more of these elements within their backgrounds but are more likely to be less advantaged, have a poorer previous education, have graduated from a new university with parents who are not graduates and possibly unable to be financially supportive.

The article will take the following structure: part 2 is a literature review of the various strands that arise when considering teacher/lawyers backgrounds, including their education and career moves, while linking those to learning and teaching within a vocational/professional context; Part 3 is an explanation of the rationale and method of the research; Part 4 contains the essence of the interviews that formed the primary research; Part 5 examines the implications of background for these teachers' learning and teaching; Part 6 considers how students progress towards becoming legal professionals; Part 7 compares legal vocational education with the practice for which it aims to prepare students and Part 8 contains some conclusions.

PART 2 – REVIEW OF THE EXISITING RESEARCH

Extracting meaningful strands from the research requires it to be seen against the complex background of existing research in a number of fields. To assist in plotting a path through these, the literature has been divided into discrete sections. At the start of each is a sentence aimed at demonstrating its relevance.

Research into Diversity Issues by the Law Society and Others

Those teachers who were the subjects of the research described in the following subsection, came from predominantly non-traditional backgrounds and are part of a group currently under-represented both in the HE teacher and student body.

Research conducted by Law Society, *Equality, Diversity and the Legal Practice Course* [2] discovered that those with relatives in the profession were just over one third more likely to pass the LPC than those without whereas ethnicity had no such effect.[3]

Numerous authors have examined student diversity and teacher reaction/approach/behaviour towards it. The US research of Singh and Stoloff recognises the increased numbers of students of colour entering HE in the US having fed through into more teachers of colour. They propose mentoring as a way to remedy the ''isolation of minority professors''.[4] Taylor and Sobel look specifically at teachers and diversity, albeit not within HE. They found that ''[i]n contrast to the increasing cultural diversity within the student population, the diversity of the teaching force has decreased substantially''.[5] Taylor and Sobel consider teachers' classroom behaviour links to their existing beliefs; understanding of this can enable teacher education to prepare them

[2] N Fletcher, *Equality, Diversity and the Legal Practice Course* (Research Study 49, The Law Society of England and Wales, 2004), at 1.

[3] *Ibid*, n 2.

[4] D K Singh and D L Stoloff, ''Mentoring faculty of Color'', Presented at the Annual Meeting of the American Association of Colleges for Teaching Education, 2003, at 4.

[5] S V Taylor and D M Sobel, ''Addressing the discontinuity of students' and teachers' diversity: the preliminary study of preservice teachers; beliefs and perceived skills'', (2001) 17(4) *Teaching and Teacher Education* 487, at 487.

better for the classroom.[6] A similar link to teachers' pasts was the focus of the US schools-based work of Shechtman and Or. Assuming alteration to be desirable, they found that altering beliefs was not achieved by formal interventions because emotions often remain untouched by formal training. Their finding that it is worthwhile challenging "core" beliefs because "openness, acceptance, regard, empathy and justice . . . all related to positive teacher functioning and (school) effectiveness", rings true in relation to the findings of my research.[7]

Research into Career Trajectories and Biography

There is a significant body of work examining the use of both career trajectories and biography within qualitative research. The advantages and pitfalls of this research can be found in the literature and were used to inform both the structure of my own research and analysis of the its results.

Academic trajectories in particular are the subject of Ackers' research, involving "early stage" academics.[8] No consideration is given to those involved in HE vocational education (where research is rarely a function of career advancement), but her work considers diversity and possible alternatives to the "traditional" career track, looking at the increase of "teaching-intense" posts. A doctorate is less commonly a prerequisite for legal educators, as is research.[9] The higher salaries for lawyers outside academia means fewer graduates think of remaining in HE than in other disciplines, she says.

Denzin's publication provides much food for thought in categorizing and identifying the issues relating to the variety of methods associated with research that could be described by the term Interpretive Biography.[10]

Within UK universities, Deem found that the type of institution within which a teacher works will influence career narratives. She appears not to envisage much movement between old and new universities. Within LPC teaching, movement between institutions appears to be freer.

McVee discusses narratives as a way of exploring culture; what she describes as "grand narratives" pervade cultures and one's critique of them is limited by one's own experience and knowledge, a useful reminder when considering the current study.[11] Her use of just two biographical narratives to discover meaningful results and her view that "Examination of narrative must include consideration of how we position ourselves and others through story and in relation to the social, historical and cultural contexts" were inspirational within my research.[12]

Both Vargas[13] and Tokarczyk and Fay[14] use HE teachers' biographies from the US. They describe, often movingly, obstacles faced by women who do not fit the prevailing model of HE teachers. They use individual contributions, written personally. In the work of Tokarczyk and Fay these describe their lives first as non-traditional students, then as teachers. Vargas worked with the personal biographies of women of colour

[6] *Ibid*, n 5.

[7] Z Shechtman and A Or, "Applying Counselling Methods to Challenge Teacher beliefs With regard To Classroom Diversity and Mainstreaming: An Empirical Study", (1996) 12(2) *Teaching and Teacher Education* 137 at 144.

[8] L Ackers, "Academic Career Trajectories: Identifying the "Early Stage" in Research Careers", Centre for the Study of Law and Policy in Europe Working Paper 2005:1.

[9] *Ibid*, n 8 at 2.

[10] N K Denzin, *Interpretive Biography* (Sage Publications 1989).

[11] M B McVee, "Narrative and the Exploration of Culture in Teachers' Discussions of Literacy, Identity, Self and Other", (2004) 20(8) *Teaching and Teacher Education* 881 at 898.

[12] *Ibid*, n 11 at 17.

[13] L Vargas, *Women Faculty of Color in the White Classroom*, (Peter Lang Publishing, 2004).

[14] M M Tokarczyk and E A Fay, *Working Class Women in the Academy: Laborers in the Knowledge Factory,* (The University of Massachusetts Press, 1993).

whose narratives describe greater difficulties in their career progressions, possibly because of, as they perceive it, discrimination against them on both ethnicity and gender grounds. Both works identify and use the concepts of "impostor complex" and the need to "pass" that is also used in my own work.

Research into Tutor Training

Since the lawyers who formed the subject of my own research had moved from legal practice back to academia, it was necessary to examine, in some depth, what this shift of environment meant for them. There have been several studies in this field, summarised below.

Trowler and Knight studied how UK universities induct new staff to explore how this might best be done.[15] Their work explores notions of socialisation, situated learning, communities of practice and culture. Filstad's work[16] widens the focus to organisations in general, examining the use new-comers make of the role models they witness. This has relevance both for becoming a practising lawyer and a new teacher.

Fiona Cownie explores in depth the specific process of becoming a *legal* academic, building on the work of Becher on academic "tribes".[17] She identifies and describes elements that make UK legal education unique within UK's HE system but which are nevertheless echoed in writings from the US as they relate to culture, identity and the socialisation into the legal community. These start when students begin their law studies. I will argue that the LPC builds on this, making it highly relevant to this study.

Career Stages and Anchors

Fascinating work has been done that illuminates career trajectories by analysing an individual's career stages.

The analysis of my interviews used the life stage approach, informed by the work done by Super and by Schein on career stages and career anchors respectively. Super's original 1950's work has been criticised as out-dated[18] for example its consideration of women in work is negligible, but his work has developed into a theory of four stages for career development: exploration, establishment, maintenance and disengagement.[19]

Schein's concept, briefly, is that individuals, for motives they may not fully express, move between jobs throughout their careers until they find one in which they feel comfortable. That job is then their career anchor. More than one anchor is possible during a career. It too uses a male-centred model of employment that excludes those women who change career after starting a family (or considers women's employment as abnormal so that no attempt need be made to analyse it).[20]

Academic Tribes

By moving to academia, the research subjects, probably unconsciously, joined a new tribe, one which has the potential to affect profoundly how they see themselves and their work. There have been several studies into academic tribes.

[15] P Trowler and P T Knight, "Coming to Know in Higher Education: Theorising Faculty Entry to New Work Contacts", (2000) 19(1) *Higher Education Research and Development* 27.

[16] C Filstad, "Careers within Careers: Reconceptualizing the Nature of Career Anchors and Their Consequences", (2004) 16(7) *The Journal of Workplace Learning* 396.

[17] F Cownie, *Legal Academics: Culture and Identity,* (Hart Publishing, 2004).

[18] D C Feldman and M C Bolino, "Careers within Careers: Reconceptualizing the Nature of Career Anchors and Their Consequences", (1996) 6(2) *Human Resource Management Review* 89.

[19] For an overview of this aspect of Super's work see R Smart and C Peterson, "Super's Career Stages and the Decision to Change Careers", (1997) 51 *Journal of Vocational Behaviour* 358.

[20] C Filstad, "Careers within Careers: Reconceptualizing the Nature of Career Anchors and Their Consequences", (2004) 16(7) *The Journal of Workplace Learning* 396.

Becher identified a variety of academic tribes, demonstrating that not all academics are the same,[21] whilst Ruth Neumann also considered the differences between disciplines in respect of university teaching in Australia, although she found that "... connecting the teaching and learning perspectives through studies of academics and their own students is rare".[22] Evans and Sadler-Smith describe "expert practitioners" who are able to adapt to students' learning styles, whilst saying little about teacher individuality. The implication is that if all teachers become expert adaptors, many problems of teaching to a more diverse student body will be solved.[23] Critics of this approach such as Haggis see it as simplistic and redolent of the new managerial approach to HE.[24]

Neumann's critique that "the view that teaching is generic reduces it to the technical matter of performance"[25] sits best with my own study; if teachers became generic a valuable richness would be lost from education.

The Legal Tribe

Amongst academic tribes, the legal tribe is fortunately well-described and work in this area also informed my research and analysis.

Cownie interviewed a large number of legal academics and the resulting view of the English Law School (building also on the seminal work of Twining[26]) sheds light on the early socialisation process. She examines identity issues, gender, class, race and ethnicity, as potentially influencing factors on a legal academic's career.[27]

Writings from a conference at Stanford Law School deal with the culture of US legal education, how it works and in particular how it forms lawyers.[28] In the US, law is almost exclusively a postgraduate course of study. It is academic *and* contains some element of training for the job, a strategy often resisted here where over one third of law graduates never practice law.[29] The US law degree, although not so focussed on legal practice and skills, bears some similarity with our LPC in its socialisation effects.

Creating the Legal Practice Community

As LPC teachers, the research subjects are involved in socialising students into their chosen profession, so literature on socialisation and communities of practice, both general and law-specific, provides insight.

The LPC aims to instil relevance into the learning process for the students. Barab and Duffy[30] examined the concept of communities of practice and identified that in fact formal education, where it seeks to prepare students for work, more nearly resembles "practice fields" in that they are not linked to society. They lack "authenticity" a complaint echoed in the student responses to the Law Society study.[31] They argue that

[21] See W Twining, *Blackstone's Tower: the English Law School,* (Sweet and Maxwell, 1994), at 24.

[22] R Neumann, "Disciplinary Differences and University Teaching", (2001) 26(2) *Studies in Higher Education* 142.

[23] C Evans and E Sadler-Smith, (2006) 48(2/3) "Learning Styles in Education and Training: problems, politicisation and potential", *Education and Training* 77.

[24] T Haggis, "Constructing Images of Ourselves? A critical investigation of 'approaches to learning' research in higher education", (2003) 29(1) *British Educational Research Journal* 89.

[25] R Neumann, "Disciplinary Differences and University Teaching", (2001) 26(2) *Studies in Higher Education* 142.

[26] W Twining, *Blackstone's Tower: the English Law School,* (Sweet and Maxwell, 1994).

[27] F Cownie, *Legal Academics: Culture and Identity,* (Hart Publishing, 2004).

[28] "Symposium on Civic and Legal Education" (1992–1993) 45(6) Stan L Rev 1525.

[29] W Twining, *Blackstone's Tower: the English Law School,* (Sweet and Maxwell, 1994).

[30] A S Barab and T Duffy, *From Practice Fields to Communities of Practice*, (Centre for Research and Learning Technology, Indiana University, 1998), Report No 1 at 98.

[31] N Fletcher, *Equality, Diversity and the Legal Practice Course* (Research Study 49, The Law Society of England and Wales, 2004), at 1.

Lave and Wenger's "situated learning" takes place in society and a classroom can only be a close approximation.[32] Eraut's work on educating professionals touches on situated learning, alongside the acquisition of tacit knowledge.[33]

The work of Cownie and the papers from the Stanford conference demonstrate that the legal culture/community begin at university; the world of work does not fundamentally change them. Things have progressed in the over ten years since Stanford, but there is still room to improve upon the intimidation and process of hierarchy creation within some US law schools.[34] Rhode,[35] Resnick[36] and Wilkins[37] all describe aspects of this socialisation. Wilkins in particular questions the validity of law school neutrality and echoes Eraut in describing how students learn to be lawyers. Kennedy describes horrid law schools producing a horrid legal profession;[38] regrettably, confirmation of such factors can be found in other writing (*eg* Cownie, Rhode, Resnick, Wilkins) and my interviewees' recollections of their time in practice.

Role Models

The interviewees saw themselves as role models and conventional wisdom appears to believe that non-traditional students will gain benefit from non-traditional teachers as role models, making an investigation into research in this area useful.

There is less literature on this within HE. Reuler and Nardone[39] examine role models and educating medical professionals briefly in relation to the transition from study to practice, finding that influence is based on observation and "the degree of similarity perceived by the student".[40] Campbell assumes that with students from a wider set of backgrounds there will need to be changes to make teaching effective; a more diverse teaching body is one possible such change.[41]

PART 3 – THE RESEARCH

With the aim of exploring how teacher experiences might impact upon learning, the study adopted an interpretive approach. The constraint on resources for a project of this kind meant that a long-term, longitudinal study of careers was impractical, and quantitative exploration of backgrounds was both beyond available resources and less likely to reveal information that enlightened debate. The Law Society research revealed interesting facts, but was unable to explore them in any detail.[42] A qualitative method was more suited to the aims of this study.

[32] For description and definition of communities of practice and situated learning, see www.ewenger.com.

[33] M Eraut, "Non-formal Learning and tacit knowledge in professional work", (2000) 70 *British Journal of Educational Psychology* 113.

[34] W M Sullivan, A Colby, J W Wegner, L Bond and L S Shulman, *Educating Lawyers: Preparation for the Profession of Law*, (The Carnegie Foundation for the Advancement of Teaching, 2007).

[35] D L Rhode, "Missing Questions: Feminist Perspectives on Legal Education", (1992–1993) 45(6) Stan L Rev 1547.

[36] J Resnick, "Ambivalence: the resiliency of legal culture in the United States", (1992–1993) 45(6) Stan L Rev 1525.

[37] D B Wilkins, "Two Paths to the Mountain Top? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers", (1992–1993) 45(6) Stan L Rev 1981.

[38] D Kennedy, "Legal Education as training for Hierarchy" in Kairys D, (ed) *The Politics of Law: a Progressive Critique* (3rd ed.) (Basic Books, 1998), at 54.

[39] J B Reuler and D A Nardone, "Role Modelling in Medical Education", (1994) 160(4) *Western. Journal of Medicine* 335.

[40] *Ibid.*

[41] A Campbell, "Cultural Diversity: Practising What We Preach in Higher Education", (2000) 5(3) *Teaching in Higher Education* 383.

[42] A Boon, "From Public Service to service industry: the impact of socialisation and work on the motivation and values of lawyer" (2005) 12(2) *International Journal of the Legal Profession* 193.

Interviewing a small number of LPC teachers in significant depth, allowing them to tell their own stories, enabled a richer picture to develop of their career trajectories and the paths they had taken through their careers up to the time of the interviews, and also enabled probing into how those experiences are reflected in their own learning and teaching. To use what Denzin describes as "Objective Hermeneutics"[43] would require careful sampling to ensure representativeness but this proved impossible.

Volunteer subjects were sought from two contrasting teaching institutions; one where the majority of students are from so-called non-traditional backgrounds, the other where the predominant student body was traditional. They were assured of anonymity. In the small community of LPC teachers, this assurance was essential and led to surprising frankness. Interviews were semi-structured, recorded, transcribed and analysed following Denzin's Interpretive Strategy method[44] with the help of NVivo software.

The number of interviews was small (six), but the balance was excellent. There were equal numbers of men and women, half were from one institution, half from the other, there was a spread of experience amongst the teachers, some having taught for over ten years, others in their first year of teaching. All interviewees were White, two were Irish. Only one interviewee came from a so-called traditional background and this proved significant.

On a small sample, overly general conclusions would be open to question on validity. Worse, I have been an LPC teacher and because of the small world of LPC teaching, we all knew each other. This carries the possibility both that that "the researcher shapes the stories that are told" [45] and that together the interviewees and I constructed a group self.[46] The interviewees being known to me and telling their stories to me made a difference – I acknowledge complicity in this, my position and their knowledge of my history will have affected what they felt comfortable telling me. This is apparent very clearly in some of the interviews. An awareness of the likely occurrence of what Bourdieu describes as "biographical illusion" is essential – the truths revealed by the subjects are their truths, if they are deceiving themselves, even they will not know to what extent they have done so. [47]

In asking for stories, certain limits were set to allow the interviews to be carried out within time limits acceptable to the interviewees; they were asked to consider their circumstances and careers from the 6th form stage onwards, only.

PART 4 – THE INTERVIEWS

These were analysed by considering four life stages: 6th form study (including family background and first ambitions); attending university and training to be a solicitor; entering practice; and leaving practice to become an HE teacher.

Stage One – 6th form and family background

All interviews started with a request to tell what life was like when in the 6th Form: family background and support, ambitions and so on.

[43] N K Denzin, *Interpretive Biography* (Sage Publications, 1989).

[44] *Ibid.*

[45] *Ibid*, at 57.

[46] *Ibid*, at 72.

[47] Quoted in F Cownie, *Legal Academics: Culture and Identity,* (Hart Publishing, 2004), at 105.

Three called their background working class, two came from effectively single parent households and one also described their home as ''violent, alcoholic'' and ''chaotic''.

Only the traditional individual had graduate parents, all the others being either the first in their family to attend university or following siblings who were the first. Amongst the non-graduate parents, jobs varied but in all cases both parents worked. One said, ''Mum just did whatever work she could to feed the kids''.

Of the two who wanted originally to be teachers, one had seen it as the pinnacle of potential achievement, coming from their background ''That was the kind of working class northern background. If you're clever, you'll be a teacher. That was as much aspiration as what you'd get, probably''. The other came to law later in life.

Two had no clear ambitions at this stage save going to university; they were quite different in the motive for this, however. One deliberately chose to avoid old universities ''I had had enough of being educated in an independent private girl's school, and I wanted to have a more diverse educational experience, so I deliberately targeted the polytechnics rather than the old universities.'' The traditional interviewee had no clear ambitions ''I don't know, Foreign Office or journalism or something like that, chose a degree subject because it was a favourite and went to university ''to have a good time''.

Stage Two – University and solicitor training

None of the interviewees spoke at length about their university and vocational training careers, most seem simply to have seen it as a means to an end.

Three of them experienced work other than law before qualifying. One had an alternative career as an actor that was relinquished for financial and self-esteem reasons (undertaking a waiting job while ''resting'' found ''one day, there was a defining moment when I just thought 'I've got a brain in my head, what am I doing? Why am I taking it from these idiots and having to put up with it?'''). Law was the degree choice because ''it sounded interesting'' and the pay was good.

One shadowed a friend at a law centre and ''. . . was completely hooked from day one'', then spending the next eight years working in law centres before seeking to qualify as a solicitor.

The traditional interviewee took a gap year and had a series of jobs such as researcher in the House of Commons, porter at Harrods etc, none of which were ever intended to become a career.

On reaching the vocational stage of education, now known as LPC, the ''means to an end'' sentiment is more clearly expressed, for example it was ''. . . a hoop I had to go through''. Yet the path to practice was nevertheless a challenge, in some cases very lengthy and demanding. However, all of them have now left practice: somewhere, something changed for them.

Stage Three – Entering practice

A Training Contract is the overture to practice and for some as they began to discover what practice was like their views started to change. Not everyone was happy with their career choice. There is a stark gender divide: the women were happy in the job, the men were not.

The three happy ones said things like ''I loved the clients. I really loved what I was doing'' (these exact words were said by two separate interviewees).

The idea of commitment to the client was universal, all expressed this in one way or another; *eg* ''I'd be committed to the client (so I let that override what was going on internally)''. All expressed client interaction as the most satisfying aspect of practice.

Two men seemed to find the work less fulfilling than anticipated, describing it as "really mindless work which a monkey could do" and "drudgery". They expressed dismay that it was not what they'd expected: "I thought it would sort of be interesting and every area *is* interesting for the first week and then the repetitiveness that kicks in and really I felt it was a bit more than a glorified clerk".

Two found the workload and lifestyle of practice unacceptable although one worked in a City firm, the other in a law centre. They both experienced "long hours, stress, pressure, deadlines". "Suddenly a big deal would come in and you'd know that for the next three or four months your life was going to be over for a bit and you'd be working flat out", "the work life balance is impossible in practice" and "it became increasingly difficult to balance being a solicitor in the law centre with having a small child".

What was genuinely surprising was that only one *did not* mention some aspect of the personalities of their colleagues and the culture of practice as being a negative factor in their experiences at this stage of their careers. The following quotes convey the tenor of what was said: –

On personalities: –

> "The main partner was a workaholic but he was also an alcoholic and a tobacco addict and we were all holding our breath waiting for him to fall over and die."
> "The kind of ego-centred personalities sometimes that are attracted to law."
> "This man . . . he would pop his head around the door with all the perspiration on his lips and be kind of shaking and say 'I'm just going to take the dog for a walk' and then you'd know you do, you talk to the secretaries and they know what is going on there and it soon becomes apparent that he was an alcoholic."
> "Full of slightly odd people who'd come from the bigger firms but they're normally there for a reason, actually."
> "One other partner who was just a bully, basically."

On culture: –

> "I was getting bullied more and more at work . . . I found that legal practice is . . . from my own experience, obviously slanted from my own – but there's quite a few people who would do that. The work ethic is quite dysfunctional."
> "They felt they were colonial, very much old school but it was all just prejudice" (this interviewee had replaced a black solicitor whom the firm and other local solicitors often referred to using "the N word").

There was some variety in the reasons given for leaving practice. Two even had breakdowns (one precipitated partly by the culture and personalities of the workplace). Like the frequent references to personalities and culture mentioned above, this does seem disproportionately high, even allowing it is a small sample, and has implications for learning and teaching that are explored later.

All bar two made a deliberate decision to move on, and came into teaching.

Stage Four – Moving into teaching

All of them spoke warmly of their enjoyment of teaching: "I absolutely love doing this", "from the first moment I really enjoyed it" and "I enjoyed that, I really enjoyed that" are typical of many remarks.

Two found the diversity of the student body where they taught a fulfilling feature:

> ''I love the diversity of the students, it warms my heart to walk into a room full of students from all around the world, with all sorts of different backgrounds . . . it warms my heart.''

The gender divide in the sample was clear when looking at possible return to practice. All the women felt as at home in practice as in teaching and would return there, though they felt personal circumstances made this unlikely. One man felt he might return, but that finding a firm to suit him would be hard. The other two men, who were also most vehement about the culture of practice, were as vehement in not wanting to return: ''I just felt it was a toxic job *Qn. You're never going back?* No, no, I've said I'd rather work in Marks and Spencer on the tills than be a solicitor again''. Interestingly, these two also no longer call themselves solicitors (though they could): all the others still do.

The experience of being practising solicitors has fed into teaching not simply in providing examples and anecdotes but by supporting their confidence, especially when new to teaching: ''at the end of the day I know that I did it in practice and I've done it and they haven't and therefore I'm quite capable of telling them what they need to know.''

All LPC teachers get asked why they are no longer in practice. One aspect of these interviews that intrigued was the replies they said they gave to these questions. No one answer was the same but there is a similarity in approach and a definite lack of frankness with students about life in practice. Some refuse to tell the truth: ''Well I used to lie, I did that for about a year . . . [now] I just say I'm a better teacher than I was a solicitor.''

Others consciously fudge the truth: ''So I said 'well I've got two little children and I just wanted a kind of bit more quality of life to be with the children and not be working such long hours' that type of thing which was a lie really because I didn't ever have to work long hours in practice'', ''Now that's the truth (about the reason for leaving) it isn't the whole truth . . . I don't really feel that I would be telling them my truth because it might not be their truth.''

What none of them do is tell students what they told me about how they saw life in practice. They articulate a desire to shield students from this, in part as said above, because they may not have the same experience, also as ''you don't want to put them off in any way'' or because sponsored students have cost their prospective firms considerable money already, some of which pays the teacher's salary.

PART 5 – TEACHING AND CAREER IMPLICATIONS

The sample all identified with their students, seeing in them reflections of themselves: ''because that's their dream at the moment and I was like them''.

Those who teach at the institution with a majority of non-traditional students all expressed their appreciation of the satisfaction this brought. One insightful comment was however ''sometimes I think they overplay the element to which they're helping the students and helping society . . . I don't have a (name of institution) saviour complex that we're changing the world''.

The pre-teaching experience and beliefs of the sample have been brought to their teaching; examples include reference to the love of learning, desire to help the oppressed, strong Christian belief, all of which they say influence their work, as Taylor and Sobel suggest.[48]

[48] S V Taylor and D M Sobel, ''Addressing the discontinuity of students' and teachers' diversity: the preliminary study of pre-service teachers; beliefs and perceived skills'', (2001) 17(4) *Teaching and Teacher Education* 487.

With one exception they did not fit the image of a traditional HE student or of a practising solicitor. The literature would predict they should feel uncomfortable in HE, yet that is not really the case. There is, instead, evidence that "our pasts are a strength, a means of connecting with our own student's lives".[49]

As degree students, only one mentioned feeling an outsider. None of the rest found it worth mentioning, but it is note-worthy that only one attended an old university, the rest went to new ones.

Once into practice, the picture changes and more expressed a sense of not quite fitting the image they had of these professionals "there were all people you know like asking me where I read law and actually I went to (new university) and you don't read it there, you just do it. Do you know what I mean?"

On "passing" (described as "to attempt to disguise working-class origins by outwardly adopting codes of behaviour that come from outside working-class experience"[50]) there is some evidence; they talk of efforts to seem to fit in even though this was an act and the internal sense of fitting in or belonging was absent: "I could role play with clients. I could act confident. I could do stuff, I was role-playing. I wasn't me. It was never me. But it kind of worked."

Academics with Impostor Complex "fear they've scammed others into giving them doctorates and academic positions and constantly have to prove themselves and others that they're worthy".[51] Another description of its effects is in Clark's contribution "Most of us, I think, carry a sense of not fully belonging, of being pretenders to a kingdom not ours by birthright".[52] The interviews revealed subtle nuances of feeling outsiders in practice, but not once they reached HE, with one exception, again, the traditional individual. Despite saying "most of the students are following exactly the same route as me", this person felt they actually laughed at by students "I certainly found in my first term I certainly felt I was being laughed at".

For all the rest there is a sense that their experience in practice, however unpleasant or unfulfilling, has equipped them to deal confidently with their specific teaching: "I couldn't have been this teacher based on academic ability without being a solicitor first". These LPC teachers reflect none of bell hook's predicted compromises as HE teachers,[53] even if they felt outsiders in past jobs. Their students, once qualified, may eventually feel the same, but perhaps in practice some could remain with feelings like this: "And I never have, I never will, attend one such function without looking surreptitiously around, . . .trying to spot my kind – *who's here who wasn't born knowing how to do this?*"[54]

PART 6 – SOCIALISING INTO LAW

The LPC contains a significant element of socialisation, but the LPC may not be the start. For some students, the academic stage, inter alia, has given them sufficient self-confidence to become intimidating classroom participants who cut teachers no slack, especially new ones. They demonstrate some of the less likeable aspects of personalities

[49] M M Tokarczyk and E A Fay, *Working Class Women in the Academy: Laborers in the Knowledge Factory,* (The University of Massachusetts Press, 1993) at 137.

[50] L Vargas, *Women Faculty of Color in the White Classroom*, (Peter Lang Publishing, 2004) at 152.

[51] M M Tokarczyk and E A Fay, *Working Class Women in the Academy: Laborers in the Knowledge Factory,* (The University of Massachusetts Press, 1993), at 17.

[52] *Ibid*, at 137.

[53] *Ibid*, at 103 & 108.

[54] *Ibid*, at 132.

and prejudice that my sample had experienced in practice. On socialisation, there is evidence that the academic stage marks the initiation.

Taken from the US: ''Most of us assume that some of what happens in law school affects law, lawyers and lawyering''.[55] Work done by the Carnegie Foundation for the Advancement of Teaching found ''Law School provides rapid socialisation into the standards of legal thinking''.[56] Lawyers learn in US Law School how to be tough, to compete and to survive. Is it so very different, studying law in the UK?

Pre-LPC legal education takes place in the environment Cownie describes, where the identity and culture of their teacher academics will influence students. Cownie discovered this academic tribe is as often conflicted in their identity as those interviewed here.[57] For legal academic success, she found that class (amongst other things) is an issue. This is the atmosphere within which all practitioners begin their journey into practice. It is hard to imagine this has no effect.

Many legal academics tried practice before returning to academia. This gives a message about who stays in practice and who returns to academia. ''Returning'' non-traditional academics are not random in their choice of where to work: ''It's probably why I've always worked in a new university. It's to do with what you regard as an environment sympathetic to your background''.[58] Similarly, it may not be random chance that the LPC is rarely taught at old universities but almost my entire sample studied for their degree at a new university.

PART 7 – PREPARATION FOR PRACTICE

The LPC makes extensive use of what Barab and Duffy describe as ''practice fields'': ''contexts in which learners, as opposed to legitimate participants, can practice the kinds of activities that they will encounter outside''.[59] Their analysis argues that until learners actually enter a workplace, education is merely producing an approximation, not a real community, and that this produces a lack of authenticity. LPC students often complain about how ''fake'' the role-play activities are on the course.[60] This is perhaps not the only area where LPC teaching lacks authenticity: teacher reticence may also play a part.

Newcomers will seek out role models when entering any organisational situation; lawyers do too.[61] My interviewees indicated that they know they are role models but are resistant to using that position to exert undue influence. Work elsewhere showed how important a role model is – students take into practice what their teachers demonstrate to them.[62] However, ''Observation without being able to interact with role models is insufficient'' in order to begin to create a community of practice.[63] If a lack

[55] D L Rhode, ''Missing Questions: Feminist Perspectives on Legal Education'', (1992–1993) 45(6) Stan L Rev 1547, at 1554.

[56] W M Sullivan, A Colby, J W Wegner, L Bond and L S Shulman, *Educating Lawyers: Preparation for the Profession of Law*, (The Carnegie Foundation for the Advancement of Teaching, 2007), at 5.

[57] F Cownie, *Legal Academics: Culture and Identity,* (Hart Publishing, 2004).

[58] *Ibid*, at 179.

[59] A S Barab and T Duffy, *From Practice Fields to Communities of Practice*, (Centre for Research and Learning Technology, Indiana University, 1998), Report No 1 at 5.

[60] N Fletcher, *Equality, Diversity and the Legal Practice Course* (Research Study 49, The Law Society of England and Wales, 2004), at 57.

[61] C Filstad, ''Careers within Careers: Reconceptualizing the Nature of Career Anchors and Their Consequences'', (2004) 16(7) *The Journal of Workplace Learning* at 396.

[62] D B Wilkins, ''Two Paths to the Mountain Top? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers'', (1992–1993) 45(6) Stan L Rev 1981.

[63] C Filstad, ''Careers within Careers: Reconceptualizing the Nature of Career Anchors and Their Consequences'', (2004) 16(7) *The Journal of Workplace Learning* 396.

of frankness on practice life inhibits interaction then this, together with the lack of authenticity mentioned above, could well impact on learning. This echoes what Resnick says of US law schools: they do not tell it like it is. ''Even as we tell of the horrors of the many forms of discrimination, we somehow continue to tell of the joys of legalism and the hope that we can 'fix' it''.[64]

That said, does this stage of legal education produce competent practitioners? For the men in my sample the evidence is that it did not: they admit their functioning was not good and for two this was exacerbated by their surprise and disappointment at how tedious practice can be. But no interviewee ever told their students about the less attractive side to practice. This looks like an example of Eraut's ''dualistic approach to professional education''.[65] He explains there is a mismatch between the theories a profession espouses as its theoretical base and the use of those theories in practice. The espoused theories ''represent the way professionals like to see themselves and present themselves to the public'' but in reality what happens in practice ''would not be deemed fit for public communication'' as it would diminish the image of the profession.[66] This duality exacts a price, which he argues leads to either ''scepticism or to frustration and burn out; the third route is to become professional educators and perpetuate the cycle''.[67] These LPC teachers fit the third category, and two of my sample had breakdowns while in practice. The LPC could be risking leaving students to sink or swim in the community of practice they enter.

PART 8 – CONCLUSION

Reflecting on the above, two major themes emerge:

1. The feelings of passing or impostor complex that appear in other areas of academia have no place the narratives of the non-traditional teachers, contrary to expectations;
2. None of these teachers is uninhibited in what they tell students about the life in practice for which they are being prepared.

There may be implications here for both law teachers and HE teachers in general. Looking first at what these teachers express about their attitude towards teaching, why are they all (except one) seemingly so much at home in their sector of HE, despite coming from non-traditional backgrounds? Confidence of having done the job seems to be the reason, wherever a reason was expressed. These lawyers achieved their ambitions, even if they did not stay with practice. Perhaps from their background becoming a teacher is as valid a career choice as lawyer (there is evidence for this in the interviews). Perhaps teaching seems a bit of a ''come-down'' for the traditional entrant and that explains the difference.

In a future where more teaching staff should come from non-traditional backgrounds, as widening participation works through to academic employment, this analysis holds hope. If true, it may not be inevitable that such staff feel uncomfortable, as would be predicted from Vargas and Tokarczyk and Fay's work. By sheer weight of numbers, non-traditional academics would feel happier, less obviously different from both fellow staff and students.

[64] J Resnick, ''Ambivalence: the resiliency of legal culture in the United States'', (1992–1993) 45(6) Stan L Rev 1525.

[65] M Eraut, ''Non-formal Learning and tacit knowledge in professional work'', (2000) 70 *British Journal of Educational Psychology* 123.

[66] *Ibid*, at 123.

[67] *Ibid*, at 123.

On the basis of the comfort of the familiar, it may simply be that studying for a first degree at a new university, translates into such institutions suiting non-traditional HE teachers better. Should all non-traditional HE teachers therefore aim for new universities; would this redress an imbalance or perpetuate one?

But it may alternatively be that the strength of these non-traditional lawyers derives from their having been in practice. On that basis there could be an argument for requiring all law teachers, or even all HE staff, to leave academia for a period, doing what anyone on a good gap year should; *ie* experiencing wider horizons, gaining confidence, wisdom and so on. If this is too extreme and unworkable, some way of recreating the confidence of practitioners could be sought; perhaps a serious effort at making use within the HE community of the practice of teaching.

This sample suggests role models may not be essential for students from non-traditional backgrounds. What was demonstrated was an awareness of the value of a degree from a prestigious university and the handicap of one from elsewhere, in relation to their career. Whilst for lawyers it is received wisdom that more staff from minority ethnic backgrounds will help students with the same backgrounds,[68] this may not be as important as instilling a sense of value in the worth of what is achieved by *all* less advantaged students, whoever teaches them.

Could it be that role models to encourage undergraduate students are a distraction, a way of diverting the debate away from the tough target of minimising inequalities between universities towards an easier one? Could this, like the focus on individualised learning,[69] be another example of HE trying to manage appearances and figure-work rather than combat the underlying issues?

My interviewees brought strengths to their teaching that others may learn from. More research into harnessing these could be of use.

Further, there is the issue of not being wholly candid with their students about their experiences of life in practice. There is a price to pay for this. Students already perceive a lack of authenticity on the LPC that hinders the effectiveness of their learning.[70] Additionally, some of them (as my interviewees did) may feel disappointed when the reality of practice hits them. No generalities about practice life can possibly be drawn from such a small sample. There is, however, evidence elsewhere, both within and referred to in the work of Boon,[71] to suggest their experiences are not isolated. The high levels of alcoholism and substance abuse, breakdown *etc* (see www.lawcare.org.uk for details) could be traced in some part to the gap between expectations and reality in which such reticence may play its part.[72] It may be that where aspirations are particularly high, disappointment is greater. On the question of whether the effects of this are greater or lesser for those from non-traditional backgrounds, my sample sheds no light.

A wholly commendable reason for reticence is that teachers recognise their responsibilities towards these students and do not want to deter them from their ambitions. This has its own integrity and it would be inappropriate and unhelpful to propose using the LPC as a cathartic experience for unhappy lawyers. It might be helpful to consider ways to convey more of practice reality to students. Clinical education, guest lectures, pro bono work and "work shadowing" do have potential. However, there are risks involved in following the well-trodden "not discouraging"

[68] *Op cit*, n 1, at 89.
[69] *Op cit*, n 23.
[70] *Op cit*, n 2.
[71] *Op cit*, n 1.
[72] *Op cit*, n 30.

path; not least in sanitising, rather than enlightening, the reality of legal practice. Something even more closely connected to the world outside law school might have potential, perhaps using alumni for blogs, chatrooms or uninhibited speakers could be possibilities.

The influence of employers cannot be ignored – where they pay they do not want their investments deterred. Teachers are conscious of this, and the anticipated rise of the vocational side of HE will not lessen this factor.

The difficulties of authenticity and candour within the vocational practice field are ones the LPC has *not* dealt with; this research may be the first articulation of it. With warning perhaps the wider HE sector, could research and prepare to do better, making better use of the stories teachers (and students) can tell. There is a lack of research into the teaching and learning perspectives of teachers as well as learners.[73] I hope this study begins to redress the balance.

[73] R Neumann, ''Disciplinary Differences and University Teaching'', (2001) 26(2) *Studies in Higher Education* 142.

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CASE AND COMMENT

The address for the submission of material for this section is given at the beginning of this issue

CONSTRUING THE MEANING OF "COMMERCIAL AGENT"

Sagal (Trading as Bunz UK) v Atelier Bunz GmbH
[2009] 4 All ER 1253, 3rd July 2009, (Laws, Longmore, Lloyd LLJ)

INTRODUCTION

The common law has provided (and continues to provide) a vast body of case law which governs the relationship between a principal and its agent. Indeed, it is clear that the common law subjects the agent to a number of quite burdensome duties to its principal. The natural consequence of such a relationship is that an agent will enjoy only limited rights *vis-à-vis* its relationship with a principal.[1] This imbalance has, to a certain degree, been addressed by the enactment of The Commercial Agents (Council Directive) Regulations 1993 (''the Regulations'')[2] which regulates the legal relationship between commercial agents and their principals.[3]

This note will reflect upon the notion of the ''commercial agent''. It considers briefly the rationale behind the Directive which implemented the Regulations and explores the protections provided to those who come within its scope. Finally, it explores the approaches adopted by the Courts when construing the meaning of ''commercial agent'' and seeks to argue, in the light of the recent Court of Appeal case of *Sagal (Trading as Bunz UK) v Atelier Bunz GmbH*,[4] that the Courts have now developed jurisprudence which appears to provide some clarification as to when an agent will, in law, be considered to be a commercial agent.

THE DIRECTIVE, COMMON LAW, AND REGULATIONS

In essence, the aim of the Directive behind the Regulations was to achieve greater harmony as to the laws governing commercial agency relationships and to provide more consistency in the protection afforded to commercial agents cross Member States. The theme of protecting commercial agents appears to be a central feature of the Directive and one which makes legal sense, especially when one appreciates the lack of protections which previously existed for commercial agents. Indeed, Stoughton LJ

[1] At common law, an agent maintains the right to remuneration; the right to a lien; and the right to an indemnity.

[2] SI 1993/3053 as amended by SI 1993/3173 and SI 1998/2868. The Regulations came into force on 1st January 1994.

[3] The Regulations do not simply provide protection for a commercial agent but also reaffirm some of the common law obligations and duties which exist between an agent and a principal.

[4] [2009] 4 All ER 1253.

emphasised what he perceived as the central premise upon which the Directive was founded:

> . . . the Directive appeared to be based upon a belief that commercial agents are a downtrodden race, and need and should be afforded protection against their principals. . .[5]

It is clear that the Directive sought to achieve more than to simply provide protection to commercial agents. In *Tamarind International Ltd v Eastern Natural Gas (Retial) Ltd* [6] Morison J explored in some detail the rational behind the Directive. He stressed that the fundamental propose of the Directive (and therefore the Regulations) was to uphold the right to allow nationals from Member States to set up agencies and, consequently, to promote the freedom of establishment as enshrined in the EC Treaty. Morison J explained at paragraph 10 of his judgment:

> The Directive has an essential function, the co-operation of laws relating to self-employed commercial agents . . . The Directive was made partly so as to give effect to the right of establishment and . . . the abolition of restrictions on freedom of establishment (Arts. 43 and 44). It was also made pursuant to Art. 47 'to make it easier for persons to take up and pursue activities as self-employed persons' and to harmonise laws so as to enhance fundamental social rights . . .

It should be noted from the outset that, pursuant to Regulation 1(2), the Regulations only apply to the internal agency relationship between a principal and agent. Further, and more relevant for our purposes, an agent will only be able to rely on the provisions of the Regulations if that agent is a 'commercial agent' and it is this issue which came before the Court of Appeal in *Sagal*.

Before proceeding to consider the question of whether an agent will qualify as a commercial agent and the Court's reasoning in *Sagal* (and related cases), it is worth appreciating why an agent would wish to come within the scope of the Regulations. What protections are afforded by the Regulations and why are these important to a commercial agent? In order to answer this question we must first consider the remedies which the common law provides to an agent before considering the specific provisions of the Regulations.

As stated earlier, an agent enjoys limited rights against his principal at common law. These rights include the right to remuneration; the right to an indemnity; and the right to a lien.

Although an agent is entitled to be remunerated at common law, this right is not automatic. An agent will only be entitled to remuneration if this has been provided for either expressly in the agency agreement or, in rare circumstances, may be implied by the Courts.[7] An agent will also be entitled to be indemnified for any reasonable expenses and losses incurred in discharging his obligations as an agent. As with the right to be remunerated, the right to an indemnity must either be expressly set out in the agency agreement or may be implied. Finally, the law allows an agent the right to exercise a lien over the principal's property. However, the right to a lien is only effective when the goods upon which the agent is purporting to exercise the right are in the agent's possession and where the goods are those in relation to which money is owed.

Therefore, the rights of an agent under the common law are not only limited in number but may be difficult to enforce against a principal without having to resort to the civil courts: a potentially time consuming and expensive course of action.

[5] *Page v Combined Shipping & Trading Co* [1997] 3 ALL ER 656, 660.

[6] [2000] CLC 1397.

[7] In *Way v Latilla* [1937] 3 All ER 759 the House of Lords was able to find an implied term for the agent to be remunerated for his services.

From the point of view of a commercial agent, the most significant and favourable provisions of the Regulations concern those which relate to remuneration, conclusion of contracts, and termination of the agency agreement. These provisions consolidate and extend the existing common law but also go some way further in creating additional protections which do not exist under the common law.[8]

In brief a commercial agent will be entitled, in the absence of express agreement, to commission during and after the agency agreement has come to an end. This is more favourable for a commercial agent as compared to the common law position where the right to be remunerated is not automatic. In particular, commission under the Regulations will become payable on contracts concluded during the agency which resulted from the commercial agents actions or where the commercial agent has concluded transactions on behalf of the principal with customers with whom the commercial agent has had previous dealings. Commission will also be payable to the commercial agent after the agency agreement has come to an end and where the transaction can be shown to be attributable to the efforts of the commercial agent or where the order reached the principal or the commercial agent before the agency was terminated.[9]

In addition to commission, a principal will be required to either compensate and/or indemnify the commercial agent upon termination of the agency relationship.[10] The agency agreement must provide for an indemnity and a commercial agent will be entitled to an indemnity where the commercial agent has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers. The payment of the indemnity must also be equitable having regard to all the circumstances of the case.[11]

A commercial agent will, in addition to an indemnity (if it has been provided for), be entitled to compensation for damage which the commercial agent has suffered as a result of the termination of the agency agreement.[12] A commercial agent will be entitled to be compensated where the termination of the agency agreement has deprived the commercial agent of the commission which proper performance of the agency contract would have procured for the commercial agent whilst providing the principal with substantial benefits linked to the activities of the commercial agent or where the termination has not enabled the commercial agent to amortize the costs and expenses that have been incurred by the commercial agent in the performance of the agency contract on the advice of the principal.[13]

A principal is also obliged to provide the agent with a minimum period of notice before the principal is allowed to terminate the agency agreement.[14] Neither the principal nor the agent can derogate out of the minimum periods of notice.[15]

[8] Regulation 3 reiterates an agent's common law duties which include an agent's duty to look after the interests of the principal and to act dutifully and in good faith.

[9] Regulation 7 and 8.

[10] Regulation 17.

[11] Regulation 17(3).

[12] Regulation 17(6).

[13] Regulation 17(7).

[14] Regulation 15 provides that the following minimum periods of notice must be given: 1 month for the first year of the agency agreement; 2 months for the second year; and 3 months for the third year. The parties cannot agree to shorter time periods to those set out in Regulation 15.

[15] Regulation 15(2).

Finally, the Regulations strictly control any restraint of trade clauses which may unfairly prejudice a commercial agent from continuing to conduct business after the agency relationship has come to an end.[16]

THE DEFINITION

When will an agent be considered to be a ''commercial agent'' for the purposes of the Regulations? Article 2(1) of the Regulations defines a commercial agent and an agent who falls within this definition will come within the scope of the Regulations. Article 2(1) provides that a commercial agent is:

> . . . a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the ''principal''), or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of that principal . . .[17]

It will be immediately apparent from the above definition that there are two distinct limbs, which are stated in the alternative, as to when an agent will be considered to be a commercial agent and thereby fall within the scope of the Regulations. The first limb requires that an agent possesses continuing authority from his principal to simply negotiate the sale (or purchase) of goods. The first limb does not, however, require an agent to have authority to conclude sales (or purchases). The second limb is narrower than the first and requires an agent to have both continuing authority to negotiate and conclude sales (or purchases) in the name of (and on behalf of) the principal.

Although on first impressions it may seem that such an analysis of Article 2(1) should allow Courts to easily determine whether an agent comes within the Regulations, this has not, unfortunately, been the case as will be apparent from a discussion of *Sagal* and related cases.

Sagal

In *Sagal* the claimant (the purported commercial agent) was appointed as the defendant's (the principal who was based in Germany) UK sales agent. The terms of the business plan between the parties stated (among other duties and obligations) that the claimant would take orders from UK customers and place these with the defendant, deliver the goods to customers and invoice customers. In return, the claimant was entitled to receive a 20% discount on the defendant's wholesale prices.

The claimant subsequently set up as ''Bunz UK'' and operated its business by taking purchase orders from customers and placing these with the defendant following which the defendant would confirm the orders and provide the claimant with a 20% discount. The claimant would then send its own invoices to customers requesting payment. The judge at first instance also found that the defendant fixed the prices of the goods with the claimant merely advising the defendant on those prices and the UK customers who defaulted on invoices were always pursued in the name of Bunz UK. Taking these findings of fact into consideration, the judge at first instance held that the claimant did not, for the purposes of Article 2(1) of the Regulations, possess any authority from the

[16] Regulation 20.

[17] From the definition of commercial agent it follows that agents which are not covered by the Regulations include employees acting on behalf of their employers; agents who act on a ''one-off'' basis; and agents who sell services. Regulation 2(1) and Regulation 2(2) also provide a list of agents which further restrict the application of the Regulations and include: (i) officers of a company or association (*eg* managing directors of companies); (ii) partners with authority to bind his other partners; (iii) insolvency practitioners; (iv) commercial agents whose activities are unpaid; (v) commercial agents when they operate on commodity exchanges or in the commodity market; and (vi) the Crown Agents for Overseas Governments and Administrations, as set up under the Crown Agents Act 1979, or its subsidiaries.

defendant to negotiate or contract on its behalf and therefore the claimant was not a commercial agent. The claimant appealed.

In dismissing the appeal, the Court of Appeal found that the claimant was not a commercial agent. In reaching its decision, the Court carried out the exercise of construing the meaning and effect of the Directive[18] behind the Regulations in order to answer the question of whether the Directive applied to agents who bring their principals into direct contractual relationships with their customers or whether it can also apply to agents who make their own contracts with their customers as it appeared from the facts of *Sagal*.

Longmore LJ, delivering the leading judgment, focused his attention on the actual wording of the Directive.[19] His Lordship observed that the first limb of the definition of "commercial agent" envisaged that the agent does not have authority to contract on behalf of his principal but only to negotiate terms on behalf of his principal which is then referred back to the principal. If the principal then wishes to conclude a contract with the third party then the principal will do so in his own name. The definition of commercial agent did not mean that the agent would enter into the contract with third parties on his own behalf. Longmore LJ held that agents with authority to contract (as opposed to authority to negotiate) are only commercial agents for the purposes of the Directive if they have authority to contract (and do contract) in the name of the principal. It followed, from a careful and detailed analysis of the business plan and the various contractual documents between the parties, that the claimant never possessed any authority from the principal as the claimant never contracted in the name of the defendant but only in the name of Bunz UK which, it was found, was merely a trading name for the claimant.

Longmore LJ went on to argue that although it was possible for a principal to authorise his agent to enter into contracts in the agents name, such agents would not fall within the definition of "commercial agent". His Lordship reasoned that if the principal is undisclosed or unidentified on the face of the contract then this may result in many days of oral evidence being given in order to ascertain the intentions of the parties and this was not what the framers of the Directive had in mind. Whereas if the principal's name appeared on the contract then the investigation into whether the agent is a commercial agent would be simple and quick. Thus, the contractual documents between the parties were crucial in determining whether a commercial agency existed.

Longmore LJ concluded with a stern warning to both Courts and counsel when faced with the task of ascertaining whether a commercial agency existed. Longmore LJ argued:

> . . . judges should be cautious about allowing the question whether commercial agency exists to develop into an extended trial with extensive oral evidence. The basic documentation should be before the Court at any case management conference . . . German businessmen would be surprised that it should take four days of trial to determine the question whether somebody is a "commercial agent" . . . and appalled at the resulting cost. . . [20]

[18] Directive 86/653/EEC. The words in Article 1(2) of the Directive which defines "commercial agent" are almost identical to the words in Article 2(1) of the Regulations.

[19] The general principle of EC law is that Regulations must be interpreted against the background of the Directive itself – see *Lister v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546, 558 in which Lord Templeman explained: "The courts of the United Kingdom are under a duty to follow the practice of the European Court by giving a purposive construction to directives and to regulations issued for the purpose of complying with directives."

[20] *Op Cit*, at 1259.

RELATED CASES AND DISCUSSION

Sagal is another rare but important case which demonstrates the difficulties in trying to determine whether a particular commercial relationship falls within the ambit of the Regulations. These difficulties are also reflected in the relatively few Court of Appeal authorities which have had at their heart the interpretation and application of Article 2(1). It is to those authorities to which we now turn.

In *AMB Imballaggi Plastici SRL v Pacflex Ltd*[21] the agent and principal conducted business on the basis of a sale and re-sale of goods. The principal sold goods to the agent who subsequently re-sold those goods to third party customers. The agent also charged a mark-up which the agent determined and which was not in any manner dictated by the principal. Further, there existed very little contractual documents between the principal and agent which set out the parties commercial relationship. The Court of Appeal held that the agent was not a commercial agent because it had acted on its own behalf and not on behalf of the principal. A major factor which reinforced the Court's judgment was the fact that the agent determined its own mark-up. Waller LJ reasoned:

> If a person buys or sells himself as principal he is outside the ambit of the regulations. That is so because in negotiating that sale or purchase he is acting on his own behalf and not on behalf of another. All the regulations point in the direction of the words 'on behalf of' meaning what an English Court would naturally construe them as meaning. The other person on whose behalf the intermediary has authority to negotiate the sale or purchase of goods is called the 'principal'; the duties are consistent with true agency and not with buying and reselling; 'remuneration' is quite inconsistent with 'mark-up', particularly 'mark-up' within the total discretion of the re-seller.[22]

Despite the Court placing an emphasis on the issue of mark-up as being an important factor in demonstrating that the Regulations will not apply, this is not at all conclusive as illustrated in the case of *Mercantile International Group Plc v Chuan Soon Huat Industrial Group Ltd.*[23] In that case the Court of Appeal concluded that, in the light of the detailed contractual documents, there was a commercial agency relationship even though the agent retained an undisclosed margin. This was especially so as the third parties contracted with the principal and not the agent. The Court *in Mercantile International* distinguished *AMB* on the basis that the relationship between the parties in *Mercantile International* was clearly set out in the contractual documents which were before the Court when it considered the interpretation of Article 2(1).

Thus, from an analysis of the above authorities, it appears that the Courts will be strongly inclined to conclude that a commercial agency exists where third parties have entered into contracts directly with the principal and in cases where the contractual documents before the Courts purport to set out an agency relationship. This line of reasoning is clearly reflected in *Sagal*. Longmore LJ's judgment reinforces the approach adopted by the Court of Appeal in *Mercantile International* in that the Courts will perform a detailed analysis of any contractual documents which existed between the parties when considering the application of Article 2(1). This will always be, in the light of *Sagal* and *Mercantile International*, the starting point for the Courts. It also appears from both *Sagal* and *Mercantile International* that the issue of mark-up will be relevant

[21] [1999] 2 All ER (Comm) 249.
[22] *Ibid*, at 252.
[23] [2002] 1 All ER (Comm) 788.

to a limited extent as a factor when considering Article 2(1). This will especially be the case where the Court has before it detailed contractual documents between the parties.

Finally, the Court of Appeal in *Sagal* has taken a strong policy approach in seeking to limit the time and expense which should be spent on determining whether a commercial agency exists. This policy approach is consistent with the overall philosophy behind the Civil Procedure Rules (and the approach taken by the Courts in general) of ensuring that the Court's resources and the parties' expenditure on litigating cases is kept to a minimum. It is envisaged that, following Longmore LJ's stern warning, fewer cases which concern the construction of Article 2(1) will proceed beyond the High Court and this will result in the lower Courts following the existing authorities.

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PREGNANCY DISCRIMINATION IN THE EMPLOYMENT CONTEXT

Case 506/06 Mayr v Backerei und Konditorei Gerhard Flockner OHG [2008] IRLR 387

INTRODUCTION

A recent ruling by the European Court of Justice (ECJ) in *Mayr v Backerei und Konditorei Gerhard Flockner OHG*[1] marks an interesting and potentially significant landmark. It is the first time that pregnancy discrimination has been considered in the light of *in vitro* fertilisation (IVF), the commonest form of assisted reproduction used to combat infertility. It is foreseeable therefore, that this ruling will have major, and unpredictable, implications for employers. In the UK 3·5 million people are affected by infertility which means that the number of people opting for assisted reproduction is high. In "any one year there are around 441,000 pregnant women at work"[2] and of these women, "one in six are too scared to tell their bosses of their condition"[3] as they fear that they may be dismissed. With the availability of an increasing number of reproductive technologies, (other than IVF),[4] it is likely that the number of pregnant women in work will increase, posing difficulties to employers seeking both to maintain a workforce and ensure that women are protected. The advances in reproductive technologies are challenging our current understanding of pregnancy discrimination law. This is a major concern as the Equal Opportunities Commission has estimated that "30,000 women lose their jobs every year as a result of being pregnant costing employers £126 million annually".[5]

The implications of the ruling upon employers and other forms of Assisted Reproductive Technologies (ARTs) have not yet been clearly identified, and this is a key issue that needs to be addressed. The fundamental issues that arise within the case are: when is pregnancy deemed to begin with regards to artificial forms of reproduction,[6] what protections are available to such pregnant workers and how effective are those protections.

The Facts

Ms Sabine Mayr, an Austrian national, underwent assisted reproduction, in the form of IVF. A follicular puncture (the removal of ova from a woman's follicles – contained within the ovary) was carried out on 8 March 2005. On 13 March 2005 two embryos (fertilised ova) were to be transferred into her uterus.[7] However, on 10 March 2005 her employer informed her that she was to be dismissed with effect from 26 March 2005.[8] By letter of the same date, Ms Mayr informed Flockner that she was undergoing IVF

[1] Case C-506/06 *Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] IRLR 387.

[2] BBC News Website, *Pregnant employees 'forced out'*, published Wednesday 2 February 2005; http://news.bbc.co.uk/1/hi/uk/4225941.stm, accessed 26th June 2009; Baksi, C; *Career Brief: Firms 'fare badly' with pregnancy*, Law Society Gazette, (2005) LS Gaz, 10th February 2005, 39 (1).

[3] L Veevers and S Goodchild, *Nearly half of pregnant women are treated unfairly by their bosses*, Sunday 1st October 2006, Independent news website: http://www.independent.co.uk/news/uk/this-britain/nearly-half-of-pregnant-women-are-treated-unfairly-by-their-bosses-418324.html, accessed on 8th June 2009.

[4] HFEA Website: http://www.hfea.gov.uk/fertility.html, accessed 26th June 2009; BBC News Website, *IVF*, published Friday 24th October 2008; http://news.bbc.co.uk/1/hi/health/medical_notes/308662.stm, accessed on 26th June 2009.

[5] M Frith, *Up to 30,000 women forced out of work because of pregnancy*, Wednesday 2nd February 2005, Independent news website: http://www.independent.co.uk/news/uk/this-britain/up-to-30000-women-forced-out-of-work-because-of-pregnancy-483151.html, accessed 8th June 2009.

[6] BBC News Website, *IVF*, published Friday 24th October 2008; http://news.bbc.co.uk/1/hi/health/medical_notes/308662.stm, accessed on 26th June 2009.

[7] Case 506/06 *Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] IRLR 387, Judgment at paras 17 and 21.

[8] *Ibid*, at para 18.

treatment and that the transfer of the fertilised ova into her uterus was planned for the 13 March 2005.[9]

Thus, the question that had to be resolved by the ECJ was whether or not Ms Mayr was a ''pregnant worker'' within the meaning of the *Pregnant Workers Directive* (PWD)[10] given that when she was dismissed, her fertilised ova existed, but had not yet been transferred into her uterus.[11]

Case History

The Regional Court, Salzburg (Court of First Instance) found in favour of Ms Mayr. It held that protection against dismissal should be extended to cover the case of IVF because according to the case law of the Supreme Court, Austria, it is fertilisation that is regarded as the start of a pregnancy.[12] Therefore, Ms Mayr was to be protected against dismissal as she was ''pregnant'' once fertilisation occurred.

The Higher Regional Court, Linz, then set aside the first instance judgment and held that with IVF only when the fertilised ova are transferred into a woman's body will protection against dismissal commence.[13]

The Austrian Supreme Court upon appeal sought clarification from the ECJ, as to the scope of the term ''pregnant worker'' contained in the Pregnant Workers' Directive (PWD).[14]

The Legal Issues

The principal issue to be determined by the ECJ was: ''is a worker, who undergoes IVF, a pregnant worker within the meaning of *Article 2(a)* of *Directive 92/85* if, at the time at which she was given notice of dismissal, the woman's ova had already been fertilised with the sperm cells of her partner so that *in vitro* embryos existed, but had not yet been transferred into her uterus?''.[15] The case also analysed when the so-called ''protected period'' should commence for women undergoing IVF treatment. The protected period protects women from dismissal and commences once a woman becomes pregnant and ends at the end of maternity leave.

The Relevant Employment Legislation

The PWD Article 2(a) defines a ''pregnant worker'' as one who ''informs her employer of her condition, in accordance with national legislation and/or national practice''.[16] This definition fails to establish the point at which a woman is considered to be pregnant and the method by which women are to inform their employers of pregnancy.

Article 10 of the PWD provides that ''Member States shall . . . prohibit the dismissal of workers, from the beginning of the pregnancy to the end of the maternity leave, save in exceptional cases not connected with pregnancy''.[17] This provision protects pregnant women because, from the beginning of a pregnancy until the end of maternity leave (ie the protected period),[18] an employer is prevented from dismissing a pregnant worker,

[9] *Ibid*, at paras 19 and 21.

[10] The Pregnant Workers Directive 92/85, Articles 2 and 10.

[11] Case C-506/06 *Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] IRLR 387 at paras 28 and 29.

[12] *Ibid*, para 24.

[13] *Ibid*, para 25.

[14] The Pregnant Workers Directive 92/85, Article 2(a).

[15] Case 506/06 *Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] IRLR 387, Judgment at para 29.

[16] The Pregnant Workers Directive 92/85, Article 2(a).

[17] *Ibid*, Article 10.

[18] See the Sex Discrimination Act 1975, Section 3A.

as defined by Article 2(a) above.[19] At the time of writing the relevant UK legislation implementing the EU Directive and the concept of the "protected period" is s 3A of the Sex Discrimination Act 1975.[20] From October 2010 s 3A will become s 18 of the Equality Act 2010. [21] This section mirrors the wording of s 3A.

The Equal Treatment Directive (ETD)[22] seeks to establish equality between men and women. Unlike the PWD, which only protects pregnant women from the start of a pregnancy until the end of maternity leave, the ETD is not confined to a particular phase in a woman's life.[23] Article 2(1) of the ETD states: "the principle of equal treatment, means that there shall be no discrimination whatsoever on the grounds of sex either directly or indirectly by reference in particular to marital or family status".[24] Article 2(3) clarifies that the provisions of the Directive are without prejudice to "the protection of women, particularly as regards pregnancy and maternity".[25]

The ECJ Ruling

The ECJ held that Ms Mayr was not a "pregnant worker" for the purposes of Article 2 of the PWD, because at the time when she was given notice of dismissal, her ova had been fertilised in a laboratory but had not yet been transferred into her body.[26] This was primarily because a pregnancy is identified with the development of a new human being in a woman's body, a stage that had not occurred at the time Ms Mayr was dismissed.[27] As several days usually elapse between fertilisation and transfer, the ECJ ruled that only upon transfer will protection against dismissal begin.[28]

The ECJ's ruling also recognised that fertilised ova are not always transferred immediately into a woman's body, as the ova can be stored for possible future use. Under Austria's national legislation, fertilised ova can be stored for a maximum period of 10 years.[29] Thus, commencing protection against dismissal before transfer occurs would protect women even when transfer is postponed or abandoned, with IVF merely being carried out by way of precaution.[30] Hence, this outcome would mean that protection against dismissal could potentially last indefinitely.

It is feasible to implant the fertilised ova of one woman into the body of another (this is what happens in the case of so-called surrogate mothers).[31] Therefore, this could mean that a worker who is not and will not be pregnant could invoke the protection of the PWD because such protection would commence upon fertilisation, as opposed to transfer. (The ECJ went on to find in favour of Ms Mayr, but on the ground of sex discrimination.[32])

[19] The Pregnant Workers Directive 92/85, Article 2(a).

[20] S.3A The Sex Discrimination Act 1975.

[21] S.18 Equality Act 2010.

[22] The Equal Treatment Directive 76/207.

[23] Case 506/06 *Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] IRLR 387, Opinion of Advocate General Ruiz-Jarabo Colomer, at para 67.

[24] The Equal Treatment Directive 76/207, Article 2(1).

[25] *Ibid*, Article 2(3).

[26] Case 506/06 *Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] IRLR 387, Opinion of Advocate General Ruiz-Jarabo Colomer, at para 48.

[27] *Ibid*, at para 38.

[28] Case 506/06 *Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] IRLR 387, Judgment at para 25.

[29] *Para 17(1)* of the *Fortpflanzungsmedizingesetz* (Law on Reproductive Medicine in Austria).

[30] Case 506/06 *Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] IRLR 387, Judgment at para 42.

[31] Case 506/06 *Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] IRLR 387, Opinion of Advocate General Ruiz-Jarabo Colomer, at para 46.

[32] The ECJ established that sex discrimination was made out because the treatment in question only affects women. It followed that the dismissal of a female worker essentially because she is undergoing an important stage of IVF treatment constituted direct discrimination on grounds of sex. (see paras 50 and 52 of the judgment). This has important

Consequently, the ECJ held that Articles 2(1) and 5(1) of the ETD[33] prohibit the dismissal of a female worker who is at an advanced stage of IVF (ie between follicular puncture and transfer) if it can be established that the dismissal is essentially based on the fact that the woman has undergone such treatment.[34]

Comment

In *Mayr v Backerei*[35] the ECJ held that in relation to IVF a pregnancy begins once the fertilised ovum (ie the embryo) has been transferred into the woman's body.[36] Therefore, only upon transfer will a pregnancy commence. Until that point no pregnancy will exist.

The reasoning behind the ruling was that fertilised eggs could be stored and used later on.[37] In relation to the UK, the Human Fertilisation and Embryology Act 1990, section 14(4) lays down a maximum storage period of ten years for gametes (eggs or sperm) and five years for embryos (fertilised eggs).[38] This however, has been amended by the Human Fertilisation and Embryology (Statutory Storage Period for Embryos) Regulations 1996 which allows a presumption that embryos will only be stored for five years to be rebutted in most circumstances in favour of a 10 year limit.[39] Thus, if protection afforded to women under the PWD was to start from fertilisation – the point at which Ms Mayr submitted that her pregnancy should be deemed to commence, the Article 10 prohibition against dismissal would last for an indefinite and excessive length of time. This would be contrary to the objective of the Directive which is to protect women that are already pregnant due to the vulnerability of their situation as opposed to protecting women who wish to become pregnant.[40] The reasoning behind the ruling is also consistent with cases like *Evans v Amicus Healthcare Limited (Secretary of State for Health Intervening)*[41] which held that an *in vitro* embryo is not "used" until it is transferred into a woman. Again this decision reaffirms that a pregnancy brought about through IVF will only commence when the embryo is transferred into the woman's body.

The major implication of this ruling is that it introduces another protected period for women undergoing IVF, which commences upon transfer,[42] This is despite the fact that with IVF, just like many other forms of assisted reproductive technology (ART), the treatment involves a two-week wait after transfer, before the woman or her doctor can even confirm that a pregnancy has arisen.[43] Therefore, there now appears to be a "grey area" because women undergoing IVF can now enter their protected period even before they know whether or not a pregnancy has arisen because all that is required is transfer.[44] Consequently, women undergoing IVF will be afforded greater protection on

implications for sex discrimination cases and other forms of gender-specific treatments, but a discussion of these is outside the scope of this case note.

[33] The Equal Treatment Directive 76/207, Articles 2(1) and 5(1).

[34] Case 506/06 *Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] IRLR 387, Judgment at para 52.

[35] *Ibid*.

[36] *Ibid*, at para 25.

[37] *Ibid*, at para 42.

[38] The Human Fertilisation and Embryology Act 1990, Section 14(4).

[39] The Human Fertilisation and Embryology (Statutory Storage Period for Embryos) Regulations 1996, Section 2(4)(b).

[40] Case C-506/06 *Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] IRLR 387, Opinion of Advocate General Ruiz-Jarabo Colomer, para 45.

[41] *Evans v Amicus Healthcare Limited (Secretary of State for Health Intervening)*[2004] EWCA Civ 727.

[42] Case C-506/06 *Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] IRLR 387, at para 25.

[43] C Fox, *Protection in contemplation of pregnancy?* Employment Law Bulletin, 2008, Emp.L.B.2008, 85(Jun), 3–6.

[44] *Ibid*.

the assumption that they might just be pregnant[45] because under *Mayr v Backerei*[46] women undergoing ART enter their protected period upon transfer, in contrast to women conceiving naturally who enter their protected period once they are pregnant.[47]

Although the ECJ found that Ms Mayr was not pregnant, and thus not protected against dismissal under the PWD, they held that she was still legally protected by virtue of the ETD because the medical procedure that she was undergoing was at an "advanced stage" and specific to women.[48] Thus, to dismiss because of it constituted direct sex discrimination. The "advanced stage" of her treatment referred to the period between "follicular puncture – (which is the removal of the eggs from the follicles which contain a woman's eggs) and the immediate transfer of the *in vitro* fertilised egg/s into the woman's uterus".[49] Again, this part of the ruling also affords women undergoing IVF treatment greater protection than those who conceive naturally: for in the period between follicular puncture and transfer it is not certain that a successful pregnancy will arise.

As a result of the ECJ ruling there now appears to exist a two tier legal protection system. Women conceiving naturally are protected against pregnancy discrimination once they are pregnant and have informed their employer.[50] In contrast women conceiving through ART, such as IVF, are protected against pregnancy discrimination upon the transfer of the fertilised eggs into the woman. The question is whether such a two tier system, in which those who conceive naturally are afforded less protection than those who require medical intervention and undergo ART, is justifiable.[51] The law should be consistent and also provide certainty, especially when the ultimate goal of these women is to become pregnant.

It would appear that the decision in *Mayr v Backerei* is confined to IVF. [52] However, it is submitted that other forms of ART which also involve transfer – the point at which a pregnancy is deemed to commence should also be recognised.[53] If the ruling were to be confined to IVF, it would mean that women undergoing other forms of infertility treatments would have no protection against pregnancy discrimination. Furthermore, it would mean that women who require medical intervention in order to conceive would only be able to undergo IVF treatment in order to be protected against pregnancy discrimination – even if IVF treatment is unsuccessful or not the right type of treatment to combat the particular cause of infertility.

Impact of Mayr on other ARTs

As reproductive technology advances, identifying the point at which pregnancy is deemed to commence becomes increasingly difficult. *Mayr v Backerei*[54] established that only when fertilised ova are transferred into a woman's body, can an IVF pregnancy be deemed to commence.[55] However, with advances in reproductive technologies, a key point to note is that if the ECJ ruling is wide enough to cover other types of ARTs then the term "transfer" becomes problematic. This is because the point of transfer is

[45] *Ibid*.

[46] Case C-506/06 *Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] IRLR 387.

[47] See The Sex Discrimination Act 1975, para 3A.

[48] Case C-506/06 *Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] IRLR 387, paras 50 and 52.

[49] *Ibid*, at para 52.

[50] See The Pregnant Workers Directive 92/85, Article 2.

[51] C Fox, *Protection in contemplation of pregnancy?* Employment Law Bulletin, 2008, 85(Jun), Emp LB 3–6.

[52] Case C-506/06 *Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] IRLR 387.

[53] *Ibid*, at para 25.

[54] Case C-506/06 *Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] IRLR 387.

[55] *Ibid*, at para 25.

specific to the type of ART used. With IVF, the egg is fertilised with sperm *in vitro* and the resultant ''fertilised egg'' is transferred into the uterus.

Using ''transfer'' as the stage to commence protection against pregnancy discrimination, as laid down in *Mayr v Backerei*,[56] would mean that the commencement of the ''protected period'' will differ according to the technique utilised as opposed to whether a pregnancy is successful and whether any implantation will actually lead to a successful pregnancy.

However, if the ruling in *Mayr v Backerei*[57] is correct and pregnancy commences upon the transfer of fertilised ova into a woman's body, then it should cover ZIFT (Zygote IntraFallopian Transfer), ICSI (IntraCytoplasmic Sperm Injection) and Blastocyst transfer, as all of these infertility treatments involve the transfer of fertilised ova into the ''woman's body''. But if the ruling will only cover transfers of fertilised ova into a woman's uterus specifically, like Mrs Mayr's case, then ZIFT would not be covered because the fertilised ova are transferred into a woman's fallopian tube/s. GIFT (Gametes Intrafallopian Transfer) would also not be covered as it involves the transfer of the gametes (*ie* egg / sperm) into a woman's fallopian tube/s. Therefore, upon transfer a fertilised ovum does not exist. Such fertilisation will occur inside the woman's body and result in a pregnancy if implantation is successful. In Blastocyst transfer, fertilised ova are transferred into the woman's uterus, as in IVF, but the point at which the fertilised ova is transferred into the woman is at a later stage than any other form of ART. Thus, the implication is that in comparison to IVF, the protected period would commence at a later stage ie upon the transfer of the blastocyst. Hence, it seems odd that a woman undergoing IVF will be protected at an earlier stage than a woman undergoing a blastocyst transfer; despite the blastocyst being more advanced in its stage of development.

With IUI (Intra Uterine Insemination) it is merely sperm that is injected into a woman's uterus, not fertilised ova. It is done in the hope that such sperm will then travel up the fallopian tube to fertilise the ova. Thus, this appears to fall outside the scope of the ruling in *Mayr v Backerei.*[58]

It is submitted that following the ruling in *Mayr v Backerei*[59] it is difficult to determine which other forms of ART are covered by the ruling, if any, because this was the first time that the ECJ considered pregnancy discrimination in light of assisted reproduction. However, it would be unjustified if the ruling were merely to extend to a few forms of ART – like ICSI and the blastocyst transfer – as they involve transfer of fertilised ova into the uterus, just like in Ms Mayr's case. This therefore suggests that pregnancy discrimination law needs to be adapted in order to provide protection to women, regardless of the form of ART undertaken.

Furthermore, most of the other forms of ART, just considered, involve the removal of a woman's egg (ovum) from the ovary. This is termed ''follicular puncture''. With regards to the interval between egg removal and transfer of the fertilised egg into the woman's body, a woman undergoing assisted reproduction may potentially be protected against sex discrimination on the grounds that they are undergoing an ''advanced stage'' of treatment.[60] This reflects the ECJ's decision in Ms Mayr's case. However, women undergoing IUI which involves no egg removal would not be afforded protection against sex discrimination on the basis of the ECJ's ruling.

[56] Case C-506/06 *Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] IRLR 387.

[57] *Ibid.*

[58] *Ibid.*

[59] *Ibid.*

[60] *Ibid*, at paras 50 and 52.

Conclusion

The issues addressed emphasise the scale of the problem. The law needs to be more fluid and able to reflect developments, in order to be effective and provide a greater level of protection for women undergoing different forms of ART. Until amendments are made to the relevant legislation it is likely that many women will continue to be unprotected and fall outside the scope of the legislation, until such amendments come into force.

As a result of the ruling in *Mayr v Backerei*[61] it now appears that women undergoing IVF treatment can now enter their protected period before they know about a pregnancy and even before they have informed their employers of a pregnancy[62] – as pregnancy is held to commence upon transfer for the purposes of IVF.[63] If the ruling is wide enough to cover other forms of ART the same problem arises.

Age is a factor that affects the ability of women to conceive and this is regardless of what form of ART is used to combat infertility. The implication of this for employers is that if women continue to postpone childbearing,[64] the childbearing age span and the reliance upon ART will increase. This introduces an additional measure of uncertainty for employers, and has the potential to reinforce the stereotypes that women are expensive to employ and not worthy of training and promotion.[65]

Another important point that has to be considered is that given the stress involved with ART, it is questionable whether women would want to inform their employers that they are undergoing such treatments, which would give rise to confusion in the timeline of pregnancy and maternity leave if and when the woman becomes pregnant or her treatment is inadvertently revealed.

The average cost of labour turnover in the UK is £4,301 per leaver.[66] Therefore, female employees are clearly a valuable resource to employers and should be effectively catered for in the labour market. At present, there are already 2.2 million women of working age in the UK who cite family and home responsibilities as their reason for non- participation in the labour market.[67] This is despite the fact that women are entering and participating in the workplace in greater numbers than ever before[68] and the trend is upward and predicted to continue with the greatest increase being evidenced amongst women of childbearing age.[69] Thus, combining work and pregnancy is, for many women an economic reality.[70] Whether this case has improved the prospects of protection and support for women becoming pregnant by whatever means, remains to be seen.

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[61] Case C-506/06 *Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] IRLR 387.

[62] C Fox, *Protection in contemplation of pregnancy?* Employment Law Bulletin, (2008), 85(Jun), EmpLB 3–6.

[63] See Case C-506/06 *Mayr v Backerei und Konditorei Gerhard Flockner OHG* [2008] IRLR 387, judgment at para 25.

[64] A Hill and A Asthana, *Women urged to test for fertility at 30*, Sunday 9th August 2009, Guardian Website: http://www.guardian.co.uk/lifeand style/2009/aug/09/fertility-mot-children-nhs, accessed 26th June 2009.

[65] S M Bistline, (1985) Making room for baby, *Association Management* 37:96–98.

[66] *Pregnancy discrimination at work – A review*, Working Paper Series N0·14, February 2004, Grace James, University of Reading.

[67] G Weir, (2002) *The economically inactive who look after the family or home*, Labour Market Trends, November: 577–587.

[68] M Duffield, (2002) *Trends in female employment 2002*, Labour Market Trends, 110 (11).

[69] T Desai, P Gregg, J Steer, and J Wadsworth, (1999) "Gender in the labour market", in P Gregg and J Wadsworth, *The state of working Britain* (Manchester University Press, Manchester 1999).

[70] *Pregnancy discrimination at work – A review*, Working Paper Series No 14, February 2004, Grace James, University of Reading.

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BOOK REVIEWS

Book reviews and books for reviewing should be sent to the address given at the beginning of this issue

HUMAN RIGHTS LAW

The Owl of Minerva, BOŠTJAN M. ZUPANČIČ, *President, Third Section of the European Court of Human Rights,* Utrecht, Eleven International Publishing, 2008, 448pp, HARDBACK, £75, ISBN 978-90-77596-47-0

The enigmatic title of Zupančič's work refers to the symbolic owl of Ancient Greece which Hegel noted "spreads its wings only with the falling of the dusk".[1]

In the same way, argues Zupančič, the answers to some of the "bigger questions" surrounding human rights law, such as the nature of humanity's shared values, the perceived lack of justice within domestic legal orders or whether people still believe in justice at all, are beyond our understanding since such matters can only be fully understood with the assistance of hindsight. Thus human rights, like philosophy, cannot be prescriptive, but in this collection of essays the author grapples with some of the more complex issues and relationships that have confronted commentators and courts across various jurisdictions in recent times.

The Owl of Minerva is published at an exciting time in the field of human rights scholarship, when the public/private divide is becoming increasingly blurred, and the rise in cross-disciplinarity brings new theoretical insights. As the parameters of the field continue to evolve at a remarkable pace, this book represents a welcome and timely contribution to scholarship in the field. The work, which is essentially a collection of the author's previously published essays, comprises three parts: examining developments in human rights through the lenses of constitutional criminal procedure, the substantive criminal law, and international and constitutional law.

The first part begins with an examination of "adjudication and the rule of law". The author probes the nature of the constitution, asking what it actually constitutes and draws on law, philosophy and political science. Adjudication is viewed as a service provided by the state as a legitimate alternative to the use of force. Thus for Zupančič, the "rule of law" and "law and order" are inherently interconnected and dependent on each other since there must be "a sufficiently broad aggregation of power to back up its eventual enforcement."[2] Moving on to consider truth-finding and impartiality in the criminal process, Zupančič argues that truth-finding is over-emphasised in continental systems, and should be regarded as a secondary function of the criminal process. Highlighting some key normative differences between private and public conflicts, the author argues that conflict resolution, and the need to preserve

[1] G W Hegel, *Philosophy of Right* (Berlin: 1820), trans A W Wood and H B Nisbet, (Cambridge: Cambridge University Press, 1991), *Preface*.

[2] At 31.

procedural rights as part of it, are fundamentally more important than the quest for truth.

The next chapter proceeds to consider the issue of privilege against self-incrimination. The author considers the privilege to hold a ''cardinal centrality'' in the criminal process, and he criticises courts for treating it as a ''minor procedural rule'' (p 93). The chapter examines the theoretical underpinnings of the concept in some detail, with a particularly close analysis of United States Supreme Court decisions. For Zupančič, the privilege should be viewed as a distinct and fundamental procedural right which underpins the integrity of law's adjudicatory function. Alongside the right to counsel, the right to be protected against warrant-less searches and seizures, and the right against double jeopardy, such procedural rights should be viewed as ''logical structural requirements without which a rational process of impartial adjudication is not possible'' (p 114).

The practice of plea bargaining, which is the focus of Chapter 5, is highlighted as an inherent contradiction to the theoretical parameters of the adversarial system. Whereas trials tend to focus on resolving a conflict, plea bargaining effectively sidesteps the conflict. The difference for Zupančič ''is analogous to the distinction between adjudication on the one hand and reconciliation and mediation on the other, and also between autonomous and ancillary conflicts'' (p 159). This, in turn, underpins a more fundamental chasm between the certainty of criminal procedure proper (through the trial verdict) and the mere probability that guides plea bargaining (since the prosecutor can never be certain of the outcome of a trial were it to take place).

Following a brief concluding chapter to the first part of the book, the second part moves on to consider human rights in the context of substantive criminal law. Again, a useful introductory chapter serves to clarify the core issues at stake. Just as due process rights are needed to safeguard the individual against the State, Zupančič postulates that citizens ought to have ''advance notice'' of estimated punishment for criminal conduct (p 175). His argument is developed through three substantive chapters examining the theories of punishment and legal formalism (Chapter 8), the influence of punishment on normative integration (Chapter 9) and the principle of legality in the criminal law (Chapter 10). These chapters draw heavily on the work of, inter alia, Beccaria, Durkheim, Bentham, and Kelsen. Zupančič applies these analyses with characteristic rigour in underscoring the importance of both the principle of legality and the overarching necessity for criminal law. However, the sociology of punishment is a notoriously complex field of study, and readers from a purely legal background unfamiliar with the sociological debate may struggle to follow the author's arguments in this section of the book. This is compounded by the author's occasional tendency to rehearse arguments that have already been adequately explained at an earlier juncture.

The third and final section of the book examines human rights in the context of international and comparative law. It comprises three chapters exploring the interpretation of legal precedents; the right of ''access to court''; and, finally, the ''morality of virtue'' versus the ''morality of mere duty''. A range of topics are explored here, including the separation of powers, the role of the individual vis-à-vis the state, the function of legal formalism and the centrality of ''conflict'' to the adjudication process. The author illustrates his arguments with appropriate references to case law, although again there was a slight tendency to repeat what had already been said elsewhere.

The Owl of Minerva is not primarily a legal treatise. Critics may point out that it covers only select issues and thus some of its conclusions may be untested against the greater scheme of human rights generally. Notwithstanding the author's considerable

personal experience as a judge within his own jurisdiction and at Strasbourg, it is a jurisprudential book, drawing heavily on moral and political philosophy, as well as the sociology of law. While certainly not lacking in rigour, its complexity may pose problems for some traditional lawyers and readers who have no grounding in those areas. Certainly, I would hesitate to recommend the book to readers without a reasonable working understanding of the major debates in contemporary jurisprudence.

That said, for those who are well versed in such matters, Zupančič's arguments should certainly serve to stimulate debate. Overall, this book can be said to be a fitting and useful contribution to some of the key theoretical debates in jurisprudence and human rights law and should no doubt form a valuable part of the collection of all leading law libraries.

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LAW AND NATURE: CAMBRIDGE STUDIES IN LAW AND SOCIETY

Law and Nature, DAVID DELANEY, Cambridge, Cambridge University Press, 2003, x + 440pp, HARDBACK, £70·00, ISBN 0-521-83126-1

Law and Nature is a very ambitious book. It is not only multi-disciplinary but attempts to cover several disparate areas of activity (including land development, sexual conduct, violent crime, and involuntary medication) that require consideration of different areas of law (statutory schemes, public, criminal, tort, contract, and property). The purpose of the book is to consider the use made of such conceptions as "nature" in the legal reasoning and legal rulings made in the contentious circumstances considered. There is also an emphasis on the physical consequences of legal decision making. Thus, the general aim is to illustrate how nature talk has shaped legal talk and practice.

A few caveats to this preliminary sketch need to be entered. The methodological insights and discipline of different academic specialities are not brought to bear upon aspects of social practice, neither to the problem generating activities nor to the legal responses to the same. Delaney takes from many sources, but he does not embrace the methodological disciplines of his numerous sources. Neither does he seem to exercise any single methodological approach to the material he considers. Thus, the work is multi-disciplinary in this limited sense that it takes material from, and is informed by discourses within several disciplinary areas. Second, there is no close account of the social activities that are considered. The work is not a series of case studies. Finally, the amount of doctrinal law considered is slight. The law reports are used as a source of both a narrative of social practice and as an example of argumentative practice.

Part One of the book is devoted to the development of the conceptual structure to be deployed in Part Two, and an exploration of the discourses associated with those concepts. Unfortunately this section, and indeed the rest of the book so far as it rests upon the analysis and methodologies deployed in the first part, is flawed in ways that will be considered below. However, there has clearly been considerable research activity dedicated to putting this book together. It serves as an introduction to the work of many scholars, and is generally well written. *Law and Nature* is an ambitious attempt to engage in scholarship outside of safe conventions of traditional scholarly activity.

The governing schematic of the book set out in Part One is the contrast of nature and such linked concepts as law or humanity or mind or civilisation. Thus, Delaney suggests that it can be argued nature symbolises the other, from which the distinctly rational and human is distinguished. This idea of nature can generate a moral imperative to overcome nature, and a model of human action in which nature is the inert subject matter for scientific understanding. It is these contrasting and mutually defining aspects of the natural world and the distinctively human world that Delaney identifies as the purpose of much nature talk. However, he recognises the unstable character of nature talk, and refers to nature as being "polysemous". Thus, it is sometimes the case that nature is contrasted with the despoliation of development, in such usage nature is seen as an inherently good thing.

This contrast between the world of minerals, animals and plants and the world of the human is of course familiar, and associated with the dominion over nature given by God to man in the Judeo-Christian tradition. The discourse originally had three aspects, the natural, the human, and the divine. Hence, humanity was seen as suspended between two orders, the bestial and corrupted or the angelic and eternal.[1]

[1] For a contemporary example see Richard Holloway, *Between the Monster and the Saint,* (Canongate, 2009). It is possibly vital to realise that the task assigned to nature talk can be performed in other terms, not nature v reason *per* Delaney, but life force v pity *per* Holloway. This is vital if nature talk is simply an example of a type of dichotomous argumentative

Furthermore, nature could also be seen as the work of God and contrasted with the works of man. Thus, throughout the eighteenth century and beyond there was a powerful tradition of natural theology which saw the natural world as the everyday evidence of God's actions,[2] and this tradition no doubt informed both the Romantic approach to the natural world, and writers such as Emerson.[3] The complex story of changes in the perceptions of nature in England in the early modern period has of course been traced by Thomas.[4] It is these two traditions, nature as the corrupt and nature as God's work, that underlie the ambivalent role of nature in nature talk that Delaney explores in his book.

Delaney also struggles with a different kind of ambiguity of meaning. He identifies the difference between ''nature'' the word, and the world that actually exists which may be referred to as nature. However, he does not keep the two ideas (word and referent) separate, preferring to treat this as another aspect of the instability of the word. This seems less than helpful, as it is very easy to become confused between the two, and any convention that limited the chances of confusion would have been useful. This becomes particularly inconvenient when Delaney explores the characteristics of science as idea, practice, body of knowledge, and personified ideal. Delaney's treatment of science will be further considered below.

Delaney also uses a concept of the ''political'', usually as opposed to the impartial or objective. This concept is a little difficult to pin down. It is linked with power. It is a feature that some discourses obscure under technocratic or scientific or legalistic camouflage. Sometimes it supports economic advantage, and sometimes it seems to hide the effectively arbitrary use of social force, and sometimes it seems to be a rhetorical move in a discourse. He gives a definition of the political specifically in contrast to the scientific: [5] ''Politics, here, is understood as signifying ''interests'' or the clash of disparate wills.'' This idea is linked to ''ideology''. It is not possible to tell if this definition is indicative of his more general usage, but it seems to be one aspect of what he means by politics, although it is an idea often linked to physical force as well.

The chapters in Part Two (chapters six to fourteen) that deal with different areas of social practice are a little uneven. The easiest way to give an indication of their contents, and the range of topics and erudition displayed in the book, is to simply note each in turn briefly. Delaney's focus throughout is on the United States of America, and little awareness of any other jurisdictions is shown.

Chapter six is the sole chapter devoted to physical forces and the law, being concerned with liability following land-slips in California. The problem is caused by building in geologically unstable areas, and the building tends to aggravate the instability. The law concerned is tort, and the material is generally interesting and capable of generalisation. However, there is no demonstration of how nature talk influenced the legal determinations of liability or its absence, which leaves the chapter a little stranded.

Chapter seven on the wilderness is perhaps a little too concerned at avoiding the traditional tale of the establishment of the great national parks of the United States of

form – if the more interesting and productive subject matter of analysis should be the argumentative form common to both nature talk and Holloway's account. Holloway engages in nature talk as well. However, he is clearly sensitive to potential criticisms of an unreflective nature v reason or nature v civilisation discourse.

[2] See: William Paley, *Natural Theology*, (Oxford University Press, 2006), and Richard Dawkins, *The Blind Watchmaker,* (Penguin Books, 1991).

[3] See: Ralph Waldo Emerson, *Selected Essays* (Penguin Books, 1982), ''Nature'' at pp 35–82, and ''The Transcendentalist'' at 239–258.

[4] Keith Thomas, *Man and the Natural World: Changing Attitudes in England 1500–1800* (Penguin Books, 1984).

[5] At 61.

America. Delaney worries at the concept of a ''wilderness'' and brings out some of the inherent contradictions of a state managed wilderness area. However, the topic sits uneasily in the general schematic of the book, one that contrasts nature and law, as the national parks are more reflective of romantic and transcendental thought than ideologies of dominion over nature.

Chapter eight on endangered species is very interesting. It explores tensions between property rights, development, and the ideology of economic progress on the one side and the protection of animal species and their habitat on the other. It explores some of the basic concepts of the legislation and how the rhetorical framing of the issues is approached by conservationists and developers. In this chapter politics tends to mean the lobbying by industries who want to develop land, public activities of conservationists, and the speechifying of politicians in formal political forums.

Chapter nine on vivisection is less useful. Delaney seems to want to analyse the issue as one of property law. However, the material is clearly one of regulatory effectiveness, as laboratory animals are formally protected by law in a manner that other property is not (the legal issue would be very short if there was simply property law in play). As the chapter seems to mostly serve as a vehicle for an exploration of the idea of the animal as a categorically different type of being to the human (hence property not agent) perhaps the meat industry would have served the purpose better.

Chapter ten is billed as being concerned with bestiality, but is actually broader than this, and would be appropriately described as being concerned with sexuality and deviant sexuality. In an unusual recognition of religion as a source of the terms of discourse Delaney refers to Thomas Aquinas' linking of sex and procreation.[6] Generally, the arrangement of the material is not very helpful, lumping oral sex together with bestiality might reflect some legal practice but it is hardly conducive to clear analysis. The account of legal reticence and fear of contamination is valuable.

Chapter eleven is largely concerned with surrogacy. The exposition of the common law of contract is poor.[7] It indulges in overly broad generalisations that misrepresent the law of contract: thus, not all contracts are about the future, nor do they all concern an exchange of promises, a contract is not equivalent to a document that records its terms, the common law abandoned the meeting of minds idealisation of contract and adopted an objective approach to contract in the nineteenth century, and specific performance is a discretionary remedy. Also, the judgements did not simply turn on contract, and the pushing forward of the contractual aspect by Delaney tends to distort the account of the litigation, although he carefully notes the child welfare issues that concerned the courts.

Chapter twelve on wrongful life cases is valuable. The problem is one of providing *locus standi* for a disabled person born following a failure to properly carry out a genetic test or to properly report the results of a test to the disabled person's parents. The person subsequently born has many health needs, and may never be able to be economically independent. The need for money to meet these needs and maintain the disabled person is apparent, and the causal link between the medical failure and the birth can be established. Yet it seems odd indeed to complain in tort for the misfortune of being born at all. The differing approaches of the courts to this conundrum are well explored.

Chapter thirteen is peculiar. It is concerned with excuses within criminal law. Given the general ignoring of religious thought in the book an exegesis of a book on evil is

[6] At 244.

[7] At 271, 289, and 292.

a little startling.[8] Delaney adopts a dualist analysis of body and mind in Part One, and the interplay of the mental and the physical such an account requires starts to overwhelm him a little in this chapter, and in the following one.

Chapter fourteen is the final chapter in Part Two and is concerned with the involuntary medication of prisoners diagnosed as suffering from mental illness. The treatment is interesting and provocative. Perhaps the implied equation of pseudo-science with oppression is a little facile, as genuine science can support brutal actions by those in authority as easily as pseudo-science. The concept of anti-law in the context of administrative review is probably more creative than useful.

Part Three is a concluding chapter which anticipates possible criticisms of the book. Unfortunately, it does not anticipate the problems that were signalled above and will now be considered, and we can only obtain very limited benefits from Delaney's defence of his work.

Law and Nature suffers from four intellectual weaknesses in method – using that word in the sense given it by Rorty:[9] ''The term 'method' should be restricted to agreed-upon procedures for settling disputes between competing claims.''

First, Delaney accepts that the central terms in his analysis are not consistent in their meaning and he makes no attempt to separate out the different meanings from one another in any consistent manner, neither marking the differences terminologically nor grammatically. In other words his language tends to the ambiguous and confusing. Second, there are implicit and unjustified limits upon his analysis that distort his explication of such central concepts as ''nature'' and ''mind''. Specifically, he fails to consider the clear religious influence upon the historical development of ''nature'' and this is mirrored by his failure to consider the obvious links between the ''mind'' as he describes it and the Christian conception of the ''soul''. Third, he fails to establish any rules for choosing between the arguments admitted into his analysis, beyond an implicit reliance on persuasiveness.[10] Fourth, he engages with straw men rather than either analysing specific texts or even the strongest known versions of the arguments from which he intends to diverge.[11] Obviously, these remarks require substantiation as they touch upon values close to any scholar's heart, and should not be made lightly.

The relationship between several of Delaney's key terms is radically unstable. Thus, sometimes nature is contrasted with science, and sometimes equated with science.[12] Humanity and nature are also sometimes contrasted and sometimes equated. Similarly, on most occasions law is contrasted with nature, and sometimes law is derived from

[8] The book is Fred C Alford, *What Evil Means To Us*, (Ithaca, 1997). Delaney returns to this book in his concluding remarks to chapter fourteen.

[9] Richard Rorty, *Philosophy As Cultural Politics*, (Cambridge University Press, 2007); ''A pragmatist view of contemporary analytic philosophy'', at 133–146 at 143. Presumably Delaney feels that his focus of study has no agreements on procedures, and that expertise therefore is: ''familiarity with the course of a previous conversation'' (*Ibid* at 144). However, this neglects the ''argumentative give and take of ordinary conversation'' (*Ibid* at 143) as an available source for a working method pending crystallising of disciplinary conventions. As Frankfurt puts it: ''Surely one need not have been trained in any very distinctive philosophical tradition or skill in order to be able to think clearly, to reason carefully, and to keep one's eye on the ball'' Harry G Frankfurt, *Necessity, Volition, and Love* (Cambridge University Press, 1999), at xi. The absence of any ''local and specific agreements on procedures'' leaves us with the general conventions of reasoned discourse as a source of method.

[10] With a meaning something like: ''attractive to the reader''. Delaney actually deploys the term ''attractive'' in this manner at 399: ''Regardless of one's position on many of the substantive issues examined in the previous chapters isn't it the case that nature talk is simply too attractive to repudiate?'' As I understand it he means that despite leading us into confusion and error nature talk is too seductive as a rhetorical ploy to give up on. Delaney rarely rejects an argument expressly, one exception being on at 327 (quoted in the text) where he exercises his judgement in a sensible manner. He never demonstrates that an argument is invalid or wrong, and simply presents contradictory arguments side by side. It is possible that he views all the arguments as potentially valid ''perspectives'' or ''narratives'' in which case there would be no need to resolve contradictions by devising a way of distinguishing the true or valid from the false or invalid.

[11] Delaney falls into the difficulties that face scholars who embark upon generalisations not secured by analysis of specific texts identified by William Twining in ''Talk About Realism'' (1985) 60 New York University Law Review 329.

[12] A third variant is to equate science with the enlightenment project as described by Isaiah Berlin, see: pp 60, 75, and 114.

nature.[13] It is not only nature that is Janus-faced; the relationship between law and science is also ambiguous, law being varyingly aligned with a type of science, as well as in conflict with, and opposed to science in various places.[14] If we inspect the conceptual apparatus we find that ''nature'' has no fixed meaning, being very much shaped by the discourse it features in, and thus makes a very poor tool for either analysis or synthesis. This is because joining discourses through the same lexical reference (''nature'') despite its shifting semantic content is not rational. It allows arguments of the following form: cricket and vampire films are the same in an important sense because they are both concerned with bats. This is usually and rightly considered to be invalid reasoning. Confusion between homonym and semantic content is notorious as a source of error, and surprisingly easy to fall into when reasoning. Delaney's technique of serial expositions of conflicting accounts that deal with nature in some way almost seems designed to maximise this danger, and he deploys no express technique to mitigate the risk he has created.

Delaney recognises that it is law and various conceptions of nature that is the subject matter of the book. Delaney refers to the ''polysemous'' quality of ''nature'', elaborating that the word is ''. . . ambiguous – it is radically context dependant and contingent on perspective''.[15] However, this recognition does not expressly acknowledge the different types of nature being discussed. There is clearly a difference between the word ''nature'' and that which one intends to refer to when referring to ''the natural world'' or ''the world''. One is a word, or a concept, and is subject to all of the manipulations of language, or any of our other symbolic systems that might be deployed. The other simply is, and whether it is described accurately or honestly or not, it remains whatever it is.

When considering the rhetorical uses of ''nature'', and when considering the construction of theories whether naïve or sophisticated about ''nature'', it is the word we are concerned with. When dealing with the problems of scientific method it is the second more elusive entity we are attempting to approach. However, we can only approach the world through our theories, and science long ago abandoned most plausible naïve theories of what the world might be. Therefore, there are three discrete problems. First, what the word means, a question with an answer that changes as the place of the word within some theoretical construct or other shifts. Second, what is really ''out there'', the world that we had better adapt ourselves to if we wish to succeed in our activities. Third, the relationship between the word and the world, a constantly moving target as our explanations develop and change (even if we assume for this purpose that the world stays still).

It would be unfair to expect Delaney to solve the conundrum identified as the third problem. Descartes, who is probably the source of the puzzle, relied upon the presence of God in order to solve it.[16] Rorty argued that framing the question in this manner is sterile and attempted to render the problem tractable by reframing it.[17] However, it is clearly crucial to not fall into the trap of mistaking the three questions as being susceptible to the same type of answer. Keeping the issues separate is necessary, and it is not clear that Delaney always manages to do so.[18] Perhaps, if he had reflected

[13] See: pp 8–9, and 24–25 for examples.

[14] See: pp 24, 98, and 381 for examples.

[15] At 15. Delaney also uses the word ''nature'' to mean the typical (or essential) attributes (or qualities) of some thing as in: The nature of mercy is not strained. However, this meaning is not (I think) his intended subject matter.

[16] Rene Descartes, ''Discourse on the method of rightly conducting the reason and seeking for truth in the sciences'', part 4, in Enrique Chavez-Arvizo (ed) *Descartes Key Philosophical Writings*, (Wordsworth Editions Limited, 1997), at 91–97.

[17] Richard Rorty, *Philosophy and the Mirror of Nature*, (Princeton University Press, 2009, first published 1979).

[18] It would be tedious to try and trace all inconsistent word use, but note some of the changing meanings of ''nature'' in chapter 3. On p 60: ''Whatever else may be said, science is about engaging both ''nature'' and the physical world in

more carefully upon Popper's attack upon any idea of positive knowledge of the world the issues could have been better delineated. Science is not the holder of better quality knowledge (there is no badge of rectitude in scientific knowledge) rather it has a technique for throwing out what we can establish as wrong. This is the distinctive feature of scientific method; it is a means for theorising about what the world is.

The second problem is rather more regrettable as it is a wholly unnecessary problem.[19] In Christian thought "nature" is contrasted with the "divine". Certainly since Saint Augustine of Hippo wrote the City of God this contrast has been a leitmotif of Christian thought.[20] Much of the dualism that Delaney is concerned with (dichotomies of natural v human; body v mind; nature v civilisation) fairly obviously have their origins in this religious dualism, between the divine and the worldly or between body and soul. Thus, in one contrast nature is contrasted with the artificial, the works of God and the works of man. The natural world transcends in beauty and awe-inspiring majesty anything people can create and this became a source of nature romanticism. The conflicting contrast is between nature and the divine, and nature is base when compared with the divine and this became a source of the belief that nature needs to be subdued and controlled by those who were given dominium over the natural world; people. This discourse generates a concept of "nature" that shifts in its meanings as its comparators change. It is just such a shifting concept that Delaney describes as playing such a major role in delimiting what it means to be "human". However, as he neglects the religious origins of the contrasts his account omits the divine, and generates a mysterious shifting in the meaning of the word nature.

The terms of the Christian discourse, and the many subsidiary discourses that are related to it, hover over the discussion in Delaney, who for example discusses "enlightenment thought" without acknowledging the anti-clerical impulses that informed the enlightenment. One fears that the American banishment of religion from the body politic has banished it from consideration of the relationship between law and nature. What is more damaging is that in Delaney's secular account of "nature" as a Western concept there is not only no substitute for a God, but there is no recognition of the need for a substitute. An alternative source of values is needed in order to justify human dominium over nature.

particular ways." Here "nature" in quotation marks is surely being contrasted with what is; this is nature as a word, and not as what exists. On p 59: "The immediate objective of scientific practices, whether theoretical, observational, or experimental, is the generation of true propositions about nature." Surely, here nature is that which is (I do not think science aspires to talking about the meaning of the word nature). On p 64: "Here I only want to offer the briefest counter catalogue of critical claims, the better to situate the politics of science as a component of the politics of nature and as an ingredient in the ways in which these political contests are played out through the language and institutions of law". Again, and this time without quotation marks "nature" must surely be the word. On p 65: "Because the world of physical reality (call it nature) is necessarily mediated by language (for instance, by conceptions of "nature", or "wilderness", or "environment", or "the gene") and because meaning is itself polysemous, unstable, and ideologically charged in various ways, then the representations of nature that are made out of these meanings cannot be less so." This certainly uses "nature" to mean what is – 1st use in brackets; and also uses "nature" in quotation marks to mean the word nature – 2nd use; and I rather think manages on the 3rd usage of "nature" to refer to the third issue noted above, that of the problem of representation; and all three usages contained within a single sentence. On p 67 the expression "anti-naturalists" is used which seems to be the negative of a fourth variant of "nature", I am not sure what meaning is intended, but I think it might be a variant of the final usage of "nature" noted here. Finally, the verb "naturalizing" is used to mean "not treating people as qualitatively different from everything else (because they have what we used to call a soul but now call "subjectivism" instead). It might be better to try and identify and distinguish between the different meanings of "nature" and words to be derived from "nature" for the sake of clarity of thought and exposition.

[19] See: pp 71–75; on p 72 the identity of at least some conceptions of mind and the soul is recognised, the general discussion clearly reveals awareness that one aspect of the struggle over the meaning of nature is over the presence or absence of a divinity. On p 244 as has been noted in the text Delaney refers to a religious account of natural sexual practices. On p 344 the account of evil is introduced. Thus, it cannot be said that Delaney was unaware of the possible impact of religious thought upon his subject area and as a source for some of the terms and concepts (he identifies physical and mental dualism as an idea derived from the Christian understanding of the soul).

[20] Saint Augustine, Bishop of Hippo, *The City of God*, (Random House Inc, 1993). See also *Confessions* (Penguin Books, 1961).

Delaney does not acknowledge his decision to ignore religious thought. Whether the original source has been subject to secular restatement or dialectical rejection, this exclusion of a consideration of the origins of much of the thought analysed is unfortunate. It leaves us with no clear account of what source or sources of values we might look towards when contemplating claims of human transcendence of nature. Without the divine nature of the soul it is obviously contentious to claim that people should be considered as either different from or superior to a contrasting "nature". However, there is little doubt that the vast majority of people in the Western democracies do feel that the life of a child is worth the deaths of ten head of livestock and the cutting down of a Sequoia tree. If divinity and the special nature of the human as made in God's image is not available as an explanation for this sort of intuition then we need some other source. It is also not clear that religious explanations would not be fully acceptable for many of those living in the Western democracies, especially in the United States of America. As Delaney presents the issues, we have a classic problem of unresolved value differences sitting unrecognised in the centre of the discussion of our terms of analysis. Unsurprisingly, we then repeatedly find that concepts of "nature" are used to smuggle values into discourse, without expressly arguing for or justifying the disputable values imported by the rhetorical move.

To conclude on these first two flaws. Delaney adopts a conceptual apparatus that lacks a clear account of the key terms he plans to use. He does recognise that his terms are not stable, and also that he has opted for an admittedly partial exploration of the terms he deploys. This is reasonable enough in itself as a methodology, after all he can explore the terms more fully in his exploration of concrete examples of how they are used in legal discourse, and his main concern is how "nature" affects law, not with a definitive account of the place of "nature" within Western civilisation. However, Delaney is aware that his key terms are dangerously close to a long-running dispute in epistemology, and this should alert him to the need to take special care in clarity of term and meaning. Furthermore, he neglects an aspect of the debate entirely without explanation or apparent realisation of its potential importance. Possibly this neglect of the role "nature" has had, and continues to play in, religious discourse was carefully considered and is justifiable. However, the absence of an account makes the peculiar inconstancy of "nature" obscure and the neglect was not justified.

The third problem identified above is an absence of any criteria for accepting or rejecting arguments, conceptual schema, or narratives. It is a problem that can be best illustrated by reference to chapter twelve. The chapter purports to give an account of genetic science. Although Delaney does not claim specific expertise in the field it is not necessary to be an expert geneticist to appreciate that the following claim is an egregious error founded on the type of nature human dichotomy Delany is an expert in:

"We are told, for example that humans and chimpanzees have 98% of our genetic makeup in common. The remaining 2 percent is what makes humans 'humans' or, at least *Homo Sapiens*. Variation within this 2 percent is what makes each of the billions of us unique".[21]

The passage begins with a sentence that surely begs for some sort of explanatory account; what is meant by "genetic makeup" (presumably not chemical composition for example, it would be indistinguishable), what is meant by percentage comparisons of genetic makeup, how similar is 98% in comparative terms (is it more or less difference than one might find between a dog and a cat for example). The first sentence

[21] At p 302.

carries very little meaningful information to the non-informed reader. The assertion is arresting and familiar, but it is the stuff of newspaper headlines, not considered reasoning. The second sentence is plainly false, hence the importance of exploring the meaning of the first sentence. We are dependent on far more of our genome than two percent for our organic form (that two percent expressed in the absence of the rest of the genome would be a puddle of slime). What Delaney presumably means is that it is this two percent which distinguishes us from chimpanzees.[22] However, this is not true. It may be the genetic difference, but it is the expression of genes through development that is a source of much variation. His account introduces an unnecessary and misleading element of crude genetic reductionism. One could add that our cultural development (including such technology as language) is also an independent source of difference between us and the chimpanzee. Finally, and truly egregious, is the third sentence. Our chimpanzee genetic makeup is as capable of producing variation as our non-chimpanzee genetic heritage. The assumption that the only important part of our genetic heritage is that which we do not share with chimpanzees is nothing more than the type of dichotomous and unreflective contrasting of the human and the natural that Delaney's book is directed to exploring. Our variations are produced by our genetic differences across the genome, and not just the part that is specific to our species, and equally by our developmental history and our social experience.

Indeed, Delaney generally struggles with genetics. He is frequently inconsistent in his use of key terms. An example of this is when he refers to the gene for medical conditions. He expressly refers to the gene for Downs's syndrome and Huntington's chorea.[23] Each of these conditions can be predicted by looking at DNA,[24] but neither of these conditions is caused by a specific gene as the term is used in genetics. A "gene" is an area of DNA that codes for a specific protein or RNA.[25] Huntington's chorea is caused by the expansion of a length of non-coding DNA within a gene, which is known as an intron. Down's syndrome is caused by trisomy 21, which is the possession of three, instead of the normal two, copies of chromosome 21. Delaney does not acknowledge that his treatment of the genetic sources of Huntington's chorea and Down's syndrome as conditions caused by genes, stretches his definition of gene from its accepted meaning to "something to do with DNA".

When Delaney tackles the complex subject of pre-natal genetic counselling his previous confusion over exactly what a gene is causes confusion. He seems to believe that any understanding of genetics relies upon an understanding of the genetic code and the translation of specific genes.[26] He then goes on to refer to genetic screening taking place in the 1960's.[27] This screening would have involved looking at phenotype and deducing the genotype of prospective parents and predicting the genotype and phenotype of the offspring. He then jumps from this to screening for the creation of designer babies.[28] This is like looking at a shopping trolley and predicting faster-than-light technology.

Throughout chapter 12 the reductionist view of genetics is presented as prevalent, and as the driving force behind screening attempts. This is done with no justification,

[22] It is not clear if he intended chimpanzees [*pan troglodytes*] or bonobos [*pan paniscus*] our closest living relatives in the animal world. As Delaney is concerned to explain how little genetic difference there is between species, the issue of which species he is comparing should be made plain.

[23] At 302.

[24] Deoxyribonucleic acid.

[25] Ribonucleic acid.

[26] At 312–313.

[27] At 312.

[28] At 305.

and no attempt to explore other contemporary views, even though Delaney touches on the nature versus nurture debate. Genetic screening is linked to eugenics in a disingenuous manner suggesting that genetics are a sinister attempt to 'purify' the population.[29] He also quotes a number of sources to show how the medicalization of the birthing process is intimidating to new mothers.[30] He seems to blame genetic screening for this. He does not place intrusive medical technology within any clinical context that would allow the benefits of screening to be apparent. Thus, the avoidance of frequent tragic occurrence of still births through our understanding of rhesus factors is unnoticed. Rhesus factors are determined by a genetic trait, although one it was possible to analyse and develop a treatment for without use of the genetic code.

Delaney's confusion over what exactly a gene is, and what genetic screening involves is exemplified by his statement that "A given sample of DNA is made intelligible against this ever expanding background".[31] While it is true that some conditions are caused by a number of factors (genetic and not) and that it is impossible to separate contributory cause, effective cause, and coincidence, there are many other occasions where a genetic cause can be clearly identified. Indeed, an example already used by Delaney would be Down's syndrome, and an increase in surrounding information neither increases nor obscures our understanding. If you have three copies of chromosome 21, you will show symptoms of Down's syndrome, no matter what genes are on the chromosome.

When Delaney does reject an account, he does not give any express clue as to his criteria. He rejects an argument by Dreyfuss and Nelkin expressly in chapter 12 stating:[32]

> In contrast, I see *Curlender* as not at all articulating a dehumanizing position . . . but as rejecting disembodiment and the formalist style that facilitates disembodiment. As another court said, 'It is hard to see how an award of damages to a severely handicapped or suffering child would 'disavow' the value of life or in any way suggest that the child is not entitled to the full measure of legal and non-legal rights and privileges accorded to all members of society.

There is no articulated criteria for his rejection of Dreyfuss and Nelkin, explanation of why they are in error (or even if they are to be considered to be in error), or why the quoted passage from the judgment answers their arguments. Indeed, Delaney does not claim to have identified the correct or even the better view, he merely asserts that he "sees" the matter differently. Uncritical reproduction of printed opinion is not enough to constitute scholarship. Unless some express or clearly implied method for rejecting the arguments that are flawed is put forward we are unable to distinguish the wheat from the chaff, and the enterprise becomes one huge literature review in preparation for a research question that is never formulated. The example given above is the sole occasion in the book when Delaney asserts expressly a choice between

[29] At 305.

[30] At 309 and 313.

[31] At 312.

[32] At 327. The article by Dreyfuss and Nelkin was "The Jurisprudence of Genetics" (1992) 45 Vanderbilt Law Review 313. The precise opinion Delaney dissented from, also at 327, was: "By rejecting the 'sanctity of life' principle,' they say 'the court legitimated the central thesis of genetic essentialism that persons are defined by their genetic qualities . . . It . . . implied a willingness to treat wrongful life as, indeed, wrongful: irrevocably bound by biology, unsuited to normal opportunities and life experiences". Whilst I agree that this account is misguided, this is because I think it has wrongly identified the nature of the decision before the court. The court had to decide whether to award compensation, not whether people were to be understood in the light of genetic essentialism (whatever that might mean). They are wrong because they are asking the wrong question – and it is possible to explain why it is the wrong question. The lack in the text of that explanation is the failure to articulate a method.

differing views. Thus, it has been selected as the closest he comes to deploying a method for accepting or rejecting an argument in the course of his book.

The final problem identified above is the deployment of the straw man argumentative form. A single but central example of this will be given. Delany expressly notes that in his account of science, an important topic for his work, that the ''mainstream philosophers of science'' are not considered. Delany prefers to set up ''popular conceptions of the social practice of science'' to be subject to criticism by ''more critical views''.[33] The sole reason given for this practice seems to be that from these critical perspectives: ''mainstream philosophy of science is regarded as being engaged in a legitimation project''.[34] It has been noted above that Delaney does not always find it important to be precise in his substantive science. Nor, it seems, is the meta-discourse on scientific thought worth recounting. Such an argumentative form, criticism directed at a weak and constructed opposing argument would be one criterion for rejecting an argument, as this form is notorious as an abuse of argumentative discourse. In these respects, articulation of a method and scholarly practice, Delaney does not ''think clearly, to reason carefully, and to keep one's eye on the ball''.[35]

In conclusion, Law and Nature is a book that attempts much but never really establishes a set of tools capable of achieving its aims. The problem of method in a work that spans disparate disciplines is not easy to resolve. However, there are sources for good practice available, and there seems little alternative to holding to the highest standards of rational discourse. Delaney has gathered much of interest into one place, and he certainly gives a scrupulous account of the work he reviews. However, it cannot be said that he has established any defensible method for his project, and the result is inevitably a collection of ideas rather than a true synthesis of material.

GRAHAM FERRIS* AND CLEO LUNT**

[33] At 64.

[34] At 70.

[35] Harry G Frankfurt, *Necessity, Volition, and Love*, (Cambridge University Press, 1999) at xi.

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NOTTINGHAM MATTERS

This section documents major developments and research projects within Nottingham Law School together with responses to public consultation exercises and other public contributions made by its staff.

In the spring of 2010, two LLM students at Nottingham Law School, Fabrizio Alessandria and Cathleen Rosendahl, presented a paper at the third European Labour and Social Law Seminar for Young Researchers at Trento University in Italy. Both students are studying Employment Law here in Nottingham. The following is a summary of their paper.

PRIVACY AND TRANSPARENCY IN THE EQUALITY ACT 2010

INTRODUCTION

The Equality Act 2010 (the ''Equality Act'')[1] not only harmonises and unifies all the existing strands of anti-discrimination legislation, but also introduces new provisions with the aim of strengthening protection against discriminatory and stigmatising practices, inside and outside the workplace.

This analysis will focus on two conceptual categories used by the Act to pursue the policy objectives of privacy and transparency. Even though they can be deemed as antithetical concepts – the former emphasising the right not to disclose, and the latter introducing disclosure duties – the present article will show the reasons why privacy and transparency interact coherently across different fields of anti-discrimination law, such as equal pay, disability and data protection.

In the following analysis, a comparison will be carried out between provisions of the Equality Act which affect different areas of discrimination law, to ascertain whether an appropriate balance has been struck by the Act.

PRIVACY AND TRANSPARENCY: TWO SIDES OF THE SAME COIN?

It is clear that the right to privacy plays an essential role in tackling the spread of stigmatisation and discrimination, especially in the workplace. Not to know about, for instance, the illness of a person can be the best solution to prevent any potential discriminator from taking action. However, this approach is effective in so far as the

[1] Indeed, the Equality Act repeals all the existing anti-discrimination law (see Schedule 27 to the Act), and brings together over 100 separate discrimination measures. The aim is to provide, as far as possible, a single approach through the new concept of ''protected characteristic'' (see section 4).

stigmatised person has a genuine interest in hiding his/her disability (or other protected characteristic).[2]

First of all, every individual is entitled not to be discriminated against even though his/her ''differences'' attributable to disability or other protected characteristic, such as sexual orientation or race, are well known to the employer. However, this issue is likely to represent a sociological question rather than a matter of law. What the law can do to counter social exclusion is to impose specific duties upon, and require positive action by, employers by means of non-discriminatory selection procedures, training programmes or, more generally, policies aimed at preventing stigmatising behaviour. In aiming to overcome the stigma attached to certain health conditions, disclosure can be a specific means to disprove stereotypical assumptions and to denounce discriminatory behaviour. Additionally, greater disclosure will raise awareness in society. In this regard, the right to privacy might also be sacrificed and substituted by the duty of transparency. Nonetheless, it has to be noted that this sacrifice is an individual one for every person with a protected characteristic, and as such it could bear serious consequences on his/her private sphere.

Therefore, it should be noted that transparency, even though from an opposite perspective, in some respects enables the same goal as the protection of privacy to be achieved in tackling stigmatisation and discrimination: an employer, in fact, would not wish to be labelled as a ''discriminator'' because data disclosure made clear that s/he is carrying out discriminating policies.

In this context, when enacting a new piece of anti-discrimination law, the legislature should always consider privacy *and* transparency, which constitute two sides of the same policy aimed at tackling stigmatisation in the workplace. To decide upon which category to rely will depend upon which workers' rights are involved.

The new Equality Act 2010 is a good and very recent example of the coherence and coexistence of transparency and protection of privacy in employment law. Among the many provisions concerning privacy and transparency within the Act, attention will focus on those provisions whose impact is greater on day-to-day employment practice. In the following discussion it will be demonstrated why, in some circumstances, it is necessary to let transparency prevail over privacy to achieve the aim of factual equality; and why in different circumstances the opposite approach is more promising.

PRIVACY: HOW MUCH EMPLOYERS NEED TO KNOW ABOUT EMPLOYEES' HEALTH

The coherence of privacy and transparency can be found in disputes involving employees' health issues. It is common for employers to ask applicants to fill out medical questionnaires during the recruitment process. The difficulty for applicants is to know what could and should be disclosed in such a questionnaire or during a medical examination. It is crucial to bear in mind that, tragically, information about a health condition could lead to an unsuccessful application only because of a stigma attached to the condition. In particular, people with a mental health condition often face this behaviour.

The question is whether the law protects, and if so how, people with mental health conditions from being stigmatised and, therefore, treated less favourably than others without this certain condition in a working environment.

[2] For a critical introduction to the social reasons of disability-related problems, see Sayce L, ''Stigma, discrimination and social exclusion: What's in a word?'' (1998) *Journal of Mental Health*, 7, 4, 331–343; and Bamforth N, ''Conceptions of anti-discrimination law'' (2004) *Oxford Journal of Legal Studies*, 24(4), 696.

The case of Cheltenham Borough Council v Laird

The recent case of *Cheltenham Borough Council v Laird*[3] addresses some of these issues. In this case, the local authority, Cheltenham Borough Council, claimed damages against the defendant (Mrs. Laird) for alleged fraudulent misrepresentations made in a medical questionnaire she was required to complete before her appointment. Mrs. Laird had answered the question whether she enjoyed good health in the positive, and whether she had any physical or mental impairment or ongoing condition which would affect her employment in the negative. As the defendant had failed to disclose her history of depression in this questionnaire, the local authority sued her for recovery of the costs due to her ill-health retirement, which would not have incurred if they had appointed someone else to the post.

The court held that the representations given by Mrs. Laird in her answers were not false, nor, given the terms of the questions, were they misleading. At the time of answering the questionnaire, the defendant was not suffering from depression and/or a condition causing physical or mental impairment that would affect her future employment. The court concluded that, since Mrs. Laird had answered the questions honestly and as the questions were ambiguous, it had not been negligent for her to answer them as she had. Accordingly, the claim of the local authority was unsuccessful.

This case reveals several issues. Apparently, there is a strong stigma attached to mental health conditions, although one in four adults in the UK suffers from one during his/her life. Despite the fact that, for example, depression and anxiety disorders are extremely prevalent, some employers seem to think that every employee with such a disorder is too sensitive or cannot cope with stressful workplaces.[4] Consequently, many employees conceal such a condition.

However, the most important question is: how much information has to be disclosed to a prospective employer? The judgment in *Cheltenham* acknowledges that there is no general duty of disclosure. Nevertheless, if the local authority in *Cheltenham* had been more careful in drafting its questionnaire and Mrs. Laird had answered the questions as she did (and the questionnaire had a clause which said that any misrepresentation would lead to the termination of the contract), the court would probably have held that she was liable under the Misrepresentation Act 1967. Additionally, this could constitute a breach of the duty of mutual trust and confidence,[5] and the employee would be running the risk of being dismissed. As long as the applicant does not satisfy the definition of a disabled person under the Disability Discrimination Act 1995, in fact, there is not much an applicant can do about an invasive questionnaire at the stage of recruitment. Although ambiguities in such questionnaires are likely to be resolved in favour of the employee,[6] the overall legal situation regarding this matter seems to be uncertain and rather unsatisfactory.

Does the Equality Act 2010 change the legal situation?

One of the most crucial alterations made by the Equality Act is the new restriction on employers questioning job applicants about a disability or a health condition. From October 2010, it will be unlawful to ask applicants questions about disabilities or health conditions in the recruitment process before the job offer stage.[7]

[3] [2009] EWHC 1253 (QB); [2009] IRLR 621.

[4] P Daniels, "Opinion: The mental health stigma in the workplace" (2009) *Lawyer*, 23 (32), 6.

[5] See, for example, *United Bank v Akhtar* [1989] IRLR 507, EAT.

[6] *Revell v London* [1934] 50 Lloyd's Rep 114.

[7] See section 60 of the Equality Act 2010.

Nevertheless, there are some exceptions. Firstly, it is lawful for A, the employer, to ask B, the applicant, whether any reasonable adjustment is necessary to enable B to undergo an assessment (as part of the recruiting process).[8] Secondly, questions relating to monitoring diversity in the range of persons applying to A for work are permitted.[9] Finally, and most importantly, A is allowed to ask B *specific* health related questions in order to establish whether B will be able to carry out a function that is *intrinsic to the work concerned*.[10] To avoid an allegation of discrimination, A has to be able to demonstrate that these investigations are strictly necessary due to physical or mental pressure the role enquires.

A general health questionnaire, such as the *Cheltenham* questionnaire, would be unlawful; it would not meet any requirement of the Act. As such questions are illegal under the Act, it should be permissible not to answer them at all, or even to give an untrue answer. In this context, it seems likely that even if the employer claimed damages under the Misrepresentation Act 1967 as Cheltenham Borough Council did, the claim could not succeed because otherwise section 60 of the Equality Act 2010 would be meaningless.[11] Additionally, it has to be borne in mind that Section 60(6)(b) is to be read as a reference to a function that would be intrinsic to the work once A complied with the duty to make reasonable adjustments.[12]

If job applicants are withdrawn after disclosing their condition they can bring a disability discrimination claim when they satisfy the definition of a disabled person within the Act, and it is for the employer to prove that the reason for the refusal of employment was unrelated to the enquiry.

Job offers

Under the Act, a reference to offering work, means an unconditional or conditional offer of work.[13] Therefore, after granting B a conditional offer, A can ask questions about B's health. However, the offer must not be upon a condition which is, in itself, discriminatory. It is submitted that the Act has to be read in a way that, if a condition involves health issues, it is only permissible when the condition is intrinsic to the work concerned. Otherwise, section 60 of the Act would be without effect.

Data protection regarding medical data

Section 60(1) prohibits health related questions *before* the job offer stage but, of course, it does not give A blanket permission to ask any health related question after offering the job. Employees' and applicants' data are protected by Article 8 of the European Convention on Human Rights (ECHR). Ill-health conditions and disabilities are part of the private sphere of a person and, therefore, part of his/her private life protected by the Convention.[14] Beside the Human Rights Act 1998 which implements the ECHR into domestic law, the private sphere of employees and applicants is protected by the Data Protection Act 1998. According to the Employment Practices Data Protection

[8] Section 60(6)(a).

[9] Section 60(6)(c).

[10] Section 60(6)(b).

[11] If an employee would have to answer questions which are obviously unrelated to the work Section 60 would not meet the aim it was drafted for. Of course, the problem lies in how to determine whether a question is unlawful under the Act as an applicant. However, this is an issue where the jurisprudence will be of assistance.

[12] See Section 60(7) of the Equality Act 2010.

[13] Section 60(10) of the Equality Act 2010.

[14] See D Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights,* 2nd edition, (Oxford University Press 2009), at 364–370.

Code[15] every item of information related to workers' physical or mental health involves sensitive data.[16] Employers are not allowed to collect any sensitive data of their employees without consent unless there is a proper reason to undergo a test.[17] However, it is important to bear in mind that the employer can only process data about an employee's health status in order to ensure health and safety.

According to the Equality Act, a prospective employer is not allowed to ask health related questions before a job offer. Conditional offers can only include health related conditions where the fulfilment is intrinsic to the work concerned. In addition, the applicant is protected by the Data Protection Act 1998.

Unfortunately, although the Equality Act will improve the legal situation for applicants, there is still a long way to go to overcome health related stigma in the workplace, as can be evidenced by the local authority's claim in *Cheltenham* that it would not have employed the applicant because of her prior mental health condition. Therefore data protection must prevail, in particular in relation to mental health conditions. Although it might be seen as counterproductive in overcoming the stigma attached to these conditions, the current situation, as the case of *Cheltenham* vividly demonstrates, leaves little alternative.

TRANSPARENCY: THE NEW RULES ON EQUAL PAY

One of the main objectives of the Equality Act is to increase transparency in the workplace.[18] The role played by transparency in tackling discrimination is well-known: effective disclosure and sharing of information, indeed, usually prevent individuals from engaging in discriminatory behaviours, the prevalence of which is often facilitated by ignorance and lack of information.

From this perspective, the Equality Act introduces many duties of transparency to tackle different forms of discrimination. For instance, section 20 states that information in accessible formats has to be provided about the duty to make reasonable adjustments for disabled persons,[19] while section 96 provides that more transparent criteria have to be applied by a "qualifications body"[20] in carrying on its activity.[21]

The most relevant transparency provisions in the Equality Act, however, concern the issue of equal pay. This is an area where traditionally a lack of transparency exists,[22] and where an increased awareness of the employees, who often do not know whether differences in pay are actually present, may be of some importance in tackling the pay gap connected with having, or not having, a protected characteristic.[23]

[15] Section 51 of the Data Protection Act 1998 allows the Commissioner to "prepare and disseminate. . .appropriate codes of practice for guidance as to good practice". The Code of Practice represents the Information Commissioner's interpretation of the steps an employer should take to ensure compliance with the Act.

[16] For an overview, see Yew J, "Employees' health and the DPA" (2006) *Solicitors Journal*, at 205.

[17] *O'Flynn v Airlinks Airport Coach Co Ltd* [2002] EmplLR 1217.

[18] See, *inter alia*, VV AA., "Equality Bill" (2009) *Health and Safety at Work*, 16(3), at 8.

[19] See Explanatory Notes to the Equality Act 2010, at para. 86.

[20] That is "an authority or body which can confer a relevant qualification", within the meaning of section 54(2) of the Equality Act.

[21] See Explanatory Notes to the Equality Act 2010, at para 328.

[22] See, among others, M Robison, "Towards Equal Pay" (2003) 55(6) *Employment Law Bulletin*, at 3, according to whom "the whole issue of pay is often shrouded in secrecy and lacking in transparency". See also the Employment Tribunal decision in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205 (then overruled by the Employment Appeal Tribunal), where it has been stated that "it is a vital component of the City bonus culture that . . . individuals' bonuses are not revealed".

[23] It has to be noted that the Equality Act widens the scope of equal pay provisions to every form of pay gap, while only the equal treatment for men and women was provided by the Equal Pay Act 1970.

The new provisions deal with the problem of the lack of transparency about pay from two different perspectives. On one side, section 77 promotes a wider sharing of information among colleagues, so that it would be easier for an employee to be aware of ongoing discriminatory practices in the workplace. On the other side, section 78 introduces specific disclosure duties for big and medium-sized employers, with the view of improving public awareness about inequality in pay. These new rules will be now analysed in turn.

Protected pay disclosure

Section 77 of the Equality Act, under the heading of "discussions about pay", widens the scope of protected pay disclosure and bans so-called "pay secrecy clauses".[24] The aim is to help employees to discover what they are being paid in comparison with someone who is doing similar work, and to bring an equal pay claim if necessary.

In employment settings, situations where the salaries of colleagues are concealed by an employer are not unusual. In this respect, the Equal Opportunity Commission[25] has found that more than 20 per cent of employers do not allow their employees to share information about their pay with colleagues.[26]

A greater openness in relation to pay has also been claimed in many cases brought before the employment tribunals; the main instance in this respect is represented by *Barton v Investec Henderson Crosthwaite Securities Ltd.*[27] In that case, a company provided its female employees with lower bonuses than their male colleagues. The Employment Tribunal rejected the claim because it considered that "it is a vital component of the City bonus culture that bonuses are discretionary, scheme rules are unwritten and individuals' bonuses are not revealed".[28] This decision has been overruled by the Employment Appeal Tribunal,[29] where it was made clear that new rules were necessary to counter the acknowledged lack of transparency about pay.

In such a context, section 77 of the Equality Act introduces a new provision that makes terms of the employment contract unenforceable if they prevent, or restrict, people from disclosing or seeking to disclose their pay to others in the context of a relevant pay disclosure. This is defined as a disclosure made for the purpose of enabling the person who makes it, or the person to whom it is made, to find out whether there is a connection between differences in pay and a protected characteristic. To this end, employees will be able to discuss their pay with a wider group than just work colleagues such as, for example, trade union representatives.[30] In the context of these permitted disclosures, employers are prevented from disciplining staff if such disclosures are made.[31] However, pay secrecy clauses will be still enforceable to prevent employees from disclosing their pay outside the scope of rectifying unlawful pay gaps; for example, it will still be possible to prevent an employee from disclosing his/her pay to competitors of the employer.[32]

[24] For an introduction to the Equality Act provisions about equal pay see Robins J, "Mind the gap" (2010) *New Law Journal*, 633.

[25] The Equality Opportunity Commission no longer exists. It became part, since October 2007, of the Equality and Human Rights Commission.

[26] See F Neathey, S Dench, L Thomson, *Monitoring Progress Towards Pay Equality* (2003) Research Discussion Series, Equal Opportunities Commission.

[27] [2003] ICR 1205.

[28] *Ibid*, at para 10.

[29] *Ibid*, at para 37.

[30] See Explanatory Notes to the Equality Act 2010, at para 274.

[31] See Explanatory Notes to the Bill for the Equality Act 2010, at para 284.

[32] *Ibid*, at para 286.

It has to be noted, however, that section 77 does not require an employee to disclose information about his/her pay if asked.[33] It simply removes any contractual restrictions on giving or seeking disclosure and allows an employee to disclose his/her pay to a "colleague",[34] thus fostering dialogue among colleagues within the workplace and transparency about pay.

Finally, it is arguable that discretionary bonus payments should be within the protected ambit of "discussions about pay".[35] Indeed, bonuses are considered as a part of equal pay obligations by many provisions of the Equality Act.[36] Moreover, a protected pay disclosure which covers discretionary bonuses is consistent with the legislative aim to counter pay inequality,[37] and it confirms the decision in *Barton*, where the Employment Appeal Tribunal stated that "a bonus culture involving secrecy and/or lack of transparency" could not be condoned.[38]

The new provisions about protected disclosure of pay may turn out to be of some relevance in tackling the gender pay gap. At first sight, indeed, they appear to be effective in boosting dialogue about pay among colleagues and in improving a greater sensibility on pay differences at work. This will occur, in particular, if case law confirms that protected disclosure of discretionary bonuses is within the scope of section 77, to avoid such bonuses being used by employers to avoid equal pay obligations.

Gender pay reporting

If section 77 of the Equality Act promotes transparency about pay between colleagues within the workplace, then section 78 introduces new transparency duties directly upon employers, for the purpose of publishing pay information to show whether there are differences in the pay of male and female employees. The rationale of such a provision lies, once again, in the wide pay gap still existing on the grounds of sex: despite the introduction of equal pay legislation in 1970, women working full-time in the United Kingdom still earn 12.8 per cent less than the average full-time working men.[39]

In such a context, section 78 of the Equality Act contains a power to make regulations requiring employers who have 250 employees or more "to publish information relating to the pay of employees for the purpose of showing whether, by reference to factors of such description as is prescribed, there are differences in the pay of male and female employees". This means, for example, that large employers will be encouraged to publish their pay statistics to demonstrate how they are tackling the gender pay gap.[40]

It has to be pointed out, however, that section 78 only refers to a *power* to produce regulations. The government, in fact, has stated that the regulations necessary to apply the new law will not be made before 2013, and that they will only be issued if there has been insufficient progress on voluntary reporting.[41] As to public bodies with 150 or more employees, instead the duty should apply from April 2011,[42] and the data to

[33] See McDonald R, Buckley S, "Equal Pay" (2010)96(4) *Employment Law Bulletin*, at 7.

[34] It has to be noted that the meaning of the term "colleague" is not clear, because this is the only reference to "colleague" in the Equality Act, and the word is not defined by the legislature.

[35] *Contra*, see McDonald R, Buckley S, "Equal Pay" (2010) 96(4) *Employment Law Bulletin,* at 7, which argues that disclosure of bonuses should not be covered by section 77 of the Equality Act, relying upon the narrow literal meaning of the expression "terms of a person's work" in section 80(2).

[36] See, *eg*, section 74(7) of the Equality Act, with reference to maternity-related equal pay.

[37] Expressly stated in the Explanatory Notes to the Equality Act, para 275.

[38] [2003] ICR 1205, at para 30.

[39] New Earnings Survey 2008: www.statistics.gov.uk/elmr/03_09/downloads/ELMR_Mar09_Dobbs.pdf

[40] See Broadbent J, "Tackling the earnings gap" (2010)108(3) *Employment Law Journal*, at 8.

[41] See Explanatory Notes to the Equality Act, para. 278.

[42] See Monaghan K, "The Equality Bill: a sheep in wolf's clothing or something more?" (2009) *European Human Rights Law Review*, at 535.

be published shall include – along with gender pay gap information – details of employees' ethnic minority and disability employment rates of pay.[43]

It is difficult to ascertain whether the system of mm monitoring and reporting on gender pay introduced by the Equality Act will deal effectively with pay differences. The hope is that employers, rather than facing the criticism that may flow from the publication of discriminatory policies on pay, will voluntarily rectify any existing pay gap. However, without legal enforcement of equal pay duties, the position is unlikely to change radically. It would be more effective to dispense with voluntary reporting and to introduce a compulsory duty to publish pay related information, together with a governmental pay audit panel.[44] Whilst, this would represent an infringement of employers' right to privacy, this is a field in which the need for transparency should prevail.

CONCLUSION

Privacy and transparency are conceptual categories often used in the Equality Act, with the aim to counter discrimination and to achieve factual equality. However, a balance has to be struck between the different interests at stake: the right to respect for private life, on one hand, and, on the other hand, the need for a full disclosure of sensitive issues which can hide ongoing discriminatory practices.

On this basis, this article has drawn attention to some "samples" of law concerning privacy and transparency within the framework of anti-discrimination law. The different topics reviewed have illustrated the legislative stance, where the balance between privacy and transparency deliver outcomes that are not always satisfactory. In particular, it seems that the Equality Act is more effective when the protection of privacy prevails, as in the case of health questionnaires during the recruitment process. On the contrary, a more cautious approach has been noted in respect of transparency such as in the case of gender pay reporting, where the new provisions are applicable only on voluntarily basis and do not appear to be adequate to narrow the existing pay gap.

The overall balance between privacy and transparency within the Equality Act, therefore, seems to lean towards protection of privacy. However, because of the crucial role that transparency could play in improving public awareness of discrimination and stigmatisation issues, a greater and more effective development of transparency provisions should be considered.

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[43] See VV AA, "Equality Bill" (2009) 16(3) *Health and Safety at Work*, at 8.

[44] See Fawcett Society, *The Equality Bill*: http://www.fawcettsociety.org.uk/index.asp?PageID=1025

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