

# Law School Based Public Interest Advocacy: An Australian Story

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## INTRODUCTION

This article presents a case for law schools to undertake public interest advocacy. It argues that incorporating public interest advocacy into curricula and research enhances clinical legal education and enables law schools to make a distinctive and valuable contribution to justice and law reform. The article outlines an integrated model for law school based public interest advocacy based on the experience of one of Australia's newest law schools at Newcastle in the Hunter region of New South Wales. The article then describes a recent public interest case undertaken by academics, clinicians and students at Newcastle law school, explaining their participation in the case and exploring the contributions made by the case to legal education, the correction of injustice and reform of the law.

The case, one of Australia's most controversial deaths in custody, concerned the fatal shooting on Bondi Beach in Sydney in June 1997 of French photographer Roni Levi. The article examines the shooting, its investigation by police, a coroner and an independent commission of inquiry. It analyses the flaws in these legal investigations, considers their justice implications, and outlines the legal and policing reforms achieved through the case.

The article concludes with the suggestion that changes in law school culture as well as curriculum are needed to ensure that law schools embrace public interest advocacy and other forms of clinical legal education for the future benefit of the law and its students.

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University of Newcastle Legal Centre assisted by their law students, the authors have undertaken a number of public interest cases aimed at exposing flawed investigation, correcting injustice and achieving reform. This article draws on what the authors learned, with their students, from these cases.

## WHAT SHOULD LAW SCHOOLS DO?

Late last century William Twining imagined an ideal law school, one which would provide:

*... not only basic education and training, but also specialist training, continuing education, basic and applied research and high level consultancy and information service. The nearest analogy is the medical school attached to a teaching hospital which, inter alia, gives a high priority to clinical experience with live patients as part of an integrated process of professional formation and development.*<sup>2</sup>

Twining observed, somewhat ruefully, that this ideal had not been realised in any Western country. The failure to realise the ideal of law schools which integrate the study and practice of law is partly an institutional legacy. Traditionally, legal education in English speaking countries has been segmented into discrete stages, involving academic instruction at a university followed by practical legal training after law school. Education at law school has consequently often omitted or marginalised legal ethics and practical legal skills such as client interviewing and counselling, the discovery, management and proof of facts, advocacy and negotiation<sup>4</sup>.

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2 Blackstone's Tower: The English Law School The Hamlyn Lectures, 1994, Sweet and Maxwell, p.52

3 According to the Australian Law Reform Commission, "since the 1960's, legal education in English speaking countries generally has been described as being 'divided into three relatively discrete stages, involving (1) academic training at a university; (2) subsequent practical training with both institutional and in-service components and (3) continuing education.'" Australian Law Reform Commission Managing Justice: A review of the federal civil justice system, Report No. 89, Sydney, 2000 (ALRC Managing Justice) para. 2.7 quoting a description in Weisbrot, D. Australian Lawyers Longman Cheshire Melbourne 1990, p. 124.

4 Australian Law Reform Commission 'Review of the Federal Civil Justice System', Discussion Paper 62, August 1999 para 3.9. In this context the Commission observed that, 'properly conceived and executed, professional skills training should not be a narrow technical or vocational exercise. Rather, it should be fully informed by theory, devoted to the refinement of the high order intellectual skills of students, and calculated to inculcate a sense of ethical propriety, and professional and social responsibility'. ALRC Managing Justice para. 2.85.

Recent reports on legal education in the United States<sup>5</sup>, the United Kingdom<sup>6</sup> and Australia<sup>7</sup> have encouraged a narrowing of the gap between what is taught in law schools and the knowledge, skills and ethics associated with legal practice. There is an increasing acknowledgment amongst legal educators and practitioners that the traditional separation of theory from practice in legal education is inadequate to the task of law, impoverishing both the education of lawyers and the delivery of legal services.<sup>8</sup> Increasingly also, many legal educators incorporate the study, appreciation and practice of ethics and justice, as well as the development of basic skills into their curricula.<sup>9</sup>

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5 The American Bar Association Task Force on Legal Education and Professional Development ('The MacCrate Report') identified core skills and 'fundamental values' for lawyers and called upon law schools to address them. The skills identified were: problem solving; legal analysis and reasoning; legal research; factual investigation; communication; counselling; negotiation; litigation and alternative dispute resolution; resolution of ethical dilemmas and administrative skills necessary to organise and manage legal work effectively. The 'fundamental values' were dedication to the service of clients; the promotion of justice, fairness, and morality, striving to improving the profession and professional self-development. Legal Education and Professional Development-An Educational Continuum (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) American Bar Association, Chicago, 1992 (MacCrate Report) p.66.

6 The First Report on Legal Education and Training, The Lord Chancellor's Advisory Committee on Legal Education and Conduct, HMSO London April 1996 ('ACLEC Report') maintained that lawyers should internalise personal and professional ethical values and standards from the earliest stages of their education and training. The Committee suggested that teaching in ethical values should extend beyond a familiarisation with professional codes of conduct and practitioner obligations to the client. In its view the legal profession owes wider social and political obligations to society as a whole, for example, in protecting the rights of minorities and promoting the welfare of the disadvantaged. The Committee believed that law students should be made aware of the values that legal solutions carry, and of the ethical and humanitarian dimensions of law as an instrument which affects the quality of life (ACLEC Report paras. 1.19-1.20). ACLEC urged that legal education and training should ensure that future lawyers fully appreciate 'the high professional and ethical standards on which our legal system and, indeed our democracy depend' and the 'essential link between law and legal practice and the preservation of fundamental democratic values' (ACLEC Report para. 1.15) . According to ACLEC, the objective of the education and training of lawyers up to the point of initial qualification should be depth of learning in areas of basic knowledge and generic skills and the development of common professional values (ACLEC Report para.

10). As an example of generic skills development, ACLEC suggested that legal research skills should extend beyond merely "finding the law". They should encompass training in taking 'a problem, often presented in non-legal terms, and through a process of investigation to provide a range of potential legal solutions, each accompanied by an analysis of its benefits and risks to the particular client". Such skills should lie at the heart of what it means to be a lawyer. para. 1.15.

7 The Australian Law Reform Commission has suggested that legal educators should consider the need to reorient the traditional approach to legal education which still dominates Australian legal education, of 'what lawyers need to know', around 'what lawyers need to be able to do'. The Commission has supported moves to diversify Australian legal education by the inclusion in law school curricula of practical skills such as 'training in fact finding, negotiation and facilitation skills, as well as the discrete skills, functions and ethics associated with decision making'. Australian Law Reform Commission 'Review of the Federal Civil Justice System', Discussion Paper 62, August 1999 paras 3.18 and 3.23.

8 For example, the reports on legal education in Canada, the United States and the United Kingdom. Respectively, Arthurs, H. Law and Learning, Report to the Social Sciences and Humanities Research Council Of Canada by the Consultative Group on Research and Education in Law, Ottawa, 1984 (the Arthurs Report); Legal Education and Professional Development-An Educational Continuum (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) American Bar Association, Chicago, 1992 ('MacCrate Report'); First Report on Legal Education and Training, The Lord Chancellor's Advisory Committee on Legal Education and Conduct, HMSO London April 1996 ('ACLEC').

9 On the jurisprudential, pedagogical and practical tendency to separate ethics and morality from law and the case for incorporating ethics into the modern law school curriculum, see Economides, K Ethical Challenges to Legal Education and Conduct, Hart Publishing, Oxford, 1998. On the positivist tendency to separate law from justice and the case for the modern law school to play a role in equipping future judges and lawyers to understand and deliver justice, see Cooper J & Trubek L. Educating for Justice: Social Values and Legal Education, Dartmouth Publishing, Aldershot, 1997.

Legal education has traditionally concentrated on law as rules. The study of legal reasoning at law school is confined almost entirely to reasoning about disputed questions of law, most often explored through appellate court rule making. However, as Twining has also observed, “questions of fact deserve as much attention as questions of law” in legal education, scholarship and legal discourse generally.<sup>11</sup>

Isolation of theory from practice and concentration on law as rules, limits lawyers’ knowledge of law. Separation of theory from practice has contributed to the continuing failure of law teachers and legal practitioners to “acknowledge that [they] are, in truth, members of a common profession of jurists”,<sup>12</sup> and to the frequent failure of legal scholars “to see the common thread between the law of the law school and the law in its practical and social contexts”.<sup>13</sup> Legal realists were among the first to insist that legal theory, scholarship and teaching should move beyond exclusive attention to legal rules and doctrines.<sup>14</sup> Legal realism continues to provide theoretical support to bridge the gap between legal theory and practice. But it is not alone. Normative legal theorists appreciate that logical and semantic gaps in legal discourse render law uncertain both in concept and application.<sup>15</sup> Feminist scholars, legal sociologists and others agree that legal rules are

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- 10 Christopher Langdell, *Dean of Harvard Law School at the end of the 19th century, is credited with devising the case method and convincing generations of law school academics that the proper subject matter of legal education and scholarship was the elucidation of legal doctrine through the study of decided cases. A snapshot of Langdell’s view on legal education and scholarship is caught by the following two quotes from his Harvard Celebration Speech ((1887) 3 LQR 123-5). ‘Everything you would wish to know can be obtained from printed books’ and ‘What qualifies a person, therefore, to teach Law is not experience in the work of a lawyer’s office, not experience in dealing with men, not experience in the trial or argument of causes, not experience, in short, in using law, but experience in learning law’. As cited in Brayne, H ‘A Case for Getting Law Students Engaged in the Real Thing- The Challenge to The Saber-Tooth Curriculum’ (2000) 34(1) International Journal of Legal Education 17, 19.*
- 11 Twining, W *Rethinking Evidence: Exploratory Essays* Basil Blackwell, Oxford, 1990.
- 12 Savage, N and Watt, G “A House of Intellect for the Profession” in Birks, P (ed) *What Are Law Schools For? Pressing Problems in the Law Volume 2*. Oxford University Press, 1996. p.47. In Australia in the late 80’s, the Pearce Report described the relationship between the legal profession and the legal academy as ‘uneasy’ (Pearce, D et al *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission*, Australian Government Publishing Service, Canberra, 1987 (‘PearceReport’). Australian Law Deans described the relationship as containing ‘an element of tension’ (Statement of the Australian Law Deans, Appendix 3 of the Pearce Report para 71.) At the start of a new millenium that relationship, according to the Australian Law Reform Commission, ‘has not been advanced by this time, and a more consultative and respectful approach has not yet developed’. ALRC *Managing Justice* para 2.75.
- In order to advance collaboration amongst legal educators and practitioners the Commission has recommended, amongst other things, consideration of the establishment of an Australian Academy of Law. ALRC Managing Justice paras 2.115-2.128 and Recommendation 6.*
- 13 Savage, N and Watt, G “A House of Intellect for the Profession” in Birks, Peter (ed) *What Are Law Schools For? Pressing Problems in the Law Volume 2* Oxford University Press, 1996. p.47.
- 14 Oliver Wendall Holmes, *Justice of the United States Supreme Court and author of The Common Law* Little, Brown, Boston, 1881 declared (in dogmatic counterpoint to Langdell’s dogma about learning law from books) that ‘the life of the Law has not been logic: it has been experience’. Oliver Wendall Holmes (1880) 16 *American Law Review* 253 (reviewing Langdell’s casebook on contract). Holmes viewed law as predictions of what courts will decide rather than law as abstract logical deductions from general rules. Jerome Frank in *Law and the Modern Mind*, Anchor Books, New York, 1963 (first published 1930) and *Courts on Trial*, Princeton University Press, Princeton, 1949 insisted that legal teachers and scholars should pay attention to trial court decision making instead of exclusively studying appellate decisions. See also Karl Llewellyn *The Bramble Bush*, Ocean Publication, New York (first published 1930), *The Common Law Tradition*, Little, Brown, Boston, 1960 and *Jurisprudence: Realism in Theory and Practice* University of Chicago Press, Chicago, 1962.
- 15 For example: Hart, HLA *The Concept of Law*, Oxford University Press, Oxford, 1994; Stone, Julius *Precedent and Law*, Butterworths, Sydney, 1985; MacCormick, N *Legal Reasoning and Legal Theory*, Clarendon Press, Oxford, 1994; Habermas, J *Between Facts and Norms*, Polity Press, Cambridge, 1996.
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inadequate to explain and predict how cases are decided.<sup>16</sup> Indeed, legal determinacy and indeterminacy, and the relations between law and facts are central concerns of modern jurisprudential discourse.<sup>17</sup> Developments in legal education and scholarship, such as those concerned to explore the theory and practice of fact investigation and adjudication in law and the working relationships between law, ethics and justice, have been especially retarded.<sup>18</sup>

Legal education is not only important to law students and their teachers. It plays an essential role in shaping 'legal culture', and in determining how well the legal system operates in practice.<sup>19</sup> Achieving systemic reform and maintaining high standards of performance in a legal system, relies on the development of a healthy professional culture that takes justice and ethical concerns seriously.<sup>20</sup> The development of a healthy professional culture should start at law school. Inadequate legal education is a sure foundation for inadequate legal service.<sup>21</sup> For example, inadequate education and training in advocacy produces poor advocates, and 'poor advocacy can prolong proceedings, reduce the quality of decision making and increase costs for clients and the courts and tribunals'.<sup>22</sup>

A concern identified in public inquiries and reports into legal services in Australia is that the legal profession "has not contributed as it should have to the practice of justice in Australian democracy".<sup>23</sup> Some commentators have argued that lawyers should take responsibility for creating institutions in which they address community concerns as a *quid pro quo* of professional

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16 For discussion of the role of legal theory in clinical legal education see Noone, MA 'Australian Community Legal Centres-The University Connection' in Cooper, J and Trubek, L (es) *Educating for Justice: Social Values and Legal Education*, Dartmouth Publishing, Aldershot, 1977 and Goldsmith, AJ 'An Unruly Conjunction? Social Thought and Legal Action in Clinical Legal Education' (1993) 43 *Journal of Legal Education* 415.

17 Minda, G 'Jurisprudence at Century's End' (1993) 43 *Journal of Legal Education* 27.

18 Recent works which both reveal and attend to the long standing gaps in legal education and scholarship represented by the failure of law school texts and academic legal writing (including those on evidence and trial advocacy) to deal systematically with fact gathering and proof in legal process include: Binder, D A and Bergman, P *Fact Investigation: From Hypothesis to Proof*, West Publishing Co., St. Paul., Minn. 1984; Anderson, T & Twining, W *Analysis of Evidence: How To Do Things With Facts*, Weidenfeld and Nicholson, London, 1991; Moore, A J, Bergman, P and Binder, *Trial Advocacy: Inferences, Arguments and Trial Techniques* West Publishing Co., St. Paul, Minn., 1996; Robertson, BA & Vignaux, GA *Interpreting Evidence: Evaluating Forensic Science in the Courtroom* John Wiley 1995; Roberts, Graham *Evidence: Proof and Practice* LBC Information Services, Sydney, 1998 (especially Chapters 1 & 2 on evidence and proof of evidence); Burns, R P A *Theory of the Trial* Princeton University Press, New Jersey, 1999.

19 ALRC *Managing Justice* para 2.3. The Commission was asked to consider the significance of legal education

and professional training to the legal process in the context of reform of the federal civil justice system. See ALRC *Managing Justice Terms of Reference* at pp. 3-6.

20 ALRC *Managing Justice* para 2.3.

21 As Mary McAlesse, now President of Ireland, but then, Professor of Law, Queens University, Belfast has observed: 'professional formation involves the lifelong honing of skills and deepening of knowledge. Those of us involved in professional formation know we are only putting in place a foundation stone which will be built on over a lifetime. But that foundation stone is quite different from every other stone in the edifice. Placed well it guarantees a solid structure. Placed badly it can support a structure which is not up to withstanding the pressures it will inevitably come under.' ACLEC First Report on Legal Education and Training Report of the Proceedings of the Conference, London, 8 July 1996 pp.27-34 at p. 33.

22 Australian Law Reform Commission 'Review of the Federal Civil Justice System', Discussion Paper 62, August 1999 para 3.35.

23 Parker, Christine 'Justifying the New South Wales Legal Profession 1976 to 1997' (1997) 2 *Newc LR* 1. Such reports include: Senate Standing Committee on Legal and Constitutional Affairs *The Cost of Justice: Foundations for Reform*, the Parliament of the Commonwealth of Australia, Canberra, 1993; Senate Legal and Constitutional References Committee *Inquiry into the Australian Legal Aid System-Third Report* Senate Printing Unit, Canberra 1998.

self-regulation.<sup>24</sup> Others argue that improvements in the regulation and delivery of professional legal services will require 'nurturing an internal catalyst of change within the profession itself'.<sup>25</sup> Others have pointed to the need to encourage lawyers to undertake *pro bono* legal service and have suggested educational and other initiatives to foster the development of a *pro bono* culture in the legal profession to achieve this end.<sup>26</sup>

Notwithstanding the recommendations of many reports into legal education, the contentions of many academics and legal practitioners, and the teachings of many divergent schools of modern jurisprudence, many law schools continue to maintain their distance from the practice of law. Only recently have some Australian law schools become involved in the direct provision of practical legal training, mainly in the form of 'add-on' programs available after the completion of the LLB degree. Only a few have attempted to integrate practical legal skills and legal ethics within the basic law degree program.

Most Australian law schools have not only omitted practical skills from their curricula but have also failed to actively support and encourage their academic staff and students to participate directly in the legal process.<sup>30</sup> Many academics have made important contributions to law reform by way of submissions, and sometimes by membership of law reform agencies. Others have made significant contributions to test cases in appellate courts. Countless law school academics and students have supported community legal centres through their individual labour. Some law schools co-operate with community legal centres in the provision of client clinics that students may elect to participate in under supervision for academic credit.<sup>31</sup> However, most Australian law schools have not encouraged staff and student participation in legal practice as an integral part of their teaching and research programs.

24 Parker, Stephen *Islands of Civic Virtue? Lawyers and Civil Justice Reform*, Inaugural Professional Lecture, Griffith University Brisbane 1996 p.42-25 and Parker, Stephen 'Competing Images of the Legal Profession: Competing Regulatory Strategies' (1997) 25 *International Journal of the Sociology of Law* 385-409.

25 Parker, Christine 'Justifying the New South Wales Legal Profession 1976 to 1997' (1997) 2 *Newc LR* p.24.

26 The Centre for Legal Process, *Law Foundation of New South Wales Future Directions for Pro Bono Legal Services in New South Wales* 1998. Initiatives suggested by the Centre included, 'visible participation in *pro bono* work by law academics and prominent members of the legal profession, in order to provide role models for law students and junior members of the profession, ...[including] involvement in...major cases or projects', and 'the introduction of the subject of *pro bono* work at an early point in the law school curriculum, including the opportunity to participate in *pro bono* services'. Principle 9

27 In Australia 'practical legal training has largely been the preserve of the professions, whether delivered directly through articulated clerkships (for solicitors) or pupillage programs (for barristers), or through specially designed institutional courses of instruction' ALRC *Managing Justice* para. 2.9 On the history of the division between academic and professional legal education see Hepple, B A 'The Renewal of the Liberal Law Degree' (1996) 55 *Cambridge Law Journal* 470.

28 ALRC *Managing Justice* para. 2.9 providing the examples of such 'add-on' programs at Wollongong University, UTS, Queensland University of Technology, Bond University and Monash University.

29 Newcastle Law School is the pioneer of such integration in Australia. Flinders University has also recently integrated practical legal training courses into its undergraduate law program. The stated rationale for the Flinder's step is contained in ALRC *Managing Justice* para. 2.112 note 142- A Stewart Submission 327.

30 Likewise, as Hugh Brayne has observed in relation to the United Kingdom, 'engaging students in the experience of law has not been a mainstream tradition in our law schools'. Brayne, H 'A Case for Getting Law Students Engaged in the Real Thing- The Challenge to The Saber-Tooth Curriculum' (2000) 34(1) *International Journal of Legal Education* 17.

31 Australian Law Reform Commission 'Review of the Federal Civil Justice System', Discussion Paper 62, August 1999 para. 3.10. Examples of such co-operation are: the University of New South Wales with the Kingsford Legal Centre in Sydney; Monash University with the Springvale Legal Service in Melbourne. Murdoch University operates the Rockingham Legal Centre in Western Australia. See ALRC *Managing Justice* para. 5.203. See also Giddings, J 'A Circle Game: Clinical Legal Education in Australia' (1999) 10 (1) *Legal Education Review* 33.

By contrast, Newcastle law school, one of Australia's most recently established law schools, 'completely integrates classroom and clinical training at the undergraduate level, effectively merging the first two stages of traditional education and obviating the need for subsequent practical legal training'.<sup>32</sup> Newcastle also provides for staff and student participation in legal process, including public interest advocacy.

### **NARROWING THE GAP BETWEEN LAW SCHOOL AND PRACTICE: THE NEWCASTLE ENDEAVOUR**

*For some years, Australian law schools have accepted that their dual mission was to provide (or contribute to, in the case of combined degrees) a broad liberal education,<sup>33</sup> as well as to provide a basic grounding for those entering the profession... In the United States, 'live client' clinical programs, usually focusing on community legal centre/poverty law type practice, have been widely used by law schools to supplement classroom instruction on substantive law, and to provide students with an appreciation of the nature of 'law as it is actually practised' -- including the social dimension and the ethical dilemmas which may arise. Virtually every accredited American law school operates a substantial clinical practice program, and some have a range of programs which cater for specialist interests (such as environmental law, criminal appeals, civil liberties, children, and so on).<sup>34</sup> .... In Australia, the much lower level of resources available to law schools has meant that only a handful of law schools run clinical programs -- and only the University of Newcastle allows students to undertake a fully integrated clinical degree program rather than simply an elective unit.<sup>35</sup>*

As 'a clinical law school', Newcastle seeks to integrate learning of the theory and practice of law.<sup>36</sup> Curriculum and research, people and partnerships, are the keys to integration.<sup>37</sup>

The critical aspects of integration at Newcastle are: the inclusion of generic skills, ethical ideals and jurisprudence in the core undergraduate law program; the creation of the University of Newcastle Legal Centre, the development of its partnerships with other legal service providers and the

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32 Australian Law Reform Commission 'Review of the Federal Civil Justice System', Discussion Paper 62, August 1999 para. 3.12

33 ALRC Managing Justice para. 2.17 and see the Statement of Australian Law Deans, attached as Appendix 3 to the Pearce report.

34 ALRC Managing Justice para. 2.18

35 ALRC Managing Justice para. 2.19. According to the Australian Law Reform Commission 'the other law schools with elective clinical programs which involve operation of a community legal centre (and receive substantial Commonwealth funding) are the Universities of New South Wales, Monash, Murdoch and Griffith. The University of Western Australia is currently operating an experimental program, with the encouragement of the WA Supreme Court, which involves law students assisting (under supervision) with criminal appeals in cases in which legal aid is not available or insufficient. Other law schools, for resource and pedagogical reasons, have chosen to develop placement programs rather than clinical programs; for example, Wollongong and Sydney. Many law students also are volunteers with community legal centres.' ALRC Managing Justice Para 2.19 endnote 30.

36 The founding Dean of Newcastle Law School described its program in the following terms: 'in the past the three traditional; methods of professional legal training-theoretical learning, skills training and experiential learning-have been undertaken sequentially. In our LLB course theory and skills are taught at the same time. We have a clinical law school. Constant exposure to simulated exercises and legal practice permits students to test and extend their legal knowledge whilst developing skills ranging from legal research to negotiation and advocacy'. Rees, N 'A Clinical Law School', University of Newcastle Centre for Advancement of Learning and Teaching Newsletter, February, 1990 No. 6 p.2

37 The Australian Law Reform Commission recently commended Newcastle's approach to legal education, commenting that it represented a, "good example of... properly conceived and executed professional skills training....[which] should be fully informed by theory, devoted to the refinement of the high order intellectual skills of students, and calculated to inculcate a sense of ethical propriety" Managing Justice: A review of the federal civil justice system, Report No. 89, Sydney, 2000, Australian Law Reform Commission para. 2.85

integral role of the Centre and its partners in the delivery of the law school's teaching and research program; the availability of a 'professional program' as a course of study, skills development and clinical placement to law students in the undergraduate law program; the provision of opportunities for voluntary (*pro bono*) legal practice at the University of Newcastle Legal Centre for law students; and the inclusion in the elective program of applied legal subjects which emphasise skills development, including public interest advocacy.<sup>38</sup>

### The Curriculum and Research Program

When the Faculty of Law at Newcastle was established a group of its founding academics encouraged the University to embark upon a clinical legal education program.<sup>39</sup> The Faculty offers two undergraduate LLB streams<sup>40</sup> - a degree stream (LLB) and a professional program stream (LLB/Diploma of Legal Practice). A core program is undertaken by students in both the degree and professional program streams.<sup>41</sup> The professional program, completed over the final two years of undergraduate study, earns students an LLB degree and a Diploma of Legal Practice and entitles them to apply for admission to legal practice without the need for further practical training. The program integrates legal learning, skills and clinical placement. Students who take this program undertake clinical placement at the University of Newcastle Legal Centre, the Legal Aid Commission or the Many Rivers Aboriginal Legal Service, and may undertake placement with a private legal firm or public law office. The professional program at Newcastle is currently the only fully integrated clinical degree program available in Australia.

Legal research at Newcastle includes clinical research involved in public interest cases. Clinical research, evolving out of academic, practitioner and student planning for and reflection upon individual cases, is a critical part of the dynamic of public interest advocacy.<sup>42</sup> Research enhances not only the quality of the advocacy of an individual case but also the prospects of achieving more general reform outcomes, and takes many forms.<sup>43</sup>

38 For example, the subjects *Forensic Analysis and Legal Practice*, *Public Interest Advocacy*, *Law Review and Advanced Legal Research and Writing*.

39 The Faculty of Law at Newcastle, established in 1992, admitted its first students in 1993, and undertook its first public interest case in 1995 (the Leigh Leigh case, as to which see later). The school's foundation Dean, Professor Neil Rees, came with a background in clinical legal education and the development of legal centres associated with law schools and with experience as a solicitor in public interest practice. Dean Rees and his founding colleagues were instrumental in the establishment of Newcastle as 'a clinical law school'.

40 The Faculty offers its LLB degrees to undergraduates as part of a combined degree (at the time of writing there were six combined degrees: Arts, Science, Economics, Commerce, Business and Science (Forensic)). Graduates may undertake an LLB as a stand-alone degree.

41 The core program, commencing with legal system and method, a 'building block' skills and techniques subject, and containing other foundation law subjects (criminal law and procedure, torts, contracts, and property law), has several related aims. These include, imparting substantive legal content, providing an introduction to essential legal concepts, principles, ethical ideals,

techniques, approaches, and generic problem solving methods and techniques. Inculcating an interest in the functions of law in its various contexts and enhancing student appreciation of law through a study of jurisprudence.

42 As Simon Rice has observed, from an educational standpoint, clinical case research requires students to consider the impact of legal rules and provides an opportunity to consider values in law and law in society issues. Because it derives from but is not limited to legal action taken on behalf of an individual client, clinical project work can demonstrate for students the extent to which law can serve broader interests than those of the individual and its political and social impact. Rice, *S A Guide to Implementing Clinical Teaching Method in the Law School Curriculum Centre for Legal Education*, Sydney, 1996 pp.28-29.

43 These forms include written submissions to courts, tribunals, law reform agencies and other public bodies. Books and chapters in books. Research papers and theses. Articles and case-notes in law journals, including clinical law journals. Community legal education, including article and feature writing in newspapers, and participation in television documentaries and radio current affairs programs.

## Staff and Students

Upon the foundation of its law school Newcastle University formulated a recruitment profile for the school's academic staff that would support the delivery of an integrated clinical program. Staff were chosen from a mixture of academic and practical backgrounds. Some staff came from pure academic backgrounds; others had a combination of academic and practice backgrounds; others had purely legal practice backgrounds. Staff with a background of practice were encouraged to continue to practice in order to enhance the Faculty's teaching and research programs. Pure academic staff were encouraged to collaborate with those working in the clinical teaching and research programs. The inclusion of practising lawyers, both solicitors and barristers, as academic members of the law school, was an essential step in providing Newcastle's clinical program.<sup>44</sup> Their proven ability to practice, their skills and experience, and their knowledge of and connection to 'law jobs'<sup>45</sup> were essential to support the clinical program. The Faculty was founded on the policy that clinical staff of the Centre should be members of the academic staff of the law school and their distinctive teaching and research efforts should be recognised equally with those of mainstream academic staff.<sup>46</sup> The Faculty's core of full time teachers was complemented by part-time clinical teachers drawn from the judiciary and the profession.

Law schools are often depicted as training schools for anti-social, or at least self-interested, legal practice. They are often seen as training grounds for an elite who go on to earn enormous salaries serving commercial interests rather than engage their skills in the pursuit of justice and the public interest.<sup>47</sup>

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44 Those recruited to Newcastle's 'clinical law school' include former and current members of federal and state courts or tribunals, a senior criminal trial barrister, partners and solicitors in private and public law firms and government law offices such as the Director of Public Prosecutions.

45 In the sense employed by Karl Llewellyn and other legal realists. Llewellyn saw law as consisting not just of rules but of institutions and people carrying out 'law jobs', in which techniques and methods engaged in the application of rules are as important to the understanding and operation of law as the rules themselves. And in which values and ideals are at work, often undetected by the uninitiated, in the creation or buttressing of rules. In this context those 'uninitiated' into 'law jobs' included not just law students but the traditional academic teachers who taught them. See, for example, Llewellyn, K *The Bramble Bush* (1930) (1951), and *The Common Law Tradition* (1960).

46 However, equal recognition of the value of the work of clinical legal staff, in terms, for example, of tenure and promotion, remains problematic.

47 See Economides, K 'Cynical Legal Studies' in Cooper, J and Trubek, L (eds) *Educating for Justice: Social Values and Legal Education*, Dartmouth Publishing, Aldershot, 1997. Some scholars like Harvard's Duncan Kennedy argue polemically that law schools serve as 'ideological training for willing service in the hierarchies of the corporate welfare state', Kennedy, D 'Legal Education and the Reproduction of Hierarchy' 1982 *Journal of Legal Education* 32. Others like Louise Trubek lament that mainstream and traditional law schools are insufficiently concerned with ethics, justice, and public interest and are dominated by a 'myopic cynical positivism' which encourages law students to focus almost exclusively on their own subjective careers. See Cooper, J and Trubek, L 'Social Values from Law School to Practice: An Introductory Essay' in Cooper J and Trubek L (eds) *Educating for Justice: Social Values and Legal Education*, Dartmouth Publishing, Aldershot, 1997.

There is a considerable body of legal educational literature and empirical research that suggests that the overall effect of law school is to inculcate cynicism about legal ideals and even to reorient students' personal values and commitment.<sup>48</sup> The literature contains many reports of students who come to law school with ideals of doing justice but who fail to follow their ideals through in their course choices, career choices, and, ultimately, in the attitudes and approaches they bring to their chosen legal work.<sup>49</sup>

Public interest advocacy at Newcastle developed, in part, in response to traditional law school practices that impart or compound legal cynicism. It engages law students to provide access to justice and encourages their deeper consideration of the relationship between law and justice. Student interest in and commitment to public interest case work at Newcastle is generous and sustained.

### Partnerships with the Profession

The University of Newcastle Legal Centre has grown from seeds sown by community legal centres.<sup>50</sup> It shares many of the aspirations and methods of these centres. However, the Newcastle Centre holds a distinctive place in both the public interest practice of law and legal education in Australia. Established as a centerpiece of the University's undertaking to provide integrated teaching and research programs in law and practice, it is truly a law school based legal centre.

Newcastle Law School has extended and consolidated its clinical program through collaboration with the Legal Aid Commission of New South Wales and the Many Rivers Aboriginal Legal Service. Lawyers employed by the Commission and Many Rivers work alongside lawyers from the Centre to provide legal aid services to the community and act as clinical supervisors to law students who assist them with their cases.<sup>51</sup> Many people come to the Centre with complaints of injustice.

48 Some of this literature is reviewed by Adrienne Stone in 'Women, Law School and Student Commitment to the Public Interest' in Cooper, J and Trubek, L (eds) *Educating for Justice: Social Values and Legal Education*, Dartmouth Publishing, Aldershot, 1997 pp. 58-61. The literature includes the following: Rathjen, G 'The impact of legal education on the beliefs, attitudes and values of law students' [1976] 44 *Tennessee Law Review* 85; Stover, R. V *Making It and Breaking It. The Fate of Public Interest Commitment During Law School*, Univ. of Illinois Press, Urbana, 1989; Kuby, C 'Three Years of Adjustment: Where do Your Ideals Go?' *Juris Doctor* December 1976 p. 34; Erlanger, H, and Klegon, D. (1978), 'Socialising Effects of Professional School: The Law School Experience and Student Orientations to Public Interest Concerns' (1978) 13 *Law and Society Review* 11; Erlanger, H, Epp, C, Cahill, M. and Haines, K. 'Law Student Idealism and Job Choice: Some New Data on an Old Question', (1996) 30A *Law and Society Review*, 85; Reidel, C 'Public Interest Law: A Growing Commitment: A Shrinking Market National (1996) *Jurist* 38; Gunier, L et al (1994) 'Becoming Gentlemen: Women's Experience at One Ivy League Law School' (1994) 143 *University of Pennsylvania Law Review* 1; Homer, S and Schwartz, L (1990) "Admitted but not Accepted: Outsiders Take An Inside Look at Law School" (1990) 5(1) *Berkeley Women's Law Journal* 31;

Granfield *The Making of Elite Lawyers: Visions of Law School at Harvard and Beyond* Routledge, New York, 1992.

49 For example, the predominant answer to the question about how law school had influenced their values, in the Pearce Report's survey of Australian law graduates, was that it made them 'more cynical' (54%). This was followed by 'more practical' (52%), and 'more politically aware' (39%). Only 10% of graduates reported that legal education made them 'more idealistic'. Pearce, D et al *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* AGPS Canberra 1987, Appendix 5, 195, Table 5.19 (Pearce report). As noted in ALRC *Managing Justice* para 2.3 note 6.

50 Including legal centres attached to or associated with law schools (like Fitzroy, Kingsford, Springvale) and independent centres (like, the Public Interest Advocacy Centre (PIAC), based in Sydney). See, Basten, J, Graycar, R and Neal, D 'Legal Centres in Australia (1985) 7 *Law and Policy* 113; Chesterman, J *Poverty Law and Social Change: The Story of the Fitzroy Legal Centre*, Melbourne University Press, Melbourne, 1996.

51 The Commission and the indigenous legal service established a collaborative legal service, research and education effort with Newcastle law school in 1996.

Many receive assistance. However, resources are limited and its educational objectives mean that only some cases can be undertaken as public interest advocacy cases.<sup>52</sup>

## **PUBLIC INTEREST ADVOCACY AT NEWCASTLE LAW SCHOOL**

Public interest advocacy is taught and practised at Newcastle law school as a form of clinical legal education.<sup>53</sup> At the heart of clinical legal education is a real client. It is the presence of a real client that distinguishes clinical legal education both from traditional legal education, which may often be conducted without any reference to a 'client', and from practical legal skills training, which hypothesises or simulates client situations.<sup>54</sup> Clinical legal education exposes students to real, factual problems requiring real solutions. As Hugh Brayne has observed, 'good judges and good lawyers use a combination of legal knowledge, analytical powers, insights, experience, and understanding of human nature to make difficult decisions in a practical and wise way.'<sup>55</sup> Law students engaged in public interest advocacy gain personal experience of the impact of law on individuals. Under the collaborative guidance and supervision of academics and practitioners, students who learn by assisting others construct a foundation for personal growth towards becoming 'good lawyers'.

Public interest advocacy at Newcastle brings together a team of academics, practitioners and law students to work on individual cases that raise fundamental concerns about the administration of justice. Given the educational and research missions of the University, public interest advocacy at the law school has a number of related objectives, including encouraging student learning, inspiring research and analysis, and promoting improvements in the law.

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52 At Newcastle, cases are assessed in the light of the justice and educational objectives and values discussed in this paper. By way of comparison, at Harvard Law School, Alan Dershowitz considers the following matters when deciding whether to accept a case: 'is the case likely to raise important issues of a general nature?'; 'whether I can make effective use of my students'; 'whether my academic skills will add a special dimension to the defense'. According to Dershowitz, the O J Simpson trial in which he was involved met all these criteria and provided one additional factor. Dershowitz surmised that the Simpson case 'would become the vehicle by which a generation of Americans would learn about the law'. Dershowitz's disavowal of other factors and his reasons are worth quoting in full. According to Dershowitz, in deciding whether or not to take on a case (including the Simpson case) he does not consider a potential client's 'popularity, unpopularity, or controversial nature; his wealth or poverty; and his prospects of winning or losing. Because I am a professor with tenure, I believe I have a special responsibility to take on cases and causes that may require me to confront the powers that be—the government, the police, prosecutors, the media, the bar, even the university. The lifetime guarantee of tenure entails the responsibilities to challenge the popular and defend the unpopular'. Dershowitz, *A Reasonable Doubts: The O.J. Simpson Case and the Criminal Justice System* at pp 25-26, Simon & Schuster, New York, 1996. See further Dershowitz, *A The Genesis of Justice* Warner Books, New York, 2000 at pp. 89-92.

53 Important accounts of clinical legal education include: Jerome Frank 'Why Not a Clinical Lawyer School?' (1933) 81 *University of Pennsylvania Law Review* 907; Barnhizer, DR 'The Clinical Method of Legal Instruction: Its Theory and Implementation' (1979) 30 *Journal of Legal Education* 67; Amsterdam, *Clinical Legal Education--A 21st Century Perspective*, (1984) 34 *Journal of Legal Education* 612 ; Campbell. S 'Blueprint for a Clinical Program' (1991) *Journal of Professional Legal Education* 121; Symposium 'The Many Voices of Clinical Legal Education' (1994) 1 (1) *Clinical Law Review* 1; Rice, S *A Guide to Implementing Clinical Teaching Method in the Law School 1996 Centre for Legal Education* ; Symposium 'Fifty Years of Clinical Legal Education' (1997) 64(4) *Tennessee Law Review*; Brayne, H, Duncan, N and Grimes, R *Clinical Legal Education* Blackstone Press 1998.

54 As Simon Rice has observed: 'it is the student participation in the complexity of the lawyer/client dynamic which offers opportunities for achieving the various clinical legal education goals and which gives the clinical method its unique character' Rice, S *A Guide to Implementing Clinical Teaching Method in the Law School 1996 Centre for Legal Education* p.10.

55 Brayne, H 'A Case for Getting Law Students Engaged in the Real Thing- The Challenge to The Saber-Tooth Curriculum' (2000) 34(1) *International Journal of Legal Education* 17, 26.

The suitability of a case for public interest advocacy at Newcastle is assessed according to a matrix of considerations. Typically, supervisors ask whether a case is likely to: confront students with a real case of injustice which will challenge them to fashion effective legal responses; demonstrate the practical contribution which lawyers can make to fundamental democratic and legal values, including the protection of individuals and groups from the abuse of public and private power;<sup>56</sup> stimulate research and learning of substantive law, reinforce traditional student skills,<sup>58</sup> foster practical legal skills, and cultivate qualities required of 'good lawyers'<sup>59</sup>; and encourage students to reflect upon the moral and ethical dimensions of law and how law ought to be practised.

Students undertake public interest advocacy either as volunteers (pro bono), or on clinical placement with the Legal Centre as part of the professional program, or enrolled in "Public Interest Advocacy", an optional subject in the LLB program. Each student is engaged on an individual public interest case as part of a team, under the supervision and guidance of a clinician and an academic co-ordinator. Each student member of a public interest advocacy team engages, in different ways, with the client and with fact gathering and analysis, legal research, case-management, preparation of 'pre-trial' materials (including the formulation of case theories and issues and relevant and probative lines of examination and cross-examination), 'trial' presentation (including the formulation of opening and closing addresses and written submissions) and follow up. Some students instruct in court during a hearing, others are engaged in formulating questions as the hearing progresses, and reviewing the evidence at the end of each hearing day, and formulating final submissions.

## The Cases

Public interest teams at Newcastle have undertaken a number of cases, including the Leigh Leigh case, the Eddie Murray case, the Eastman cases,<sup>60</sup> a justice program in East Timor,<sup>61</sup> and, most recently, the Roni Levi case.<sup>62</sup>

56 *First Report on Legal Education and Training*, Lord Chancellor's Advisory Committee on Legal Education and Conduct, HMSO London April 1996 (ACLEC Report) para 2.4

57 Brayne, H, Duncan, N and Grimes, R *Clinical Legal Education* Blackstone Press 1998 contains student feedback indicating improvement in understanding and performance in other legal subjects by students taking a clinical option.

58 Traditional legal teaching presents students with only hypothetical or decided cases, usually in discrete and pre-determined legal categories. By contrast, clinical method extends student knowledge and traditional skills, like extracting rules from cases, distinguishing precedents and interpreting statutes, by requiring a student 'to sift through a number of legal categories, testing knowledge of each, before being able to resolve a problem.' Rice, Simon *A Guide to Implementing Clinical Teaching Method in the Law School* 1996 Centre for Legal Education p.27

59 Including a capacity to handle conflict constructively, an ability to seek and use feedback from clients, an aptitude for clear-headed reasoning under pressure, an appreciation of other actor's standpoints, and a sense of responsibility Brayne, H 'A Case for Getting Law Students Engaged in the Real Thing- The Challenge to The Saber-Tooth Curriculum' (2000) 34(1) *International Journal of Legal Education* 17, 21-29.

See also: Henderson, L 'The Dialogue of Heart and Head' (1988) 10 *Cardozo Law Review* 123; Watson A S 'Some Psychological Aspects of Teaching Professional Responsibility' (1963) 16 *Journal of Legal Education* 1.

60 The Centre undertook two related High Court appeals on behalf of David Harold Eastman, convicted in 1995 for the murder in 1989 of the Australian Capital Territory Assistant Commissioner of Police Colin Stanley Winchester. See *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 73 ALJR; 165 ALR 171 (an unsuccessful High Court challenge to the legality of the trial based on a claim that the trial judge was not validly appointed); *Eastman v the Queen* [2000] HCA 29 (a claim, rejected 4/3 by the High Court, that the trial miscarried because Eastman was unfit to plead, instruct counsel and defend himself, because of mental illness).

61 The project in East Timor to train representatives of non-government organisations in war crimes investigation and evidence gathering was sponsored by the Catholic aid agency, Caritas Australia.

62 The work of the Centre on public interest cases has regularly drawn the attention of national, state and local media and featured in media such as, *The Australian Higher Education Supplement*, the *Sydney Morning Herald Magazine Good Weekend*, *Insight* (SBS Television), *The 7.30 Report* and *Australian Story* (ABC Television).

The Centre represented Robyn and Jessie Leigh, mother and sister of Leigh Leigh, a fourteen year old Newcastle schoolgirl, sexually assaulted and murdered at a teenage beach party in November 1989. Acting upon a report prepared by the Centre on behalf of the Leigh family, the NSW Minister for Police announced in Parliament in October 1996 that the New South Wales Crime Commission would conduct a review of the police investigation into the Leigh Leigh case.<sup>63</sup> The Crime Commission and, subsequently, the New South Wales Police Integrity Commission, revealed significant investigative failures in the case, recommended disciplinary action in relation to the officers involved and the introduction of reforms in investigative procedures relating to serious crime.

The Centre also represented Arthur and Leila Murray, the parents of Eddie Murray, an aboriginal footballer. At the age of twenty one, Eddie was found dead, hanging in a police cell at Wee Waa, in June 1981. Eddie Murray's death was one of the cases reviewed by the Royal Commission into Aboriginal Deaths in Custody in 1987. Work over a number of years by a Newcastle public interest advocacy team resulted in the exhumation of Murray's body in 1997 by the New South Wales State Coroner. An additional autopsy revealed a previously unidentified and unexplained fracture to Murray's sternum. The Murray case was referred recently by the New South Wales government to the Police Integrity Commission and is currently under active investigation by the Commission.

The Centre is currently representing, amongst others, the families of five young women who went missing in the late 1970's and the family of a young unarmed Maori man fatally shot by police in Sydney in February 2000. The work of the Centre on missing persons led to the establishment by the New South Wales Police Service in 1997 of its largest ever investigative strike force to re-investigate the disappearance of the young women. The disappearance of the young women is currently the subject of an inquiry by the New South Wales State Coroner.

A number of reports and submissions to courts, tribunals, government and government agencies have resulted from the work undertaken by the Centre in these public interest cases. These reports include those on: the murder of Leigh Leigh and its investigation by police;<sup>64</sup> the death in custody of Eddie Murray and its investigation by police and the Royal Commission into Aboriginal Deaths in Custody;<sup>65</sup> the unresolved disappearances of a number of missing persons in the Sydney and Hunter regions and their investigation by police; and, most recently, the police shooting of Roni Levi and its investigation by police, the State Coroner and the Police Integrity Commission.<sup>67</sup> The reports have sought redress of individual injustice, exposed failures in legal fact gathering and analysis and laid the ground for more general reform.<sup>68</sup>

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63 The Minister told Parliament that, "Newcastle Legal Centre has worked tirelessly on this case and, for the last few months with the assistance of the NSW police, Mrs Leigh's lawyers have painstakingly sorted the existing police evidence and the result is a 300 page report which raises some alarming questions."

64 Cavanagh, R, Boersig, J and Watterson, R *The Murder of Leigh Leigh November 1989 - A Forensic Report* (1996).

65 Cavanagh, R and Pitty, R *Too Much Wrong - Report on the Death of Edward James Murray* (1997).

66 *Missing Persons in the Hunter Region a Submission to NSW Minister for Police* (1997).

67 Watterson, R, Boersig, J, Cavanagh, R and Hughes, C *A Very Public Death: The Police*

*Shooting of Roni Levi Bondi Beach Saturday 28 June 1997* (1998).

68 *The Leigh Leigh Report, the Eddie Murray Report and the Missing Persons Submission provided the bases for police, coronial and governmental reconsideration of unresolved disappearances and of deaths previously considered resolved. A Very Public Death and other submissions by the Centre relating to the shooting of Roni Levi have been the subject of public inquiry by the New South Wales Police Integrity Commission. The Levi case is discussed in detail later in this article.*

The common cause of injustice in the public interest cases conducted by the Centre is investigative failure. According to Jeremy Bentham, "the basis of justice is evidence".<sup>69</sup> Many cases of injustice occur because legal process fails to discover the full facts or because false facts are accepted by it as true. Justice can only be done when the facts are truly known. Correct application of the law to produce justice depends on sound and reliable fact gathering and evaluation. Not even the most rigorous examination of facts at trial, nor flawless legal analysis on appeal, can rectify flawed or inadequate pre-trial investigation of the facts.<sup>70</sup>

The contribution of law school based public interest advocacy to the exposure of flawed investigation, leading to systemic change in legal process is exemplified by the Levi case.

## PUBLIC INTEREST ADVOCACY AND THE POLICE SHOOTING OF RONI LEVI

### The Shooting and Its Investigation

French photographer Roni Levi was shot and killed on Bondi Beach by Constable Rodney Podesta and Senior Constable Anthony Dilorenzo, police officers stationed at Bondi police station, at approximately 7.30 am on Saturday morning 28 June 1997.

During the evening before his death, with the help of some friends, Levi presented at St Vincent's Public Hospital, Darlinghurst, in a confused state. Levi had no history of drug or alcohol abuse, violence or psychiatric illness.<sup>71</sup> He was diagnosed by doctors at St Vincent's as suffering from borderline delusional thought processes and admitted as a voluntary patient for neurological and psychiatric investigation. Before such investigation could be completed, and still apparently in a confused state, Levi left the hospital in the early hours of the Saturday morning. By some means, still unknown, Levi travelled from the hospital to his flat near Bondi beach.

Around six a.m, when his flatmate opened the front door to let him into the flat, Levi was swaying and unsteady on his feet. His flatmate asked Levi what was wrong but Levi did not respond. Instead he went to his own room, obtained a coat, and left the flat. About twenty minutes later, he returned. This time when his flatmate opened the door Levi walked into the kitchen and picked up

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69 Jeremy Bentham *The Rationale of Judicial Evidence*, Garland Publications, New York, 1978 (reprint of 1827 ed. published by Hunt and Clarke, London).

70 The Royal Commission into Aboriginal Deaths in Custody pointed out that 'in many respects the quality of coronial inquires is shaped by the quality of the initial police investigation', and made the powerful and telling observation that even rigorous examination at a coronial inquiry cannot rectify inadequate or flawed police investigation Royal Commission into Aboriginal Deaths in Custody, National Report Volume 1 para. 4.2.26.

71 The opening statement by Counsel Assisting the Coroner at the inquest into Levi's death contains the following description of Levi's background: 'The deceased died on 28 June 1997. He was born on 6 January 1964 at Ashcalon, Israel and was the eldest of five children. The evidence discloses that he was interested in fine arts, painting and photography when at school and that after leaving school, he went to a photographic college.

*He was a vegetarian, he didn't drink alcohol other than on special occasions, nor did he drink tea or coffee. He didn't smoke and he didn't, it is said, use illicit drugs. At the time of his death, he was not on any medication and he was a person who frequently meditated.'... [Those who knew him] describe Levi as, variously, 'health conscious, very energetic, gentle, quietly spoken, polite, quiet, subdued, calm, mild mannered, well mannered, caring, sensitive, someone who never was angry, never lost his temper, never raised his voice, not intimidating, nice, wouldn't have hurt a fly, not physically brave, wouldn't fight, not aggressive.'.... 'He's also described as having a sense of humour and lastly, the evidence discloses... that he was never violent nor was he known to be suicidal.' Inquest into the Death of Roni Levi, Transcript Monday 9.2.98 at pp.5-6.*

a kitchen knife. The flatmate ran outside, and shortly thereafter, to the nearby Bondi police station to alert police.<sup>72</sup>

A senior sergeant, Podesta, Dilorenzo and another other Bondi police officer set out to search for Levi in three separate vehicles. Podesta, Dilorenzo and the other officer spotted Levi near Bondi beach at about five past seven, and chased him down the beach and into the water. The senior sergeant did not join his men on the beach but set up a 'command post' to oversee the situation from the promenade, overlooking the beach. Not long after he set up his post, the senior sergeant was joined by a fifth Bondi officer and two officers from Paddington who had heard a call for assistance on the radio in their patrol van. These three officers joined Podesta, Dilorenzo and the other Bondi officer on the beach with Levi. At times Levi was fully immersed in the surf. At other times the police on the beach and the senior sergeant on the promenade could see that Levi was pointing the blade of the knife towards himself. When he saw that Levi might harm himself with the knife the senior sergeant on the promenade called for an ambulance. Police on the beach surrounding Levi later called for police negotiators.

After a time Levi emerged from the water on to the beach. He walked up and down the shoreline shadowed by police who at times had their pistols drawn.<sup>73</sup> Police repeatedly called upon Levi to drop the knife. According to police accounts they were positive but firm. According to civilian eyewitnesses they were much tougher and direct. 'Put down the knife you fucking dickhead'. And to a female jogger who inadvertently came near, 'Fuck off'.<sup>74</sup>

All the officers confronting Levi formed the impression that he was mentally unstable and not communicating rationally. One said that they thought that Levi 'might've lost the plot'.<sup>75</sup>

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72 No civilian claimed to have been threatened by Levi with the knife. The evidence of the police officers involved in the incident agreed that Levi did not directly and immediately threaten any civilian with the knife. Rather, the evidence of the police officers involved in the incident and some civilian eye witnesses is that Levi was regarded as posing a threat because he was carrying a knife which he sometimes waved, pointed or jabbed at police and which he failed to drop in face of police demands to do so.

73 The evidence of some of the incident police adduced at the inquest but not contained in their statements is that, after he emerged from the water, Levi's coat was at most times during the incident off his shoulders. The evidence of most civilians is to the same effect. The photographs of the incident taken by Jean Pierre Bratanoff-Firgoff support this (as to which see later).

74 The police evidence in this respect is directly contradicted by the testimony of one significant eye witness and thrown into doubt by the evidence of another. In a statement John William Durack SC, a

civilian eye witness of the incident said that 'at one point [Levi] walked purposefully again towards the police, in a threatening fashion and I heard at least two of the police calling out in an aggressive fashion 'Drop the knife, drop the knife, you fucking deadshit' (or 'dickhead' or similar expression) as they backed away from him'. [Statement of John William Durack SC, Levi Inquest-Brief of Evidence Vol 3 at para 13.]. Durack's evidence in this respect was repeated at the inquest and was not challenged at the inquest. The evidence of Karen Anne Allison, a jogger who came close to the incident in its early stages is that one of the incident police officers told her to 'fuck off' [Statement of Karen Anne Allison, Levi Inquest- Brief of Evidence Vol 3 at para 12.] Ms. Allison's evidence on this was not seriously challenged or weakened at the inquest.

75 One of the officers on the beach, Constable Geoffrey Smith, gave evidence at the inquest that there was some sort of reference amongst police on the beach 'to the fact that he might've lost the plot' [Levi Inquest Transcript 4.3.98 p. 43].

Another said he reminded him of a mentally ill patient he once had to deal with.<sup>76</sup> One officer called to Levi 'let's go up the beach and have a talk. No one is going to hurt you'.<sup>77</sup> Still Levi did not respond. Another officer attempted to strike Levi's arm to dislodge the knife with a baton. Levi started to move in a westerly direction towards the promenade. The police attempted to contain Levi by forming a semi-circle around him with their pistols drawn. The same officer again tried to strike Levi with a baton, and again missed. Levi kept advancing towards the promenade with the police surrounding him.

The police dealing with Levi were each equipped with guns. However, they had only two 'long' batons between them and they did not have capsicum spray. Police authorities had for some years been considering equipping officers with capsicum spray and replacing 'long' batons with extendable batons. Capsicum spray can be used to disable a person. 'Long' batons are cumbersome and carried in police vehicles, not as part of an officer's personal equipment. 'Long' batons were often left behind in the heat of the moment. For this reason extendable batons, lighter, portable, and designed to be worn alongside a gun on an officer's belt had been under consideration but were still not in use by the New South Wales Police Service at the time of the Bondi incident. All the officers on Bondi beach left their 'long' batons behind in their vehicles. During the incident, as an afterthought, one of the officers returned to the senior officer at the command post on the promenade and collected two batons from the five police vehicles parked there to take down on to the beach. This officer was the only officer who engaged a baton in an attempt to deal with Levi.

The senior sergeant on the promenade could communicate by radio with the officers on the beach to give advice or receive their requests for assistance and with command headquarters to obtain any additional assistance to deal with the situation. However, throughout the incident, the senior sergeant did not communicate with his officers on the beach. Police negotiators, especially trained to deal with difficult situations, were not called until 7.21 am, but were expected to arrive within minutes of that call.

Just as the officer with a baton was going in for a third attempt to dislodge the knife from Levi, Podesta and Dilorenzo fired four shots. It appears that Podesta, the most inexperienced officer facing Levi, fired first. His first shot hit Levi in the chest, his second shot hit Levi in the lower back, when Levi was facing away from him. Dilorenzo's shots hit Levi in the chest. When they fired their guns Podesta and Dilorenzo were facing Levi with their backs towards the promenade. Levi was shot about thirty metres from the promenade at about 7.30 am, some ten minutes after negotiators were first alerted by police central communications to go to Bondi beach. The whole incident lasted about thirty five to forty minutes.<sup>78</sup>

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76 One officer who observed Levi turn the knife on himself and squeeze it into his stomach also that Levi's eyes were 'extremely glazed and open' and commented that 'he appeared to me to be psychotic.' Statement of Senior Constable John Lewis Jones, Levi Inquest-Brief of Evidence, Vol. 4 para. 12. Another officer observed that Levi's eyes 'seemed glazed over', and commented that 'it was a similar look that I have seen in mentally ill persons I have detained previously.' Statement of Senior Constable Grant Russell Seddon, Levi Inquest-Brief of Evidence, Vol. 4 Statement para 11. Another officer gave evidence at the inquest that when dealing with Levi on the beach it had crossed his mind that Levi was suicidal [Constable Christopher John Goodman-Levi Inquest Transcript 4.3.98 p. 25]. In his statement

Constable Geoffrey Smith described Levi as having 'opened his mouth, stuck his tongue out and made loud gargling noises.' [Statement of Constable Geoffrey Smith, Levi Inquest-Brief of Evidence, Vol. 4 para 8]. All officers agreed that Levi made only such 'gargling' noises and did not speak to them or utter a coherent word during the whole of the incident.

77 Statement of Senior Constable John Lewis Jones, Levi Inquest-Brief of Evidence, Vol. 4 para.12.

78 The duration of the incident measured from the time Levi's flatmate first alerted police (at some five to ten minutes before 7.00 am) until police discharged their fire arms at Levi (at about 7.30 am.)

The police officers who witnessed Podesta and Dilorenzo fire at Levi gave estimates to the Coroner of the distance between the shooters and Levi ranging from two to three metres. Many of the thirty nine civilian eye witnesses estimated that distance to be three metres or more. A police crime scene examiner arrived on the beach within minutes of the incident. He determined the location of the shooters from discussions with one of the officers involved in the incident immediately after it had occurred and while that officer was still on the beach. He determined Levi's location from his observations of disturbed sand, Levi's blood stains in the disturbed sand and the nearby location of the knife which had been dislodged from Levi's hand after he was shot. He estimated that Podesta and Dilorenzo had been 5.2 metres from Levi when they discharged their firearms. But this estimate by the crime scene examiner was relegated to his notebook, and not included in his statement to the Coroner.

Only two of the thirty nine civilian eye witnesses described Levi as "lunging" or otherwise attacking the two officers when they shot him. But each of these witnesses had been interviewed by Bondi police officers who were close colleagues of the shooters and whose involvement in the investigation was in breach of police instructions designed to ensure the integrity of evidence collected in police investigations of police shootings.

According to Podesta and Dilorenzo, Levi lunged at them with the knife and tried to kill them. Podesta said that Levi was about one and a half to two metres away when he fired. Dilorenzo said that Levi was about a foot from his chest with the knife when he fired. Dilorenzo believed his back was, almost literally, against the wall. Both said they were concerned for the welfare of the spectators on the promenade. Both believed that Levi wanted to commit suicide by having police shoot him. These were their accounts, and the reasons they gave for firing their guns, when interviewed by police on the day of the shooting.

Unknown to police, Levi's presence on the beach attracted the attention of a photographer . The photographer took a series of still photographs of the incident, including the very moment of the fatal shooting. These photographs, published the next morning on the front page of a Sydney newspaper, were later provided to the police. However, the police involved in the shooting were unaware of the photographer's presence, and unaware that photographs of the incident had been taken when they made their statements about the shooting. The photographs were to play an important part in attracting public attention to the shooting and as evidence at the coronial inquest.

### **The Inquest**

Robert Cavanagh, as counsel and John Boersig, as instructing solicitor, represented Roni Levi's widow, Ms Melinda Dundas, at the coronial inquiry into Levi's death in February and March 1998.<sup>80</sup> A student team, co-ordinated by Ray Watterson and guided and supervised by Cavanagh and Boersig, prepared material for the inquest and, subsequently, in compiling reports and submissions to the New South Wales Police Integrity Commission about the shooting and its investigation. Preparation included extensive student research into the powers, functions and procedures of the coroner and the commission.

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79 *The photographer, Jean Pierre Bratanoff-Firgoff, a French professional photographer, was coincidentally taking photographs for a commercial assignment at Bondi beach at the time of the incident.*

80 *The New South Wales Legal Aid Commission provided funding and support for Ms. Dundas in relation to counsel's preparation and appearance, expert reports and some investigative work for the inquest.*

A coronial inquest serves several functions, including investigation of the cause of death, preliminary determination of any criminal responsibility, and prevention. It is the explicit preventative function, expressed through recommendations directed to reduce the likelihood of a similar death to that under inquiry, which gives the coronial inquest a unique place in the Australian legal system.<sup>82</sup> Preparation for the Levi inquest therefore included not only detailed analysis of the facts preceding and attending the shooting but also consideration of the implications of other inquests and inquiries into police shootings and police conduct.

The Royal Commission into the New South Wales Police Service handed down its final report six weeks before the Levi shooting.<sup>83</sup> The Royal Commission conducted hearings and made findings and observations in relation to the use and supply of illegal drugs by police officers stationed at Bondi police station.<sup>84</sup> In the light of these findings and observations, and as part of its preparation for the inquest, the Centre sought from the Crown, unsuccessfully, information relating to the backgrounds and activities of the Bondi police officers involved in the Levi shooting.<sup>85</sup>

The State Coroner, as required by law, and assisted by an investigation team of senior crime police, assumed responsibility for the investigation of the Levi case within hours of the shooting.<sup>86</sup> Significantly (and as discussed later), information uncovered subsequently by the Police Integrity Commission that Podesta and Dilorenzo were both under internal police investigation in relation to illicit drugs at the time of the shooting, was not provided to the investigating police, or to the State Coroner, when the investigation was commenced.

At the inquest, Cavanagh, as counsel for Ms Dundas, draw extensively on the preparatory work of students, to cross examine the shooting incident police, civilian witnesses, police commanders,<sup>87</sup> and police investigators. At the conclusion of the inquest, Cavanagh submitted that the coroner should recommend to government a number of reforms intended to improve hospital management of patients, avoid future deaths at the hands of police and improve the integrity and raise the standards of investigation of deaths in custody. The Coroner referred the shooting to the Director of Public Prosecutions,<sup>88</sup> and handed down a number of recommendations for reforms in the law and hospital and police procedures.<sup>89</sup>

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81 Coroners Act 1980 (NSW).

82 Waller, K *Coronial Law and Practice in New South Wales*, 3rd ed, 1994. pp. 7-8. See also Selby, H *The Inquest Handbook*, Federation Press, Sydney, 1998.

83 Royal Commission into the New South Wales Police Service, *Final Report*, May 1997.

84 Royal Commission into the New South Wales Police Service, *Final Report*, May 1997, Vol. 1 Chapter 4 para. 4.67.

85 At the inquest the Coroner ruled that the question of whether there was material on the police service personnel files of either officer involved in the shooting that would cause the senior investigating officer a concern in the course of his investigation was not relevant and questioning of the senior investigating police along these lines by Cavanagh was discontinued. Levi Inquest Transcript 12.2.98 pp.77-78. In his closing

submissions Counsel Assisting the Coroner submitted, and the Coroner agreed that, there was 'no evidence that alcohol or drugs was involved in this matter at all.' Levi Inquest Transcript 6.3. 98 p.10.

86 The Coroners Act, 1980 (NSW) ss. 13A (1)(a) and 14B (1)(b) requires that a death in police custody be the subject of an inquest to be conducted by the State Coroner or a Deputy State Coroner.

87 Including those senior police officers responsible for the introduction of non-lethal methods of control, such as capsicum spray and extendable batons, and for police training in weapons handling

88 Findings of the Inquest into the Death of Roni Levi, D. W. Hand, State Coroner, Glebe, 6 March 1998.

89 Recommendations of the Inquest into the Death of Roni Levi, D.W. Hand, State Coroner, Glebe, 11 March, 1998.

The Director of Public Prosecutions subsequently decided not to initiate prosecutions against the two police officers who shot Levi.<sup>90</sup>

### **The Police Integrity Commission**

In part, because of concern that the decision of the Director of Public Prosecutions was undermined by the initial police investigative failure, the Centre submitted a detailed report to the Police Integrity Commission on the shooting and its subsequent investigation.<sup>91</sup> The report contended that important evidence and matters relating to the shooting were not considered or fully investigated by police prior to the inquest. It maintained that a series of investigative failures compromised the integrity of the shooting investigation and raised serious doubts about the thoroughness and reliability of the evidence obtained by police, produced at the inquest, and available to the Coroner and the Director of Public Prosecutions.

The report called upon the Commission to reinvestigate the shooting, investigate whether Podesta or Dilorenzo were using or involved in the supply of illicit drugs prior to the shooting, and whether they were affected by drugs or alcohol at the time of the shooting. The report also called upon the Commission to consider whether police corruption, serious misconduct or incompetence had tainted the investigation of the shooting and caused a miscarriage of justice. As the report pointed out, the officers who shot Levi would be guilty of a crime if they fired without lawful justification. Consequently, failures in the investigation of the shooting may have caused a miscarriage of justice. A miscarriage of justice may result from a failure to properly investigate or prosecute particular types of persons, whether through bias, political manipulation, corruption or incompetence.<sup>92</sup> Flawed police investigation, usually works against an accused person. As the report pointed out, however, in the case of a police shooting investigated by police, investigative flaws are likely to operate in favour of police shooters and to reduce their prospect of being found guilty of unlawful homicide.

Some time after the Centre provided its report to the Commission, the Commission conducted hearings into allegations that some members of the New South Wales Police service were associating with suppliers of prohibited drugs and were involved in the use and supply of prohibited drugs.<sup>93</sup> Senior Constable Anthony Dilorenzo and Rodney Podesta<sup>94</sup> were the subject of investigation and inquiry by the Commission at these hearings. At the hearings it was revealed that Podesta and Dilorenzo were the subjects of police Internal Affairs' drugs surveillance. One period of surveillance of Podesta coincided with the inquest.<sup>95</sup> A period of surveillance of Dilorenzo occurred shortly after the inquest.<sup>96</sup> The surveillance tapes, questions arising from them, and

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90 On 30 June, 1998 Mr Nicholas Cowdrey QC, the Director of Public Prosecutions ('DPP'), decided not to proceed with criminal charges against any person arising out of Roni Levi's death. He gave the following reasons. 'In my view on the evidence available the prosecution would not be able to prove beyond reasonable doubt that the officers did not act in self-defence when they fired at Mr Levi. Accordingly, in my view, there would be no reasonable prospect of conviction on any relevant charge'. Correspondence Director of Public Prosecutions to Newcastle Legal Centre, 30 June 1998.

91 A Very Public Death, Interim Report by the University of Newcastle Legal Centre to the NSW Police Integrity Commission relating to the Police Shooting of Roni

Levi, Bondi Beach, 28 June, 1997, 23 September, 1998.

92 Walker, C and Starmer, K, ed. *Miscarriages of Justice: A Review of Justice in Error* Blackstone Press, Ltd , London, 1999 p. 36.

93 Police Integrity Commission Operation Saigon Phase 1, February 1999.

94 Rodney Podesta resigned from the New South Wales Police Service some time after the shooting and before the Commission's hearings.

95 Surveillance of Podesta during February 1998, included Saturday 28 February. This was a Saturday during the public sittings of the coronial inquest into the shooting.

96 In April 1998.

questions arising from other aspects of police Internal Affairs Commission investigations were put to Podesta and Dilorenzo at these hearings.

Rodney Podesta confessed to drug use apparently revealed by police surveillance of him during the inquest<sup>97</sup> and to drug use not long before and around that time. Podesta confessed only to using and dealing in drugs in the period after the Levi shooting.<sup>98</sup> Podesta also confessed to participating in the supply of cocaine apparently revealed by the same police surveillance of him. Podesta was charged and convicted in relation to supplying a prohibited drug on this occasion<sup>99</sup> and was sentenced to four months periodic detention.<sup>100</sup>

At these hearings, and subsequently, Dilorenzo denied any involvement in the use or supply of illegal drugs or any other wrongdoing. However, Dilorenzo was removed from the police service pursuant to s. 181D of the Police Service Act 1900, NSW.<sup>101</sup> Such removal is not a dismissal from the service and has the same effect under the Act as resignation or retirement.<sup>102</sup>

Following a further submission by the Centre to the Commission,<sup>103</sup> the Commission announced<sup>104</sup> the commencement of further hearings into allegations concerning the involvement of Rodney Podesta and Anthony Dilorenzo in the use and supply of prohibited drugs, allegations that they were affected by drugs and/or alcohol when they shot Levi, and allegations of police corruption or misconduct in the investigation of the shooting.<sup>105</sup> The Commission conducted public hearings into these matters in November, 1999 and in February and March 2000 and tabled its report concerning its investigations and hearings in Parliament on 15 June, 2001.<sup>106</sup>

The Commission's report revealed details of the investigation of Podesta and Dilorenzo's association with illicit drug use and supply. In May 1996 the Internal Affairs Branch of the New South Wales Police Service had begun an investigation of Anthony Dilorenzo in relation to alleged improper association with drug dealers. In May 1997 Internal Affairs had commenced an investigation into Rodney Podesta's alleged use and supply of prohibited drugs and joined this investigation with that of its investigation into Anthony Dilorenzo. Both officers were still under investigation in relation to drug related allegations at the time of their shooting of Levi, however, as the Commission reported, neither officer was tested for drugs or alcohol following the incident.

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97 On Saturday 28 February 1998.

98 Podesta admitted to binge drinking, using a cocktail of ecstasy and cocaine and partying all night in inner city night clubs. But he insisted that 'most of the times I've taken drugs' was in the period after his father died of a protracted illness, late in 1997. He told the Commission that he no longer used illegal drugs. But he also told the Commission that, during the time that he now confessed to using drugs, he was acutely conscious of the need to conceal his involvement in drugs, especially from senior officers and other police. Transcript Police Integrity Commission Hearing Operation Saigon 23.2.99.

99 On Saturday 28 February 1998.

100 Podesta admitted obtaining 3.5 grams of cocaine on 28 February 1998 so that he could cut it, keep a gram for himself, and sell the remainder. In relation to this transaction to buy cocaine in order to supply, Podesta pleaded guilty to the charge of 'supply prohibited drug' and was sentenced to four months imprisonment to be served by way of periodic detention.

101 Sub-section 181D (1) of the Police Service Act 1900 (NSW ) authorises the Commissioner, by order in writing, to remove a police officer from the Police Service if the Commissioner does not have confidence in the police officer's suitability to continue as a police officer, having regard to the police officer's competence, integrity, performance or conduct.

102 Sub-section 181D (8) of the Police Service Act 1900 (NSW).

103 Submission by the University of Newcastle Legal Centre on behalf of Ms. Melinda Dundas to the New South Wales Police Integrity Commission, 15 March 1999.

104 Notice of Police Integrity Commission Public Hearing and Terms of Reference, Sydney Morning Herald ,1 September, 1999.

105 On 29 October 1999 the Centre made a further submission to the Commission on behalf of Ms. Dundas in relation to the matters the subject of the Commission's public hearings.

106 Police Integrity Commission, Report to Parliament, Operation Saigon, 15 June, 2001.

The Commission found that Podesta: (i) used prohibited drugs, including cocaine and ecstasy, prior to his joining the police force; (ii) continued to regularly use cocaine and ecstasy whilst a serving police officer, between the time he joined the force in May 1995 until the time he left the force in March 1998, including the periods just prior to and after the shooting; (iii) supplied cocaine on several occasions whilst a serving police officer; and (iv) improperly associated with Mark Dilorenzo (the brother of Anthony Dilorenzo), a convicted drug supplier, whilst Podesta was a serving police officer, including in the period just prior to the shooting.<sup>107</sup> Based on evidence before it the Commission recommended that consideration be given to the prosecution of Podesta for supplying cocaine. The Commission added that, had Podesta not resigned from the police service, it would have recommended that consideration be given to his removal from the service, having regard to his use and supply of prohibited drugs whilst a serving police officer.

The Commission found that Anthony Dilorenzo used cocaine with Podesta on a number of occasions some months prior to the shooting and was involved in the use of prohibited drugs with another person at a time after the shooting. The Commission added that, had Dilorenzo not been dismissed from the police service because the Commissioner of Police had lost confidence in his suitability to continue as a police officer, it would have recommended that consideration be given to his removal from the service.

The Commission found that police had received information from a number of sources after the shooting alleging that Podesta and/or Dilorenzo were affected by drugs and/or alcohol the evening before the shooting. It found that some of this information had been inadequately investigated and some of it had been “effectively lost” by police investigators.<sup>108</sup> The Commission acknowledged that these lost investigatory opportunities supported “legitimate concerns that a proper investigation of the shooting had not been undertaken”.<sup>109</sup>

The Commission’s investigations uncovered a number of individuals able to give evidence about Podesta and Dilorenzo’s activities on the evening before the shooting. However, two witnesses who may have been able to provide relevant evidence died after the shooting and before the Commission’s hearings. In the result, only one witness testified to seeing Podesta apparently under the influence of drugs on the evening before the shooting.

A former girlfriend of Podesta’s testified that Podesta had visited her home late that evening, that he appeared to be “high on cocaine”, and that he had told her that he had been using cocaine.<sup>110</sup> However, Podesta’s claim that he was with friends and relatives on that evening was supported by the evidence of two long standing friends and his mother. The Commission was “not comfortably satisfied that the account [of the former girlfriend of Podesta] is correct”.<sup>111</sup>

The Commission concluded that the information that it had been able to recover or obtain, almost four years after the shooting, could not support a finding that either Podesta or Dilorenzo were affected by alcohol and/or drugs at the time of the incident.

The Commission criticised many other aspects of the investigation of the shooting. It found, for example, that no “orderly or structured control was taken of the shooting immediately after it

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107 *Police Integrity Commission, Report to Parliament, Operation Saigon, 15 June, 2001. p. 56.*

108 *Police Integrity Commission, Report to Parliament, Operation Saigon, 15 June, 2001. p. iv.*

109 *Police Integrity Commission, Report to Parliament, Operation Saigon, 15 June, 2001. p. 61.*

110 *Police Integrity Commission, Report to Parliament, Operation Saigon, 15 June, 2001. p.58.*

111 *Police Integrity Commission, Report to Parliament, Operation Saigon, 15 June, 2001. p. 62.*

occurred [and] that there was a systemic failure to comply with the then procedures [for the investigation of a police shooting], and there was a real risk that such an important investigation may have been carried out by officers who might be perceived as not being at arm's length from Podesta and Dilorenzo".<sup>112</sup> The Commission concluded, however, that the deficiencies in the investigation, while serious, were not "due to corruption or misconduct, merely confusion and misunderstanding".<sup>113</sup>

The Commission observed that the Levi case was "a powerful example of the necessity for an effective system of drug and alcohol testing of police officers involved in critical incidents.... if both officers had been drug tested after the incident, there would be no doubts as to whether they were affected by drugs and alcohol at the time".<sup>114</sup> A statutory power to conduct random or targeted drug and alcohol tests of police officers had existed since January 1997, but there was no statutory power at the time of the Levi shooting requiring officers involved in critical incidents to provide samples for drug and alcohol tests and random drug testing had not been implemented.<sup>115</sup>

The Commission maintained that the law should allow for, and require the obtaining of, the best evidence for the purpose of drug and alcohol testing of a police officer following a critical incident. It therefore recommended that blood testing of a police officer following a critical incident be introduced. The Commission also recommended the immediate commencement of random drug testing for the New South Wales Police Service.<sup>116</sup> On the same day these recommendations were tabled in Parliament, the government announced that it accepted them and would introduce legislation to give effect to them.<sup>117</sup>

### **Investigative Failure in the Levi Case**

The investigative failures in the Levi case, detailed in the Centre's reports and submissions to the Police Integrity Commission or revealed by the Commission's report, include the following:

- No independent government agency investigated the shooting: the investigation of the circumstances leading to and involved in the shooting was carried out by the police.
- Contrary to the Police Commissioner's instructions for the investigation of a police shooting, the investigation team included a number of police officers who were close working colleagues of the police involved in the shooting.
- The methods employed by police to gather evidence, particularly the obtaining of statements, cast serious doubt upon the reliability of that evidence. For example, contrary to standard practice for the investigation of a fatal shooting, key eye witnesses to the shooting were not interviewed. Instead, police eye witnesses were allowed to

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112 *Police Integrity Commission, Report to Parliament, Operation Saigon, 15 June, 2001. p. iv.*

113 *Police Integrity Commission, Report to Parliament, Operation Saigon, 15 June, 2001. p. iv.*

114 *Press Release PIC releases report on drug use in NSW Police Service, 15 June 2001.*

115 *The Police Legislation Further Amendment Act 1996 (NSW) amended the Police Service Act 1990 (NSW) by inserting s. 2111A, providing for random and targeted alcohol and drug testing of police*

116 *Police Integrity Commission, Report to Parliament, Operation Saigon, 15 June, 2001. p. vii.*

117 *For a more detailed account of the Levi case see Goodsir, D Death at Bondi: Cops, Cocaine and Corruption and the Killing of Roni Levi, Pan Macmillan, Sydney, 2001.*

prepare their own statements. They did this after talking to each other and to the two officers who shot Levi.<sup>118</sup>

- The manner in which police investigators obtained statements from civilian eye witnesses may have adversely affected the reliability of some civilian evidence. For example, some civilian eye witnesses were interviewed by Bondi police officers contrary to the Police Commissioner’s Instructions.
- Media statements about the shooting made by senior police shortly after the shooting may also have affected the reliability of some of the civilian evidence.

### **Levi and Justice**

The resources available to the State, the investigating police and the police under investigation in any inquiry into a death in custody dwarf those available to the victim.<sup>119</sup> Law school based public interest advocacy on behalf of Levi's widow helped to alleviate the disparity in the Levi case. Exposure of the flaws in the investigation of the shooting commenced with the initial examination and analysis of the police brief of evidence by the Newcastle public interest advocacy team. More flaws in the police investigation were exposed when police investigators were cross-examined at the inquest by Cavanagh, assisted by his student team. Deeper problems arising from the drug associations of the officers who shot Levi came to light only after the Police Integrity Commission conducted independent investigations, assisted by the information, analysis and research of the submissions made to it by the Newcastle team.

The Centre’s reports and submissions and the Commission's report reveal how a flawed police investigation may compromise an inquest and the exercise of a prosecutor’s discretion. As the Commission observed, the pattern of police investigative failure in the Levi case, kindled “legitimate concerns that a proper investigation of the shooting had not been undertaken”.<sup>120</sup> However, as the Commission also observed, it did not address or was unable to satisfactorily resolve many of the questions arising from Levi’s very public death in police custody.<sup>121</sup>

Despite the scrutiny by the Coroner, the Director of Public Prosecutions, the Commission, and the work of the public interest advocacy team on behalf of Ms Dundas, it remains the case that, as a result of the initial investigative failures on the part of the police, the truth about the Levi shooting may never be known and justice may never be done.

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118 Taylor, Jones, Seddon, Smith and Goodman were permitted to make their own statements and were not independently interviewed. Dilorenzo, Podesta, Taylor, Jones, Seddon, Smith and Goodman each had the opportunity to collude on their version of events and admitted at the inquest that they had in fact discussed the incident with each other in some way before making their statements or giving their interviews.

119 Walker, C and Starmer, K, ed. *Miscarriages of Justice: A Review of Justice in Error* Blackstone Press, Ltd, London, 1999 Chapter 7 Fitzpatrick, B ‘Disclosure: Principles, Processes and Politics’ at pp. 151-169

120 Police Integrity Commission, *Report to Parliament, Operation Saigon*, 15 June, 20001. p. 61

121 Those questions include those most fundamental to doing justice in this case. Like: why was Levi shot dead instead of being taken alive into protective custody; were the police telling the truth when they claimed that they had no choice but to take Levi’s life: did they have to shoot because Levi threatened their lives; were the officers who fired the four fatal shots, one in the back, shielded by other police from the law and accountability; did the police who witnessed the shooting consciously or unconsciously mould their version of events to support their colleagues?

## Law Student Participation in the Levi Case

Students contributed to the Levi case by carrying out essential investigative and legal research tasks and drew deep lessons from their contribution. Especially lessons about investigative failure and injustice which may result from it.

Over sixty Newcastle law students actively participated in the Levi case.<sup>122</sup> In preparation for the coronial inquest into Levi's death, students attended briefing sessions with the lawyers in charge of the case and undertook various supervised tasks of fact gathering, research and analysis. These tasks included: perusal and analysis of the police brief of evidence; analysis of media material relating to the shooting; background preparation of material for lines of cross-examination. They also included fact gathering, legal and policy research relating to, amongst other things: the jurisdiction, powers and functions of the coroner, especially the recommendations function; other inquests and inquiries into police shootings; police training and procedures in relation to the use of firearms; police training and procedures in relation to the mentally ill; hospital practices and protocols in relation to 'absconding' patients; drug and alcohol screening for police.

In preparing submissions for the Police Integrity Commission, students carried out analyses and prepared material covering a number of areas. Students carried out research and analyses into the nature of contemporary police corruption;<sup>123</sup> compliance by police investigators with the Police Commissioner's Instructions relating to the investigation of a death in custody and the implications of any non-compliance for the integrity of the investigation in the Levi case; the record of police investigative failure in the Levi case and its implications for coronial and prosecutorial decision making; the identification and analysis of the opportunities arising in the course of the investigation of the shooting for the police involved in the shooting to collude on their stories and the implications of any such opportunities for the reliability of the police evidence; the implications of the failure to test the officers involved in the shooting for drugs and alcohol; the record of police/media communications relating to the shooting and its implications for the proper administration of justice.<sup>124</sup>

A principal educational objective of student participation in the Levi case was to assist students to develop the kinds of cognitive skills necessary to undertake sound investigation and management of facts in law.<sup>125</sup> Much legal process is devoted to fact adjudication, where the law is clear and undisputed. Facts also underpin the exercise of discretionary judgements in law. Facts are also

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122 Some students were enrolled in the optional subject, *Public Interest Advocacy*, some were on clinical placement in the *Professional Program*, others were volunteers.

123 Students considered academic and official sources, including: the *Report of Commissioner G E Fitzgerald of the 'Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct'*, Brisbane, Queensland, July, 1989; *Report of the Inquiry into the Death of David John Gundy* by Commissioner J H Wooten, Australian Government Publishing Service, 1991; and the *Royal Commission into the New South Wales Police Service, Final Report*, May, 1997.

124 Because of its sensitivity, staff, rather than students, dealt with certain confidential information relating to possible individual police drug activities.

125 The cognitive skills involved in fact investigation in law include those necessary to: examine facts in detail and to make all possible interpretations; identify gaps and ambiguities; place the information in context; identify and indicate priorities and relevance in factual issues; distinguish between fact and inference, and direct, circumstantial and hearsay evidence of fact; organise facts in a way which aids understanding and supports appropriate propositions of law. See *First Report on Legal Education and Training*, The Lord Chancellor's Advisory Committee on Legal Education and Conduct, HMSO London April 1996.

critical in appellate rule-making. Consequently, contemporary legal educators have challenged academics in law schools to take facts more seriously.<sup>126</sup> 'New evidence' scholars have attempted to formulate theories and conceptual frameworks for understanding the nature, functions and practices of fact gathering and proof in legal process.<sup>127</sup> Despite these advances, the processes of fact-finding and evaluation remain neglected areas of legal discourse, education, and research.

Students involved in the Levi case were challenged to address and provide the most intellectually rigorous answers to a series of questions about facts and law that actually confronted the legal decision makers in the case. These decision makers included the Coroner, the Director of Public Prosecutions, the Police Integrity Commission, other lawyers and the police. Students were also encouraged to reflect on the nature and significance of these questions and the alternative answers available to them.<sup>128</sup>

### **Levi Reforms**

At the conclusion of the inquest into Levi's death the coroner made a number of recommendations for reform of the law and police and hospital procedures.<sup>129</sup>

The Coroner recommended that all hospital policies and procedures manuals, including nursing manuals, should include a protocol dealing with all patient abscondments. He recommended that such a protocol should address, particularly, notification of the family, security and, in appropriate cases, notification of police, for abscondments which occur without any forewarning.<sup>130</sup> The coroner recommended a number of reforms in the law, protocols and policies relating to drug testing of police officers, the conduct of investigations of deaths in custody, and police training and resources.

The Coroner's recommendations relating to the investigation of deaths as a result of a police shooting and the background to them were as follows:<sup>131</sup>

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126 See, for example, Anderson, T & Twining, W *Analysis of Evidence: How To Do Things With Facts* Weidenfeld & Nicholson, London, 1991; Twining, W, *Rethinking Evidence*, Basil Blackwell, Oxford, 1990. See also Franklin, J *The Science of Conjecture: Evidence and Probability Before Pascal*, John Hopkins University Press (Franklin complains that law students are taught about subtle rules on the exclusion of evidence instead of how to evaluate the facts).

127 See, for example, Wigmore J *The Science of Judicial Proof as Given by Logic, Psychology, and General Experience, and Illustrated in Judicial Trials*, 1937; Tillers, P & Green, E D (eds) *Probability and Inference in the Law of Evidence*, Dordrecht, Kluwer Academic Publishers, 1988; Anderson, T & Twining, W *Analysis of Evidence: How To Do Things With Facts*, Weidenfeld and Nicholson, London, 1991; Twining, W *Rethinking Evidence: Exploratory Essays* Blackwell 1990; Twining, W and Stein, A *Evidence and Proof* Dartmouth, Aldershot, 1992; Wells WAN *Natural Logic: Judicial Proof and Objective Facts*, Federation Press, Sydney, 1994; Roberts, Graham *Evidence: Proof and Practice* LBC Information Services, Sydney, 1998 (especially Chapters 1 & 2 on evidence and proof of evidence).

128 Amongst other things, students were challenged to reflect upon: how is the strength of an inference to be determined; how is the net persuasive value of a mass of evidence to be assessed; how are judgments about the probative force of different items of evidence to be combined; how does the lawyer or the trier of fact determine whether a mass of evidence, which logically supports the truth of the proposition ultimately to be proved, satisfies the applicable standard of proof; what do we mean when we say a proposition has to be proven to be more probable or not, proven by clear and convincing evidence or proven beyond reasonable doubt? Anderson, T & Twining, W *Analysis of Evidence: How To Do Things With Facts*, Weidenfeld and Nicholson, London, 1991.

129 The recommendations were directed to the Minister for Health and the Minister for Police.

130 The coroner made this recommendation to the Minister for Health. He also recommended to the Minister for Police that the Police Service enter into discussions with the Department of Health with a view to formulating an appropriate protocol in dealing with mentally ill and disturbed persons.

131 *Recommendations of the Inquest into the Death of Roni Levi*, D.W. Hand, State Coroner, Glebe, 11 March, 1998.

- The investigation of a police shooting should be monitored by an Assistant Commissioner or Chief Superintendent of Police.<sup>132</sup>
- The scene of a police shooting should be attended by an Assistant Commissioner of Police to ensure that proper investigative procedures are followed and necessary resources are provided for the investigation.<sup>133</sup>
- Investigators should take special care to ensure all police eyewitnesses are interviewed properly.<sup>135</sup>
- No police officer, other than the officer in charge of the investigation or his delegate, should make any statement to the media in relation to a police shooting resulting in a death.<sup>135</sup>
- Police investigators should be required to thoroughly check ERISP tapes before and after an interview.<sup>136</sup>

132 According to the Police Commissioner's Instructions at the time of Levi's death investigations of deaths as a result of police shooting were to be carried out by police officers from outside the region where the incident occurred. This system sought to secure a degree of independence of the police conducting the investigation from those under investigation. The Coroner recommended that this system be maintained but strengthened by the additional requirement that such investigations be monitored by a police officer of at least the rank of Assistant Commissioner or Chief Superintendent.

133 In order to increase the independence of persons investigating a death resulting from a police shooting Counsel Assisting the Coroner, Mr David Cowan, advanced a recommendation that such investigation should be carried out by seconded interstate police officers in order to increase the independence of such investigators from the NSW Police Service. The Coroner declined to make this recommendation because of practical problems of implementation, which he considered might arise from its implementation. Instead, the Coroner recommended that an Officer of the rank of Assistant Commissioner or above attend the scene of any police shooting resulting in a death, to ensure that all procedures laid down in the Commissioner's Instructions are followed and that all necessary resources are immediately available to the Officer in Charge of the investigation.

134 The coroner recommended that special care should be taken by investigators to ensure that all key police eyewitnesses to any police shooting resulting in a death immediately be, and continue to be, separated and immediately be directed not to discuss the incident and that they be interviewed as soon as possible thereafter.

135 The coroner made this recommendation relating to police media relations as a safeguard against the public canvassing of what occurred in a police shooting in a manner which can affect the recollection of witnesses. Around midday on the day of the shooting the Commander of Bondi police called a press conference

outside Bondi police station. The Bondi Commander told the media that Levi had lunged at police with a knife and they had to shoot him. This was the account of the shooting provided by Podesta and Dilorenzo. It was also the vital question the police had only just commenced to investigate and which was for the Coroner to decide. At the time of the press conference and its broadcast, the other police and civilian witnesses who saw the shooting had not yet provided their version of events to the investigating police. The Bondi Commander's account was widely publicised that night on television news and on the Sunday and during the following week in the print media. It was an immediate and forceful public account of the shooting by a senior police officer. It operated to publicly 'confirm' or at least reinforce Podesta's and Dilorenzo's version of events. It was capable of influencing the other police and civilian witnesses who saw it and who were yet to come forward to provide their version of events. Indeed of the thirty nine civilian eye witnesses who provided statements about the shooting to investigators only two supported the accounts of Podesta and Dilorenzo that Levi had 'lunged' at them when they fired. Each of these witnesses were interviewed by Bondi police, contrary to the Police Commissioner's Instructions. In an interview for television conducted about an hour after the shooting but not broadcast, one of these eyewitnesses, Leo Hamlin, was unable to say whether or not Levi lunged at police when they shot him. However, in his statement taken by a Bondi police officer at Bondi Police Station some days after the incident Hamlin stated that Levi had lunged at police just before they shot. Hamlin was found by the Coroner to have been influenced in his statement and evidence by the Bondi Commander's televised press conference on the day of the shooting. See Recommendations of the Inquest into the Death of Roni Levi, D.W. Hand, State Coroner, Glebe, 11 March, 1998.

136 The coroner made this recommendation because of his finding that in this case a problem had arisen with the recording of both sound and vision respectively of the ERISP tapes of the interviews of Constable Podesta and Senior Constable Dilorenzo

- The Coroner's recommendations relating to drug testing and police training and resources were as follows:
- Legislation should be amended to provide for police officers involved in a fatal shooting to be mandatorily alcohol/drug tested as soon as possible following such an incident.<sup>137</sup>
- Police training in dealing with mentally ill persons should be reviewed and constantly updated and reinforced with police officers.<sup>138</sup>
- Police service proposals to introduce capsicum spray and extendable batons be expedited.<sup>139</sup>

Many of the coronial recommendations in the Levi case have been implemented. Reforms have been introduced to the hospital and police management of situations involving people who may be mentally ill.<sup>140</sup> Legislation now provides for the mandatory drug and alcohol testing of police officers involved in fatal shootings.<sup>141</sup> The New South Wales Police Service now equips its officers with capsicum spray<sup>142</sup> and extendable batons.<sup>143</sup> New guidelines regulate the conduct of police investigations of deaths in custody.<sup>144</sup> As previously noted, the Police Integrity Commission, seeking to ensure that the law obtains the best evidence from the drug and alcohol testing of a

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137 The coroner described this as a 'strong' recommendation. In making this recommendation the Coroner commented that mandatory alcohol/drug testing following a police shooting would be an important form of protection for police officers in a situation where allegations concerning the use of drugs or alcohol are made.

138 The coroner made this recommendation after expressing the view that the events that occurred on Bondi Beach highlighted the need for police training in dealing with mentally ill persons to be reviewed and constantly updated and reinforced with police officers.

139 Having heard evidence that the Police Service had considered the introduction of capsicum sprays and extendable batons and proposed to do so, the coroner commended these proposals and recommended that their implementation be expedited.

140 A Memorandum of Understanding between the NSW Police Service and the NSW Department of Health, 11 August 1998, establishes a new framework for the management of situations involving police and health staff and persons who may have a mental illness.

141 On 23 June 1998 the Police Service Amendment (Alcohol and Drug Testing) Act 1998 No 40, NSW came into effect in New South Wales. The new legislation provides for mandatory alcohol and drug testing of police officers directly involved in an incident in which a person is killed or seriously injured as a result of the discharge of a firearm by a police officer.

142 At the inquest in March 1998 the then Head of School of Operational Safety and Tactics at the NSW Police Academy, Chief Inspector Thomas William Lupton, gave evidence that the use of capsicum spray had been under consideration by the NSW Police Service for some three years prior to 1998. [Levi Inquest Transcript 5.3.98 p. 28].

143 At the Police Integrity Commission, Chief Inspector Lupton gave evidence that since June 1997 extendable

batons had been incrementally introduced into the service at a local level. According to Lupton, the reason the extendable baton was given 'very real consideration' by the Service for its introduction was based on what occurred in the Levi shooting. [Transcript of Evidence Police Integrity Commission Hearing Operation Saigon Phase 3 1.3.2000 p.479] From this incident where several officers had confronted a person with a knife the Service had come to clearly appreciate the need for officers to be personally equipped with batons. If each of the officers in the Levi case had to hand, as part of their personal equipment supply, an extendable baton, their training would have prepared them to resolve the situation by the co-ordinated, multiple use of their batons as a real possibility. [Transcript of Evidence Police Integrity Commission Hearing Operation Saigon Phase 3 1.3.2000 p.479] According to Lupton, the advantage of the expandable baton in comparison to the baton in use at the time of the Levi incident was that, it collapses neatly, is comfortable to wear and is carried on the belt at all times. As Lupton explained to the Police Integrity Commission in the context of the Levi shooting the advantage of the extendable baton over the long baton was that 'on exit from the vehicle, in the heat of the moment, at least, the baton went with the Constable rather than be left in the vehicle.' Lupton added that in the Levi case "it may well have been a better option in this situation had there been more than one or two batons there". [Transcript of Police Integrity Commission Hearing Operation Saigon Phase 3 Wednesday 1.3.2000 p.498]

144 The New South Wales Commissioner of Police has issued new Guidelines for the Investigation and Review of Deaths/Serious Injuries in Custody for the New South Wales Police Service. The new guidelines incorporate and seek to give effect to the coroner's recommendations relating to the conduct of police investigations of police shootings.

police officer following a critical incident recommended the introduction of blood testing of a police officers following a critical incident. The Commission also recommended the immediate commencement of random drug testing for the New South Wales Police Service. Each of these recommendations was accepted and acted upon by government.

However, the Levi case has highlighted the need for further and deeper structural and institutional reforms of the criminal and civil justice systems in New South Wales. These reforms are still outstanding. They include an overhaul of the State Coroner's Office and the substitution of an independent agency for the police in future investigations of deaths in custody.

The coronial system in New South Wales has been described as, "the proverbial poor relation in the administration of justice in NSW".<sup>145</sup> There have been many calls for a major overhaul of the coronial system; to upgrade the status and resources of the Coroner's office, to improve its fact finding capacity, to provide greater access to and assistance for relatives of victims, to reform the coroner's powers and procedures to give greater emphasis and efficacy to the preventative role of an inquest and improve monitoring and implementation of coronial recommendations.<sup>146</sup> At least one commentator has drawn attention to the absence from the coronial system of mechanisms for independent or public interest representation in cases raising issues of major public concern.<sup>147</sup>

The Levi case highlights the limitations of current coronial practice and underscores the need for a systemic overhaul of the New South Wales Coroner's Office. A modern coronial system needs to discharge its investigative, preventative and educative functions to the highest standards. This requires the assembly of an independent specialist team of legal, medical, police and scientific investigators under the guidance and direction of a State Coroner with the status of a Supreme Court judge. Only such a specialised and autonomous institution, properly resourced in terms of skills and infrastructure, is able to provide a fair and adequate, thorough and caring community response to questionable death. A response which will truly "speak for the dead to protect the living".<sup>148</sup>

145 Hogan, M "Towards a New South Wales Coronial System for the Nineties" (1991) 2(3) *Current Issues in Criminal Justice* 75 at p. 77 and p.78. It may be, for example, that poor resources and support accounts, at least in part, for the lengthy delays that have attended a series of 'high profile' inquests in New South Wales, including the inquests in relation to Thredbo and the Sydney/Hobart Yacht race.

146 Selby, H *The Inquest Handbook*, Federation Press, Sydney, 1998.

147 Hogan, M "Towards a New South Wales Coronial System for the Nineties" (1991) 2(3) *Current Issues in Criminal Justice* 75 at p. 79. Hogan argues that the imperative for those closely connected with death to deny culpability is strong. Positing the need for a form of *amicus curiae* procedure in inquests, Hogan argues that unravelling the unusual circumstances of death occurring in a public institution demands more than the choice offered by the competing versions advanced by those directly interested. 'The representation of the public interest is inadequate. Coroners come from a context that is not usually investigative or inquisitorial.

*The judicial role in local courts is a passive recipient and adjudicator of evidence presented by competing parties.....In all cases, too much responsibility to represent interests other than those of the individuals or agencies involved in the death falls on the existence, willingness and resources of relatives of the deceased. This is too great a burden.'*

148 The Ontario Law Reform Commission has expressed the view that an inquest should serve three primary functions: (i) as a means for public ascertainment of acts relating to deaths, (ii) as a means for formally focussing community attention and initiating community response to preventable deaths, and (iii) as a means for satisfying the community that the circumstances surrounding the death of no one of its members will be overlooked, concealed or ignored. See Bennett, RC Deputy Chief Coroner Ontario "The Changing Role of the Coroner" 1978 .

In routine coronial inquests, investigations are usually carried out by the police. The police also prepare the brief for the inquest, assist the coroner and secure the attendance of witnesses. In police custody and police shooting cases investigations are usually supervised by counsel assisting, instructed by the Crown Solicitors' office.

Roni Levi met a very public death at the hands of police, a death witnessed by the media and scores of civilians. The Levi case calls into question the professionalism and integrity of police investigative methods, and the effectiveness of coronial superintendence of police investigators attached to the police service. The police investigation of the Levi shooting, the recommendations made by the coroner relating to such investigations, and the report of the Police Integrity Commission, combine to emphasise the need for more fundamental reforms in the investigation of deaths in custody.

The Royal Commission into the New South Wales Police Service recommended the establishment of a new agency, external to and independent of the police service "with a specific focus upon the investigation of serious police misconduct and corruption"<sup>149</sup>

That agency has been established as the Police Integrity Commission.<sup>150</sup> The Royal Commission proposed that this new independent agency be responsible for the investigation of a special category of complaints about police matters, namely, 'serious misconduct and corruption',<sup>151</sup> which should include, "matters in which it is unlikely that there will be public confidence in an internal police investigation (for example, where the complaint relates to death or serious injury in police custody)."<sup>152</sup> The latter recommendation has not been implemented. The Levi case underscores the need for government to implement the Royal Commission's recommendation for the investigation of complaints about deaths in custody to be undertaken, not by police, but by an independent agency such as the Police Integrity Commission and to consider transferring the primary responsibility for the investigation of all future deaths in custody from the police to an independent agency such as the Police Integrity Commission.

## CONCLUSION

The Levi case illustrates the educational, justice and reformist role and value of law school based public interest advocacy. However, law school based public interest advocacy is unlikely to develop and contribute to justice and learning about law unless it becomes a part of the teaching and research culture of law schools. Until accepted by the academic system, public interest advocacy will never effectively serve justice, produce legal change and contribute to a better understanding of law itself. The potential for collaboration between law students, academics and practitioners to contribute to the public good is enormous. The future of law school based public interest advocacy will depend, however, upon greater preparedness to take it on, greater recognition of its worth and greater support for its endeavour.

At the start of the 21st century, Newcastle Law School is the only clinical law school in Australia with an integrated approach to clinical legal education. Others are moving to include clinical legal

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149 *Royal Commission Into The New South Wales Police Service, Interim Report, February 1996 Chapter 5 para 5.29.*

152 *Royal Commission Into The New South Wales Police Service, Interim Report, February 1996 Chapter para 5.58*

150 *The Police Integrity Commission Act, 1996 (NSW).*

151 *Royal Commission Into The New South Wales Police Service, Interim Report, February 1996 Chapter 5 para 5.54*

education in their curriculum and there are signs that public interest advocacy and other forms of clinical legal education will move from being fringe dwellers and take a real place in the Antipodean law school of the twenty-first century.

Perhaps the clearest signpost to the future is that placed recently by the Australian Law Reform Commission. The Commission's recommendations included those aimed at encouraging an emphasis in Australian legal education upon legal ethics and high order professional skills (without derogating from the responsibility law schools have to provide students with a grounding in substantive law); a national discipline review and the establishment of an Australian Academy of Law. A national discipline review of legal education in Australia and the establishment of an Australian Academy of Law, as envisaged by the Commission, might be expected to provide foundation and support for the future of clinical legal education in Australia.

However, Australian law schools, like their counterparts throughout the world, will need to change their culture as well as their curriculum to ensure that public interest advocacy and other forms of clinical legal education develop for the public benefit and for that of the law and its students. William Twining imagined an ideal law school as one, which "gives a high priority to clinical experience".<sup>156</sup> Anthony Amsterdam<sup>157</sup> and, more recently, the Australian Law Reform Commission, have argued that the law school of the 21st century should move away from "a solitary preoccupation with the detailed content of numerous bodies of substantive law"<sup>158</sup> and more effectively integrate clinical legal education and other forms of "properly conceived and executed professional skills training" into their curricula.<sup>159</sup> To do so law schools will need to confine to history Langdell's 19th Century catechism for law students and their teachers that "everything you would wish to know can be obtained from printed books".<sup>160</sup> Law schools will need to take more seriously the 20th Century pedagogy of jurists like Twining and Amsterdam, in order to find a proper place for "learning from the experience of practising law"<sup>161</sup> in the new millennium.

153 ALRC *Managing Justice Chapter 2 pp. 113-202, especially para 2.77.*

154 A national discipline review of legal education which the commission envisaged should consider matters like: the balance in law school curricula between liberal and professional education; the teaching of professional skills (including legal ethics and professional responsibility), and the mounting of clinical programs (including fostering pro bono partnerships and other collaborations between law schools and legal practitioners); the location of practical legal training programs in law schools; and the resource base for law schools and law libraries.

155 The Commission suggested the establishment of an Academy of Law to promote a more active collegial relationship among judges, lawyers, legal academics and law students, and 'to facilitate effective intellectual interchange of discussion and research of issues of concern, and nurture coalitions of interest' Including a coalition of those academics, judges, practitioners, and law students who wish to encourage active and systematic participation of jurists and law students in community legal services and clinical legal education programs'. ALRC *Managing Justice paras. 2.115-2.128.*

156 *Blackstone's Tower: The English Law School The Hamlyn Lectures, 1994, Sweet and Maxwell, p.52*

157 Amsterdam, A 'Clinical Legal Education--A 21st Century Perspective', (1984) 34 *J. Legal Educ.* 612.

158 ALRC *Managing Justice para.2.82.* As the ALRC notes this is essentially the position taken by the 'Priestley 11' requirements.

159 To explain the notion of 'properly conceived and executed professional skills training' in the context of undergraduate law school education we adopt the following description of the ALRC. '[P]roperly conceived and executed, professional skills training should not be a narrow technical or vocational exercise. Rather, it should be fully informed by theory, devoted to the refinement of the high order intellectual skills of students, and calculated to inculcate a sense of ethical propriety, and professional and social responsibility. ALRC *Managing Justice para. 2.85*

160 Christopher Langdell, *Harvard Celebration speech* (1887) 3 *LQR* 123-5 and see before at footnote 14.

161 Amsterdam, A 'Clinical Legal Education--A 21st Century Perspective', (1984) 34 *J. Legal Educ.* 612/613.