Introduction

In his background paper to this conference, Judge Goldring when speaking of the original Australian Law and Social Change conference thirty years ago said that the view of “social change” adopted then was “in some ways prescient” “but in other ways demonstrated a significant (lawyerly) lack of awareness of society and the way society would change over the following years”. This raises two issues that I hope will carry through this paper.

1. The first is that lawyers in general (and I include here legal academics, practising lawyers and judges) are not always particularly effective in understanding or reflecting social change.

2. The second is that if lawyers are to effectively act as agents of social change, we need first to better reflect or understand social change.

This paper will focus on how the High Court reflects social change through its use of social facts. I will argue that there is no coherent method in Australian law for determining reliable social facts and that this results in the adoption of conflicting and potentially inaccurate assumptions in the High Court about the way society and social institutions operate. I will use a case study of the use of social facts in High Court negligence cases in 2003 to demonstrate the general argument about the way the High Court utilises social facts, and will then discuss specifically the High Court decision in the contentious birth case of *Cattanach v Melchior*. Finally I will raise for consideration some methods and strategies for improving the Court’s use of social facts.

Five Key Assumptions in this Paper

There are five key assumptions that underlie my analysis and argument in this paper.

1. Courts need to reflect social change to effect social change. Questions of social policy, the nature of social policy, the nature of Australian society,
social values and the social effects of particular findings of liability are important concerns in the High Court.

The very nature of the High Court as the ultimate Court of Appeal means that, at least in its appellate jurisdiction, the cases that come before it are “hard” cases, which involve competing legal and moral principles. Because of the nature of the special leave process, they are cases that are likely to have a wide impact on the members of Australian society, and impact beyond the parties to the matter. This gives rise to the need for the Court to consider and explore the social context of the law, the social effects of the law and the nature of relevant social policy. These matters are particularly evident in my own area of research of tort law, but are also pervasive concerns in other areas of the common law, and arise in areas such as the reach of criminal law, migration law and the interpretation of the constitution.

2. The High Court uses policy and makes law.

Not so many years ago we may have assumed that it was common wisdom that in tort cases the High Court had recourse to policy matters in its judgments, and that in general the High Court made law and did not simply declare it. However, recently the debates about these two assumptions have resurfaced with vigour. In this paper, given our time constraints I do not wish to buy into those debates, except to point out my starting point which is to assume that the High Court both uses policy and has a crucial lawmaking function.

3. **Judicial Gaps in knowledge exist between adjudicative facts and legal principles.**

This paper argues and demonstrates that judges in appellate cases often experience a gap they need to fill to come to a final decision, between the adjudicative facts (facts in issue between the parties) and the legal principles in a particular matter.

4. **Social facts are assumptions about society, the world, and institutional behaviour.**

Without (for the purposes of keeping strictly to time) discussing the basis for this definition, I want to clarify that it covers a whole continuum of factual assumptions judges make between the adjudicative facts of a matter at one end of the spectrum and pure legal principle at the other. Social facts can be matters which courts use to help them interpret adjudicative facts (for example assumptions about the effect of alcohol on people), facts which set the context or background for a judgment (for example the nuclear family is the most important fundamental unit of our society), policy or consequence arguments (for example liability in a birth case could cause psychological damage to a child) and at the far end of the spectrum statements which verge on value statements (a decision in this case will invite disrespect for the law or indeterminate liability).

5. **There is a lack of coherence in the use of social facts in High Court cases.**

The use of social facts in High Court cases are unpredictable, and often not referenced in any way. The use of social scientific or empirical support for social scientific facts is very rare and the rules of evidence and practice are unclear and incoherent in the way that they apply to the use of social facts in law-making.

2. **Five Key Findings: Survey of Social Facts in negligence cases in the High Court 2003.**

This social fact analysis emerges from my own area of interest in negligence but it could equally be carried out on any other area of the law- tort law has no special significance.
inherently although cases in tort law are often very policy driven. Justice Mullane, for example, has previously carried out a study of Family Court custody cases.\(^2\) In the interests of time I will not dwell on the methodology of my study except to say that I analysed the eleven negligence cases handed down by the High Court in 2003\(^3\) and recorded all social fact statements, the judges who made them, whether the statements were referenced and the source stated if any. The results of the analysis were

1. There were 325 social fact statements in eleven negligence cases. As I will discuss shortly the most prolific social fact case of the year was the case of *Cattanach v Melchior* which concerned whether damages could be recovered for the costs of upbringing of a child following a failed sterilisation.

2. The analysis showed the High Court using social facts for may different purposes. For example Justice Kirby in *Joslyn v Berryman* made a statement regarding the effect of alcohol on seasoned drinkers, to evaluate the nature of the intoxication of the parties to the action.\(^4\) Many judges made statements setting the background context to their decisions- for example that children remain financially dependent on parents for longer periods\(^5\), and at the other end of the spectrum that financial aspects of caring for parents is likely to “become more of a practical concern”\(^6\). There were many statements predicting the social consequences of particular findings of law- for example whether there would be “deep pockets” to meet a plaintiff’s claim\(^7\), whether wrongdoers would be deterred from accident causing behaviour\(^8\), and in the case of *Cattanach*, the alleged damage that would be done to parent-children relationships.\(^9\)

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\(^4\) *Joslyn v Berryman; Wentworth Shire Council v Berryman* (2003) 198 ALR 137 at [88].

\(^5\) *Cattanach v Melchior* (2003) 199 ALR 131 at [20].

\(^6\) *Cattanach v Melchior* (2003) 199 ALR 131 at [34]

\(^7\) *New South Wales v Lepore; Samin v Queensland; Rich v Queensland* (2003) 195 ALR 412 at [240].

\(^8\) Ibid at [267].

\(^9\) *Cattanach v Melchior* (2003) 199 ALR 131 at [404].
3. The majority of social fact statements had no source or reference stated—only 81 were referenced in any way.

4. Of those references the majority were to case law, with 69 references including case law.

5. There were only three direct social science references, all given by Justice Kirby in *NSW v Lepore* (a case about non-delegable and vicarious liability for child sexual assault) to English Home statistics in support of increased instances of physical and sexual assaults on children by those employed to care for them\(^\text{10}\), and in *Cattanach* to the Kinsey reports on sexuality (in relation to social changes relating to knowledge of human sexuality)\(^\text{11}\) and also to an AMP insurance report about the costs of raising children.\(^\text{12}\)

You could, at least tentatively, conclude from this that the majority of social facts simply reproduced lawyers’ and judges’ experience and intuition. Social science evidence appears to be very rarely used, even when the relevant social facts ostensibly draw from a discipline outside law and where the social science might be appropriate and available. This may be for a number of reasons including constraints of the rules of evidence, discomfort in the judiciary and legal profession about the utility or desirability of social science in the court-room and from practical constraints like time and cost. It is perhaps not wise to underestimate time restraints and work-load restraints considering the ever increasing case load of the High Court in the last few years, particularly in immigration cases in its original jurisdiction.

### 3. Cattanach v Melchior\(^\text{13}\) Case Study

Let me know turn to discuss the use of social facts in *Cattanach*—perhaps the most dense example of social fact use by the High Court I have ever seen, and at least the most dense in 2003.

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\(^\text{10}\) *New South Wales v Lepore* (2003) 195 ALR 412 at [276] and see footnote 301


\(^\text{13}\) (2003) 199 ALR 131
1. 169 Social Fact Statements. Justice Heydon in a minority judgment was the most prolific social fact user in the case with 79 statements of social fact. The majority of social facts in the case were unsourced or sourced only to case law authority. The social facts, particularly those used by the minority of the court, included some quite contentious, contestable and value laden statements including inherent social values of human life especially the lives of children, the nature of the nuclear family as the central unit of our society, the effects of commodifying children, the nature and incidents of the parent/child relationship in modern Australian society, the possible psychological reactions of parents, children and lawyers involved in wrongful birth litigation, the stressful nature of wrongful birth litigation and the financial strategies adopted by Australian families.

2. There are two areas where the use of social facts without social scientific evidence is particularly problematic. The first is the use of very contestable social facts about the nature of Australian society without the identification of existing and contemporary social science evidence. For example, in Cattanach Heydon J suggests “the confidentiality which surrounds adoption suggests a perception by the legislature of the damage which can flow to children from learning that their parents regard them as a burden.”  

14 This is sourced to a 1965 Law Review article15 and is preceded by a discussion of the 1964 QLD adoption legislation.16 However a large body of contemporary adoption research and practice suggests to the contrary, and in particular notes the damage done, including loss of culture, to parents and children from the “old” practices of secrecy in adoption.17 Many Australian legislatures have either reformed or are reforming their adoption legislation to respond to contemporary social demands and are moving away

14 (2003) 199 ALR 131 at [384].
15 RJL, “The Birth of a Child Following an Ineffective Sterilization Operation As Legal Damage”, (1965) 9 Utah Law Review 808 at 812 n 23
16 (2003) 199 ALR 131 at [337] referring to the Adoption of Children Act 1964
17 See for example the NSW Law Reform Commission, Review of the Adoption of Children Act 1965 (NSW), Report 81 (1997). At paragraph 7.1 the commission indicates that “one of the most distinctive features of recent thinking and practice in adoption is the view that adoption law should not facilitate deception or secrecy, but should promote honesty and openness. This mode of thinking developed from research into the long-term effects of adoption and the needs of consumers of adoption services. Research and experience both in Australia and overseas shows that this is in the best interests of the child and should, therefore be encouraged.”
from notions of secrecy. This includes QLD where our legislation has been under review since 2002.\footnote{See \textit{Adoption Legislation Review Public Consultation}, Overview of Key Issues, Queensland Government Department of Families, March 2003. See also \textit{Adoption Legislation Review Public Consultation Paper}, Queensland Government Department of Families, 2002.}

3. The second problematic area of use of social facts by judges is where judges state social facts which originate outside the knowledge of the law, and outside common human knowledge, in the knowledge of a particular discipline (for example psychology). For example in \textit{Cattanach} Justice Heydon refers numerous times to the argument that children will be psychologically damaged upon learning that they were unplanned by their parents and also the subject of litigation.\footnote{For example see (2003) 199 ALR 131 at [372]-[384], [390]-[391], [392], [399], [410].} Psychological effects on children is clearly not a matter the law has any knowledge about and it is also a complex issue outside the realm of normal human experiences. There are no citations in the judgment to any social science or empirical evidence for the proposition. The judgment cites American cases in support of the social fact, however none of these appear to provide any social science support for the fact and neither do the law review articles that the American cases appear to source the argument from. It appears that this “so-called” emotional bastard argument sources from a 1957 American case\footnote{See the discussion in \textit{Sherlock v Stillwater} 260 NW 2d 169 (Minn, 1977) at 173-4 which refers to the 1957 case of \textit{Shaheen v Knight} 6 Lyc. 19, 23, 11 Pa. D & C. 2d 41, 45 (1957).} and most probably reflects the social values of that time in relation to illegitimacy, lack of openness within families and taboos about reproductive and fertility matters, rather than any proven psychological effect.

4. Perhaps one of the most interesting aspects of \textit{Cattanach} is not the social facts used, but the social facts the judges never consider in the case. This case crucially concerned a matter that has enormous impact on the lives of Australian women and it is women who are generally more affected by child birth and child rearing. However, the High Court, apart from Justice Kirby generally\footnote{(2003) 199 ALR 131 at [162]}, never discusses any social facts about the effects of children and child raising on the lives of women. This is despite the fact that there is a very large body of social scientific work that bears on this issue, and that clearly identifies that child raising and parenthood are deeply gendered issues which impact on women far more greatly.
than men. Judge Goldring in his briefing paper to this conference identified that a significant omission in the original ALSC conference was the failure to consider “that women in general, and women lawyers and feminist legal scholars in particular have influenced the way Australian law and society operate”. There is much to celebrate in both the advancement of the interests of women in Australian law and the growth of a distinct body of Australian feminist scholarship over the last thirty years. However, Cattanach also reminds us that in some ways the more things change the more they have stayed the same.

5. Cattanach also demonstrates that rules about not referring to “policy” matters in cases or rules about keeping out personal value judgments may have the effect of silencing reference to particular categories of social facts, although not others.


I wish to now raise briefly some thoughts on ways in which we might achieve a more effective and coherent reflection of social change in the High Court and by analogy in other Australian courts. I raise these issues not by way of prescription but more by way of some issues, thoughts and themes that I suspect will be taken up more fully and more effectively during other sessions of this conference.

1. A study of the use of social facts in the High Court displays very clearly that judges do feel the need to fill a gap between adjudicative facts and legal principle. The nature of this “information gap”, and theoretical model of that gap has been considered by many legal theorists and I do not intend to add to that theoretical work here. My point is, that as a starting point to better reflecting social change in the courts, we must at least accept that a gap exists in judicial knowledge that must and will be filled by judges. Once we accept that is so, this leads us to consider the best way of filling that gap.

2. I propose that the existence of this gap leads to the necessity for greater use of social scientific and empirical evidence (when available) in High Court social fact finding particularly when a social fact is highly contestable or is clearly outside the realm of either the law or common human knowledge. By saying this I do not mean that courts should descend to some form of decision-making by pragmatic balancing of competing social scientific propositions, or that we should privilege social science over law. I do not suggest that judges should entertain an instrumentalist approach to judging. I do not suggest that there is one truth in social science—clearly as in the law there are often competing conclusions in the social sciences and competing “truths”. I do not suggest that the use of social science leads automatically to “right” answers about the law. The process of judicial decision-making is more complex than this and operates in the context of existing legal principles established by precedent, the adjudicative facts in issue between the parties, and general umbrella principles such as coherence. However, where judges require more than that, and they need to fill the knowledge gap, it seems to me that available social scientific evidence has the ability to enhance the court’s reflection of social change. In other words, more information rather than less is a valuable thing.

3. Our rules of evidence and practice provide for courts engaging in finding facts in issue between the parties, but do not coherently deal with social facts being used by judges in their law making function. It appears at present that the reception of social facts is an unregulated part of the judicial function, not covered by existing evidential rules like judicial notice. If a judge wishes to refer to social scientific evidence in support of social facts, or a party wishes to introduce social fact evidence, it is unclear what the authority to do this is, or at what stage of proceedings it should be done. It is unclear whether rules preventing the introduction of fresh evidence in the High Court prevent the introduction of valuable social fact material at that level, where it may be the most useful. This leads us to the need to re-consider our rules of evidence and procedure if we wish to have more effective social fact finding.

4. My earlier analysis of *Cattanach* displays not just issues about the selection of social facts in cases and the “gender” issues inherent in that, but also some wider institutional issues. In *Cattanach*, as in many other cases, all the members of the High Court and all counsel with speaking roles before the High Court on appeal were men. If social facts used by the High Court are to more accurately and comprehensively reflect social change then this raises issues about the need to achieve greater diversity, not only as to gender, in both the judiciary and the senior legal profession. While it is no doubt true we have come along way down this road since 1974, there is still much road to travel. As will be discussed in a later paper at this conference, while women now constitute over fifty percent of law school students, institutional barriers, patterns of work inconsistent with the reality of the lives of many women, and concepts of merit which reflect those barriers continue to inhibit the progress of women in the legal profession.

5. Finally, if there is to be better social fact finding in the High Court, this raises the potential for more voices in the High Court particularly in matters which have wide social ramifications. Let me raise for thought ways this may be done. Parties could be required in their appellate briefs to state any relevant existing social scientific evidence of which they are aware that bears on policy issues in the matter (called in America a Brandeis brief). While there may be those who object to this particularly on the basis of cost, one wonders whether it would be any more time intensive or costly than the extended analysis of the law of multiple other countries we often see in the High Court. It may be potentially much more useful. If we aim to get better social fact information into the High Court, as others have suggested in the past we should consider encouraging greater use of amicus curiae and intervenors where appropriate. This may be done by adopting less restrictive rules about when these parties may be allowed to appear and submit written submissions. This is the approach taken in America and Canada. While of course the value and merit of briefs may differ greatly, American research tends to suggest that they are most valuable to the American Supreme Court when they provide explicit social facts about the background context of the relevant case and reliable social fact evidence about the effects of the law. In other words, they provide something different, that the parties to a
case cannot easily provide themselves. It is interesting to note that although still quite uncommon, the High Court seems to have taken a more relaxed approach to the admission of amicus over the last year particularly in migration cases, where for example Amnesty International has been allowed to intervene in several cases. Finally the use of more voices also raises issues about interdisciplinarity in the legal profession and in legal education, a topic taken up later at this conference by Richard Johnstone and Mary Keyes.

In conclusion, I have argued that it is important that Courts, particularly the High Court accurately reflects social change and social circumstances and that at present there are many barriers to this occurring. Better reflection of social facts need not be activist. When Australian people feel that their realities are being accurately considered by the High Court, this can only add to greater legitimacy and acceptance of decisions particularly when there is a disagreement with the ultimate result.