> Well this exemption is aimed at those teachers who would seek to cross the bounds and to promote homosexuality in the classroom as an alternate [sic] lifestyle.[6]

One would think school authorities already have procedures in place to deal with teachers who teach material thought to be harmfully inappropriate, or outside the syllabus. But in any case, there may be some difficulties in using the exemption in this kind of situation. Take the example of a gay or lesbian teacher dismissed for promoting gay lifestyles in the classroom. The school authority would have to show first, that a discussion of gay lifestyles was reasonably likely to be detrimental to the physical, psychological or emotional wellbeing of children. That would be difficult to prove. Second, it must be established that the dismissal was reasonably necessary to protect children. With other mechanisms in place to discipline teachers it would be difficult for the school to show the dismissal was reasonably necessary, rather than counselling or warning the teacher.

The conclusion that the exemption would be difficult to utilise in practice fosters the suspicion that the section was intended to 'send a message' about gay and lesbian employees rather than remedy a problem.

Conclusion

Ultimately the victory for the Territory's homosexual community[7] has been the inclusion of sexuality as a ground of prohibited discrimination in the *Anti-Discrimination Act* 1992 (NT). The victory has been marred by the ill-conceived s.37 'sexuality exemption'. There are doubts the exemption will be legally effective. Nonetheless, long-discredited and prejudicial assumptions about homosexual people have been resurrected and publicly affirmed, fuelling anti-gay sentiment in the Territory — surely not the desired effect of anti-discrimination legislation. Even if the section is never used, it will have the effect that many gay and lesbian employees working with children are fearful of disclosing their sexual preference in the workplace.

Territory 'ratbags and paint throwers' still have a job ahead of them to convince the Government to remove this discriminatory exemption.

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References

1. Stone, S., Media Release, 1 October 1992.
2. Ortmann, M., Media Release, 27 July 1992.
3. S.37 *Anti-Discrimination Act* 1992 (NT). A child is defined as a person under the age of 18, see s.4.
4. S.28 *Anti-Discrimination Act* 1991 (Qld). The wording of the Queensland exemption is virtually identical except it refers to 'minors' rather than 'children' and to 'lawful sexual activity' rather than 'sexuality'.
5. Ortmann, M., Media Release, 30 July 1992.
6. Sexuality Debate, *7.30 Report*, ABC Television, 26 August 1992.
7. Discrimination on the basis of 'bisexuality' and 'transsexuality' is also prohibited under the Act: see the definition of 'sexuality' in s.4.

ENVIRONMENT

Cross the road but do not breathe

SIMON RICE reports that Japanese citizens, with pro bono lawyers, take on business and government to forge a right to something more than personal property — to personal health

Japan is notorious as a breeding ground for industrial disease. Minamata disease, Itai-itai disease, Yokkaichi disease are the big ones; induced by air and water pollution, crippling and killing thousands of people over decades. It is not surprising that asbestos is used and abused as it if were as innocuous as cardboard.

The most infamous of the diseases, Minamata disease, was in fact mercury poisoning. Many thousands of people, residents of fishing villages on the coast of the Yatsushiro Sea, were affected by the consumption of fish and water poisoned by industrial waste. The poisoning caused paralysis, mental disorders and birth defects.

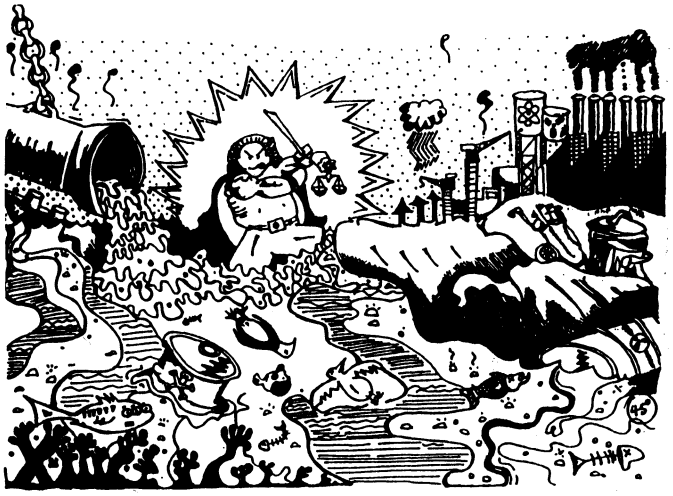
Although the pollution was at its worst in the late 1950s, it continues even today, at lesser levels. Minimata compensation cases have been running for over 20 years with little reward. A recent 'victory' has been reported (*Sydney Morning Herald* 26.3.93, p.8), in which 105 victims won a *total* of $A6 million dollars in damages. Significantly the finding was against not only the polluting company, but also against the local area government.

Part of Japan's appalling record and reputation in this area might be explained by examining the gap between government and people. The ghost of a feudal hierarchy haunts relations between the rulers and the ruled. There is plenty of evidence that the people are not nearly as tolerant as the government of environmental abuse.

Fighting the good fight for pollution victims is the Japan Federation of Bar Associations (the JFBA). In effect, it is a law society; membership is a condition of practice as a lawyer. It is surprisingly active in campaigns involving issues which do not directly promote the profession, with a strong record in advocating pollution controls.

The JFBA commits itself to 'working on traditional human rights . . . to support liberty and rights of citizens . . . research and studies on . . . pollution, environmental protection and consumer problems [and] to reform the systems of justice and law' (Booklet 1988).

Although ironic in the light of Japan's aggressive exploitation of natural resources in its region, it is the JFBA which continues to lobby for international recognition of environmental standards. With an agenda like this, the JFBA has its work cut out in Japan.



In a system with no contingency fees and no orders for professional costs, the industrial disease cases have been run for little or no fee. Within the limits of the system, compensation has been sought for victims of the pollution diseases, though often thwarted by government and bureaucracy. Prevention being preferable to an elusive and inadequate cure, the JFBA proposed the existence of an environmental right, as a fundamental human right, as early as 1970.

In theory, the environmental right flows from constitutional provisions which guarantee individual dignity and the right to a standard of wholesome living. The natural environment, as an asset of all people, should be above any consideration of private property and economic interest. The right to enjoy and to be a part of that environment is fundamental to the human condition, and that right should therefore be the basis for an injunction to prevent damage to the environment. So goes the theory. The simplicity of its premise is easily understood on learning of the full horror of the industrial diseases.

Although the theory of a fundamental environmental right is alive and well, in the real world of litigation and enforcement it is scarcely an embryo. What effective rights to the environment there are in Australia are statutory or in the common law. In either case, standing to litigate is dependent on a private right akin to a property right. The requirement for a property right is the very antithesis of an environmental right. Conventional legal theory raises standing as a major barrier to the practicality of an environmental right.

But in Japan they are trying. The codified civil system has a short history in Japan, with no indigenous basis and a post-war, Anglo-American influence. The Supreme Court can be arbitrary in its decisions, interpreting codes and statutes as necessary to get the desired and 'just' result. Precedents can be followed or ignored as can opinions of academics.

Time and again the JFBA has tried to injunct industrial development on the basis that nearby residents have a right to the environment. Applicants have consistently been denied standing, although this is usually only decided on appeal; plaintiffs are often successful in the lower courts. The Supreme Court interprets the constitutional guarantees of dignity and standards of living conventionally. The guarantees translate into duties of the State, not rights of the individual — an individual's interest in constitutional guarantees is reflective, not concrete. And besides, say the courts, if we are to consider an environmental right, perceptions of the environment are fluid, not universal and constant. It is therefore sufficient to protect personal and property rights, rather than to look for a right common to all.

The Japanese Supreme Court in 1981 denied residents near Osaka airport an injunction against night flights. Although the residents who started the case in 1969 had been successful through the lower courts, the Supreme Court saw no civil 'right' to a healthy environment.

But there have been victories. In lower courts applicants have succeeded by showing a common interest in maintaining a state of affairs. The right to cross a road, or the right to not have to live near a freeway, may not strike us as a legal interest to found an injunction, but it has impressed the Japanese District Courts.

A definition of 'necessary standing' which emerges is defined, first, by close geographical residence; second, by long, though not necessarily economic use of the existing environment; and third, by real anticipation of change which does not necessarily threaten harm, but may simply threaten disruption without social advantage.

The need to balance competing rights is a curious issue when considering the environment. It involves not competing environmental rights, but competition between an environmental right and a right to use private property. The relatively flexible Japanese code-and-precedent system may allow for the consolidation of this right as an enforceable legal right. It is a beginning.

Simon Rice is a Sydney lawyer who researched these issues in Japan.

CRIMINAL LAW

Conspiracy defined

An English decision on conspiracy dealt with the political context in which such a charge exists. BARBARA ANNE HOCKING discusses.

The advantages which a charge of conspiracy affords the prosecution have long been recognised. It is an offence characterised by vagueness and indeterminate boundaries. With its essentially 'utilitarian' rationale, it has provided state prosecutors with a formidable weapon in relation to an earlier intervention into contemplated criminal activity than that permitted by the related inchoate offences of incitement and attempts.[1] The offence is 'predominantly mental'[2] and inevitably it has been applied to a range of conduct and activities. Where the offence has been used politically, it has been characterised as 'an impressive illustration of judicial bias'.[3] Yet the modern relevance of conspiracy remains that it has as its most substantive rationale the prevention of the greater