

Introduction



About this book: Its origins and aims

This book has grown out of years of our joint and individual tertiary teaching in law subjects in social work, human service, and rehabilitation courses and independent training in psychology, counselling, law, and human service courses in industry. It reflects the questions, concerns, and perspectives we have heard from human service and psychology students and practitioners during these experiences. Our hybrid experiences and backgrounds reveal themselves throughout the book. We all have law degrees, and Rosemary Kennedy also has qualifications in psychology. Rosemary has worked as a psychologist, university teacher, human services manager and currently works as a human services consultant, and in professional regulation. Jenny Richards and Tania Leiman work in legal practice, have taught extensively in universities, and had experience as volunteers in the human services.

Consistent with our focus on integration, we attempt here to combine and build on what is already available in a number of diverse professional areas. We draw frequently on previous human service or social work law books from Australia, the United Kingdom and the USA. Social work, generic human service, case management, and psychology professional and practice literature are also much in evidence. Australian law texts and a wider range of legal articles appear regularly too. As with earlier editions, our aim in this book is to interpret law to human service

readers, to familiarise them with the legal landscape in which they operate, and to advance their legal literacy. We seek to promote accomplished human service practice in which legal and ethical understanding is integrated and embedded. This is not a law book as would be understood by lawyers, nor a human service ethics or intervention book. While the law is presented relatively normatively, we do not view it as uncontested. Even more than in earlier versions, in this fourth edition, we make regular reference to points of critique and debate about law, the policies which underpin it and its application.

We have sought to replicate the character of our previous editions, while incorporating significant differences. Our conceptual framework which founds the structure of the book has been further refined. All sections have been reworked to some extent, and in each of them, we have abridged or expanded materials according to their topicality and significance in the contemporary human services—for example, current issues such as consumer control over service purchasing and the emergence of social benefits bonds are dramatically altering the policy and funding context of human service work. We have substantially rewritten some sections, including those dealing with professional regulation, and family, criminal, social security, consumer protection, housing and immigration law. All legal and other references have been updated, as have the websites at the end of each chapter. Text boxes have been revised and expanded, and new navigational tools added.

That said, what do we hope to achieve with this new edition?

Our approach is founded on a model that positions individual worker decision making centrally in the human services within a set of wider contextual influences and forces. It is also founded on our view that individual decision making must be legally and ethically informed. We canvas a great deal of ‘black letter’ law but integrate broader questions of justice, rights, ethics and morality throughout, and provide suggestions for further reading on these topics. We retain our slant towards technical law in this new edition because there is still little current Australian human service writing in compendium form, and little confidence with technical law in human service practice. In contrast, the human rights and ethics perspectives on practice generally are well served in literature (see, for example, Hugman 2005; Ife 2012) and their rhetoric is privileged in human service discourse.

Our technical or ‘black letter’ approach reflects what British writers Braye and Preston-Shoot describe as the ‘nuts and bolts’ angle of their proposed triangular relationship between social work practice and law (Braye and Preston-Shoot 2006a, p. 23). In this conceptualisation of the relationship, the central knowledge, skills, and values of practitioners are configured around one or more of the three different yet connected angles of a triangle. These angles or orientations are labelled ‘technical/rational’, ‘moral/ethical’, and ‘structural/rights’ (see, for example, Braye et al. eds 2005; Braye and Preston-Shoot 2006a, 2006b, 2010). Each of these orientations, overlain by organisational imperatives, shapes the way in which practitioners frame their work and make decisions. Although each orientation on its own is insufficient to produce mature and balanced professional activity, each is nevertheless essential and

contributory. For this reason, questions of ethics and rights are prevalent throughout this book, and codes of ethics and their relevant clauses appear regularly. In fact, the positions we take are underpinned by the values or general ethical principles inherent in the Codes of Ethics of both the Australian Association of Social Workers (AASW) (2010) and the Australian Psychological Society (APS) (2007). Two values are shared by these Codes: respect for persons and professional integrity. The AASW Code adds commitment to social justice. The APS Code adds propriety, inclusive of competence. Recurring themes throughout this book, these values, or general ethical principles, are evident in some form in all codes relevant to human service work (see, for example, Australian Community Workers Association (undated) and Australian Counselling Association, 2013).

This book is not intended to provide legal advice, nor do we attempt to transform human service readers into pseudo-lawyers. Instead, we aspire to encourage readers to strive towards better quality human service practice. Competent practitioners have, among other things, an appreciation of the architecture of the law, and the ways in which it does and does not constrain and shape human service activity. Practitioners may not be able to name a piece of legislation from memory, or cite a particular section of an Act, or know how a particular case has established a legal principle, or perform proficiently as an expert witness. However, they will have better than average knowledge of the types of legislation that impact on their fields of practice, of relevant jurisdictional issues, and of the outline of pertinent common law. In particular, they will know how to use law to advance the interests of their clients, and ethical practice more generally. They are familiar with the structures and personnel through which justice is administered in their jurisdictions. They are confident enough to engage with the legal system and in partnerships with lawyers and other justice personnel as needed. They will have knowledge of courts and basic skills as witnesses. A few of them will even become deeply conversant with specific Acts and questions of justice administration, or adroit expert witnesses in their fields of work, and their expertise will be sought by lawyers.

While diversity in legal knowledge and expertise is to be expected, we argue all effective human service workers require basic competence in the following areas (adapted from Albert 2000, p. 340):

- identifying and assessing the legal rights of clients and referring them appropriately
- identifying and assessing the legal dimensions of all human service work situations
- looking for and finding human service-related law
- accessing legal resources
- interacting confidently and collaboratively with legal structures and justice personnel
- writing court reports and knowing what is involved in giving evidence in court
- educating lawyers and other justice personnel about human service work, its aims, values, and mandates
- influencing the social policy that underpins, explains, implements, or complements law
- lobbying for changes in law.

Our audience

Our intended audience is those involved with the human services. We hope this book speaks directly to those who are working or about to work in the field, particularly in Australia. Some readers may find the material in the book daunting. The law is not simple—nor are ethical endeavours in the human services—and the interaction between law, ethics and practice is complex. Some readers may find the material in this book challenges accepted professional dogma. We suggest, however, that with patience and an open mind, this complexity and these challenges are not only navigable, but also potentially exciting. We argue that accomplished human service practice is dependent on individual workers confronting and coming to terms with the complexities and the challenges inherent in such practice. We have included many real stories about and practical examples of the interaction between human service practice, law and ethics. We hope these stories and examples resonate with readers such that they are encouraged to engage more deeply with ideas and concepts which may be new and or unsettling.

Defining the human services

So what is meant by the ‘human services’? The human or community services can be defined as profit and non-profit, government and non-government ‘social services designed to meet human needs that are required for maintaining or promoting the overall quality of life of the prospective service populations’ (Zins 2001, p. 7). There are debates about the scope of the human services, and this sector and others, particularly health and education, overlap. However, the human services are commonly described as encompassing juvenile and adult corrections, employment, child and family welfare, social security, mental health, disability, rehabilitation, community health, aged care and emergency/crisis services in all of the preceding areas. Not surprisingly, this miscellany is reflected in an almost infinite array of job names, which include generic and client target group titles and occupational and professional titles (Kennedy and Harvey 2001). For example, generic titles include project, support, community, outreach, liaison, case worker, and case manager—to name only a few. There are also field and client population specific titles such as youth, aged, family, child, family violence, and refugee workers. In addition the more familiar professional titles appear, for example counsellor, psychologist, and social worker. Our aim in this book is to speak directly to all of these workers, to students in related courses, and to others associated with the fields of practice listed above.

We hold that our inclusive approach is justified by the nature of the human service work world. Deregulation and high demand for workers in the human services are reflected in positions with wider eligibility criteria; more and more, employment is found in the private sector rather than in state agencies, and professional boundaries are increasingly permeable. Increasingly, people without relevant university degrees or those with diverse other qualifications, including law graduates, are taking up human

service jobs based on employer assessments of competency, availability and budgetary considerations, rather than qualifications and professional title (Kennedy and Harvey 2001; Meagher and Healy 2003, 2005, 2006, 2007; Healy and Lonne 2010; Martin and Healy 2010; Community Services and Health Industry Skills Council 2008, 2013).

The big and important debates about professional territory, expertise, and consumer protection provoked by these changes are tangential to our main focus in this book. However, the book is premised on an appreciation of the elasticity of professional, work, and service delivery boundaries. We seek to address the whole human service workforce because the law has similar application across all human service work and professional and occupational groups. This inclusive approach is pragmatic. It is also ideologically based on our view that all clients deserve the best and most informed service regardless of which profession or occupation provides it. Practitioners need all the professional development assistance that they can get, yet those with limited formal training and their clients are often invisible in academic writing and other professional discourses. Our all-encompassing approach is driven by our hope to connect with practitioners regardless of their formal education and professional identities, whilst at the same time meeting the needs of readers in the professions who are struggling to forge a more robust identity in the contemporary human services. Social work has an all-pervasive presence in this book and social work readers will find many places where social work leadership is evident, called for, or possible and where the Code of Ethics of the AASW (2010) appears. The human services present social work with a large stage on which to perform and lead, and our inclusive approach seeks to remind social workers of the potential for their profession on this stage.

In summary, we hope this book speaks to a wide spectrum of readers, all with an interest in the human services—but with two important caveats.

First, the position of psychology is different from that of the other occupational or professional groups mentioned above. It has more homogeneous theoretical underpinnings, greater acceptance as a discipline, arguably a more identifiable public profile, is also concentrated in the health sector, and as explained in Chapter 4, it is a registered profession in Australia. It also tends, like most professions, to be insular. For all these reasons, psychologists may believe this book to be irrelevant to their internal professional preoccupations; a position we contest. Although there is a healthy demand for psychologists (Health Workforce Australia 2014), genericisation of positions is also relevant to this profession (see, for example, King et al. 2002). Due to constraints in the higher education sector, many students who enter psychology courses will not be eligible for registration as psychologists on completion of their university studies (Grenyer et al. 2010; Littlefield 2014). In fact, perhaps by default, a number will become human service workers after graduation (Bryan et al. 2011). There are even a few commentators who note the diverse and interesting opportunities for psychologists in generic human service areas (for example, McClean 2014). All of the law we canvas in this book is applicable to psychology graduates whether they are working as human service workers, or as registered psychologists in the human service, health or education sectors. In fact, many of the references are from psychology and the APS Code of Ethics (2007) is referred to frequently.

Second, while this book is not pitched at lawyers or other justice workers, we believe these, whose work intersects with the human services, may find it instructive, particularly to help interpret their experiences of an unfamiliar world and its ethos.

Terminology

A few points about our use of language in the book are necessary. Given the explanations above, we use 'human service worker' as an inclusive label to refer to workers across the human services. At times a specific occupational or professional designation, particularly 'social work' or 'psychology', is used. This is because that particular group is being discussed, or because the sources cited use it. Generally, we have assumed others' commentaries about social work, psychology, and other human service subgroups to have applicability throughout the human services, unless qualified by the primary authors.

We refer to 'the law' frequently, and clarify its meaning by the contextual discussion. When used as an umbrella term signifying the 'other' from a human services perspective, we intend this to include substantive law, the legal system, and lawyers. Sometimes it is used to refer more specifically to specific and substantive areas of the common law and/or legislation.

We use the word 'agency' to describe the organisations that employ workers and deliver human services. However, 'agent' and 'agency' have particular legal meanings concerned with the power to act on behalf of others. Workers in fact are often legal 'agents' for their agencies. If the legal meaning of the term is intended, we make this clear in the text; otherwise, it is used in the human services sense.

Last, the vexed term 'client' must be mentioned. There have been many debates about which terms are appropriate to describe people who need and or are subject to services. 'Service users', 'consumers', and 'customers' are sometimes referred to. We use the term 'client' here generally without any particular judgment about its merit, because it is in relatively common usage, both in law and in the human services. In the contemporary human services characterised by contractualism, organisations procuring and receiving services are also referred to as clients. So, for instance, the agency commissioning a policy paper from a consultant, and the court requesting a bail report, can be seen as clients. However, for the purposes of this book, the word 'client' generally refers to human users of human services unless otherwise stated.

Assumptions about legal knowledge

We assume that readers will have, through general knowledge or introductory studies, a basic understanding of the political and legal institutions of Australia, including the nature of the Federation and its component jurisdictions, and the hierarchy of Australian courts. We also assume a basic understanding of how federal and state and territory parliaments make laws; the place of bills and delegated legislation; how courts interpret law; and the differences and interaction between common law and legislation, and between private and public law.

Access to a legal dictionary is always useful as unfamiliar legal words can be checked when they crop up. If this checking process is entrenched in human service practice it becomes a simple but powerful form of professional development. Some readers may find accessible introductory texts (such as those listed in the Appendix) complementary. The websites at the end of this chapter also provide an entry into the world of law and law making.

In all jurisdictions, legal aid bodies and community legal centres with public education mandates provide extensive educative material. In most jurisdictions, a law handbook, generally online, is maintained. These are all essential legal resources for workers seeking to expand their general legal knowledge and to service and refer clients. Websites for some of these main legal services and for law information are provided at the end of each chapter. The Appendix also provides some very basic assistance in accessing and reading legislation and legal cases. It is not intended to replace the resources mentioned above. Rather, we offer it as an immediate refresher for those who have some experience with the law and human service practice and as a supportive prompt for those who do not.

The law is a work in progress. It is always changing, generally slowly but sometimes rapidly. Legislation mentioned in this edition will very likely be amended or repealed in future, and significant new Court judgments will from time to time appear. This is neither unexpected nor problematic. The nature of the beast is that these things happen. What we hope to do in this book is to familiarise readers with the origins and shape of law relevant to the human services so that they know what sorts of things to look for and where, when they need accurate, current information about the law.

As the scope of our book is wide and our intended audience and its jurisdictional interests diverse, the relevant legislation or common law on any matter is seldom fully canvassed. The result would be encyclopaedic and it has already been said that attempts to produce accurate and comprehensive records may be out of date as soon as they are written. Whenever possible, the major pieces of legislation in each jurisdiction are tabled, but elsewhere specific examples of law from different jurisdictions are selected to illustrate the varied and similar ways in which law approaches and responds to professional work and social problems.

Legal cases in Australia which have involved human service facts are not numerous, so it is necessary to extrapolate about what the law might be, often cautiously, from cases in other fields, for example in education or medicine. Four corollaries are important to note here. First, legal conclusions about some aspects or examples of human service practice remain uncertain until courts clarify them in future cases. Second, since the registration of psychologists under the *Health Practitioner Regulation Laws* in 2010, there is a growing body of legal cases concerning the professional behaviour of psychologists. Some of these are referred to in this book. Third, the dearth of decided cases does not mean that human service agencies and workers do not face legal risks. They face legal risks routinely and the consequences can be momentous for agencies, workers and clients (see, for example, Kennedy 2009; Jones 2014). One of our aims in this book is to reduce the likelihood of their happening to, or impacting negatively on, readers. Finally, it is significant to note that failures of human service systems, organisations and workers have been canvassed

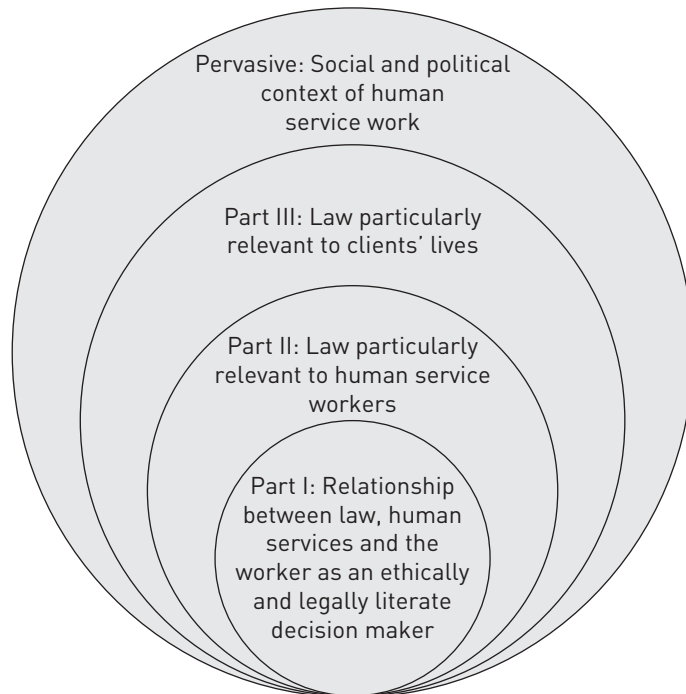
extensively in formal enquiries and Royal Commissions, particularly recently. More will be said about these investigatory mechanisms in Chapter 7.

Book structure: Finding material

We have divided the book into three parts, an organisational arrangement depicted in Figure 1.1. Figure 1.1 actually contains four, not three, nested circles. The outer circle is included to emphasise the point that all legal and human service activity takes place within a social and political context, even though this context is not the main focus of the book.

Part I conceptualises the place of law in human service work and the centrality of the human service worker as decision maker. The focus here is on 'self' in the context of the law–human service nexus. The individual decision maker is located at the core of the book, and the rationale for this is set out in Chapter 3. This core position does not suggest that individual workers carry the full weight of responsibility for the failures and successes of the human services. However, it does declare that individual workers do carry significant ethical and legal responsibilities. Part II covers the general legal obligations, rights and duties of workers in the human services. Here the focus is on workers and agencies in general. Part III considers a number of areas

FIGURE 1.1 THE STRUCTURE OF THE BOOK



of substantive law relevant to service delivery with client groups. The three parts are nested and all sit within the broader social and political context. The general rights and duties of workers and agencies outlined in Part II are elaborated on and qualified by the matters raised in relation to specific service delivery areas in Part III. Some of the law in Part III which is relevant to clients is equally relevant to human services workers (for example, criminal law). Echoes and illustrations of material in Part I recur throughout the other two parts. An almost infinite array of substantive law topics is relevant to the lives of human service clients, but only some of the more common topics are covered in Part III. Workers who are generally conversant with the law and its place in their work will themselves more easily be able to locate and explore other areas of law pertinent to particular jobs and fields of practice. Parts I and II attempt to address topics in reasonable depth because they are not usually fully explored elsewhere. Conversely, Part III is characterised by breadth, partly because the areas are big and partly because many of them are canvassed extensively in law books.

Chapter headings and the groupings of material in chapters have meaning in their own right. We have deliberately shied away from organising chapters around particular client populations (for example, the aged or juvenile offenders) or specific fields of human service practice (for example, domestic violence or mental health). Our intention here is to demonstrate the multiplicity and commonalities of legal and other imperatives that bear upon practice, and in doing so, challenge compartmentalised thinking about both law and practice. Material relevant to many client groups and fields of practice is spread throughout the book. Some material is relevant to all fields of practice and client groups; for example, new approaches to funding as outlined in Chapter 4. Some material is more relevant to particular human service concerns and client groups. Table 1.1 may assist the reader in quickly locating material directly on point for their specific interests. The table is not comprehensive in that many issues and fields of practice are referred to throughout the book. The table points out those sections in chapters in which the field or group is specifically addressed.

TABLE 1.1 LOCATING HUMAN SERVICE FIELDS OF PRACTICE AND CLIENT GROUP RELATED MATERIAL

Human service concerns/fields of practice	Most relevant chapters	Most relevant sections
Human rights	Chapter 3 Chapter 6 Chapter 11 Chapter 12	Synchronicities between law and professional ethics Range of tribunals All All
Mental illness	Chapter 11	Mental illness Mental health and law Guardianship and administration

(continued)

TABLE 1.1 (*continued*)

Human service concerns/fields of practice	Most relevant chapters	Most relevant sections
Domestic violence	Chapter 8 Chapter 9	All Family violence and family law
Family breakdown	Chapter 8 Chapter 9	All All
Housing and homelessness	Chapter 10	Housing, homelessness and accommodation
Poverty	Chapter 10	Income support
Disability	Chapter 11	All
Child protection	Chapter 9	All
Crime—juvenile and adult	Chapter 8	All
Victims of crime	Chapter 8	All
<i>Major groups of client populations</i>		
Children	Chapter 4 Chapter 8 Chapter 9	Contracts and the human services All All
Youth	Chapter 4 Chapter 8 Chapter 9	Contracts and the human services Young people and the criminal law Child protection
Families	Chapter 8 Chapter 9	All All
Aged	Chapter 4 Chapter 10 Chapter 11	Contracts and the human services Aged care Guardianship and administration
Asylum seekers and refugees	Chapter 4 Chapter 11	Contracts and the human services Refugees and asylum seekers
Indigenous Australians	Chapter 6 Chapter 8 Chapter 10 Chapter 11 Chapter 12	Specialty courts Indigenous Australians and the criminal law Income management All All

In all chapters, efforts are made to entice human service workers into the world of law through practice examples, challenges and real human service legal cases. We begin each chapter with a set of objectives which articulate our aims and conclude each chapter with a collection of key practice points that encapsulate the practice implications of the material and ideas just covered. Websites listed at the end of chapters include some pertinent and authoritative legal and related sources for additional information.

Text boxes are used to challenge and engage the reader. Boxes labelled 'Myths and realities' contain blunt assertions about the law and ethics that challenge some of the commonly held myths in the human services. They appear at places where a point may require clarification, or be contested, and are presented as learning tools. Many of the assertions in these boxes derive from reactions about the interaction between law, ethics and rights which we have heard from students and workers during our education, research and consultancy experiences. Boxes labelled 'Law in practice' set out summaries of the circumstances and findings of actual and pertinent legal cases concerning human service activity. These boxes may not always cite the latest court result in a situation because appeal activity is dynamic. The chosen cases represent a range of human service scenarios, professions, fields of practice and client groups. The cases provide salutary lessons for all human service workers and agencies and illustrate the points being made in the surrounding text. All of the law cases in boxes are on publically accessible websites as are those embedded in the text. Boxes labelled 'Reflection' contain open-ended questions designed to encourage discussion and reflection.

Positions reiterated and elaborated

While we avoid an insular professional perspective on the human services and are deliberately inclusive of the range of occupational and professional groupings therein, we are certainly not cynical about professionalism. A clarion call for improved 'professional' practice in the human services reverberates throughout this book. We argue professional practice is informed, objective, disciplined, competent, open-minded, and always holding client interests uppermost, regardless of worker qualifications or identification as a member of a particular profession. In addition, in our view, workers who function 'professionally' consciously exercise discretion, a key reason for decision making being one of the organising themes of the book.

We hope another position is evident too. Often at points where substantive law may be thought to, and in fact may, collide with broader concerns about rights and justice, we warn of the difference between an emotional reaction to the law and an objective evaluation. All too commonly, human service personnel react very negatively to the character and operation of legal systems and the law. Their objections may have a solid basis, but unless they are able to translate these objections into informed and strategic responses, they are likely to waste energy, lack credibility and operate ineffectually. Misplaced or emotional advocacy and its consequences are evident at

several points in this book. So a plea for understanding fully, thinking carefully, and acting strategically becomes a motif of our book. This is not a defence of black letter law. Rather, this assertion reflects our call for human service workers to feel confident enough about their knowledge of law to be able both to challenge and to enlist it effectively in pursuit of their social justice agendas and their clients' interests. This potential for positive interaction between legal imperatives and quality practice is something we seek to emphasise throughout.

We make one last related point. The law does not take precedence in this book. We acknowledge both the legal and human service worlds as significant components of society, and we recognise both as flawed, yet producing examples of extraordinary human accomplishment. There are better and worse practitioners and practices in both worlds. Instead, we assert that capable human service workers can and should be equal partners and contributors in their necessary interactions with lawyers and the legal system. We also assert a mirror image of this position with respect to lawyers and justice personnel but that is the subject for another time and another book.

Some useful websites

Legal aid and community legal centres

www.communitylaw.org.au/cb_pages/getting_legal_help.php	www.legalaid.qld.gov.au	www.legalaid.wa.gov.au/Pages/Default.aspx
www.fitzroy-legal.org.au	www.legalaid.tas.gov.au	www.legalaidact.org.au
www.lawlink.nsw.gov.au	www.legalaid.vic.gov.au	www.lsc.sa.gov.au
www.legalaid.nsw.gov.au/home	www.legalaid.vic.gov.au/about-us/community-education-and-projects	www.naclc.org.au
		www.ntlac.nt.gov.au

Human service professional associations

www.aasw.asn.au	www.asorc.org.au	www.psychology.org.au
www.acwa.org.au	www.pacfa.org.au	www.theaca.net.au

Other human rights and human service related law information links

www.australia.gov.au/topics/law-and-justice	www.hrca.org.au	www.lawstuff.org.au
www.freelegal.com.au	www.humanrights.gov.au	www.welfarerights.org.au
	www.lawonline.com.au	

Case law and legislation

www.austlii.edu.au
www.comlaw.gov.au

Some Indigenous law links

www.alrm.org.au	www.hobartlegal.org.au/tasmanian-law-handbook/rights/aboriginal-law/what-aboriginal-law
www.als.org.au	

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