DownUnderAllOver

A regular column of developments around the country

Federal Developments

NEW CHARACTER TEST IN THE MIGRATION ACT 1958: LEGISLATING AWAY NATURAL JUSTICE AND MERITS REVIEW

On 30 October 1997, the Government introduced the *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill* 1997 to the House of Representatives. The Bill has been passed by the House, but it does not appear that the Senate will debate it until next year.

The Bill proposes to amend the *Migration Act 1958* to give the Minister for Immigration and Multicultural Affairs extremely broad scope to refuse to grant, or to cancel, a visa if the visa applicant or visa holder cannot convince the Minister that they pass the 'character test'.

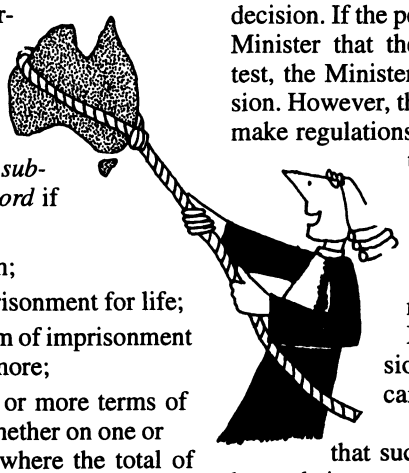
The Bill follows the case of Lorenzo Ervin, the American Black Panther convicted of plane hijacking in the United States, who the Government unsuccessfully attempted to deport from Australia earlier this year. The High Court was extremely critical of the Government's handling of the matter, particularly for its complete disregard of the principles of natural justice. The Government has responded by legislating away the common law rule of natural justice in circumstances where the Minister considers it is in the national interest.

The character test

A person will not pass the proposed character test if:

- they have a *substantial criminal record;*
- they have or have had an association with someone else or a group whom the Minister reasonably suspects has been involved in criminal conduct;
- the Minister considers that they are not of good character having regard to their general and criminal conduct, past and present;
- in the event that they were allowed to enter Australia, there is a significant risk that they would engage in criminal conduct, harass another person, vilify a section of the Australian community, incite discord in the Australian community or a segment of the community, or represent a danger to the Australian community or a segment of it.

Otherwise, the person passes the character test.



The proposed provisions say that a person has a *substantial criminal record* if they have been:

- sentenced to death;
- sentenced to imprisonment for life;
- sentenced to a term of imprisonment of 12 months or more;
- sentenced to two or more terms of imprisonment (whether on one or more occasions) where the total of those terms is two years or more; or
- acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result have been detained in a facility or institution.

A person will have a substantial criminal record even where the conviction on which the Minister seeks to rely has been spent.

Where character becomes an issue, the onus will be on the visa applicant or holder to *satisfy* the Minister that they pass the character test. The Minister, in contrast, will have the power to cancel a person's visa if he or she has a *reasonable suspicion* that the person does not satisfy the Minister that they pass the character test. The test of *reasonable suspicion* has a significantly lower threshold than the test of *satisfaction.*

The national interest

In the normal case, the rules of natural justice will apply to decisions as to character. However, where the Minister is satisfied that the refusal or cancellation of a person's visa on character grounds is in the national interest, the rules of natural justice will not apply. Nor will the code of procedure set out in the Act for dealing with applications apply in such circumstances. This means that the Minister will be given the power to refuse to grant a visa, or to cancel a visa on the spot, without allowing the visa applicant or holder an opportunity to make representations as to their character.

As soon as is practicable *after* making the decision, the Minister will be required to invite the person to make representations to the Minister as to the decision. If the person then satisfies the Minister that they pass the character test, the Minister can revoke the decision. However, there will be a power to make regulations providing that a particular person, or a person included in a specified class of persons, will not be entitled to make representations to the Minister as to the decision to refuse to grant or cancel a visa on character grounds. (It appears that such a regulation cannot be made in respect of a person who is a detainee).

Overturning a favourable decision of an immigration officer or of the AAT

It is also proposed that the Minister be given a power to overturn a decision of a delegate or of the Administrative Appeals Tribunal (AAT) which is in favour of a person's character. The principles of natural justice will generally apply.

However, where the Minister is satisfied that the substitution of the original decision with a decision to refuse or cancel the visa is in the national interest, the rules of natural justice will not apply. The visa applicant or holder is to be given an opportunity to make representations *after* the Minister's decision, and the Minister may revoke his or her decision if subsequently satisfied that the person passes the character test. Again, regulations may deny certain people an opportunity to make representations.

Conclusive certificates

The Bill also proposes to grant the Minister the power to issue conclusive certificates in relation to a decision (including non-character decisions) if

the Minister believes that it would be contrary to the national interest to change the decision or it would be contrary to the national interest for the decision to be reviewed. Where a conclusive certificate is issued, no merits review of the decision will be available.

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills has been critical of the Bill. In particular, the Committee has expressed concern that some provisions of the Bill make rights and liberties unduly dependent on insufficiently defined administrative powers. The Committee also noted with concern the proposal to deny certain people natural justice. ● **BC**

ACT

END OF SELF-GOVERNMENT IN THE ACT?

A working party is to be established to review the structure of government in the ACT, following recommendations made by the National Capital Futures Conference held in October. The working party will comprise representatives of both Territory and federal government.

The Federal Capital Territory, later named the Australian Capital Territory, was created on 1 January 1911, when land was surrendered from NSW to the Commonwealth. Prior to self-government, the territory was administered by the Federal Government under s.122 of the Constitution through the Minister for Territories. Self-government in the ACT was established in 1989 when the *Australian Capital Territory (Self-Government) Act 1988* (Cth) and other related legislation came into effect. The first ACT election was held in 1989 and the ACT Legislative Assembly held its first sitting on 11 May 1989.

The ACT has one house of parliament, the Legislative Assembly. Since 1995, a proportional representation, or Hare-Clarke, voting system has been in place. The Legislative Assembly has 17 Members, referred to as MLAs. All members vote to elect a Chief Minister, who selects a further three ministers to form a cabinet. The Territory has no governor or administrator. Accordingly, the Chief Minister and the three appointed ministers form the executive government of the ACT.

Several suggestions for reform have come out of the National Capital Futures conference. One proposal is for the ACT to become a municipality of NSW. The ACT Government would in effect be replaced by a town council. The Commonwealth would retain only a small part of the ACT, presumably being the land on which Parliament House is built and its surrounds. Sydney and Canberra, it is proposed, could be administered as one economic unit. However, Premier Bob Carr has rejected this proposal, saying that the ACT would become a liability for NSW and would jeopardise its credit rating.

Related proposals are that the Chief Minister be elected directly by the people; that the Chief Minister be authorised to choose ministers from outside the Legislative Assembly and that some or all MLAs be part-time.

The calls for reform stem primarily from criticisms of the ACT Government and its institutions as being too grandiose and in excess of the needs of the ACT. It is said by some that self government has resulted in wasteful and inefficient administration and excessive political posturing.

However, others say that the ACT has its own sense of identity and community and that it is important to maintain such identity in the national capital. Those who oppose any change say that the present system is in fact fairly inexpensive and efficient, especially given that the ACT does not have an upper house. There is concern that the health and education systems in the ACT could be jeopardised if administered outside of the ACT by a government located in Sydney. It has also been argued that the ACT Legislative Assembly has developed a good open committee system, and good freedom of information and whistleblower legislation. ● **SM**

Northern Territory

SENTENCING PROPORTIONALITY: ALICE THROUGH THE LOOKING GLASS

When the national media spotlight recently shone on a 14-year-old boy imprisoned in the maximum security wing of the Alice Springs Prison for incorrectly crossing the road, the ensuing community outrage was predictably followed by a deafening silence from the Northern Territory Government. What a contrast to Chief Minister and Attorney-General Shane Stone QC's spirited (if not entirely persuasive) defence of his decision to confer silk on himself. That auto-appointment appears to be another first for the Territory: what other common law jurisdiction can boast a Queen's Counsel who has been previously found guilty of unprofessional conduct by his peers in a decision which, when challenged, the Supreme Court declined to disturb?

Returning to the case of the juvenile jaywalking jailbird, the incident disturbingly highlighted the intransigent contempt shown by the Territory for the terms and principles of various international human rights agreements to which Australia has purportedly committed itself. But how did this incident actually happen?

Until recently, minor traffic offenders who failed to pay their on-the-spot fines could work them off by doing community service, and many of them did so. So many, in fact, that the Government, concerned at the loss of revenue, decided to remove this option and provide prison as the only alternative to payment. It could be argued that, deterred by the prospect of imprisonment, fine defaulters would hasten to pay their debts to society — that is, were it not for the fact that the change in law was not publicised. Most affected Territorians only became aware of the new rules when a policeman came knocking on their door with a Warrant of Commitment to prison.

That's how the boy in question came to be incarcerated: he had no money to pay the fine, and no family to pay it for him. There was simply no alternative. But how on earth did he end up in maximum security?

There used to be a juvenile detention centre in the Alice, but as business was adjudged to be slack, it was shut down a few years back. Now kids are flown up to Darwin for detention, unless it's for only a short period, in which case they're held in prison. And at the prison, policy dictates that everyone is held in maximum security until they have 'earned' the privilege of being moved to a less stringently administered wing. This means that those who are inside for the least serious offences, and for the shortest periods, do the hardest time. And, unlike minor traffic offenders, those who are fined by a court for more serious matters such as drunk driving,

assault or firearms offences, can continue to work off their fines by community service. The result: jaywalkers sit in jail, while serious offenders pick up litter. Franz Kafka, your spirit is alive and well in the Territory. ● **RG**

Queensland

BOYS KEPT IN LEG IRONS

Criminal justice matters continue to grab the headlines in Queensland. A carefully planned escape by five maximum security prisoners in early November prompted Police Minister Russell Cooper to announce that the Borbidge Government would introduce the 'toughest prison regime' in the country. One consequence of this bravado: *boys kept in leg irons*. That's right, it's not a typo. Leg irons and handcuffs were used on four boys (aged 14 & 15) charged with stealing, who appeared before Redcliffe Magistrates Court in mid-October. The police watchhouse keeper had been concerned at the possibility of an escape and so took this extraordinary step. An overreaction to say the least.

Meanwhile, the police code of silence has been *condemned* by the report of the Criminal Justice Commission's inquiry into Queensland police involvement in the drug trade. The report included a call for the CJC to establish a sophisticated anti-corruption unit with a view to breaking down the code of silence which protects corrupt police officers. The report also called for random drug tests of police officers and accused the Queensland Police Credit Union of disclosing to officers under investigation that their financial affairs were being monitored.

AN END TO PROPAGANDA?

Labor Opposition Leader, Peter Beattie has promised to end the practice of governments running what might be viewed as political party self-promotion advertisements under the guise of informing the public of government policy. Beattie stated that under his proposed policy, advertisements would have to be educative or informative and deal with a new issue or an issue of which the community was unaware. Further, no advertisements would be permitted within nine months of the scheduled date of an election. ● **JG**

Western Australia

HIV PREVENTION IN WA PRISONS

Conditions in WA prisons, and in Australian prisons in general are conducive to the spread of HIV infection. This is because considerable risk behaviour occurs in prisons. Such risk behaviour includes sharing syringes and anal intercourse (see Strang (1990) 4(6) *National AIDS Bulletin* 42 and Dwyer, *Minimising the Spread of HIV within the Australian Prison System* Australian Institute of Criminology Paper, 1991).

The Western Australian Ministry of Justice has recently implemented new policies for the treatment of prisoners who are HIV positive. These include informing prison officers if a prisoner under their care has a blood borne disease (although HIV status will not be specified, it is likely to be in the forefront of officers' minds). Prison staff are to be trained in standard precautions. In addition, prisoners will be provided with information about the HIV virus and all prisoners will be encouraged to undertake blood testing.

Those prisoners who are HIV positive will have access to work, recreation, and other prison activities, consistent with a general community standard as advised by health staff. However, they will have single cell accommodation and more frequent cell searches. If any prisoner has engaged in high risk behaviour and this behaviour continues, he or she will be transferred to a medium or maximum security prison.

While these policies acknowledge the risk of HIV infection, they are limited to guidelines for the treatment of prisoners who are already HIV positive. They ignore the fact that prisoners do engage in high risk behaviour, without protection from HIV infection. Prisoners should be provided with condoms and should have access to methadone programs. The Attorney-General has stated that in this regard, a condom trial is scheduled for January 1998 in two out of nine WA prisons. However, no reforms have been proposed in respect of transfer through syringes. While the issue of providing clean syringes is controversial, syringes are available in prisons and will continue to be used and shared. Prisoners should, at least, have access to bleach and information about cleaning syringes. ● **ME**

South Australia

AN EXTRAORDINARY OUTBREAK OF COMMONSENSE

The Liberal party just managed to scrape back into government at the October State elections, its support plummeting amidst recent internal party plotting and backstabbing. This was an extraordinary result given that the Labor party had been reduced to 11 seats at the last election as a result of the catastrophic State Bank collapse. The election produced a number of other victories for common sense. The Democrat vote skyrocketed and many of the ALP seats were won by women. In the end, the message to all parties was not to underestimate the electorate. Voters were not just sick of Liberal infighting but also of its policies of sell offs, outsourcing and cuts to public services. Is this a sea change in South Australia? John Howard may one day mark this State election as the beginning of the end for his Government.

BACK TO SIX O'CLOCK CLOSING?

The regulation of time in Adelaide promises to become a hotly debated issue in the future for two reasons. First, the State election saw a deal between the collection of minor parties in the upper house, the Legislative Council, that resulted in the election of Australia's first No Pokies member of parliament, Mr Xenaphou. Among other things, Mr Xenophou demands tighter regulation of the hours that pokies can be played.

More recently, the Festival State has been pondering the tragedy of a young man murdered while he worked behind the till at an all night petrol station. One response has been to call for these stations to be closed at night unless security is significantly increased. One would hope that further tragedies could be avoided but closing petrol stations when the sun goes down sounds vaguely familiar. Didn't some societies in the dim, dark ages close the pubs at 6.00 p.m.? ● **FR**

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desertification, and the exhaustion of natural resources. It is in such circumstances that the realisation of the connection between the recognition of human rights and environmental protection becomes vital. The practical comparative and theoretical perspective that this book offers is a valuable contribution to the development of that connection.

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References

1. UN Doc. E/CN.4/Sub.2/1994/9 (6 July 1994).
2. See, Aguilar, A. and Popovic, Neil A.F., 'Law Making in the United Nations: The UN Study on Human Rights and the Environment', (1994) 3(4) *Reciel*, pp.198-200; Popovic, Neil A.F., 'In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment', (1996) 27(3) *Columbia Human Right Laws Review* 487; Popovic, Neil A.F., 'Humanitarian Law, Protection of the Environment and Human Rights', (1995) 8(1) *Georgetown International Environmental Law Review* 67.
3. See, for example, Stein, Paul, 'An Antipodean Perspective on Environmental Rights', (1995) 12(1) *EPLJ* 50; Wells, Katherine, 'An Ecocentric Bill of Rights for Nature: Some of the Legal Issues' (1995) 12(5) *EPLJ*: 344; Godden, Lee, 'The Dilemma of Priority: Can We Have both Human Rights and Environmental Rights?', Beresford, Marcus, 'Constitutionalization of Environmental Rights and Alternative Options', Gilfillan, Lin, 'The Right to Environment — Recognition and Implementation at the National, Regional and International Level', papers delivered at *Defending the Environment*, the third public interest environmental law conference, Adelaide, 21–22 September 1996; and Proceedings of the Human Rights and the Environment Workshop, Environment Defenders Office (NSW), at University of NSW, 12 October 1991.
4. This was argued in a communication submitted to the Human Rights Committee under the Optional Protocol. See *EHP v Canada*, Communication No. 67/1980. In that case the HRC observed that 'the present communication raises serious issues with regard to the obligation of state parties to protect human life (article 6(1))'. The complaint was ultimately declared inadmissible for failure to exhaust local remedies.
5. See, for example, Glick, Richard D., 'Environmental Justice in the United States: Implications of the International Convention on Civil and Political Rights', (1995) 19 *Harvard Environmental Law Review* 69.
6. See, Alston, Philip, 'Conjuring up New Human Rights: A Proposal For Quality Control' (1984) 78 *The American Journal of International Law* 609.

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Victoria

KENNETT'S WORLD

On 11 November the Kennett Government received the first genuine set-back to its proposed changes to the Auditor- General's Office, with Liberal back-bencher and former leadership contestant, Roger Pescott, resigning over the changes. His very public objection to Kennett's ideas about the role of the Auditor-General has left the Government facing a by-election that may be fought over the contentious issue. Pescott's actions have received wide-ranging support: Remembrance Day may take on another significance for the ALP.

Meanwhile, Kennett's world continues as usual. Legislation which would diminish the rights of intellectually disabled tenants will be debated in Parliament in the near future. The proposed legislation would prevent tenants with intellectual disabilities from going to the Residential Tenancy Tribunal over difficulties with private landlords.

And workers in Victoria are fighting the Government's decision to abolish common law claims for injured workers. While workers could not be blamed for assuming that the worst was over when it came to the Kennett Government's industrial relations policies, the decision to abolish common law claims has left many reeling. The decision was made after the WorkCover Authority claimed that the cost of common law claims had increased dramatically. However, the accuracy of these assertions has been questioned by the Victorian Labor Opposition and the Law Institute. The abolition of common law claims will combine with a reduction of benefits paid to injured workers through WorkCover. The changes will mean that an injured worker must be at least 80 per cent incapacitated to receive the maximum payment. Under the current system workers may receive 95 per cent of their wages for the first six months they are out of the workplace. The changes will halve this period, after which payments will be reduced to just 60–75 percent of the worker's pre-injury salary. The proposals have resulted in two major demonstrations and it seems likely that the fight will continue. ● **MC**

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