DownUnderAllOver

A regular column of developments around the country

Federal Developments

HUMAN RIGHTS LEGISLATION AMENDMENT BILL

The *Human Rights Legislation Amendment Bill 1996* was introduced into Federal Parliament on 4 December 1996. The Bill contains provisions to transfer the function of determining complaints under Commonwealth anti-discrimination legislation from the Human Rights and Equal Opportunity Commission (HREOC) to the Federal Court; and to transfer responsibility for conciliating complaints of discrimination from the Commissioners to the President of HREOC. It will also effect some changes in the structure of HREOC.

Having complaints determined by the Federal Court followed from the decision in the case of *Brandy v HREOC* (1995) 183 CLR 245, where the High Court held unconstitutional the previous system by which determinations of complaints by HREOC became enforceable on registration in the Federal Court. With HREOC determinations unenforceable after the *Brandy* decision, complainants had to go through a HREOC hearing and then a Federal Court re-hearing to secure an enforceable order in a discrimination case.

Under the new procedure in the Bill, complaints will be conciliated in HREOC then, if conciliation is unsuccessful, the matter may be taken directly to the Federal Court.

The second aspect of the amendments in the Bill concerns the role of the Sex, Race and Disability Discrimination Commissioners. At present, each of these Commissioners is involved in attempting to settle discrimination complaints by conciliation. Under the new system, the Commissioners will not be involved in complaints; all complaints will be handled by the President of HREOC. The Commissioners will have a new role of appearing, with the leave of the Court, as amicus curiae when discrimination cases are being heard in the Federal Court. ● **RL**

COPYRIGHT ENTERS THE DIGITAL AGE

Two new intellectual property treaties were finalised at the World Intellectual Property Organization (WIPO) Diplomatic Conference in Geneva in December 1996. The two new treaties are the WIPO Copyright Treaty and the Performances and Phonograms Treaty.

The new WIPO treaties provide international standards for copyright, performers' rights and rights of producers of sound recordings.

The treaties are being hailed as taking copyright into the digital age. The big advance in the treaties is that they provide effective protection for copyright owners, performers and producers of sound recordings against unauthorised use of their works and recordings on the Internet.

Over 100 countries participated in the negotiations. Australia actively participated in the Diplomatic Conference and was centrally involved in the development of the extended communication to the public right that will cover transmissions of text and images on the Internet.

Amendments will need to be made to the *Copyright Act 1968* if Australia is to accede to the new treaties. The major amendments required to comply with the treaties will be the introduction of a broad-based transmission right and an increase in performers' rights.

Each of the new treaties requires 30 accessions to enter into force.

The proposed Databases Treaty had been the subject of great concern among many in the international scientific community leading up to the Diplomatic Conference, but was not considered at the Conference. The Conference called for work to be done on the proposed Databases Treaty in early 1997. ● **CH**

ACT

THE 'BEST INTERESTS OF THE CHILD'

The ACT Legislative Assembly has amended s.5 of the *Children's Services Act 1986*, dealing with the matters to be considered in proceedings concerning children. The amendments came into effect on 22 November 1996.

The amendments added subsection 5(4) to the Act, which provides that for the purposes of subsections 5(1) and (2), a court is to regard the 'best interests' of the child as the paramount consideration. 'Best interests' is defined as 'including matters related to the care, welfare or development of the child'.

Subsection 5(1) of the Act provides that in exercising jurisdiction, the court will 'seek to procure for the child such care, protection, control or guidance as will best lead to the proper development of the personality of the child and to the child's becoming a responsible and useful member of the community'.

The need for this amendment is not entirely clear. Subsection 5(1), on its own, seemed to accord with the 'best interests' test — certainly that was the submission made by the Territory in its 1992 response to the report on compliance with the United Nations Convention on the Rights of the Child.

However, a view which has recently been put forward by many expert witnesses is that the court should adopt a test of 'good enough parenting', rather than making an order which is in the 'absolute best interests' of the child. This view has received the support of Higgins J in the matter of *A and B v Director of Family Services* (unreported, Supreme Court ACT, 31 May 1996) in which his Honour said:

> The purpose of the Act is clearly spelt out in section 5. It is not the purpose of subsection 83(3) [which provides for the making of care orders] to find the best possible alternative for children. It is not to protect them from all foreseeable risk. Parents vary greatly in their perceived competence and skills in parenting. Welfare and other authorities need to be care-

ful of cultural and professional arrogance.

The legislation is designed to foster and support the family unit rather than to undermine it.

The new amendment to the Act will certainly affect the interpretation adopted by Higgins J. It will be interesting to see how this change affects the conduct of litigation in this sensitive area. ● **JE**

New South Wales

The new NSW Police Commissioner carried out his own 'day of the long batons' when he commenced his reform of a Police Service that has been under the scrutiny of a Royal Commission for the last two years.

Numerous senior officers were effectively sacked or demoted as the Service was re-organised. Eleven new regions replaced four regions and 25 districts, with four women in the top 19 positions, including one as Deputy Commissioner. The police management pyramid was flattened out and it appears there is more change to come, especially in the organisation of detectives.

The Commissioner promised the changes would result in improvements in all the usual things associated with managerialist rhetoric, such as supervision, accountability and communication but the real test of their impact will be in assessing way down the track the type of policing we will get in NSW.

In related developments, the NSW Council on the Cost of Government has advocated the closure of numerous police stations as a cost-saving measure so it will be interesting to see how the police, the bean counters and the politicians resolve some of the tensions involved in making such decisions.

NSW political rhetoric is still based on the 'lets crack down on crime in the streets' model which results in massive overpolicing of blacks and juveniles in particular.

Shortly after the restructure was announced the Commissioner launched the new Code of Conduct all police will adhere to. It is a stylish 8-page A4 document full of good ideas about proper conduct. It also comes with a 9 cm by 15 cm summary on a card, suitable for wallet or purse: every citizen should have one.

Among the gems the one I like best says:

> We guarantee to provide a satisfactory level of service to any person or organisation with whom or which we have contact: our customers.

Customers? Some cops would have said verbals helped provide such a satisfactory level of service but I suppose those days are over.

If the last few years scrutiny of the Police by the ICAC and the Royal Commission has shown anything, it is how there has been a massive failure in the integrity of police leadership: managers are not necessarily good leaders and vice versa, while time servers are usually neither.

In a couple of years it will be possible to see if the changes really have an impact on the way policing is led in NSW. If various groups are still overpoliced the changes will have been for naught. ● **PW**

Northern Territory

FUNDING CRISIS

An application to vacate a Supreme Court trial in December by the North Australian Aboriginal Legal Aid Service (NAALAS) on the basis that the Service had no funds to pay for counsel for the four defendants, drew comment from the presiding judge, Justice Sir William Kearney. The situation was said by Justice Kearney to be 'appalling and outrageous' and 'of transparent unfairness' to the defendants, each charged with one count of grievous bodily harm and three counts of aggravated assault. Justice Kearney commented that he would be sending the transcript to Federal Attorney-General, Darryl Williams. NAALAS lawyer John Lawrence indicated that the Service has had severe funding cuts, saying 'there is a crisis imminent and this merely a manifestation of it'.

SHAME

In a very 'Territory' innovation based on the 'shame' factor, people carrying out community service orders now have to wear bright orange bibs advertising the fact. One would have thought Darwin, Alice and other towns and communities small enough that everyone would know anyway.

SCHEMES

The NT Government is considering copying a Queensland scheme under which young Aboriginal offenders would be 'banished' to outstations and possibly subjected to punishment under customary law. NT Aboriginal Development Minister, Mick Palmer, stated 'we have to keep our minds open to what is the best way to deal with youth crime' — does this indicate a change of policy attitude since mandatory sentences for property offenders were introduced recently (see this column, December 1996), or are the latter just not working?

The NT Government has joined forces with WA in proposing a scheme in response to the High Court's Wik decision on pastoral leases. In an extraordinarily generous gesture, doubtless directed to contributing to the reconciliation process, native title on pastoral leases would be extinguished in exchange for access rights of native title holders. However, Aboriginal people already have rights of access under the *Pastoral Lands Act,* as do their WA counterparts. Queensland, which does not already give access rights to traditional owners, is more reluctant to join up this particular extinguishment cheer squad. ● **AD**

Queensland

HAPHAZARD APPROACH TO INDIGENOUS ISSUES

The Borbidge Government appears intent on inflaming the concerns of the farming and mining sectors in relation to the High Court's *Wik* decision. In early January, Queensland Natural Resources Minister, Howard Hobbs, ordered that his Department take no action on a range of leasehold land dealings. Hobbs has declined to release details of the legal advice which supported this course of action.

A strong community backlash was generated by police action at Woorabinda, 150 km west of Rockhampton, when the funeral of an Aboriginal person was disrupted by the arrest of 54 people. The arrests related to warrants for minor traffic matters. Police Minister, Russell Cooper, subsequently apologised for the insensitivity of the police action which prompted strong criticism from the Police Union. Meanwhile, Police Commissioner, Jim O'Sullivan, defended the actions of the officers.

On a more positive note, Neville Bonner has been appointed to chair a 12-member Indigenous Advisory

Council which will advise the State Government on justice issues. Further, several Government ministers have supported calls to decriminalise public drunkenness. No timeline has been set which may ring alarm bells for those who remember the Goss Labor Government failing to honour commitments made in this area.

CRIMINAL JUSTICE COMMISSION

The brawl between the Borbidge Government and the Criminal Justice Commission (CJC) was in part prompted by comments by CJC Chair, Frank Clair, in relation to continuing high-level police involvement in the illegal drugs trade in Queensland. The CJC has now established a full-scale Inquiry with a view to exposing such corruption. Some commentators have suggested that the future of the CJC now depends heavily on the success of this Inquiry, which is likely to run until at least the middle of the year.

The CJC had probably hoped the heat would die down after the Inquiry into the Mundingburra by-election cleared both Borbidge and Cooper of any criminal behaviour in relation to the agreement with the Police Union.

NEW CRIMINAL CODE LEGISLATION

The Queensland *Criminal Code* and related legislation is to be amended in the near future. The major changes relate to increases in the maximum penalties available in relation to a range of offences. Graffiti artists will face a maximum penalty of seven years imprisonment. This should be contrasted with the three years maximum for common assault. A new offence of computer hacking and misuse will also be created. ● **JG**

South Australia

TOUGH POLLS, TOUGH ON CRIME

In January the *Advertiser* published the results of a public survey on the criminal justice system it conducted in its pages in December. (Sound familiar?)

Five thousand readers bothered to respond to the survey — 'the first of its kind in the State's history' according to the paper (wonder why?) — which did not prevent the headline reading 'The crimes we all fear' (well presumably a proportion of 5000 *Advertiser* readers anyway). On p.2 a further report of the survey stated 'Public wants tougher judges'.

Among the findings: 75% said that judges were not independent and uninfluenced by others when making their decisions; that they were lenient on the wealthy and high public profile people; that there was 'overwhelming concern' about levels of sex crimes, murders, vandalism, burglaries, attacks on the elderly, armed hold-ups and drug dealing; that victims were not fairly treated or compensated; 50% believed that imprisonment should not be seen as a last resort; 75% wanted prison conditions to be more severe and wanted the reintroduction of capital punishment; and most believed that the 'police treated people fairly and equally, were polite and civil, deserved community confidence and needed more support in fighting crime'.

The Attorney-General suggested that perceptions about crime were different from the reality, and appeared to place little store in the survey. Others questioned its methodology. Opposition Labor Leader, Mike Rann, released his party's law and order policy on the same day promising the 'toughest anti-paedophile legislation in the country' providing for indefinite jailing of paedophiles, tracking their movements in the community and recording them on a national register. He was also reported as saying that 'throwing away the keys for repeat offenders' had to be considered. A Labor poll had apparently shown that 85% of people thought courts and judges were out of touch with the community.

Labor says it is adopting a Tony Blair 'tough on crime, tough on the causes of crime' approach but there is little discussion at this stage on the causes of crime. With a conservative government that has its fair share of law and order proponents and a Labor opposition wanting to show how tough it is on crime, there seems a strong chance that the State election due this year will see a repeat of what happened at the last NSW election where both sides tried to outbid each other in the 'tough guy' stakes. How long the Attorney-General can maintain his measured response is anyone's guess. ● **BS**

Victoria

FUNDING CUTS

Practitioners and applicants all over Australia are struggling with the consequences of dramatic cuts to the federal legal aid budget. However, Victoria Legal Aid (VLA) has come under particular criticism over the introduction of new guidelines and extensive cuts already in place.

Family law litigants are already feeling the effects of the cuts, with VLA imposing a $10,000 cap on all family law applicants, including existing ones, and a $15,000 cap on funding for separate representatives for children. The retrospective nature of the cuts has resulted in existing cases coming to a standstill when funding runs out, leaving many parties without Orders or directions regarding contact, residence or property, and, in one example, resulting in physically or sexually abused parties having to represent themselves or go unrepresented in a final hearing.

Chief Justice Nicholson has described the funding caps as 'unconscionable' and suggests that in some cases the guidelines would breach the UN Convention on the rights of children. Similar criticisms have been levelled at the ceilings imposed on funding for criminal matters, being $30,000 for defendants charged with murder and $15,000 for other serious offences, while it is thought that defendants on less serious charges will go unrepresented. Consequently, defendants no longer able to obtain funding could be released on bail and their prosecution stayed.

The Law Institute has been highly critical of the new guidelines and caps, describing them as an overreaction by VLA. However, Director of VLA, Robert Cornall, has defended the guidelines suggesting that they may encourage a more efficient court system.

AUDITOR-GENERAL

Meanwhile, in December 1996, the Kennett Government used its numbers to prevent further probing into the legality of its proposed review of the *Audit Act*, and the role of the Victorian Auditor-General. The review will examine the possibility of government agencies being able to appoint their own private sector auditors, and therefore bypass the Auditor-General. Unperturbed by what seems to be a further and serious erosion of Victorian democracy, the Government argues that the review is necessary in accordance with national competition policy, claiming that their own legal opinion supports the power of the Government to review the Act. ● **EC**

Western Australia

MORAL GUARDIAN

The Government of Western Australia recently introduced new censorship laws aimed at 'striking a balance between protecting the community, particularly children, from offensive material while ensuring that, as far as possible, adults have the right to determine what they view'. In determining what, exactly, constitutes 'offensive' material, those responsible for classifying and limiting the distribution of these materials are asked to take into account 'the standards of morality, decency and propriety generally accepted by reasonable adults'. This, we are told, is but one way to ensure that the public is duly protected from exposure to objectionable sexual material which is 'simply beyond the pale and [which] should not be available to the public under any circumstances'.

Although designed to radically rewrite WA's censorship laws, a careful reading of the legislation reveals that the State's new *Censorship Act* stands as a rather unfortunate example of how *not* to address the individual and systemic harms that result from the production and distribution of pornography. Focusing solely on the need to protect against moral corruption, as opposed to seeing pornography for what it really is (a form of sex discrimination resulting in systemic inequality), the legislation fails to ensure that those most in need of protection from pornographic harm are not so protected.

The legislation is also susceptible to inconsistent and discriminatory application. The Act calls for the formation of a panel of 'community representatives' responsible for classifying publications. The Act does not make it clear how these people are to be selected, nor does it indicate why some people are deemed to be more representative of the community than those not so selected. More troubling, however, is the fact that pursuant to s.15 of the legislation, the Minister responsible for the Act is not obliged to submit material to the Committee but rather can ignore the Committee structure all together. Should the Minister decide to do so, she or he need only follow the following guideline:

> 10. A publication will be classified as refused if, in the opinion, of the Minister, the publication:
>
> ...
>
> (c) describes or depicts, in a manner that is likely to cause offence to a reasonable adult —
>
> (vi) an act or matter that the Minister has determined, having regard to the standards of morality, decency and propriety generally accepted by reasonable adults, is contrary to the public interest.

Given the Act's obsession with moral propriety, it does not require a great deal of insight to foresee the potential for considerable abuse arising from application of the above section. By focusing on pornography as an issue of immorality, rather than as an issue of inequality and the harms that result from inequality, the Government fails to ensure that those most in need of legal recourse will find it. It also risks imposing unjustified limits on legitimate forms of sexual expression — expression which, far from harmful, may in fact prove quite central to the goal of achieving systemic equality.

Despite assertions to the contrary, WA's new censorship laws are far from radical. What is needed is legislation which *is* radical in so far as it really does offer those who have been harmed by pornography the opportunity to do something about it. By redefining pornography as a threat to social equality and by adopting enforcement measures which *ensure* that this threat is curtailed, our legislators would do much to ensure that the harms of pornography are taken seriously, while guaranteeing that the 'right to speak' is a right shared by all citizens. This legislation, in its present form, does neither. ● **CK**

DownUnderAllOver was compiled by Elena Campbell, Anne Marie Donnelly, Jenny Earle, Catherine Hawkins, Christopher Kendall, Renee Leon, Jeff Giddings, Brian Simpson and Peter Wilmshurst.

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Conclusion

The way in which young people are perceived — as members of the community, or as threats to it — has important ramifications for how public space is constructed. Whether they be subjected to coercive control over their activities, and their very presence, in the public domain, or whether they be accommodated within existing commercial structures, it is clear that a number of major legal, political and social issues are associated with the regulation of youth space.

The challenge for the future is to expand our visions of both public space and of young people. It is crucial to speak about the need to democratise public space, particularly if entrenched spatial divisions are to be overcome. Similarly, it is vital that we treat young people with dignity and respect — from welfare to education, employment to consumption, the issue is ultimately one of basic human rights. And as 'our future', young people deserve no less than the best we can offer in the way of material and social space within which to live and grow. The future is now.

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