> a prisoner, and any realistic definition of what that means, is that I am a person who is one of the most disadvantaged in the community... I am a person who is most at risk of having his human rights violated and I am asking for the protection of the law and the Courts.[4]

With legal aid in crisis more and more people, including prisoners, have no choice but to represent themselves before the courts. There is nothing in state legislation that provides a basis for prisoners to retain possession of legal documents, or resist a search for, or seizure of legal documents.[5] The refusal by prison authorities to allow convicted prisoners and prisoners on remand awaiting trial, sufficient access to legal documents and legal advice to allow them to prepare a defence or an appeal (if already convicted like Minogue) has serious implications for the notion of a fair trial and the ability of convicted people to appeal unsafe verdicts.

In *Dietrich,* the majority of the High Court found that in most cases representation by counsel was essential to a fair trial, referring to the 'elementary right of every accused person to a fair and impartial trial'. Quoting favorably from an earlier decision, Deane J maintained that:

> ... such a right exists as a personal right seems to me so deeply rooted in our system of law and so elementary as to need no authority to support it. It is a right which inheres in every system of law that makes any pretension to civilization. It is only a variant of the maxim that every man is entitled to his personal liberty except so far as that it is abridged by a due administration of the law. Every conviction set aside, every new criminal trial ordered, are mere exemplifications of this fundamental principle. And if that right be admitted, it would be an empty thing, unless the law adequately protected it.[6]

If it is unfair for a person accused of a serious criminal offence to stand trial and by extension be forced to prepare an appeal without the benefit of legal counsel, how much more unfair is it where the unrepresented defendant or convicted person is also a prisoner who is unable to maintain control over the legal documents necessary to prepare and present their case, or even to have contact with lawyers who may be able to provide some assistance?

It is testament to the significance of the issues before the Federal Court that the International Commission of Jurists (ICJ) (Victorian Branch) has successfully sought leave to appear as *amicus curiae*, or friend of the court. The ICJ was founded by lawyers in 1952 to promote the rule of law. It is an international non-government organisation with consultative status with the United Nations, UNESCO, the Council of Europe and the Organisation of African Unity. The Australian section of the ICJ was founded in 1958 to provide an organisation through which the Australian legal profession could promote and sustain the rule of law and the observance of human rights and fundamental freedoms and to promote human rights conventions and adherence to and observance of the Universal Declaration of Human Rights (1948).[7] The ICJ will be represented at the hearing by Queen's Counsel and two junior counsel. The Commonwealth Attorney-General has also intervened.

The stakes for prisoners are high. Minogue has 18 years left to serve of a 28-year sentence. Without access to legal aid, legal documents, or legal text books he is effectively denied the ability to prepare an appeal regardless of the merits of his case. Lack of legal representation severely disadvantages defendants in criminal trials and people trying to appeal verdicts that may be unsafe. The inability of prisoners without legal representation to retain possession of the legal documents necessary to prepare a defence or appeal on their own behalf reduces the notion of a fair trial and access to justice to the level of farce.

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References

1. The case is listed for a one-day hearing on 15 September 1998.
2. In the Federal Court of Australia Victorian District Registry between Craig William John Minogue and Human Rights and Equal Opportunity Commission, VG 744 of 1997.
3. *Minogue v Human Rights and Equal Opportunity Commission,* Affidavit in support of the Application, 25 February 1998, p.3.
4. Above ref. 3, pp.15 and 21.
5. See Groves, M., 'Any privilege for the unlucky?', (1997) 22 *Alt.LJ* 1.
6. *Dietrich v The Queen* (1992) 177 CLR at 326. Deane J quoting Isaacs J in *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at pp. 541–542.
7. *Minogue v Human Rights and Equal Opportunity Commission,* Affidavit of Professor Spencer Zifcak, Chairman of the International Commission of Jurists (Victorian Branch), 30 July 1998.

LEGAL CENTRES

Human resource practices

PETER HUXTABLE comments on employment and human resource practices in Community Legal Centres.

There is no doubt that Community Legal Centres (CLCs) provide great benefit to the community and improve the level of justice in our society.

The overriding motivation of CLC workers — being staff, management and volunteers — is goodwill, community service and socio-legal reform.

The writer has had over 20 years involvement in CLCs, as a volunteer, employee and committee member. He has seen many examples of poor staff management practices and avoidable interpersonal conflict, which have resulted not only in poor performance and heartache in CLCs, but also threatened their very survival.

The writer suggests the following safety net of management, human resource and employment practices in CLCs (and indeed any community groups) as worthy of consideration.

- As a first principle, all people, whether they are clients, volunteers, staff, or management must be treated with basic courtesy, respect and trust, and be consulted. People can have very different perceptions of reality. What is fair, just and appropriate to one person can be the antithesis of those things for someone else. If common ground is to be reached in human affairs, everyone must be treated with dignity and be valued.
- Do not employ someone simply because no-one else suitable has applied for the job. Make sure the Centre selects a person they have confidence will do a satisfactory job (not necessarily a perfect job). If the right

applicant doesn't apply, advertise again. It can be surprising the number of new applicants attracted, even after only a month. Although there are short-term difficulties in having the position vacant, the long-term problems caused by selecting someone unsuitable can be far worse.

- Know the relevant Industrial Award well and adhere to its provisions, particularly employment contract, dispute resolution, performance review, and termination of employment clauses.
- Job description forms should be reviewed regularly and updated (at least every time the position becomes vacant).
- Selection criteria for positions should be very carefully considered to ensure they link to the job description and reflect the knowledge, skills and other requirements needed to perform the job. A selection panel should not get to the end of a job interview and have their 'gut feeling' tell them something different from what the selection process does. If this is the case, the flaw lies in the selection criteria not being good enough or being weighted inappropriately.
- Essential selection criteria should be separated from desirable criteria.
- Some selection criteria, even essential criteria, will be more important than others and this should be clearly spelt out. For example, if a demonstrated commitment to a participative, teamwork culture is highly essential, this could be given double the weight of, say, ability to draft law reform submissions.
- Don't split what should be one selection criterion. For example, ability to effectively communicate would normally be one criterion, rather than being split into, say, ability to effectively communicate in writing, and ability to effectively communicate verbally. If such criteria are split, this could well distort the eventual scoring of job applicants in their interviews, for example, 20 points might end up being allowed for communication, rather than a more appropriate 10.
- Specific reference should be made at the job interview (or subsequent interview, if there is more than one) to the ethos, values and practices operating at the Centre, and which the job applicant, if successful, would be expected to adhere to. The ethos, values, practices, organisational structure etc. should be incorporated into a manual and the applicant advised that an employment contract would have the manual attached to it, as a term of employment.
- Referee checks must be done on the preferred applicants. In practice, what you see and perceive at interview is by no means a guarantee of what you get. Provided one is up-front about it (including to the applicant), there is nothing wrong with contacting former employers or others who are not nominated referees, in order to obtain information relevant to the applicant's ability and willingness to do the job. If a reference check is negative, the applicant should be given the opportunity to respond to the criticism.
- Once an applicant is selected and accepts the job offer, the employment contract must be prepared immediately. It should incorporate relevant award provisions. The award covering CLC staff is the Social and Community Services Industry — Community Services Worker's Award 1996 (the SACS Award). The SACS Award is a national award, with slight State by State variation. The contract cannot take away or reduce any rights or entitlements that the employee has under the award. The contract should have attached to it the job description form, selection criteria and Centre manual. There should be a clause in the contract stating that these documents may be amended from time to time, through proper process. It is also wise to include a clause stating that the employee is subject to the lawful direction of the Centre, which Centre has, by its constitution, delegated this power to the management committee.
- A performance agreement should be entered into immediately with the new employee. Specific committee members (usually two), who understand and are committed to the performance management process, should be responsible for the performance management of individual staff members, particularly the Centre coordinator and legal staff. Performance agreements should specify performance goals, standards and indicators (linked to the achievement of the Centre's strategic plan), both quantitative and qualitative, set appropriate training, and indicate the basis of how rewards are to be made.
- Rewards can be more than salary increments, and can include particular training, attendance at conferences, pet projects etc. The culture of the organisation and the wishes of the employee will determine the most effective rewards.
- It is essential that the needs, wishes and goals personal to the employee are canvassed as part of the performance management process. Performance management is not only to make employees and management clear about what is expected in a job, but to develop the employee in the job so as to achieve greater performance.
- Timely reviews of performance agreements are essential. Miss reviews at your peril! For instance, under the SACS Award, the first milestone review is six weeks from commencement of employment. If timelines are missed, it not only devalues performance management in the eyes of the employee, it can undermine the role and standing of committee. Performance review should not be a once-a-year phenomenon linked to salary increment. Performance management should be more akin to coaching and should, ideally, occur continuously. However, realistically, a couple of specified management committee members should meet with a new solicitor or coordinator fortnightly in the early days. This can be tapered off (or increased) as appropriate.
- Proper documentation of performance reviews must occur. If there is substandard employee performance, this must be formally recognised, addressed and recorded. If it is not, and the inadequate performance continues, then there is no objective basis for discipline that can withstand external scrutiny.
- Substandard performance may point to a need for training. The specific training plan should be recorded and progress reviewed within a specified period. But remember, defensible discipline is only an added benefit of a good performance management system. The real purpose of performance management is not to be an audit and control tool, but to provide a job and staff development mechanism, aimed at achieving superior performance.
- Committee members should be fully au fait with their duties, responsibilities and potential liabilities. The formal legal responsibilities of committee members vary

according to each State's Associations Incorporation legislation for incorporated, not-for-profit bodies. Penal provisions apply for non-compliance. Common law fiduciary duties for committee members also apply (for both incorporated and unincorporated bodies). The main ones are:

- the duty to exercise due care, diligence and skill,
- the duty to act in good faith,
- the duty to exercise powers for proper purpose,
- the duty to avoid conflicts of interest.

- Ensure that there is adequate insurance to cover all operations and activities of the Centre, including actions of committee members. Different types of insurance are available for incorporated associations and their management committees. Insurance can protect a Centre against losses incurred from a breach of duty by a committee member, including fraudulent or dishonest behaviour. It can also protect individual committee members against personal liability in certain circumstances (for example, directors and officers liability insurance). But such insurance policies covering all reasonable contingencies can be hard to find and can be very expensive.
- Members of the management committee should be in clear agreement about the mission, goals and values of the Centre.
- Management committees should renew themselves regularly. It is advisable to have one or two new committee members elected at each annual general meeting.
- Community Legal Centre management committees must have enough members to share the workload, in tough times as well as easy times. Committee members must not only have the requisite knowledge and skill to manage, they must also have the commitment and time to see that all the bases (of good management and risk) are covered. It is easy to underestimate the commitment and time which may be required of CLC management committees to do their job properly.

And, last of all, good luck!

Peter Huxtable is the manager of non-litigation services for Legal Aid Western Australia. He has been involved in the Community Legal Centre movement for over two decades, and continues to participate in specific Centres.

NATIVE TITLE

The Larrakia case

ANNEMARIE DEVEREUX discusses the latest High Court native title case ruling out the survival of native title on freehold land.

> *'Native title is extinguished by a grant in fee simple. This statement of law must be taken as settled. It does not admit a qualification.'*

In these words Justice Kirby pithily summarises the effect of *Fejo and Mills v Northern Territory & Oilnet* (High Court of Australia, 10 September 1998) (the *Larrakia* case). The High Court was unanimous in holding that where there has been a valid grant of fee simple over land, native title is thereby extinguished. Such extinguishment is not a temporary suspension of native title but an extinguishment in perpetuity. Whilst the conclusion of the *Larrakia* case is not surprising given the obiter comments of several judges in *Mabo (No 2)*[1] and the judgments of the Court in *Western Australia v the Commonwealth*[2] and the *Wik* cases,[3] it is significant in settling the question definitively and for its rejection of arguments concerning suspension of native title.

The facts giving rise to the *Larrakia* case were as follows. Part of the land over which the Larrakia people claimed native title and the protection of the *Native Title Act 1993* involved land which had been granted in fee simple in 1882. The Commonwealth acquired the land in 1927 for the purposes of establishing a quarantine station. A quarantine station was established in 1935, though in 1956, the land was used as the site for a leprosarium. The land subsequently fell into disuse and there were no dealings with the land until the Northern Territory Government subdivided the land in 1996 and began granting leases over individual parcels. The leases were not merely set term/purpose leases, but allowed the lessee, provided certain terms were met, to surrender the lease and acquire the fee simple interest in the land. One of the leases was granted to Oilnet, the second respondent in the case. Jim Fejo and David Mills (on behalf of the Larrakia people) lodged a native title application over the land leased to Oilnet in December 1996. On 1 April 1997, the application was accepted by the Native Title Tribunal Registrar.[4]

The proceedings were complicated to some extent by the commencement of action by the appellants of two proceedings in the Federal Court of Australia seeking a number of declarations. These declarations included declarations that 'native title exists' in relation to the Oilnet leased area, that 'the Larrakia people are the holders of that native title' and that, before it could grant a valid lease to Oilnet, the Northern Territory was obliged by the Act either to negotiate with the Larrakia people or to compulsorily acquire their native title. The appellants also sought injunctions, both interlocutory and permanent, restraining Oilnet from undertaking or continuing to 'undertake any development of, or the erection of improvements on or affecting' the land, the subject of those leases, and restraining the Northern Territory from accepting a surrender of the Crown leases that it had granted to Oilnet or exchanging those leases for a freehold title. The Northern Territory applied for orders dismissing the proceeding on the grounds that no reasonable course of action was disclosed and that the proceeding was frivolous, vexatious or an abuse of process. On 13 February 1998, the appellants applied by notice of motion for interlocutory injunctions.

On 27 February 1998, O'Loughlin J refused the application for interlocutory injunctions and dismissed the proceeding on the basis that native title could not exist over the land given the prior grant of fee simple. The appellants appealed to the Full Court of the Federal Court. The first ground of the appeal concerning the existence of native title was removed to the High Court. In the High Court proceedings, there were two central questions:

- was it appropriate for the Court to be determining the existence of native title at this stage of the proceedings given the statutory regime for determination of native title ('the procedural question'); and
- what was the effect of the 1882 grant of fee simple and the later acquisition of the land by the Commonwealth?