DownUnderAllOver
Developments around Australia

FEDERAL DEVELOPMENTS

Discrimination on the ground of criminal record

The incidence, impact and regulation of discrimination on the ground of criminal record is currently the subject of much debate in the community and among policy-making bodies.

In December 2004, the Human Rights and Equal Opportunity Commission (HREOC) released *Discrimination in Employment on the Basis of Criminal Record*. The Discussion Paper invited submissions about the extent and nature of discrimination in employment on the basis of criminal record, the rights and responsibilities of employers and employees in relation to criminal records information, and the adequacy of the legal regime and other measures in protecting people from discrimination of this nature.

Discrimination on the ground of criminal record is not prohibited under anti-discrimination or equal opportunity legislation in Victoria, New South Wales, Queensland or South Australia, while the protection afforded in the remaining states and territories is piecemeal and inadequate. At a federal level, the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) provides no effective legal remedy against discrimination on the ground of criminal record.

The impacts of discrimination are multifaceted. Discrimination on the ground of criminal record in employment is a causal factor in many people's experience of social exclusion, disempowerment, ill health and identification with the marginalised condition. According to Melbourne Citymission, effects include 'lack of self esteem, feeling like they will never get a second chance, being unable to support their families financially, and giving up looking for work'. Discrimination in employment can inhibit the rehabilitation and social reintegration of past offenders, and therefore increase the risk of recidivism. There are obvious concurrent social and economic costs associated with such outcomes.

According to submissions to HREOC made by Fitzroy Legal Service, the PILCH Homeless Persons' Legal Clinic and Job-Watch, reforms necessary to promote non-discrimination on the basis of criminal record and the development of policies for social inclusion, include:

- providing effective remedies in relation to instances of unlawful discrimination on the basis of criminal record under the Human Rights and Equal Opportunity Commission Act
- amending state and territory equal opportunity laws to add 'criminal record' as a protected attribute
- enacting 'spent convictions' legislation, both nationally and in states such as Victoria where it is currently absent, to promote the ability of ex-offenders to rehabilitate, reintegrate and move forward with a 'clean slate'.

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NEW SOUTH WALES

A bit of monarchy Bashiring

NSW is a long way from Marston Moor but it could have a re-run of a few aspects of the England of Charles I and those Puritans.

A psychiatrist lodges a claim for unfair dismissal in the NSW Administrative Decisions Tribunal. It is being heard in the Equal Opportunity Division of the Tribunal. The psychiatrist was employed by the Central Sydney Area Health Service and his boss at the time is now the NSW Governor. The psychiatrist believes the Governor has relevant evidence to give and holds documents related to his case.

The Governor claims she is not bound to give evidence as she has 'sovereign immunity', an argument apparently based on medieval common law.

I seem to recall in my Blackstone's *Commentaries* something along the lines that our sovereign is incapable of doing wrong, thinking wrong or meaning to do an illegal act. Similarly did not the English Civil War and settlement of 1688 entrench parliamentary power in statutes above the power and prerogatives of the Crown?

Meanwhile back on our planet a recent wonderful book by Anne Twomey titled *The Constitution of New South Wales* (Federation Press, Sydney, 2004) makes clear at a number of points the duty on the Crown to obey the law. (A short supplement may need to be issued once this case and a current High Court one are over).

Section 2 of the NSW *Constitution Act 1902* as expected defines 'The Legislature' as the Crown with the advice of the Legislative Council and Legislative Assembly.

The Legislature saw fit to exclude the sovereign from being a compellable witness when it passed the *Evidence Act 1995* (s 15).

The Legislature saw fit not to exclude the sovereign when it passed the *Administrative Decisions Tribunal Act 1997*. Section 84 allows the issue of summons for any person to give evidence and to attend and produce documents. The Crown gave Royal Assent so accepted as law her agreement to comply with such a summons if issued. (Yes I know the usual rule of statutory

interpretation is the Crown is not bound unless by express reference or necessary implication. However, having been very specific in the *Evidence Act* it is clearly the case that she intended to bind herself to the *ADT Act*, especially given the objects clause in the Act, in particular, s 3(g).)

Does a concept of sovereign immunity apply to the person of the sovereign before she became Governor? Does this raise the Crown's two bodies stuff — she is both a corporation sole and a person isn't she? When she was a humble public servant and academic there was no entitlement or expectation to become our sovereign. (Hereditary succession makes things so much easier). This would also seem to exclude the operation of the privilege provisions in s 125 of the *ADT Act* as the documents are not those of the Crown but merely an Area Health Service.

The resolution of the broad issue of the state of the law as it applies to the Crown in 2005 should be addressed by the High Court. There is in fact an excellent opportunity for it to do so because of its grant of Special Leave in the Jarratt case.

Jarratt was Deputy Commissioner of Police in NSW and was sacked on the basis of an argued residual Crown prerogative to sack public servants at pleasure, without the need for procedural fairness.

The High Court on 10 December 2004 gave Special Leave to appeal a NSW Court of Appeal decision upholding the Crown's right to sack Jarratt. Given the importance of deciding the exact scope and extent of the Crown's right, especially given older High Court and other authorities, McHugh J was keen to get it to the Full Court and there it is now. (See [2004] HCA Transcripts 547).

We now need some quick baton passing from the ADT to the Supreme Court and thence to the High Court to join it to Jarratt's case. (Charles III might thank us one day if his legal status in NSW is made clear).

Consider another possible scenario if the politicians wanted to assert parliamentary supremacy in some way, especially the NSW Legislative Council. Either the Council or Assembly, or a Committee of either or both Houses, might enquire into the sacking and act as follows:

- the Council or Assembly could use the provisions of the *Parliamentary Evidence Act 1901* (s 4) to call the Governor to give evidence and issue a warrant and apprehend her if she refuses (ss 7 and 8)
- the Legislative Council could call for the Minister for Health to table all papers regarding the sacking of the psychiatrist and call on the Premier or Attorney General to table all papers regarding advice to the Governor.

A few people would have to go off and brush up on the High Court's decision in *Egan v Willis* (1998) 195 CLR 424 and Twomey (above) discusses some of the issues in her book (eg, pp 514–21).

Could the Legislative Council put the Governor on trial I wonder?

One thing missing in the reporting of this case has been the lack of outrage. No page 1 declarations of the rule of law, no editorials, no letters to the editor. I have relied on reports in *The Australian* between 2 and 7 April 2005. Why is the sovereign refusing to appear in a simple civil discrimination case, especially when she was a different body? No 'for reasons of state' seem apparent.

Where is Oliver Cromwell when you need him, just for a quick walk on walk off role, none of the Puritan stuff?

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QUEENSLAND

Palmed off

Relations between Palm Islanders and the Queensland Government deteriorated rapidly after the death-in-custody of Cameron Doomadgee in mid November last. Doomadgee died in the police watch-house shortly after being arrested for public drunkenness. He had suffered four broken ribs and a torn liver. Police claim the rib injuries occurred in a scuffle with officers on the steps of the watchhouse, and that his death was triggered by a fall from a table.

Community and family members have led outraged calls for a full and public commission of inquiry. The Crime and Misconduct Commission (CMC) responded by announcing an inquiry of its own. Dissatisfied with the spectre of CMC officers investigating police, a section of the deprived community erupted late last year, rioting and torching the police station. A coronial inquest is proceeding in Townsville, after some police witnesses stated they feared for their safety if they had to give evidence on the island.

The Premier quickly rallied around the police force. Well meaning but accident-prone Indigenous Affairs Minister, Liddy Clark, sought to intercede. However, she became engulfed in a dispute about whether she had promised to pay for airfares for two non-Palm Islander Indigenous activists to attend the island. Clark lost her Ministry after the CMC found her responsible for misleading statements on the matter.

In the interim, Premier Beattie visited the Island, in part to open a Police Citizen's Youth Centre. Demonstrating the fractured relations between islanders, police and government, the Council intended to boycott the opening. At a formal meeting with the Council, Premier Beattie offered to clear an $800,000 debt owed to the Government, something the Council had been agitating for. Prominent social justice lawyer, Andrew Boe, acting for the Council, attended the meeting. Premier Beattie allegedly said, 'I know that my director-general who is outside might have a heart attack, but if the council opens the centre with me today, I will clear that debt from my own Premier's budget, but the Centre must be opened today. Look, if we go up there together and open the Centre today, the debt will be cleared' (*The Australian*, 24 February 2005).

The CMC had to consider whether this was an attempted bribe, within the offence of official corruption. Solicitor-General Sofronoff found that Premier Beattie had offered to use public moneys to induce unrelated conduct, but that he only stood to gain indirect political benefit. This conclusion buttressed the CMC's decision not to proceed to charges or a public inquiry, although its QC's advice was that 'technically, it would be open ... to find that what was sought here was sought corruptly ... but it is a rather weak case'.

Sofronoff's advice is not beyond debate. There is authority from electoral bribery cases that 'corrupt' conduct consists in the quid pro quo, not some extra element of immorality. His conclusion is only sound if one believes Premier Beattie acted primarily for the public benefit associated with the Centre, rather than for the PR benefit to himself, or that criminal law is too crude for the argy-bargy of politicised negotiations.

For this Premier, no crisis is without a silver lining. Appealing for sympathy by describing the allegations as the toughest in his career and describing sleepless nights, he celebrated being cleared by announcing an all-party parliamentary committee to work with the Island Council.

Breaches of peace — Review

The Queensland Law Reform Commission is to review the Peace and Good Behaviour Act 1982, specifically in relation to conduct covered by breaches of the peace and enforcement issues. Submissions close 17 June. A discussion paper is available from <www.qlrc.qld.gov.au>.

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SOUTH AUSTRALIA

Children in State Care Commission of Inquiry meets with Aboriginal communities

Commissioner Ted Mullighan has begun meeting with Aboriginal communities in Adelaide and regional South Australia as part of the Children in State Care Commission of Inquiry's goal of reaching out to as many victims of sexual abuse as possible. 'There is a real need to get out of the city and talk to a lot of people who we believe would like to know this inquiry is open, and would want to make a submission about things that happened to them ... We want to encourage people to come forward, tell their story and perhaps start the recovery process ... ' said Commissioner Mullighan. The inquiry has also established an Aboriginal advisory committee to suggest culturally appropriate ways of encouraging Aboriginal people to tell their stories.

AMY ROBERTS is an archaeologist/research officer at Aboriginal Legal Rights Movement — Native Title Unit.

VICTORIA

Changes to the regulation of Victoria's energy industry

In December 2004 the Victorian Parliament passed the *Energy Legislation (Amendment) Act 2004* ('the Act'). The Act made a number of changes to the *Electricity Industry Act 2000* and the *Gas Industry Act 2001*, which govern the regulation of the Victorian energy industries. Amongst other matters, the Act inserted the following provisions:

- extending the 'consumer safety net' provisions for another three years (until 31 December 2007)
- prohibiting retailers from charging small retail customers a fee or charge for late payment of a bill
- giving the Victorian Government the power to prohibit or regulate exit or termination fees in contracts
- giving the Victorian Government the power to prohibit or regulate the implementation of pre-payment meters.

One of the most significant changes made was the insertion of a new s 40B into the *Electricity Industry Act* and s 48A into the *Gas Industry Act*, both of which provide for a new obligation on retailers to make 'wrongful disconnection payments' to customers in certain circumstances. This new obligation, which came into force on 8 December 2004, is stated to be a licence condition, making a payment obligatory if the retailer disconnects the supply of electricity or gas to the premises of a 'relevant customer' after failing to comply with the terms and conditions of the contract specifying the circumstances in which the supply of electricity or gas to those premises may be disconnected.

The amount of the payment is currently $250 for each whole day that supply is disconnected (with a pro rata amount payable for any part of a day disconnected) and must be paid as soon as practicable after reconnection of supply, either directly to the customer or by way of a rebate on the customer's bill. 'Relevant customers' are customers consuming less than a specified, fairly large, amount of electricity or gas and will therefore include most domestic customers. The new provisions also make clear that the payment does not affect any other rights that customers may have, for example to seek compensation for loss suffered as a result of being wrongfully disconnected. This suggests that the payments are intended not only to compensate consumers who have been wrongfully disconnected but to encourage retailer compliance with their regulatory obligations.

ANNA STEWART is the Deputy Director of the Consumer Law Centre Victoria.

Calls for end to discrimination against the homeless and unemployed

In late December 2004, the Attorney General, the Hon Rob Hulls MP, announced that the Victorian Government proposes to amend the law to prohibit discrimination on the basis that a person is homeless or unemployed. Such an amendment would constitute a world first in the development of legal protections for these vulnerable groups.

Discrimination against people who are homeless, unemployed or social security recipients is widespread but currently lawful across Victoria and Australia, particularly in the area of housing, health care and the provision of goods and services. Such a change is imperative to enable the homeless, the unemployed and social security recipients to enjoy the same freedom from unwarranted discrimination as people with homes, jobs and means.

In my view, there are five key reasons to specifically protect people from discrimination on the grounds of homelessness and unemployment:

1. Discrimination is a major cause of homelessness. Discrimination can systemically exclude people from housing, health care, education, employment and other basic necessities which can result in homelessness.
2. Discrimination can maintain a state of homelessness by diminishing self-esteem, independence and self-reliance. Pathways out of homelessness require the development of laws and policies which promote social inclusion and participation.
3. Discrimination can diminish well-being, cause ill health and exacerbate homelessness. According to the World Health Organization, 'discrimination violates one of the fundamental principles of human rights and often lies at the root of poor health status'. Among homeless people, discrimination can result in higher anxiety, depression, worsened quality of life, a sense of loss of control and difficulty coping.
4. Discrimination costs all of us money. Recent studies show that discrimination has significant social and economic costs. People are most likely to be productive members of society

when they are protected from discrimination and their rights to adequate housing and an adequate income are fulfilled.

5. The current failure of federal and state governments to prohibit discrimination on the basis of homelessness or unemployment is a violation of Australia's obligations under international human rights law. Both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, ratified by Australia almost 30 years ago, require that federal and state governments effectively protect people from discrimination, including on the ground of social status.

While detractors of anti-discrimination and equal opportunity legislation sometimes argue that minority groups — such as gays and lesbians, people with disabilities and Indigenous Australians — should not be afforded 'special' treatment or rights, this argument is misleading and misconceived. Anti-discrimination legislation across Australia does not confer any special benefits or rights. It does not require special or more favourable treatment; it merely tries to prevent less favourable treatment or the imposition of unreasonable practices, conditions or requirements.

Amendment of the *Equal Opportunity Act* is necessary to ensure recognition of the right of all Victorians, including people who are homeless or unemployed, to live free from discrimination.

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WESTERN AUSTRALIA

Cultural difference: the case of Stack v WA

The recent Western Australian Court of Criminal Appeal decision in *Stack v The State of Western Australia* [2004] WASCA 300 raises significant issues regarding the accommodation of cultural differences in court proceedings.

In an application seeking extension of time to appeal his conviction for manslaughter and unlawful wounding, the applicant contended inter alia that he had been denied a right to a fair trial by virtue of the trial judge's direction that defence counsel was not to ask leading questions of an Aboriginal witness, and by the judge's directions to the jury regarding their assessment of the credibility of Aboriginal witnesses.

During defence counsel's cross-examination of a young Aboriginal witness for the prosecution, the trial judge expressed the concern that 'responses to leading questions were not in any way answers to the questions as much as responses which are designed'. His Honour stated: 'I do not propose to allow any further questions to be put to him in leading form'. While the CCA unanimously accepted that the trial judge had a common law discretion to prevent questions being put in a form ordinarily permitted, Steytler and Templeman JJ held that there was insufficient basis for the direction, and grounds for concluding that a miscarriage of justice may have resulted from the judge's ruling.

As all people involved in the case were, in the words of Murray J, 'of Aboriginal descent, but by no means living in a traditional lifestyle' the trial judge had, at the commencement of the trial and in his final address, raised issues for the jury to consider when approaching and assessing the credibility of Aboriginal witnesses. His Honour clearly sought to make the jury aware of cultural differences and their manifestation in use and understanding of English, eye contact, silences, and responses to leading questions.

The trial judge stressed to the jury that whether the matters he had raised 'bore upon the evidence of any particular witness, and if so in what way and to what extent were for them to assess'. The CCA unanimously rejected the applicant's submission that the remarks wrongly invited the jury to 'regard as suspect answers given by Aboriginal witnesses to leading questions in the course of cross-examination' leading to a miscarriage of justice.

However, all three justices expressed disquiet at the trial judge's remarks being made in the absence of tendered evidence, and Murray J noted that 'the admissibility of evidence as to the use of English language by persons of Aboriginal descent and their understanding of what is meant by others who question them in English' remains unresolved.

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definitions of terrorism that cover many traditional forms of political dissent.[47] Nothing in the judgments in *Al-Kateb* would stand in the way of the establishment of Guantanamo Bay-style prison camps in Australia.

The plight of stateless detainees also throws into sharp relief the fundamental contradiction between national legal systems and the global transformation of social and economic life. The cases reveal the increasingly intolerable barrier to human freedom — including the basic democratic right to live and work wherever one chooses — represented by the continued existence of the nation–state system.[48]

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47. M Head, 'Another threat to democratic rights: ASIO detentions cloaked in secrecy' (2004) 29 *AltLJ* 127.

48. M Head, 'Refugees, Global Inequality and the Need for a New Concept of Global Citizenship' [2002] *Australian International Law Journal* 57.

Postscript

Immigration Minister Amanda Vanstone announced in March 2005 that the government may permit a 'small number' of long-term detainees to live, under strict surveillance, outside detention camps until they can be deported <www.minister.immi.gov.au/media_releases/media05/v05046.htm>.

Those released will be granted only an insecure bridging visa, to be called a Removal Pending Protection Visa, which the Minister may revoke at any time. To qualify, detainees must cease all legal action against the rejection of their asylum applications, effectively renouncing their claims to refugee status. Alternatively, they must have exhausted all avenues of tribunal and legal appeal, a process that can take years.