Briefs

PUBLIC SERVICE

No, Minister!

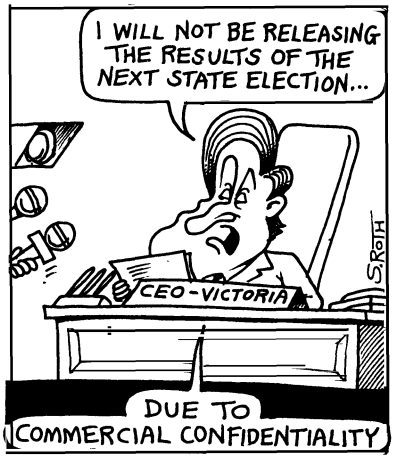
MARGARET THORNTON discusses the implications of changes to the public sector in Victoria.

The *Public Sector Management and Employment Act 1998* (Vic.) (the Act) recently became law in Victoria. It should not go unremarked because it represents yet another assault on public institutions by the Kennett Government. The list of casualties to date includes the abolition of the position of Commissioner for Equal Opportunity, the abolition of the Law Reform Commission, and the abolition of the Accident Compensation Tribunal, together with the somewhat less successful attempts to reduce the powers of the Director of Public Prosecutions and the Auditor-General.

Ostensibly, the Act sets out to restructure public employment but, in the process, it does much more than this. Devastating for all of us is the fact that public servants are no longer to be designated as such. Henceforth, they are to be known as 'employees'. Well, what is the difference you might ask? The point is that they will not be serving us, the public, but, through a direct line of authority, the government of the day. Within a stratified system, each tier of functionality is subject to supervision and review by a higher level, overseen by a Commissioner for Public Employment. The 'reform' is designed to effect a docile and compliant public service.

The Act not only removes security of tenure but allows 'employees' to be fired at the whim of an Agency Head. Indeed, sound advice, which might be unwelcome to a Minister's ears, could well result in dismissal if an Agency Head deemed that such advice fell under one of the enumerated grounds for termination, such as *inefficiency* or *incompetence* (s.31). The employment of Agency Heads and other executives will be governed by individual contracts of employment, the former being effected with the Public Employment Minister. The employment of an executive can be terminated by an Agency Head for *'any reason consistent with terms and conditions of his or her contract of employment'* [my italics] (s.32(1)). The Minister may remove an Agency Head for a similar reason. More chilling, but in line with Kennett Government practice, the Governor-in-Council may remove an Agency Head *'at any time'* [my italics] (s.32(2)). It, therefore, can be seen that all personnel are rendered quiescent on pain of instant dismissal within a degraded Public Service.

In this context, it might be noted that statutory authorities, or what is left of them, including the crucial positions of the Auditor-General, the Solicitor for Public Prosecutions and the Chief Commissioner of Police, all have the function of Agency Heads in relation to their respective offices (s.16(1)). It is apparent that the idea of a stalwart public service with at least a modicum of independence, which is one of the more positive aspects of Australia's British heritage, has been dealt a fatal blow.



The Objects section of the Act is illuminating. Lip service is paid to the rhetoric of 'service', 'merit' and 'integrity', all significant but malleable terms. However, it was s.3(a) that caught my eye. It states that one of the objects is to 'enable Victorian public sector employees to be brought under the general industrial framework established by the *Workplace Relations Act 1996* (Cth) *on a similar footing to employees in the private sector*' [my italics]. Leaving aside the vagaries of the *Workplace Relations Act,* the acceptance of private sector employment as the appropriate model for the public sector subverts the convention that the public sector should be a model for the private. What else can it mean other than that profits, economic rationality and public *non*-accountability, the paradigmatic values of business rather than service, are all-important.

New corporatism

The endeavour to make the public sector more like the private sector is another manifestation of the 'new' corporatism. The new corporatism is associated with a marked political shift to the right, the privatisation of public goods, globalisation, and a preoccupation with efficiency, economic rationalism and profits. The 'old' corporatism involved government, business, unions and other interest groups working (reasonably) harmoniously together within the liberal state. In the new corporatism, government is working hand-in-glove with the business sector, and all other interests have been rendered peripheral, as shown by the waterfront dispute.

Instead of accommodating the interests of workers and treating them with respect, it is now acceptable to manage and control them with the sole purpose of harnessing their productivity. The abandonment of formal EEO programs for women and designated groups in public authorities, which has been effected by the *Public Sector Reforms (Miscellaneous Amendments) Act 1998* (Vic.), a corollary of the Act, is an example of the jettisoning of the broad social justice agenda of egalitarianism and non-discrimination.

As a further manifestation of the 'new corporatism', the welfare state is rapidly contracting, and public goods are being privatised. The neoconservative phenomenon is by no means peculiar to Victoria, although this State has led the way for Australia. The new corporatism is a global phenomenon. It is marked in New Zealand, England, Canada and the United States. (While the United States has never really had a welfare state to contract, the features of the new corporatism are no less clearly in evidence).

The new corporatism has resulted in the impoverishment of the public sphere and civil society, where the values of

accountability, criticism and robust debate have conventionally been all-important, for they are basic to a democratic polity. I would therefore suggest that the Act's enfeeblement of the executive branch of government, through the measures outlined, is dangerous for democracy.

While the concept of 'private' undoubtedly has a place for all of us in certain aspects of our lives, it has no place in the public sphere. To endeavour to make the public sphere more like the private is misconceived. Instead of secrecy and a lack of scrutiny, democracy demands accountability and transparency. Victoria has already moved to the privatisation of utilities and prisons, while transport and a range of other authorities and services are being mooted.

New Zealand has gone so far as to consider privatising the police force. The implications of such a move are frightening, for the private carapace is very adept at immunising its practices under the rubric of commercial confidentiality. In its fervour for economic rationality, the New Zealand Government has, I understand, even ceased to collect statistics. What a model for Mr Kennett and like-minded Australian politicians to emulate! What need would there be for freedom of information legislation if there is no information? But even more ominous is the question: How can there be any semblance of freedom if there is no public sphere?

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HUMAN RIGHTS

Craig Minogue v Human Rights and Equal Opportunity Commission

JUDE McCULLOCH examines the human rights of prisoners incarcerated under State law.

Craig Minogue is serving a 28-year sentence over the 1986 Russell Street bombing. He is seeking an order from the Federal Court to compel the Human Rights and Equal Opportunity Commission (HREOC) to hear a complaint regarding alleged breaches of his human rights.[1] Minogue complains that he has been denied access to legal documents and restricted in his access to lawyers while he is a prisoner of HM Prison Barwon of the State of Victoria. HREOC has refused to hear his complaint on the basis that they have no jurisdiction to hear complaints from prisoners incarcerated under State law.[2] Minogue is attempting to prepare an appeal based on fresh evidence to take before the Court of Criminal Appeal. Legal aid is currently refused, so Minogue is facing the task of wading through the 12,000-page transcript of his trial, furnishing fresh evidence, and drawing out the legal arguments on his own.

Minogue complained to HREOC that his human rights were being breached by prison authorities because he was not afforded rights set out in various articles of the International Covenant on Civil and Political Rights (ICCPR). The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) contains the ICCPR in its second schedule, creates HREOC, and assigns to it the function of inquiring into and reporting to the responsible Minister on any act or practice that may be inconsistent with or contrary to human rights as declared in the scheduled instruments (s.11(1)(f)). Australia is a party to the ICCPR and, since 25 December 1991, a party to the First Optional Protocol to the Covenant which recognises the competence of the United Nations Human Rights Committee to receive and consider complaints from individuals who claim to be victims of violations of any of the rights set out in the covenant. The ICCPR is not, however, part of Australia's domestic law.

The provisions of the ICCPR relevant to Minogue's complaint provide that:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ... [Article 14.1]
>
> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equity:
>
> To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. [Article 14.3 (b)]
>
> Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. (Article 14.5).
>
> All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. [Article 26]

HREOC refused to entertain Minogue's complaint about alleged breaches of his human rights as set out in the ICCPR on the basis that he is a prisoner incarcerated under State law. In materials before the court Minogue submits that:

> the States do not have the right to deny me meaningful access to the Courts, or to prepare a defence for an action brought against me, or to prepare for an action I have initiated. The States do not have the right to deny me access to lawyers to seek advice and give instructions in relation to defending myself for an action brought against me, or to prepare or to initiate an action myself. These are the human rights I was claiming in my complaint to the HREOC, these are not rights that can be said to be rights over which the State's [sic] have a caveat.[3]

The human rights issues raised by the case are significant. According to HREOC'S 1996-97 annual report, 20% of all complaints to HREOC are from prisoners. HREOC will currently not hear human rights complaints from prisoners unless they are incarcerated under Commonwealth law. The overwhelming majority of prisoners are incarcerated under State laws. It is not surprising that prisoners frequently complain about breaches of their human rights. As Minogue points out:

> As an imprisoned person, whose every waking and sleeping moment is controlled by the State, I, more than any other member of the Australian society need the protection of HREOC... I am