

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?

Margaret Thornton teaches in the School of Law and Legal Studies, La Trobe University.

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

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.

Jude McCulloch is a community lawyer with Western Suburbs Legal Service.

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