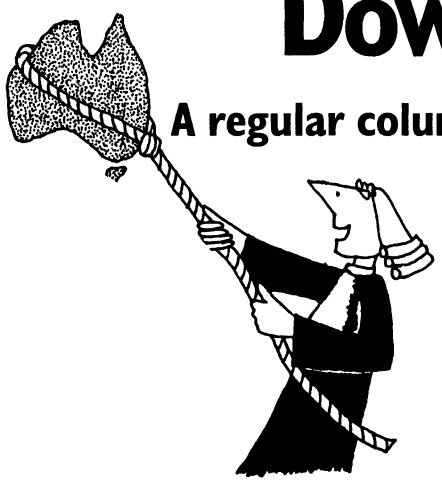
DownUnderAllOver

A regular column of developments around the country



Federal Developments

Through the back door — changes to unfair dismissal laws

On 18 December 1998 the Federal Government introduced changes to its unfair dismissal laws.

The new measures, introduced by regulation, will exclude new employees of businesses with less than 15 employees and require six months continuous service before any new employee can access the unfair dismissal provisions. Apprentices and trainees are exempted from the new measures.

The regulations purport to exclude certain classes of employees from applying for an unfair dismissal remedy under the *Workplace Relations Act 1996* (the Act). The regulations rely on the authority contained in s.170CC(1) of the Act which provides that the Governor-General may make regulations to exclude certain classes employees from specified provisions of Division 3 of Part VIA of the Act. Section 170CC(1)(b) of the Act provides that one of the classes which may be excluded by regulations is 'employees serving a period of probation or qualifying period'. The Act also provides that regulations may be made which exclude 'employees in relation to whom the operation of the provisions causes or would cause substantial problems because of ... the size ... of the undertakings in which they are employed' (s.170CC(1)(e)(ii)).

Excluded by new regulation 30BAA are employees who had not completed a period of at least six months continuous service at the time the employer gave the employee notice of termination, or at the time the employer terminated the employee's employment (whichever event occurs first). Certain events are disregarded in ascertaining continuous service, for example, a termination or suspension imposed by the employer to prevent the employee from completing a period of at least six months continuous service.

New regulation 30BAB also excludes a second class of employee: those employees in a business with no more than 15 employees at the time the employer gave notice of termination to the employee or the employer terminated the employee's employment (whichever occurs first). One of the government's rationales for the regulation, as outlined in the Explanatory Statement, is the 'substantial problems caused by the operation of unfair dismissal provisions' for small business. These include being 'less able to absorb the costs of responding to an application' including 'information and evidence gathering costs; costs for legal or other professional advice; and opportunity cost of lost time in seeking advice, attending settlement discussions and attending hearings'. No mention is made of the costs to the applicant in lodging an application (e.g. legal costs, filing fees and lost time) or the financial detriment an applicant could suffer after being dismissed.

To further deter applicants from making unfair dismissal claims, the government has increased the filing fee for lodging an unfair dismissal application from $50 to $100. While the government's stated reason for this increase is to prevent people from making frivolous or vexatious claims, the higher fee will probably also deter genuine claimants, particularly if an applicant has not been able to find subsequent employment and is suffering financial hardship.

The government initially attempted to introduce the controversial policy through regulation in 1997. The regulation was disallowed by the Senate on 26 June 1997. The government then introduced the Workplace Relations Amendment Bill 1997. This Bill was rejected twice by the Senate despite strong campaigning from the government.

The current regulations are the third attempt by the government to bring in the controversial changes. The Senate's view on the previously proposed amendments, as demonstrated by its voting patterns, was that the amendments were unacceptable. Introduction of this new regulation just prior to Parliament's summer recess represents a clear challenge by the executive to the legislature.

It is unclear what fate the recent regulation will face. The government has also introduced the *Workplace Relations Amendment (Unfair Dismissals) Bill 1998*, containing proposed amendments to the Act which more or less mirror the content of the new regulations. It will be interesting to observe what will happen to the 1998 Bill, which has been referred by the Senate to the Employment, Workplace Relations, Small Business and Education Legislation Committee, when debate resumes. • **BC**

[The Senate has recently disallowed the regulations: Ed.]

Regulating sexual slavery

In August 1998 this column included an article on proposed new offences relating to slavery and sexual servitude contained in the *Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1998*. Sue Mezenrath, Convenor of the Scarlet Alliance, the national association of sex worker organisations, has outlined the views of Australian sex workers regarding the proposals.

- Ms Mezenrath claims that proposed offences relating to slavery and sexual servitude will not fulfil the objective of punishing the agents who currently help to bring sex workers from a number of Asian countries to Australia. She argues that the provisions contained in the Bill discriminate against sex workers, and equate prostitution with issues of sexual exploitation and the exploitation of

labour; particularly migrant labour. It is the status of foreign sex workers as illegal workers, rather than the nature of the work, which allows them to be exploited by their employers.

- Ms Mezenrath recommends a series of proposals to protect migrant sex workers from exploitation. She argues that the rights of sex workers are better protected by legitimising the industry, and that a range of laws already exist under which agents of sex slavery can be prosecuted.
- Ms Mezenrath calls on the Commonwealth to encourage and support State and Territory governments in decriminalising all forms of prostitution, thereby improving working conditions for all sex workers, including migrant sex workers. The recognition of sex work as a legitimate occupation would also enable federal anti-discrimination laws to apply to workers in the sex industry (for example see *Discrimination Act 1991* (ACT)).
- Ms Mezenrath argues that the Commonwealth Government should review Australian labour laws (Commonwealth, State and Territory) regarding the exploitation of all labour to ensure compliance with International Labour Organisation (ILO) Conventions, including ILO Convention No. 122, ILO Convention No. 111, and ILO Convention No. 29.
- Ms Mezenrath argues that sex workers who come to Australia willingly should be able to apply for short-term working visas. This would afford sex workers a greater amount of protection, since they would be able to work in legitimate businesses, under legitimate circumstances, and so have the option to refuse to work under substandard conditions.
- Ms Mezenrath argues that sex workers already operate outside existing laws, and the proposed legislation should be abandoned as it will further drive migrant workers to the most marginal fringes of the sex industry. This will make it increasingly difficult for support and HIV organisations to supply them with information and safe sex supplies.
- Ms Mezenrath claims that the federal government has a number of avenues currently available to it to punish the agents, including prosecution under State and Territory laws for a range of relevant offences including the deprivation of liberty, obtaining financial advantage by deception, abduction, extortion, kidnapping, forgery, conspiracy and passport or migration offences.

In the past, however, Commonwealth, State and Territory laws have not proved effective to discourage the activity in Australia for a number of reasons. The sexual servitude industry in Australia is part of a significant and increasing international trade so that although existing laws may address some aspects of the domestic activity, they do not address the international conduct. The primary focus of relevant prostitution and migration offences is on the people subjected to trafficking, such as the illegal immigrants or sex workers, and not the traffickers. Although existing State and Territory laws on assault, false imprisonment and dishonesty offences, may apply to the offenders directly involved, the organisers and recruiters are less vulnerable to prosecution because their involvement is remote from the exploitative prostitution. For this reason, the offences are targeted at those who would force sex workers into exploitative conditions.

Josephine Brook

Josephine Brook is a Canberra lawyer.

The full text of Ms Mezenrath's article appears in the March 1997 issue of *HIV/AIDS Legal Link.*

ACT

The ACT Government has introduced legislation which would effectively remove compensation for criminal injuries from the vast majority of people who are now eligible for that compensation. The proposal is to remove the present provision of awards for 'pain and suffering' and replace it with limited free counselling or a lump sum award of $30,000 for people who have the most serious form of injuries. There is effectively nothing in between.

The proposal allows for a limited number of visits to a counselling service contracted by the government to provide this service. There is no provision for payment to a psychologist or other counsellor of the victim's own choosing. Further, the award of $30,000 can only be made when the contracted counselling service attests that the victim has requested services from that counselling service which the service is unable to provide.

The problems with this legislation are obvious. By the time most people apply for Criminal Injuries Compensation they have usually made their own arrangements for counselling with a person of their own choosing, if indeed they wish counselling at all. In many cases, financial compensation is the only appropriate way to deal with the claim and at the present time there is a sliding scale up to $50,000. The sorts of cases which presently attract the maximum award of $50,000 tend to be cases where the victim has suffered extreme psychiatric symptoms as a result of the criminal action and my experience has been that this tends to apply in incest cases where the victim suffered many years of abuse. Under the proposed legislation, those people would be eligible only for very limited (and possibly inappropriate) counselling. It appears that the only people who would ever be eligible for the one-off award of $30,000 (there is no sliding scale) would be people who have suffered very serious, permanent, physical disabilities so that they are no longer able to function in the community. In those circumstances, $30,000 would appear to be grossly inadequate, in any event.

This legislation was introduced without recourse to any community consultation, other than with a local victims support group. It seems incredible that any agency dealing with the victims of crime would support this legislation as it means the very vast majority of people affected by crime would no longer be entitled to compensation. The legislation — after a great deal of lobbying and adverse publicity — has been referred to a committee and will be considered later in 1999.

Jennifer Saunders

Jennifer Saunders is President, ACT Council for Civil Liberties

NSW

Drug Court opens in NSW

Australia's first Drug Court opened on 8 February in a courtroom in Parramatta. NSW Premier Carr indicated it was expected to aid in solving a problem that has swamped the courts, defeated the police, and costs taxpayers hundreds of millions of dollars. Heroin, cheaper and purer, is flooding NSW.

Studies indicate a large increase in consequent thefts, armed robberies and burglaries. In the current state election campaign featuring a strong 'law 'n order' competition, Carr must be pleased with this initiative, committing $12 million to the Court and $5 million to related rehabilitation services.

District Court judge, Gay Murrell, first judge of the Drug Court, formerly impressed as the first environmental prosecutor of the EPA in 1992. There she did similar path-breaking work requiring an innovative, multi-discipline approach.

The court was inspired by the US experience. It is said 500 such courts have opened since the first in Miami in 1989. Reportedly, crime rates have been dramatically cut where such courts operate.

The initiative parallels Victoria's recent Cannabis Program and Drug Diversion Pilot in attempting to re-orient the criminal justice system — at least regarding the out-of-control drug problem — from heavy law enforcement to harm minimisation through a carrot and stick approach. If druggies show commitment to rehabilitation, they will be assisted through de-toxification and directed from the expensive, brutal and ineffective cycle of arrest and imprisonment. • **GB**

Northern Territory

The question of what in fact constitutes 'racial discrimination' was raised in the North Territory Anti-Discrimination complaint of *Colin Nichaloff v Rattle 'n Hum (NT) Pty Ltd* (unreported, 29-30 November 1998) that was settled by agreement. The complaint raises an important issue of whether anti-discrimination in its guises exists only in overt and express situations or can it be found by inference or implication?

The racial discrimination complaint arose from several incidents that occurred at a Darwin nightclub where the complainant, an Aboriginal male, was refused entry by 'bouncers' on the ground that only members and 'back-packer' tourists could be admitted. It was revealed that it was the practice of Darwin nightclub bouncers to use ostensible non-racial excuses for refusal of entry to members of the public as a mechanism to avoid potential conflicts or violence.

The complainant had observed on one such refusal of entry that a group of non-Aboriginal people had been admitted without their status as members or tourists being ascertained. The complainant had also been unsuccessful in obtaining membership status to the nightclub after repeated attempts.

The complainant was required to establish that his refusal of entry and failure to obtain membership had in fact been discriminatory. The existing law in s.19(1)(a) of the *Anti-Discrimination Act 1996* (NT) prohibits discrimination against people on the basis of an attribute that includes race.

The Act in s.20(1) defines 'discrimination' as to mean any:

> (a) Distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity; and
>
> (b) harassment on the basis of an attribute; in an area of activity referred to in part 4.

It was alleged by the complainant that he had been denied under s. 28(d) of the Act the goods, services, and facilities of the night-club on the basis of an attribute being his Aboriginal race.

Section 47(1)(a) of the Act provides an exemption to the scope of the legislation for 'private clubs' which may restrict membership on the basis of an attribute in order to protect a minority culture. It was argued that the restriction of people admitted to members who were pre-dominantly non-indigenous and backpacker tourists from Europe and America provided the complainant with a perception that Aboriginals and other people of colour were to be excluded from the nightclub.

The respondent contended that there had never existed an overt policy of racial discrimination against Aboriginals in entry to its nightclub. However s.20(3) of the Act provides that with any incident of discrimination it is not necessary for the attribute of race to be the sole or dominant ground for the less favourable treatment.

Therefore, racial discrimination may arise where any provider of services, goods and facilities — including nightclubs — refuses entry by means of ostensible non-racial excuses that infer a distinction, restriction, exclusion or preference where race is a significant component. • **DW**

Queensland

Enlightened Young Liberals

Queensland politics continues to astound. While the rest of us had pretty much fully recovered from the silly season, our wannabe politicians were concerning themselves with a range of very trivial matters. In mid-January, the Queensland Young Liberals held their State Conference. Our aspiring conservative pollies debated some extraordinary motions including that women should be liable to a fine if they breast-feed their child or children in a public place. The conference also considered whether state politicians should wear Star Trek-type uniforms when in the parliamentary chamber. All I can say is 'How embarrassing!'.

While former State Liberal Leader, Joan Sheldon, was quick to highlight and criticise the childishness of the motions, some of her colleagues remained conspicuously quiet.

One Nation imploding

Queensland politics in 1998 was quite obviously dominated by the emergence of Pauline Hanson's One Nation Party. It now appears that 1999 may see the self-destruction of the same party. Three of the ten remaining One Nation State MPs have resigned from the party in early February and more appear likely to follow. The MPs who have resigned have claimed that the One Nation Party is run as a dictatorship by Hanson and her fellow party directors, David Oldfield and David Ettridge.

No doubt, there will have been further significant developments in relation to this matter before this issue of the *Alt.LJ* finds its way into your mailbox. The next significant issue in the turbulent life and times of One Nation will probably be whether the One Nation dissenters join the Queensland National Party. If the Nationals accept these potential new MPs, this will quickly lead to major tensions with the Nationals' coalition minor partner, the Liberals.

Problems with legal costs complaints

An investigation by the *Courier-Mail* has revealed that two of the 30 cost assessors used by Queensland's

Solicitors Complaints Tribunal to determine disputes regarding legal bills are solicitors who have themselves been previously found to have overcharged clients. The Complaints Tribunal process replaced the system of taxation of costs in the Supreme Court and was introduced only eight months ago. With the Beattie Government currently reviewing regulation of the legal profession, there will no doubt be further developments on this issue. • **JG**

South Australia

Don Dunstan

Don Dunstan died on 6 February 1999 in Norwood. Where do you begin to assess his contribution to Australian society? Although he was very much a South Australian his government in the 1970s was a role model for reform everywhere. The South Australian editorials have claimed he beat out the path for Whitlam to follow. As a law student in Melbourne in the late 1970s it was over the border to South Australia that I looked for reformist inspiration.

Aboriginal land rights, electoral justice, consumer protection reform, enlightened urban planning, homosexual law reform, industrial democracy ... the list of causes he championed seems endless. His contribution to the arts in this State was immense.

When I moved to Adelaide seven years ago it soon became apparent that although it was over a decade since he left office, his influence continued. He was still an active campaigner for social justice — amongst his many activities he spoke at rallies, wrote a regular column in the *Adelaide Review* and, of course, in what has already become a piece of local history gave one of the Whitlam lectures last year in front of 5000 people at the Adelaide Convention Centre — 5000 people paying to hear a political speech about the excesses of economic rationalism and a strategy for change. Has that ever occurred before?

In his last interview screened on Friday he said that he hoped his death would not be seen as a time for nostalgia. The causes he championed and the agenda he set is as relevant — perhaps more relevant — than when he was Premier. So many here have lost a friend and ally. We must mourn his passing. We must ensure his agenda lives on. • **BS**

Victoria

The Commonwealth and State Attorneys-General have released the private consultants report into the Review of Victoria's Community Legal Centres Funding Program. The report recommends widespread changes to the program which provides funding to 30 of Victoria's Community Legal Centres, plus the peak organisation, the Federation of Community Legal Centres Secretariat.

The recommendations include amalgamating 19 metropolitan generalist CLCs into four regions, each region with just one legal centre, and several access points where some existing legal centres are currently located. The effect is to remove legal centres from community control and management, and place them under the control of one single regional management committee. In addition, the report recommends that legal centres should have a focus on core client services (i.e. casework delivery), that models for output-based funding be developed, and that the Federation of Community Legal Centres Secretariat be restructured. As part of this restructure, it is recommended that the activities of Federation law reform working groups be funded only on a project by project basis.

The report also recommends the establishment of two new legal centres in rural regions which are currently not serviced by legal centres.

The Federation of Community Legal Centres has attacked the report as being methodologically flawed, and factually incorrect. Whilst agreeing that there is a desperate need for legal centres to be established in regions not currently serviced by a CLC, it has stated that achieving this by rationalising services in metropolitan areas, and restricting access to these centres will result in further denial of desperately needed legal services to disadvantaged communities in metropolitan areas. In addition, there is a major risk that removing centres from community control will result in the loss of large numbers of community volunteers, on whose commitment, much of the work of CLCs rely. Currently, over 700 people across Victoria volunteer their services at their local CLC.

The Federation is also concerned that the community legal education and law reform activities of CLCs are under considerable threat as a result of the proposed changes, and that the recommendations provide the Government with the weapon by which it can attempt to silence the Federation in its law reform advocacy role.

The government has established an Implementation Advisory Group to report, within six months, on appropriate strategies to implement the recommendations of the report. The Federation has concerns about the consultation process to be employed in this stage of consideration, given the inadequate consultation with CLCs that has occurred to date.

Louis Schetzer

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DownUnderAllOver was compiled by Alt.LJ committee members Gill Boehringer, Belinda Carman, Jeff Giddings, Brian Simpson, David Woodroffe together with invited writers listed under their contribution above.