DownUnderAllOver
Developments around Australia

FEDERAL DEVELOPMENTS

A new twist in the mandatory detention of refugees

In a new twist to its refugee policy, the Howard government announced in March that it would permit a select handful of long-term detainees to live, under strict surveillance, outside the country's notorious detention camps until they can be deported <www.minister.immi.gov.au/media_releases/media05/v05046.htm>. The media generally portrayed the move as a tentative softening of the government's mandatory detention regime, which was first instituted by the previous Labor administration in 1992. But the creation of a minor loophole only highlights the inhumanity and anti-democratic character of the entire system, and the government's determination to retain it.

Hundreds of men, women and children will remain behind razor wire, mostly in remote desert concentration camps, despite having been convicted of no crime. They will continue to be incarcerated simply for fleeing persecution and seeking refuge without official permission. All that will change is that Immigration Minister Amanda Vanstone will have the power to release a few of those who have been stuck in a legal no-man's land for years because no other country will allow them entry.

Vanstone emphasised that the decision would affect only 'a small number' of the rejected refugee applicants, about 115 of whom have remained imprisoned for over three years. The longest-serving prisoner, Peter Qasim, a Kashmiri who has been locked up for over six years, would not qualify, she declared, because he had displayed a 'lack of cooperation' with immigration officials <www.abc.net.au/insiders/content/2005/s1337030.htm>.

In many cases, the detainees have been denied refugee status on the spurious ground that they can avoid persecution in their home country by living in a 'safe' third country. Efforts to deport them have been unsuccessful, however, precisely because the governments of these allegedly safe states have refused them entry. Peter Qasim, for example, has been trapped in this Catch-22 legal black hole because the government of India, which Canberra insists could offer him a safe haven, has refused to accept him. The new visa will not cover the 54 Afghani and Iraqi detainees still stranded on the remote Pacific island of Nauru, where they were transported by Australian naval ships in 2001 after being intercepted in the seas between Indonesia and Australia.

In a media release on May 13, Vanstone further revealed that detainees could not apply for the new visa unless she first invited them to do so. According to the media release: 'The Minister said there was no formal application process for the new visa and access is dependent on an invitation from the Minister and eligibility against the criteria for the visa, which includes character and security checks' <www.minister.immi.gov.au/media_releases/media05/v05058.htm>. Vanstone's remarks point to the arbitrary nature of the new powers she will exercise.

To qualify for temporary release, detainees must cease all legal action against the government's rejection of their asylum applications, effectively renouncing their claims to refugee status and abandoning any prospect of gaining permanent residency or citizenship in Australia. Alternatively, they must have exhausted all avenues of tribunal and legal appeal, a process that can take years. Those released will be granted only an insecure bridging visa, to be called a Removal Pending Protection Visa, which Vanstone may revoke at any time. They must sign contracts agreeing to cooperate in their removal from Australia when deported, and to report weekly or monthly to immigration authorities. They will have no rights to be reunited with their families or to leave the country temporarily for purposes such as funerals. They will have access to a limited range of welfare, medical and education programs, in return for which they will be subjected to 'mutual obligation' requirements to find work. This will most likely mean working in insecure, cheap labour sweatshop conditions, as employers are unlikely to give decent, well-paying jobs to workers who can be whisked out of the country at any moment.

By introducing the new visa category by regulations, without amending the *Migration Act 1958* (Cth), the government has retained the virtually unlimited power of executive detention that the High Court sanctioned in three landmark decisions handed down last August. In the lead-up to last year's federal election, the government went to the High Court to overrule lower court findings that it was unconstitutional to detain asylum seekers indefinitely, perhaps for life, when there were no realistic prospects that they could be deported. The High Court upheld the government's appeals, overriding previous decisions that offered some protection against arbitrary detention.

In *Al-Kateb* [2004] HCA 37 and *Al Khafaji* [2004] HCA 38, by a four-to-three majority, the High Court ruled that the government could use the 'aliens' power (s 51(xix) of the *Constitution*) to impose detention for as long as the government deemed it necessary. The judges held that, even if deportation were not possible, indefinite detention did not unconstitutionally impose punishment without trial. In the third case of *Behrooz* [2004] HCA 36, by six-to-one, the High Court declared that the conditions of incarceration in the country's remote camps — no matter how harsh and inhumane — could not provide a defence to a charge of escaping from immigration detention. These decisions, which arguably considerably

extend the power of the executive government to detain people without trial, have generated serious concerns about the impact of these rulings on basic democratic rights and civil liberties. Such concerns have been registered in the *Alternative Law Journal*, with attention being drawn to the ominous implications of these decisions for the 'war on terrorism' ((2004) 29 *AltLJ* 222; (2004) 29 *AltLJ* 228; (2004) 29 *AltLJ* 248; (2005) 30 *AltLJ* 63). Indeed, in the light of these High Court rulings, the question has become: What, if any, limits exist on executive detention without trial?

In effect, the new bridging visas will constitute a minor safety valve for the continued exercise of that extraordinary power. The government has clung to this orientation despite mounting public opposition to mandatory detention, rekindled by recent shocking cases — including that of Cornelia Rau, an Australian permanent resident who was wrongfully detained for 10 months as a suspected 'unlawful non-citizen' — and Vanstone's subsequent announcement that more than 200 other instances of wrongful immigration detention have been referred to former Australian Federal Police Commissioner Mick Palmer for investigation. Far from pointing to any softening of the refugee detention regime, the latest cynical twist in policy perpetuates a barbaric system.

MICHAEL HEAD teaches law at the University of Western Sydney and is a regular contributor to the *World Socialist Web Site*, where an earlier version of this note first appeared.

NEW SOUTH WALES

New draft regulation for Dust Diseases Tribunal

In New South Wales, the specialist Dust Diseases Tribunal determines compensation claims made by people suffering from asbestos-related diseases (that are not related to workers compensation). A claimant is required to establish certain elements before being entitled to make a claim in this jurisdiction. In summary, these are that the claimant suffers from a dust-related condition or disease, that the disease was attributable (wholly or partly) to the breach of a duty owed by the defendant to the claimant and that the claimant suffered damage or loss as a result.

Submissions have now closed for the draft *Dust Diseases Amendment Regulation* and the draft *Dust Diseases (Standard Presumptions — Appointment) Order 2005*. The NSW government released these drafts in response to the Report prepared from its Review of Legal and Administrative Costs in Dust Diseases Compensation Claims and in the wake of recent James Hardie controversies. The stated aim of the Review was to consider areas for reform in the way claims are litigated, in particular, more efficient processes for their handling and resolution, as well as reducing costs for litigants. Among other things, the draft Regulation puts in place a framework for a new claims resolution process (for asbestos claims only).

Although the Review considered alternative means of commencing such claims, it was decided that the current system of commencement by Statement of Claim would be preserved. However, at the same time, claimants will also file a Statement of Particulars which includes expert reports and other documentary evidence. One of the conclusions of the Review was that an early exchange of information and evidence encourages early settlement, and in turn reduces parties' costs. At present, according to the government's issues paper, although approximately 93% of claims settle, often settlement does not occur until after the hearing has commenced. The Statement of Particulars seems to be directed towards promoting early settlement.

A defendant is required to prepare a Reply which will include details of facts that are admitted or denied, facts for which it requires further information, and any documents relied on for contentious issues. Defendants are also required to join any other defendants to the proceedings as soon as possible, to ensure that claims are progressed expediently.

Other matters covered by the Regulation include costs penalties in certain circumstances for failing to settle, and compulsory mediation, which the claimant is required to attend unless he or she is incapacitated.

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NORTHERN TERRITORY

Community court

A six-month pilot program of the Northern Territory Community Court commenced on 29 April 2005. Based on the North American 'Real Justice' model already adopted in many parts of Australia, it is hoped the Court will evolve to reflect the needs of Northern Territorians.

The Community Court aims to make the court experience more meaningful to offenders, and therefore more effective. The Northern Territory Court is aimed primarily at Aboriginal participants, although it is hoped that over time it will expand to encompass non-Aboriginal cultural groups. The establishment of the Court was instigated by the Yili Reung Council, an Aboriginal council which covers the Darwin region. One of the goals of the Community Court is to restore Aboriginal cultural values — to that end the Court will acknowledge traditional law, and elders will be encouraged to advocate traditional ceremonial rehabilitation, particularly for young offenders.

The Court has the same jurisdiction as the Court of Summary Jurisdiction (CSJ) in the Northern Territory. When a plea of guilty is entered in the CSJ, the offender is then referred to the Community Court.

The Community Court uses a round-table format, and a coordinator determines who will be appropriate community participants. Both the offender and victim are entitled to have support persons with them, and the judicial officer is supported by relevant community leaders. If possible, elders from the offender's community will attend the Court in order to admonish and bring shame on the offender. Victims are encouraged to participate in the process, and are entitled to have their views on sentencing expressed. It is hoped that victims will also feel a sense of justice from the round-table discussion.

The initial implementation has been positive, with use of the Court largely offender driven. However, it has been difficult to obtain appropriately qualified interpreters, and the Court is located only in Darwin. To date, no 'bush courts' (courts which sit once a month in remote Aboriginal communities) have been delegated as Community Courts.

Another anticipated problem relates to integrating Community Court sentences with supervision by Correctional Services. Post-release rehabilitation can include attending ceremonial obligations. As these are sex-segregated, intensely private

meetings within cultural sub-groups, monitoring the success of these ceremonies will be difficult. It may mean that the only real method of monitoring the success of a participant is through lack of recidivism. As the program develops, it is anticipated that different types of supervision orders will be introduced, to be monitored either by Correctional Services or community members.

RUTH BREBNER and **CAROLINE HESKE** are lawyers with the Office of the Director of Public Prosecutions in the Northern Territory.

QUEENSLAND

Street smart law for Queensland's homeless

Surviving on the streets is tough enough but imagine not only having to struggle for basic priorities like food, shelter and safety but also negotiating the legal system on your own.

A new Legal Aid Queensland project is addressing this issue. The Homelessness and Street Offences Project provides representation to homeless people in Brisbane's Magistrates Courts.

For the purposes of the project 'homeless' includes:

- living on the streets, in a car or in a squat
- staying in crisis/emergency accommodation
- living in a hostel
- living temporarily with friends/family ('couch surfing')
- living in a boarding house.

The project is researching the sorts of offences homeless people are charged with and how they are dealt with by the courts. One of the project's aims is to look at how criminalisation of homeless people charged on minor offences for anti-social behaviour can be prevented.

The project is due to finish at the end of June 2005 and has provided representation to over 50 homeless people in the Brisbane Magistrates Courts. So far, the project has identified a number of trends, including the fact that about 70% of homeless clients have mental health issues and the anti-social behaviour exhibited by many is a result of their impaired decision-making capabilities. A significant failure to appear rate has also been evident, usually because the homeless person has other priorities to worry about like finding food and shelter and staying safe.

The stories of clients charged with minor offences after sleeping rough clearly demonstrates the need to reform the way the Queensland legal system, from the police to the courts, deals with homeless people. One couple was charged with trespass after being found sleeping in a fire exit stairwell in an inner city building. They had nowhere else to stay. A similar case involved a young girl forced to sleep in a doorway. The police were called and she tried to run away. She was charged with public nuisance and obstructing police. The project officer is currently negotiating with the police on behalf of these clients to have their charges dropped.

Although the project is still underway, a number of likely recommendations will be put forward when it ends in June. One involves the courts considering alternative sentencing options to simple fines. And let's face it, for a homeless person, a $200 fine might as well be $200,000. There is no way they are going to be able to pay it back. The project will culminate in June 2005 with a community forum, and the completion of a report analysing the data collected and outlining the overall experience of defendants. Everyone involved with the project has been encouraged by the support received from police, magistracy, social workers and support groups.

KAY ROSOLEN and **YASMIN GUNN** are solicitors with Legal Aid Queensland

TASMANIA

Further family violence laws controversy

Supreme Court Chief Justice Peter Underwood has publicly criticised the new *Family Violence Act 2004* in a published judgment. His comments were made during a bail application by a man accused of assaulting his former partner. Chief Justice Underwood said that the legislation was contrary to the principles of natural justice because the government was not required to release documents to the accused setting out the basis of the allegations against him.

He also said that he would have granted the man bail, but was not allowed to under s 12 of the Act. Section 12 provides that a person charged with a family violence offence is not to be granted bail unless the judge is satisfied that this would not adversely affect the safety, wellbeing and interests of an affected person. This section has previously been criticised by both the Law Society of Tasmania and the Director of Public Prosecutions because it appears to undermine the presumption of innocence. Chief Justice Underwood commented that 'the difficulty about all this is that the onus is on the applicant to satisfy me that his release on bail will not be likely to adversely affect the safety, wellbeing and interests of the complainant'.

The Chief Justice also ridiculed the requirement to take into account a safety audit of the alleged victim's home in deciding whether or not the accused person could be trusted on bail.

Attorney General Judy Jackson's response was that there would be no review of the legislation, seemingly contradicting a statement she made a few days earlier suggesting that she had asked the Department of Justice to make any changes to ensure that the Act was working properly.

Criticisms of Tasmania's gun laws

On 24 May, Auditor General Mike Blake tabled his report on gun control in the Tasmanian Parliament. His report found that access to guns in Tasmania had been restricted since 1996 and that there were fewer guns in the community. This appears to explain the fact that gun-related crimes and accidental injuries have also dropped over this period. However, the report acknowledges the disturbing fact that Tasmanian police did not appear to be able to meet the legislative requirement to assess the mental condition of licence applicants.

National Coalition for Gun Control chairman Roland Browne said the report was timely, alleging that the State government intended to substantially reduce the protections currently found in the legislation.

The right to be nude in Tasmania

Tasmanian clean-skin wine retailer Nude Wine has reportedly received correspondence from Tasmanian juice-maker Nudie demanding that it stop using the word nude in its name. Nudie claims that the use of the word nude infringes its trademark and is misleading and deceptive conduct under the *Trade Practices*

Act. If the juice company is successful, local nudist groups may need to consider new names for their organisations. Tasmanian 'clothes-free' colonies?

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VICTORIA

Massive woodchipper sues greenies

Gunns, one of the world's biggest exporters of woodchips and controller of 85% of the Tasmanian timber industry, has lodged a 200-odd-page writ in the Victorian Supreme Court against 20 defendants seeking damages of almost $6.3 million. Among those sued are Australian Green's leader Bob Brown, environmental activists, film makers, doctors and grandmothers. Gunns accuses some of them of hindering the clearfelling process by blocking access roads in the Tasmanian forests as well as causing damage to the company's business interests — by public criticism on a national and international level, such as writing to the company's primary customers in Japan.

Most observers agree that the real motivation behind the suit is to silence criticism. On 23 February 2005, noted international ENGOs, Friends of the Earth International, Greenpeace International, the Rainforest Action Network and the Sierra Club issued a joint press release unreservedly condemning the action by Gunns as 'shameful' and 'a classic example of a corporation deliberately attempting to intimidate members of civil society engaged in peaceful opposition to environmental abuse. As such, this law suit represents nothing less than a direct assault on democracy and free speech which is of great concern to civil society movements worldwide'.

A significant number of lawyers have offered their services pro bono to the defendants. One of the lead barristers in the action, is Mark Dreyfus QC, who described the claim as 'very long, confused, muddled, deficient in details and parts of it should be struck out'. The defendants recently won round one when presiding judge, Mr Justice Bongiorno, rejected Gunns' application for an extension on the next hearing date. Gunns' barrister, Mark Irving, had to apologise to the court for the company's failure to meet a deadline to provide information to the defandants. Irving said he was embarrassed (I would be too if I was acting for Gunns). The case will return to court on 4 July as planned, at which time the defandants can ask to have the case struck out. Gunns was ordered to pay defandants' costs for the June proceedings. The trial is expected to run for at least a year.

BARRY WHITE is a Melbourne lawyer.

Human rights in Victoria

As foreshadowed in the Attorney General's *Justice Statement* in May 2004, the Victorian government has recently commenced a consultation process about strategies for the promotion, protection and realisation of human rights in Victoria.

The consultation is being undertaken by a panel of 'eminent persons' which comprises Professor George Williams (Director, Gilbert + Tobin Centre of Public Law at the University of NSW), Rhonda Galbally (CEO, Our Community), Andrew Gaze (Melbourne Tigers basketballer) and Haddon Storey QC (former Victorian Liberal Minister).

A discussion paper, which aims to inform and guide the consultation process,was released on 1 June 2005 and is available at <www.justice.vic.gov.au/humanrights>. While a 'Statement of Intent' released by the government in April 2005 outlines the government's preferred model for human rights protection (namely, legislation based on the *Human Rights Act 2004* (ACT) which does not confer directly enforceable rights but instead provides a framework within which rights are considered in the design and delivery of law and policy), the community is not bound by the Statement in its input to the consultation process.

Accordingly, the process will provide an important opportunity for Victorians to have a say about:

- the fundamental importance, inalienability and indivisibility of all civil, political, economic, social and cultural rights
- the need to constitutionally or legislatively entrench human rights in Victoria through a Bill of Rights
- the responsibility of government, across all levels and arms of government, in relation to respecting, protecting and fulfilling human rights
- enforcement mechanisms and the availability of effective remedies where human rights are not fully respected, protected or fulfilled.

Submissions to the consultation process are due by 1 August 2005. The panel of eminent persons will report to government by 30 November 2005. Don't pass up this important opportunity; have your say!

PHILIP LYNCH is Coordinator of the PILCH Homeless Persons' Legal Clinic.

WESTERN AUSTRALIA

One vote one value comes to WA — but not to the Upper House

Persistence has paid off for Western Australian Attorney General Jim McGinty. He was Leader of the Opposition in the mid 1990s when Western Australian electoral laws resulted in one MP representing 9135 constituents and another representing 26 480. A similar disparity existed in the required quotas for seats in the Upper House. McGinty failed to persuade the majority of the High Court that any constitutional principle was infringed by an electoral law that facilitated this gerrymander: *McGinty v Western Australia* (1996) 186 CLR 140.

Five years later McGinty found himself as Attorney General in the first Gallop government. In 2001, he secured the passage of electoral reform Bills. However, the Bills failed to become law after the majority of the High Court ruled that the constitutionally entrenched 'manner and form' requirements for amendments to electoral laws had not been followed: *Attorney General (WA) v Marquet* [2003] HCA 67.

In February 2005 the second Gallop government was elected. Once again, Attorney General McGinty steered the electoral reform Bills through the Parliament as a matter of priority. Compromises were made to secure the necessary votes in the Upper House. The changes to the Lower House are significant. Boundaries will be re-drawn so as to ensure each electorate comprises the same number of voters 'plus or minus' 10% with a special 'plus or minus' 20% rule for seats larger than 100 000 square kilometres. In practice, it is likely that five seats will end up with around 17 000 voters and the remaining 53 seats will contain around 21 000.

The changes to the Upper House will result in the State being divided into six regions with each region represented by six members. However, only three of the regions are to be in and around Perth. My 'back of the envelope' calculations suggest that an Upper House member from Port Hedland will represent as few as 11 000 constituents compared to a Perth colleague who will represent over 50 000 constituents. The result is that the current level of malapportionment in the Upper House may actually get worse.

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Long wait over as 44-year-old murder conviction quashed

Western Australia's Court of Criminal Appeal made legal history on 1 April 2005 when it overturned Darryl Beamish's conviction in 1961 for the brutal murder of 22-year-old Perth socialite Jillian Brewer: *Beamish v R* [2005] WASCA 62. It was the longest period between conviction and successful appeal in Western Australian history.

At the time of the murder, Beamish was a 19-year-old deaf-mute who had previously been convicted for aggravated assaults on young girls and theft. In the original trial, the case against Beamish centred on his detailed confessions to the murder. Beamish was originally sentenced to death, but the sentence was later commuted to life-imprisonment.

In the 2005 Court of Criminal Appeal decision, Justices Steytler, McLure and Wheeler admitted fresh evidence of a confession made in 1964 by serial killer Eric Edgar Cooke just 15 minutes before he was hanged. The evidence consisted of a written statement made by prison chaplain George Jenkins, at the time, that referred to Cooke's repeated admissions to the murder of Brewer. Cooke was the last person executed in Western Australia.

The 2005 appeal was the sixth appeal against Beamish's conviction. In 1961, the Court of Criminal Appeal dismissed Beamish's first appeal and his application for special leave to the High Court later that year was also dismissed. Following Cooke's confession, Beamish appealed again in 1964. The 1964 appeal was also unsuccessful, as were his subsequent attempts to seek special leave to the High Court and Privy Council. Beamish served his sentence and was finally released in 1977.

In its 2005 decision, the Court of Criminal Appeal allowed the appeal on the grounds that had Cooke's gallows confession been available to the original jury, there would have been a significant possibility of acquittal.

Beamish's successful appeal follows that of John Button who was also imprisoned for a murder that Cooke subsequently confessed to. In February 2002 the Court of Criminal Appeal overturned Button's 1963 conviction for the manslaughter of his girlfriend Rosemary Anderson.

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'Inciting Hatred' continued from page 122

religious vilification laws was illustrated in a response to such proposed legislation in Western Australia, which criticised the proposed laws as favouring Muslims and protecting the Islamic religion over Christianity.[29]

Conclusion

This article's discussion of the impact of religious vilification suggests that such behaviour should not be seen as a criticism of a person's religious beliefs, but rather ought to be recognised as a violent and harmful form of abuse that needs to be addressed. In dealing with the problem of religious hate speech, the law can play a vital role by denouncing the acceptability of such behaviour, while empowering marginalised groups. Legislating against religious vilification can also provide the motivation for the use of non-legal strategies. The use of the law to tackle religious vilification has been under utilised. The absence of religious vilification legislation can be attributed to the failure to recognise the very existence of a religious vilification problem. The assumption that religious hate speech is merely a form of criticism has tended to minimise and trivialise the extensive damage that hate speech inflicts. The questionable perception of incitement of religious hate speech as a form of religious debate suggests a need to promote a wider appreciation of the experiences of victims of religious vilification. A greater understanding of the impact hate speech has on its victims is necessary in order to provide the motivation to address the problem of religious vilification and to inform the creation of suitable legal and non-legal strategies.

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29. Christian Growth Ministries Inc, above n 24, 5. There has also been a heated reaction to a recent decision under the Victorian Legislation. See <http://theage.com.au/articles/2005/06/22/1119321771552.html> and <http://www.catchthefire.com.au/courtupdate27_decisions,reponses,etc.html>.

'Sport And The Law' continued from page 137

hard-to-see pain in tackles. Players from several clubs had grumbled about the tactic for some time, but were embarrassed to complain officially.

For a final insight, Caroline Wilson commented, in the context of player fastidiousness about sharing water bottles and code sensitivity around 'blood bins' (the rule that a player with bleeding skin must leave the field), that 'every AFL player is now tarnished by the revelation that men who will not even share water bottles for fear of illness during the season, are prepared to share women' (*Sydney Morning Herald*, 18 March 2004). In such thinking, attitudes to women are truly rooted.

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