DownUnderAllOver
Developments around the country

FEDERAL

Commonwealth Attorney-General to Consult on federal Charter of Human Rights

Following his appointment as Commonwealth Attorney-General, Rob McClelland has confirmed that, during its first term, the Rudd Government intends to conduct a national consultation regarding the need for a federal Charter of Human Rights.

This commitment is a key plank of Labor's national policy on 'Respecting Human Rights and a Fair Go for All' which provides that 'Labor will initiate a public inquiry about how best to recognise and protect the human rights and freedoms enjoyed by all Australians.' It is also consistent with Labor's pre-election commitment to 'adhere to Australia's international human rights obligations' and to 'seek to have them incorporated into the domestic law of Australia'. Speaking to the *Sydney Morning Herald*, Mr McClelland said, 'We are one of the only modern democracies without a charter of rights'. He said that a Charter would be 'part of developing a more accountable system of government'.

Details of the public consultation have not yet been announced.

PHIL LYNCH is director of the Human Rights Law Resource Centre

NEW SOUTH WALES

Jury directions in criminal trials

In February 2007, the NSW Law Reform Commission commenced its inquiry into judicial directions given to a jury in a criminal trial. In January 2008, the Victorian Law Reform Commission opened a similar inquiry.

Concerns have arisen because of the increased number, length and complexity of warnings and directions that trial judges give to the jury. Some of these directions reflect the increasing complexity of some criminal legislation; some respond to emerging forensic technologies that require a sophisticated understanding of the evidence. However, many are regarded as needlessly long-winded, and often confusing to the jury.

In many cases, trial judges now give exhaustive and elaborate directions in an effort to protect the verdict from overturn upon appeal. Appellate courts routinely scrutinise the transcript of the trial judge's summing-up, in many instances finding that an error or omission constitutes grounds for allowing an appeal.

In a conference on jury research in December 2007, the Chairman of the NSW Law Reform Commission, James Wood, noted that the problems of complex jury directions reflected the failure of the criminal litigation process to respond to the move away from an oral tradition, as contemporary jurors would be accustomed to processing information more effectively in non-spoken forms. Further, the increasing length of criminal trials meant that many well-educated and otherwise-suitable citizens were seeking exemption from jury duty. (In this respect, the NSW reference overlaps with the report on 'Jury Service', No 117 (2007) in which the NSWLRC suggested changing some of the exemptions from service, and also increasing the remuneration of jurors).

The Victorian Attorney-General Rob Hulls was reported to say that it was necessary to 'ensure jury directions are not so complicated and unwieldy as to result in a raft of technical appeals which take up valuable court resources'. (Michael Pelly, 'Change of direction for juries', *The Australian* (Sydney), 1 February 2008) Justice Murray Kellem of the Victorian Court of Appeals described jury directions as making the jury's task 'intolerably burdensome'. He gave the example of a standard Victorian jury direction on lies as running to seven pages, whereas the Californian version is only three lines long. Recently, the media reported that Justice Bernard Teague of the Victorian Supreme Court has conducted 'debriefing sessions' with jurors, covering a broad range of issues related to the juror experience, including the effectiveness and method of giving judicial directions. (Michael Pelly, 'Judge in jury post-mortems', *The Australian*, (Sydney), 1 February 2008)

These references coincide with a similar inquiry taking place in England, and other Australian jurisdictions are attempting to formulate (or reformulate) model directions. The Australian Institute of Judicial Administration will also undertake a project on jury directions, and the National Judicial College is also working to simplify directions. One part of the NSW reference is to consult the Plain English Foundation about the extent to which Bench Book directions, used in NSW District and Supreme Courts, are effective methods of communicating to the ordinary mix of jurors. Another aspect of the reference, in collaboration with the Bureau of Crime Statistics and Research (BOCSAR), is to conduct research with actual jurors, in order to establish the extent to which they understand and are assisted by judicial directions. Earlier research by BOCSAR found that, following 25 sexual assault trials in NSW, only jurors from six trials were able to give a correct answer when asked what their verdict was. Also, whilst jurors stated that they could comprehend judicial directions, further examination demonstrated that they had seriously misunderstood what the judge had told them.

Submissions to these reference are open, and can be made to:
New South Wales Law Reform Commission
GPO Box 5199
Sydney NSW 2001

Victorian Law Reform Commission
GPO Box 4637
Melbourne Victoria 3001

KATHERINE BIBER teaches law at UTS

NORTHERN TERRITORY

Birth of a Criminal Lawyer

Monday, Katherine Aboriginal Legal Aid, at the office early. Meet the senior lawyer, shows you a desk, tells you to ask any questions you want but that you'll be learning on your feet.

Interview your first client in custody, keep asking the client to 'speak up' because he speaks softly, is embarrassed about what he did, and the open cells interview room has another lawyer and client in it. Half an hour and seven pages of notes later you return to see that your senior lawyer has, in that time, prepared five other matters.

Tuesday, travelling to bush court. At the office 7.30am, run around trying to find files, promise the field officer you'll be ready in 10 minutes for the third time.

Seven hours of semi-sealed road later, arrive at the community, Borroloola.

8pm. Missed dinner at the accommodation whilst getting papers from the police. Stay up until 1am reading files and legislation, noting every issue you can think of.

Wednesday, 8:30am. Standing outside 'court' in suit and tie waiting for clients. Approximate temperature 30C. Nervous and sweaty.

9am. Senior lawyer arrives in jeans and loose shirt, laughs.

9:45am. Meet first client, sit on ground and write down every word she says in case it's relevant. Discuss options with her, advise she'll just get a fine since it's only her second offence, client instructs to plead guilty. Fend off a passing brumby which has trotted over and begun chewing on your folder of legislation.

10am. In court read out your carefully written pages of submissions, still stumbling over words, look up to see the magistrate politely waiting for you to finish. Client receives a fine, but also the mandatory minimum licence disqualification the magistrate pointedly reminds you about. Apologise profusely to client; client laughs.

10:30am. Approx 36C. Try to find another of your clients. A helpful woman nearby tells you where each of them are, from local stations to the health clinic. Approach senior lawyer, busy with a large pile of files and three clients waiting to be spoken to. Ask if you can help with his matters. A file and client are given to you, another traffic matter, and this time you tell him the precise disqualification he should get. You are learning.

5pm. 60 clients seen by the two lawyers. Dinner with court staff and prosecutors on fresh Barramundi as the sun sets.

LEWIS SHILLITO works for an Aboriginal legal service in Katherine. Any views expressed are his own.

SOUTH AUSTRALIA

Compensation for the Stolen Generations

In light of the newly-minted federal government apology to the Stolen Generations on 13 February, there is a new focus on the other unfinished business from HREOC's *Bringing Them Home* report: the issue of compensation. To date, only the Tasmanian government has agreed to establish a process for compensating the Stolen Generations. The federal and state Labor governments elsewhere have rejected claims for compensation for a variety of reasons, none of which are at all convincing. As with the apology question, the question of compensation is not likely to go away until its obvious merits in principle are properly addressed by Australian governments.

The compensation question has been hot in South Australia following Bruce Trevorrow's successful claim for damages against the South Australian Government in August 2007. Mr Trevorrow was awarded damages in respect to injuries and losses caused by his removal from his family at the age of 13 months, and subsequent actions of the State relating to his care as a ward of the State. He was also awarded $75 000 in exemplary damages against the State for his unlawful removal and detention. The total sum awarded in the judgment was $525 000.

On 1 February 2008, the judge made further orders in relation to the question of interest payable on the damages awarded. The state and the plaintiff's agreed that interest was payable at a rate of 4 per cent on the unremunerated losses from the original order which amounted to $410 892.20. However, the parties disagreed as to the period for which interest was payable. The plaintiff argued that the period was the almost 50 years between the plaintiff's removal and the date of judgment. Interest over this period was an amount of $800, 569. The State argued that interest should be allowed from the date of the issue of the proceedings to the date of the judgment, reduced by one half to account for the passage of time since the date of the injury. Calculated this way, interest amounted to $75 597.

Section 30C of the Supreme Court Act 1935 (SA) confers a broad discretion on the Court to determine the appropriate interest to be paid, while also affirming a general principle that interest would normally be the period 'running from when the liability to pay the amount of the claim fell due to the date of judgment'.

Justice Gray acknowledged the difficulty of fixing an appropriate amount of interest, recognising that the period between the occurrence of the damage and the bringing of an action and the length of any litigation will affect what is appropriate. In Mr Trevorrow's case, as will be the case in all Stolen Generations claims, the period between the damage and the action was extremely long, and this will have a significant impact on what is an appropriate interest payment: hence the plaintiff's claim for over $800 000 in interest.

In the end, the judge exercised his discretion to award a lump sum payment in lieu of interest of $250 000. To reach this sum, the judge did not set out a specific calculation, but referred in general terms to the findings in the original judgment as to the damages suffered by the plaintiff. The award of damages in the original judgment was itself expressed in very general terms. For example, in relation to loss of earning capacity, the judge held that 'the evidence does not allow any specific calculation to be made. The use of a multiplier is of no assistance. What is required is the exercise of a discretionary judgment.' The same problems of specificity necessarily applied to the award of interest.

By any measure, the Trevorrow claim was an unquestionable success and potentially a break through judgment for the stolen

generations. Justice Gray accepted that the State owed a duty of care to the plaintiff, that it had clearly breached this duty, and was satisfied that Mr Trevorrow had suffered damage as a result of this breach of duty that could be translated into a significant sum of damages. There has been much talk about whether the Trevorrow case indicates a greater potential for successful common law claims than had previously been realised by the stolen generations. This seems an unlikely outcome of the case. Nonetheless, on 28 February the state government entered an appeal against the decision, while announcing that it would honour the award of damages to Mr Trevorrow.

Despite the success in Trevorrow, the case highlights once again just what monumental obstacles stand in the way of successful compensation claims in the courts relying on the common law. Bruce Trevorrow's case was particularly strong because the breach of duty was clear despite the passage of time. This was in part due to the comprehensiveness of government records relating to his case. Perhaps even more unusually, Mr Trevorrow had many siblings who had not been removed, and whose lives could be compared to that of Mr Trevorrow, making the calculation of damages a meaningful exercise. The strength of the Trevorrow case also meant that he was able to access Commonwealth government assistance to run the case. With legal bills probably exceeding the amount of the judgment, the case would most likely not have been mounted without such assistance.

The stock standard response to the question of compensation by the Howard government was that it had no responsibility to the stolen generation beyond its existing legal liability. But this response begs the very question. Legal liability is not a fixed thing. It is the very thing we elect governments to determine. The question the Rudd government must ask itself is whether existing legal liability at common law is an adequate mechanism for the stolen generation to make claims for compensation. Once the question is put, the answer is clear. The common law is a blunt instrument to deal with the sensitivity of stolen generation cases: the adversarial process creates an inappropriate environment to relive the pain of lives lost; and the structure of liability and damages at common law is such that while there may be some big winners, these will be more than matched by big losers. Of course, there are limits to what the government will be prepared to put into any compensation package, but it is currently spending considerable sums assisting plaintiffs in the common law claims and even more money on defending these claims. This money would be far better spent in a dedicated compensation process. Having dealt with the apology, it is time to revisit the *Bringing Them Home* report recommendations on compensation.

ALEX REILLY teaches law at Adelaide University.

TASMANIA

Late January saw the Tasmanian Premier Paul Lennon announce the findings of Australia's only compensation fund for Aboriginal children forcibly removed from their families. The fund — created under the *Stolen Generations of Aboriginal Children Act 2006* (Tas) — saw 151 applications received of which 106 were deemed eligible. 84 victims and 22 children of victims are sharing in $5 000 000 of compensation funds.

South Australia is currently considering the Tasmanian findings and it is likely that the Federal Government will also scrutinize the fund with Prime Minister Rudd confirming after his election win that he will apologise to the Stolen Generations when Parliament returns. According to *The Mercury*, Tasmanian Aboriginal activist Michael Mansell was quoted as stating that the Tasmanian scheme is a model that the rest of Australia should adopt: 'No matter how sincere Kevin Rudd's apology is, it will reach the general public and the broader Aboriginal community but not the actual victims, who are still suffering. For them, an apology is not enough'.

BENEDICT BARTL is solicitor at Hobart Community Legal Service

VICTORIA

Relevance of Victorian Charter of Rights to delay in prosecution and grant of bail

Gray v DPP *[2008] VSC 4 (16 January 2008)*

In the first decision to substantively consider the Victorian *Charter of Human Rights* since it became justiciable on 1 January 2008, Bongiorno J has held that the Charter guarantees the right to a timely trial and that the appropriate remedies for failure of the Crown to provide such a trial are release of the accused on bail or, alternatively, a permanent stay of proceedings.

Facts

The accused, Kelly Gray, was charged with a number of indictable offences, including aggravated burglary, arising from an assault on 4 November 2007. He was remanded in custody and refused bail by a magistrate on 10 December 2007 pursuant to s 4(4)(c) of the *Bail Act*, which relevantly provides that a person charged with aggravated burglary is to be remanded in custody unless that person can satisfy the court that detention is not justified.

Gray subsequently applied for bail in the Supreme Court, arguing that his continued detention was not justified, particularly given that the trial was unlikely to commence before October or November 2008 and unlikely to conclude before the end of 2008. It was submitted that having regard to the seriousness of the offence, the relatively minor injuries suffered by the victim, and the applicant's prior convictions, there was a real risk that the applicant could serve more time on remand than he would serve under any subsequent sentence.

Decision

Although neither party mentioned the *Charter* in their submissions, Bongiorno J considered various of its provisions to be 'highly relevant to the question of bail', including in particular s 21(5)(c) (which provides that a person detained on a criminal charge has the right to be promptly brought before the court and tried without unreasonable delay, failing which they are to be released) and s 25(2)(c) (which provides that a person charged with a criminal offence is entitled to be tried without unreasonable delay).

Considering the application of the *Charter* to the present case, His Honour made a number of important observations:

1. Sections 21(5)(c) and 25(2)(c) of the *Charter* guarantee the right to a timely trial (ie, 'a trial held within a reasonable time').
2. The inability of the Crown to provide a timely trial is relevant to the question of bail.

3. A trial which may not be held until after the accused has spent more time on remand than he or she is likely to serve upon sentence is very unlikely to be a timely trial.
4. The remedies available to the Court to address failure by the Crown to ensure a timely trial include releasing the applicant on bail or, alternatively, a permanent stay of proceedings.

Having regard to these factors, among others, Bongiorno J concluded that the applicant's continued incarceration was not justified and that he should be released on bail.

The decision is available at http://www.austlii.edu.au/au/cases/vic/VSC/2008/4.html.

PHIL LYNCH is director of the Human Rights Law Resource Centre

WESTERN AUSTRALIA

The future of homicide in Western Australia

The Law Reform Commission of Western Australia (LRC) released its *Review of the Law of Homicide* report in November 2007. The report makes 45 recommendations which provide a coherent framework for long-overdue reform of WA's homicide laws. The comprehensive nature of the reference — spanning offences, defences and sentencing — allowed the LRC to approach its work with a view to system-wide reform with the aim of ensuring that the laws of homicide in WA are principled, consistent, clear and modern. The following principles guided the work of the LRC and its recommendations align with these statements.

1. Generally, intentional killing should be distinguished from unintentional killing.
2. The only lawful purpose for intentional killing is self-preservation or the protection of others.
3. The only other excuses for intentional killing are mental impairment and immature age.
4. There should be sufficient flexibility in sentencing to reflect the different circumstances of offences and the relative culpability of offenders.
5. The law of homicide should be as simple and clear as possible.
6. Reforms to the law of homicide should adequately reflect contemporary circumstances.
7. There should be no offences or defences that apply only to specific groups of people on the basis of gender or race.

Consistent with these principles, and supported by a detailed examination of each area, the LRC recommended against the retention of the partial defences of provocation and the introduction of diminished responsibility, both of which artificially reduce an intentional killing to manslaughter. However, the LRC recommended that the partial defence of excessive self-defence be introduced because, although the killing is intentional, culpability is substantially reduced by the presence of a lawful purpose. Reforms to self-defence have been made with acute awareness of the situation of victims of domestic violence who kill their partners. Other recommendations include the repeal of infanticide and amendments to the insanity defence.

The LRC has further recommended that the anomalous distinction between wilful murder and murder be abolished and that the mandatory life sentence for murder be replaced with presumptive life imprisonment. Other recommendations have also been made to introduce flexibility into the sentencing regime. The LRC's package of reforms has received strong support from government and legislation effecting most recommendations is expected to be introduced into Parliament in the first half of 2008.

The report can be viewed at www.lrc.justice.wa.gov.au

TATUM HANDS is co-author of the LRC's Homicide Report.

Consultation Committee recommends adoption of WA Human Rights Act

On 20 December 2007, the Consultation Committee for a Proposed WA Human Rights Act, chaired by Fred Chaney, published its Final Report. The consultations and Report found 'clear majority support for', and recommended the enactment of, a WA Human Rights Act.

Similarly to the Victorian *Charter* and the ACT and UK *Human Rights Acts*, the Committee recommended that this instrument promote a human rights dialogue across the three branches of government while maintaining parliamentary sovereignty. Unlike the Victorian, ACT and UK legislation, however, the Committee recommended that a WA Human Rights Act incorporate economic, social and cultural rights.

The Report was informed by 377 submissions, a 'clear majority' of which supported the proposed WA Human Rights Act. Many submissions also called for stronger legislative protection than that proposed. The consultation revealed that 'many people believe their rights, or the rights of others, are not given sufficient respect and need greater protection.'

The Committee found that a WA Human Rights Act should:

- maintain parliamentary sovereignty — democratically elected politicians and not judges should retain the responsibility for determining how rights should be balanced and when rights should be limited for the common good of the community;
- encourage a human rights culture in government departments and agencies;
- discourage litigation as a way to resolve human rights issues — the emphasis should be placed on conciliation to settle disputes; and
- equally protect civil, political, social, economic and cultural rights.

Following the election of the Rudd Labor Government, and the federal Attorney-General Robert McClelland's announcement that he intends to consult the community about the introduction of a national charter, it appears that the enactment of a WA state-based charter will be deferred until the outcomes of the federal consultation process are known. The Report of the WA Consultation Committee will make an important contribution to this national discussion.

PHIL LYNCH is director of the Human Rights Law Resource Centre