

continued treatment when there was a no real possibility of improvement in the quality of life. Concern was expressed that modern approaches to prolonging life would not allow a person to die with dignity.

ethics and the law. Legal difficulties arise because there is doubt as to what doctors may lawfully do notwithstanding that a doctor and patient agree with each other on what ought to be done from both an ethical and medical view point. These uncertainties arise because various legal duties imposed by the Criminal Code, including the duty to provide the necessities of life, may make a doctor who does not comply with a duty liable to prosecution. Where a patient is incompetent to make a decision there is the additional problem of determining whether any other person may make decisions on behalf of the patient and so relieve the doctor of any obligation to act in accordance with one of these duties.

options for reform. As the spectre of criminal liability raised by these provisions of the Criminal Code is undesirable where doctors are endeavouring to practice medicine with a humane concern for the terminally ill, the Commission discusses various options for reform which could be adopted to remove uncertainties with the existing law. Four general approaches are discussed –

- Patients could be given an express statutory right to control their own treatment so that those acting in accordance with their wishes would not commit an offence in so acting.
- People could be given an opportunity to make advance written directions to the effect that they do not wish to receive certain treatment if they become terminally ill, or to appoint an agent by an enduring power of attor-

ney to make decisions on their behalf should they become incompetent.

- Where a person is incompetent, decisions as to treatment could be made by a proxy.
- Doctors could be permitted to decide to withdraw or withhold treatment from a patient in certain circumstances, for example where it is therapeutically useless.

other questions. Other questions discussed are –

- Should a generally applicable statutory definition of death be provided and, if so, how should it be defined?
- Should those who provided palliative care to a terminally ill patient be criminally liable if, in merely providing palliative care, they hasten the patient's death?

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federal court enforcement of human rights and equal opportunity commission decisions

Surely the world we live in is but the world that lives in us.

Elizabeth Salter: Daisy Bates

the schema. Under the schema established by the Racial Discrimination Act 1975 (Cth) the Sex Discrimination Act 1984 (Cth) and the Human Rights and Equal Opportunity Act 1986 (Cth) complaints can be made to the Human Rights and Equal Opportunity Commission (the Commission) in respect of racial and sexual discrimination. The emphasis in the legislation is on the settlement of

complaints by conciliation: 'an informal, confidential and comparatively low-cost dispute-resolution mechanism'. Where the conciliation process fails to achieve results the Commission has wide powers to conduct its own inquiries and either dismiss the complaint, or find the complaint substantiated and make certain determinations. Where a determination has been made there is provision under both the Racial Discrimination Act and the Sex Discrimination Act for a successful complainant, or the Commission, to institute proceedings in the Federal Court to enforce a determination of the Commission.

first enforcement proceedings. Perhaps surprisingly, given the number of complaints received by the Commission, the Federal Court has only recently dealt with its first enforcement proceedings under each of these Acts. The results of the two cases show that there are hitches in the schema's goal of achieving the prompt and inexpensive resolution of complaints.

enforcement under the sex discrimination act. The first case to be dealt with was Aldridge v Booth or, as it is more commonly known, 'The Tasty Morsel' case. In this case the old Human Rights Commission had found that a complaint of sexual harassment brought by the applicant against the respondent was substantiated and that the incidents complained of were unlawful under s 28 of the Sex Discrimination Act. The Commission awarded the applicant \$7 000 damages for humiliation and injury, however, the respondent failed to pay the money to the applicant. The applicant instituted proceedings in the Federal Court to enforce the Commission's determination.

the key issue. Several important points emerged from Justice Spender's decision in the case, however, the issue of the most far-reaching significance to be dealt with was the nature of the type of hearing

that must be conducted before the Federal Court.

Because of the constitutional separation of powers, a determination by the Commission is not an exercise of the judicial power of the Commonwealth. Therefore, as recognised under s 81(1) of the Act, the Commission's determinations are 'not binding or conclusive between any of the parties to the determination'. In considering the implications of this for enforcement hearings before the Federal Court, Justice Spender addressed the following questions:

- the extent that findings of fact made by the Commission have a bearing on proceedings in the Federal Court,
- the extent to which the Commission's findings can play a part in the Federal Court being satisfied that unlawful conduct has occurred,
- what limitations, if any, there are on the power of the Federal Court to make such orders as it thinks fit?

duplication of proceedings. In answering these questions Justice Spender noted that s 82(2) of the Act requires the Federal Court to be '... satisfied that the respondent has engaged in conduct or committed an act that is unlawful under this Act.' before making any order. He thus concluded that the hearing before the court must be a fresh hearing, not an appeal, and that the hearing should not be confined to questions of law.

On the issue of the relevance of the Commission's findings of fact and overall findings Justice Spender held that:

the Court is required to be satisfied as to matters of fact. How matters of fact are established . . . will depend upon the nature of the case but where, as here, the dispute requires an assessment of the credibility of the parties and their witnesses, it

seems . . . impossible to avoid the conclusion that these issues must be determined on the basis of oral evidence. In other cases it may be possible to deal with the matter on the basis of an agreed statement of fact.

He made it clear that, unlike the Commission, the Federal Court 'is bound to proceed only on evidence properly admitted before it in accordance with the rules of evidence' and noted that the evidence before the court will frequently not be the same as that before the Commission. He thus held that the Court cannot rely upon any findings made by the Commission but must rather 'exercise its own mind on the material properly before it'.

In respect of the orders that the Court can make Justice Spender held that:

The power of the Federal Court to make orders on proceedings brought pursuant to s 82 is to be read in the context of the type of orders that can be made by the Commission, which is referred to in s 81(1)(b).

As to the relevance of the determination actually made by the Commission it was held that while the Court's orders are not made in ignorance of the determination that had been previously made it still has to make such orders as it thinks fit. In doing so it should not 'attach any particular weight to the determination made by the Commission as being that of a 'specialist body'. In this case, however, the Court made an identical order to that made by the Commission.

enforcement under the racial discrimination act. The problems implicit in the type of duplication of proceedings required under the Sex Discrimination Act became apparent in the first application for enforcement made to the Federal Court under the recently amended Racial Discrimination Act 1975 (Cth). In contemplating these problems it is interesting to speculate whether the old or new schema for resolving racial discrimination com-

plaints is the speedier, cheaper and more effective. Prior to the amendments, where conciliation failed to produce a settlement, the Commissioner for Community Relations issued a certificate which entitled the complainant to institute civil proceedings. However, the Commission notes in its 1986-87 Annual Report, of the 33 certificates issued under the former procedure between 1975 and July 1986 none had, by May 1988, led to an effective determination by the courts. The Commission said of its new procedure, prior to the handing down of the decision under consideration, that it 'is less cumbersome and ultimately provides a swifter and more effective remedy'.

effect of new evidence. In the case of *Maynard v Neilson* the President of the Commission had found that the complainant had been refused service in the respondent's hotel because he was an Aborigine and that this amounted to unlawful discrimination under s 13 of the Racial Discrimination Act. The President ordered that the respondent pay the complainant \$5 000 compensation. When the respondent failed to pay, the complainant sought an order from the Federal Court for enforcement of the award.

At the hearing before Justice Wilcox new evidence was presented by the respondent. This led to the Commission's determination being overturned as Justice Wilcox found that this new evidence indicated that the refusal of service was due to the failure of the complainant to meet the exacting dress requirements set by the respondent at the hotel and was not based on the complainant's race and colour.

criticism of the duplication of proceedings. In giving his judgment Justice Wilcox adverted to the difficulties which arise out of the fact that the determinations of the Commission are not binding on the parties. He criticised the facts that:

- relitigation of the matter requires, unless the parties otherwise agree, that witnesses must be called and give their evidence afresh and the resulting costs of duplicating the hearing are likely to be considerable,
- there is a danger in a procedure for a non-binding determination that a party (in particular the respondent) will fail to put forward all of the evidence which is relevant to his or her case.

This happened in the present case. Not only were witnesses examined and cross-examined upon matters not previously investigated, but also, additional witnesses were called who gave important new evidence. This unsatisfactory state of affairs led Justice Wilcox to conclude his judgment by arguing that:

The standing of the Commission is not enhanced by a procedure which enables parties to disregard its determinations and to resist enforcement of those determinations by the presentation of evidence withheld from the Commission . . . [I]f it is constitutionally impossible to make the findings of the Commission, after inquiry, binding on the parties, it may be better to dispense with the inquiry procedure altogether and to provide an immediate right of action in the Federal Court upon the failure of the Race Discrimination Commissioner to resolve the complaint by conciliation.

conclusions. Whether the number of respondents who fail to abide by the Commission's determinations will warrant another rethink of the Commonwealth procedure for resolving discrimination complaints remains to be seen. It is clearly undesirable from the perspective of complaints, however, that they may have to go through the additional expense, trauma, publicity and time delays of instituting proceedings in the Federal Court in order to have the Commission's determinations enforced. That they will not have the will

and stamina to do so may be a risk some respondents are prepared to take.

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the law — commandment or amoeba

An exemplar of all the best judicial qualities: a deep and scholarly knowledge of the law together with the experience and ability necessary to apply that knowledge in practice, complete dedication to the duties, often onerous of his office; patience, courtesy, dignity and absolute integrity and propriety in his public and private life.

Sir Harry Gibbs, Speaking of the late Sir Richard Blackburn, 1987 Blackburn lecture

The Hon Justice Michael Kirby CMG paid tribute to the late Sir Richard Blackburn in his recent 1988 Blackburn lecture. Sir Richard was Chairman of the Law Reform Commission of the Australian Capital Territory from 1971 to 1976, Chief Justice of the Australian Capital Territory from 1982 to 1985 and Chancellor of the Australian National University. Justice Kirby said:

He was a stalwart champion of the public discussion of law reform proposals. Where other judges doubted the propriety of judicial activism in the cause of law reform, he never wavered.

commandments. Justice Kirby, former Chairman of the ALRC, chose as his theme the need to make institutional law reform effective. Part of the need for reform comes from the limits on judicial development of the law. He described radically different views of the law. Some judges saw it as a 'kind of elaborate ten commandments'. Justice Kirby said: