RECENT DEVELOPMENTS

Katherine Cook

Commissioner appointed and Terms of Reference released for ALRC inquiry into incarceration rate of Indigenous Australians

On 10 February 2017, the Commonwealth Attorney-General and the Minister for Indigenous Affairs announced the appointment of Judge Matthew Myers AM of the Federal Circuit Court of Australia as Commissioner of the Australian Law Reform Commission (ALRC) inquiry into the incarceration rate of Indigenous Australians.

This is an important review to examine the factors leading to the over-representation of Indigenous Australians in our prison system and to consider reforms to the law to ameliorate this.

Aboriginal and Torres Strait Islander people make up 27 per cent of Australia's prison population, despite being only 3 per cent of Australia's national population.

Judge Myers has a wealth of knowledge and experience, including in Indigenous legal issues. He was appointed to the Federal Circuit Court in 2012 as Australia's first Indigenous Commonwealth judicial officer. He is a Judge in the Newcastle Registry of the Federal Circuit Court.

The Ministers thank Judge Myers for his willingness to serve the people of Australia through this important work. The Turnbull government acknowledges that this appointment creates a temporary vacancy in the Newcastle Registry of the Federal Circuit Court. This will be resolved in consultation with Chief Judge John Pascoe AC CVO.

In December 2016, the government released a consultation draft Terms of Reference for the inquiry. After wide consultation, including with state and territory governments and Indigenous communities and organisations, the Terms of Reference have now been finalised. The government thanks those who provided their views.

The ALRC will examine the laws, frameworks and institutions and broader contextual factors that lead to the disturbing over-representation of Aboriginal and Torres Strait Islander people in our prison system.

The ALRC will report to the government by 22 December 2017.

The government is committed to working with Indigenous Australians, state and territory governments, the legal profession and the wider community to develop solutions for this complex issue.

The Terms of Reference are available on the Attorney-General's Department website.

<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Commissioner-appointed-and-terms-of-reference-released-for-ALRC-inquiry-into-incarceration-rate-of-indigenous-australians.aspx>

Appointment of Aboriginal and Torres Strait Islander Social Justice Commissioner

On 9 February 2017, Ms June Oscar AO was appointed as Aboriginal and Torres Strait Islander Social Justice Commissioner in the Australian Human Rights Commission.

Ms Oscar is a Bunuba woman and community leader from the Central Kimberley region of Western Australia. She is currently the CEO of the Marninwarntikura Women's Resource Centre in Fitzroy Crossing.

Ms Oscar has an outstanding record as a determined, courageous and pragmatic advocate for the rights of Indigenous Australians. Her experience in Indigenous policy spans language revitalisation, native title, health, women's issues and, most notably, Foetal Alcohol Spectrum Disorder (FASD).

Ms Oscar was instrumental in the successful community-led campaign to restrict the sale of full-strength takeaway alcohol in the Fitzroy Valley. She also initiated a partnership to conduct the first study in Australian history on the prevalence of FASD.

Ms Oscar was appointed as an Officer of the Order of Australia in 2013 for distinguished service to the Indigenous community of Western Australia, particularly through health and social welfare programs, and was awarded the Menzies School of Health Research Medallion in 2014 for her work with FASD.

Ms Oscar's appointment demonstrates the fundamental role Indigenous women play in fostering social change at a community, national and international level. The Attorney-General is looking forward to the contribution Ms Oscar can make on important issues impacting on Indigenous women and children.

Ms Oscar will bring deep knowledge and experience in dealing with the problem of alcohol abuse in Indigenous communities and strategies to mitigate the effect of that abuse on women and children in particular.

The government looks forward to working closely with Ms Oscar and the contribution she will make to the work of the Commission.

Ms Oscar's appointment will be for five years beginning on 3 April 2017.

<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Appointment-of-aboriginal-and-torres-strait-islander-social-justice-commissioner.aspx>

INSLM's report on Certain Questioning and Detention Powers in Relation to Terrorism

On 8 February 2017, the Turnbull government tabled the report of the Independent National Security Legislation Monitor (INSLM), *Certain Questioning and Detention Powers in Relation to Terrorism*.

The INSLM has made a number of recommendations in relation to agencies' questioning and detention powers, including that:

- the legislation governing ASIO's compulsory questioning power be brought into line with the equivalent power available under the *Australian Crime Commission Act 2002* (Cth); and

- ASIO's questioning and detention power — which has never been sought, or used, by ASIO — be repealed or cease when the sunset date is reached.

The government is carefully considering the report's recommendations.

The government thanks the Hon Roger Gyles AO QC for his work. Mr Gyles made a significant contribution to the role, bringing years of experience across a range of legal fields to the complex challenges facing Australia's national security. The government will soon announce the new INSLM.

Independent oversight of our national security agencies is critical. The government will continue to ensure our national security agencies have the powers they need to keep Australians safe while protecting our freedoms.

The report is available on the INSLM website.

<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Inslms-report-on-certain-questioning-and-detention-powers-in-relation-to-terrorism.aspx>

The Commonwealth Ombudsman releases a report on the processing of asylum seekers who arrived in 2013 on a suspected illegal vessel

Commonwealth Ombudsman Mr Colin Neave has released an own-motion report on the Department of Immigration and Border Protection's processing of asylum seekers who arrived on the suspected illegal entry vessel *Lambeth* in 2013.

The Ombudsman's office first became aware of apparent discrepancies in the processing of these asylum seekers in information provided by the department, as part of the Ombudsman's obligation to report on people who have been in immigration detention for more than two years.

'There was a prolonged attempt by our office to have this clarified by the department. And while ultimately we were satisfied that the asylum seekers had been processed correctly, what emerged from this investigation was that there appeared to be no central integrated repository of all the relevant information about individual asylum seekers', Mr Neave said.

Not only did this impact on the department's ability to provide responses to the Ombudsman in a timely manner; it also meant that incorrect advice was given to the Ombudsman in relation to these asylum seekers and whether they were properly assessed as being offshore arrivals.

'This raises concerns that all relevant information was not available to officers of the department in a timely manner', Mr Neave said.

The department has accepted the Ombudsman's recommendations that it review the information it recorded for asylum seekers on the *Lambeth* and identify any shortcomings in its scope; and ensure all relevant information is readily available to departmental officers. The department also agreed that any learnings from this review would be applied to its systems more broadly.

<http://www.ombudsman.gov.au/news-and-media/media-releases/media-release-documents/commonwealth-ombudsman/2017/11-january-2017-ombudsman-releases-report-into-the-processing-of-asylum-seekers-who-arrived-in-2013-on-a-suspected-illegal-vessel>

The Victorian Government seeks special leave to appeal to the High Court

The Victorian Labor Government is seeking special leave to appeal the Court of Appeal's decision regarding the Victorian Ombudsman's jurisdiction to investigate a referral made by the Legislative Council.

The government is taking this action in the High Court to protect the architecture of Victoria's integrity regime, particularly regarding the relationship between the Ombudsman and the Victorian Parliament.

The effect of the Court of Appeal decision is that either House of the Parliament, or any committee of the Parliament, could by a simple majority require the Ombudsman to conduct an investigation on any matter.

This could include requiring the Ombudsman to investigate the actions of private companies, non-government organisations or individuals.

If such a referral were made, the Ombudsman would then be required to prioritise that investigation over the day-to-day work of the Ombudsman's office, which deals with complaints by Victorians about government departments and agencies, local councils and statutory authorities.

The government maintains that such a reading of the *Ombudsman Act 1973* (Vic) fundamentally impairs the relationship between the Ombudsman and other integrity bodies and is contrary to the principal purpose of the Ombudsman's office laid out in the Act.

The government is also concerned that the Legislative Council's referral could be read as requiring the Ombudsman to investigate the conduct of Members of the Legislative Assembly, including those in a previous parliament.

The Supreme Court acknowledged that, where a referral or an investigation by the Ombudsman would breach longstanding principles of parliamentary privilege, it would be a matter for 'the other House' to assert the privilege.

In line with the Supreme Court's observation, the government intends to assert the Legislative Assembly's privilege in this matter when Parliament returns in February.

For balance, the government will also use the Parliament to seek to amend the Legislative Council's referral to include the use of members' staff budgets and entitlements by the Liberal Party, the National Party and the Greens Party.

The High Court consideration of this matter need not impede the Ombudsman from fulfilling her statutory obligations to report to the Parliament on the current referral forthwith.

The Ombudsman has been and remains free to conduct her investigation, and relevant Members of Parliament will continue to assist the Ombudsman, as has been the case with previous inquiries conducted by Victoria Police and the Parliament of Victoria, both of which have been concluded.

<http://www.premier.vic.gov.au/government-seeks-special-leave-to-appeal-to-the-high-court/>

Report on youth justice: Victorian Ombudsman

On 6 February 2017, the Victorian Ombudsman tabled a report on the state's youth justice facilities to give Parliament and the public an insight into recent events and to illustrate how the relevant oversight agencies are holding government to account.

Victorian Ombudsman Ms Deborah Glass said the report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville represents a continuation of the Ombudsman's longstanding concerns into youth justice.

'I welcome the government's review of youth justice, commissioned last year before the recent troubles, with its focus on long-term and joined-up solutions. The chorus of blame will not make us safer as we worry about youth crime.'

'Safety will lie in a system that makes it less likely these young people will be repeat offenders. It is neither in the interests of public safety nor the public purse for young people to become entrenched in a life of crime, cycling through youth justice centres into adult prisons to which all too often they return', said Ms Glass.

Youth justice has attracted considerable media and political attention in recent months amid a series of disturbances at the two previously existing juvenile justice facilities at Parkville and Malmsbury. Severe damage caused by young people during unrest at Parkville led the Victorian Government to gazette a new youth justice centre at the Grevillea Unit in Barwon prison.

The report identifies a shift in offending patterns by some young people held in juvenile justice facilities, with evidence from the Department of Health and Human Services describing the current cohort as 'more sophisticated, socially networked, calculated and callous offending, characterised by rapidly escalating levels of violence and disregard for authority and consequence'.

'My 2015 report into rehabilitation in prisons illustrated how ill-equipped the correctional system is to deal with young adult offenders. Victoria's dual track system must go on recognising that children — even dangerous children — are different from adults', said Ms Glass.

Another major theme emerging from Victorian Ombudsman inquiries — including visits to the three juvenile justice centres — is that extended lockdowns of young people are contributing to the tension that leads to disturbances.

'It is evident that this is affected by a toxic combination of staff shortages and increasing overcrowding. It is predictable that a regime of lockdowns for young people will create unrest, and equally predictable that more lockdowns will follow that unrest', said Ms Glass.

Former Ombudsman Mr George Brouwer tabled a report, *Whistleblowers Protection Act 2001: Investigation into Conditions at the Melbourne Youth Justice Precinct*, in 2010 that identified flaws within the Parkville facility.

'Among other things, the report noted design features such as a low roof-line allowing detainees to climb onto the roof and ill-placed staircases creating blind spots and posing a safety risk to detainees and staff', said Ms Glass.

While noting that there had been a substantial response to the previous Ombudsman's report, including the establishment of Parkville College, Ms Glass noted that the precinct itself still existed and young people were still able to climb onto the roof.

'The record is patchy — successive governments have failed to make the significant investment needed to address the long-term issues that are increasingly apparent.'

'There is no short-term fix to the serious problems affecting youth justice, which have their origins not only in ageing infrastructure but in the complex interplay of health and human services, education and the justice system.'

<https://www.ombudsman.vic.gov.au/News/Media-Releases/Media-Alerts/Report-on-youth-justice-Victorian-Ombudsman>

Recent decisions

Errors of law versus errors of fact

Secretary, Department of Justice and Regulation v Zhanyu Zhong [2017] VSCA 18 (17 February 2017)

In 2009, the respondent decided he wanted to drive tourist buses for Chinese tourists. To do that he needed to be accredited to drive commercial passenger vehicles under the *Transport Act 1983* (Vic). He was also required to apply for a Working with Children Check under the *Working with Children Act 2005* (Vic).

In January 2009, the respondent made the necessary applications under the legislation. During the application processes, criminal record checks disclosed that he had been convicted of a serious criminal offence — inciting the murder of his ex de facto wife. Given the nature of the offence, the then Director of Public Transport was not permitted to accredit the respondent and the Secretary to the Department of Justice issued a negative notice under the Working with Children Act, meaning that he could not take up a position driving taxis or buses.

The respondent applied to the Victorian Civil and Administrative Tribunal for review of the decision by the Secretary and for an order directing the Director to accredit him. A Vice President of the Tribunal found in the respondent's favour primarily on the basis that the offences occurred 15 years ago; the respondent had maintained a clean record during the period; and there was no relevant link between his offending and child-related work. However, in making these findings, the Vice President also found that the respondent showed no remorse for his offending.

The Vice President ordered that the Taxi Services Commission (which has replaced the Director of Public Transport) issue driver accreditation to the respondent so that he may drive commercial passenger vehicles (which includes both buses and taxis). The Vice President also directed the Secretary to issue a working with children assessment notice to the respondent.

Both the Taxi Services Commission and the Secretary (the applicants) sought leave to appeal under s 148(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). Under that Act, an appeal may only be brought on a question of law and leave may be granted if the proposed appeal has a real prospect of success.

The applicants sought to rely on six proposed grounds of appeal that the Vice President made a 'jurisdictional error' in her findings and sought orders that the Tribunal's decision be set aside and substituted with orders that the respondent's applications be dismissed and that he be disqualified from making further applications for five years.

The Court found that the proposed grounds of appeal and the 'questions of law' do not satisfy the requirement specified in s 148(1) of an appeal in respect of questions of law. The proposed grounds were directed to errors of fact, not errors of law.

The applicants then sought to reformulate the grounds, contending that, among other things, the findings of the Vice President that there was no evidence of violence on the part of the respondent were not open on the evidence.

The Court held that, despite the respondent's lack of remorse, when other matters were considered it was open to the Vice President to find that the statutory criteria had been satisfied as to both whether there was an unjustifiable risk and whether it was in the public interest that he be accredited. It was clear that the Vice President was alert to the importance of a lack of remorse to determination of those criteria, but, as she stated, it is not the only relevant matter. In this case, the respondent had led a blemish-free life over many years and the circumstances of his crime were confined to a fraught personal relationship. It did not arise in a public work environment. Considered in that context, it was clearly open to the Vice President to find that both the risk and public interest criteria were satisfied.

The Court found that the applicants' proposed appeals had no real prospect of success. Despite counsel's attempt to reformulate the proposed grounds of appeal so that they raised questions of law, in substance the applicants' true complaint was that the Vice President failed to take into account some evidence or failed to give it the weight which they believe it should have been given. The findings that the Vice President made and with which the applicants cavil were all clearly open on the evidence; therefore, the application for leave to appeal should be refused.

Administrative law and horse racing at the Wagga Wagga Show — the appeal

Agricultural Societies Council of NSW v Christie [2016] NSWCA 331 (1 December 2016)

The applicant, Agricultural Societies Council of NSW Ltd (ASC), is a not-for-profit organisation providing services to member show societies. Those services included the drug testing of horses at shows and the conduct of disciplinary inquiries. ASC's Rules for Discipline in Horse Sections at Shows (the Rules) were formulated with respect to the undertaking of its disciplinary functions.

On 3 October 2014, Mr Christie (the respondent horse trainer) participated in the 150th Wagga Wagga Show. He rode Royalwood Black Swan to victory in the Galloway Champion Hack event. After Mr Christie's victory, the horse that he was riding was selected to undergo drug testing by Mr Capp, a director of ASC and its official present at the show. The testing revealed the presence of two prohibited substances. Ms Cullen, the horse's owner, later admitted that she alone had doped the horse.

An inquiry was initiated and on 24 March 2015 a disciplinary committee, constituting Mr Capp and three other directors of ASC, found the respondent had breached the ASC Rules by using prohibited substances. It imposed a 12-month suspension on the respondent. ASC has no contractual or other relationship with the respondent which enabled it to enforce the penalty.

The respondent sought urgent interlocutory injunctive relief and a final order setting aside or quashing the decision of the committee. In doing so, he did not rely on any contract between himself and the ASC or other private law right as the basis for the Court's jurisdiction to grant relief. Also, it was not said that ASC was exercising any statutory power or performing any governmental function.

The primary judge (Kunc J) found that the committee's decision was amenable to judicial review because it adversely affected the respondent's livelihood and reputation (*Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546 (*AFL v Carlton*); *Mitchell v Royal New South Wales Canine Council Limited* (2001) 52 NSWLR 242 (*Mitchell*)). His Honour also found that there was apprehended bias on the part of Mr Capp which vitiated the committee's decision and ordered that the decision be quashed: *Christie v Agricultural Societies Council of NSW* [2015] NSWSC 1118.

ASC sought leave to appeal from those orders. ASC contended, among other things, that the decision of its committee was not amenable to relief in the nature of certiorari. It also contended that *Mitchell* and *AFL v Carlton* were cases in which the contractual relations between the parties gave rise to the private law right and therefore were not applicable, as no such relations exists in this case.

The Court found that the basis for the exercise of the Court's power to grant relief in the nature of certiorari arises where the decision-maker is exercising a public or statutory function (*Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393). Here the ASC was not exercising any statutory power or government regulatory function. Therefore, the primary judge erred in finding the ASC's decision was amenable to judicial review.

The Court also held that a Court's power to grant a remedy such as a declaration or injunction in relation to the decision of a private tribunal (like the ASC) is founded on the exercise of contractual or other private law rights recognised at law or in equity (*AFL v Carlton*; *Mitchell*). In this case, no such rights were relied on to justify the Court's intervention.

Finally, the Court found that Mr Capp's involvement in the circumstances leading to the decision to impose a penalty was not akin to that of prosecutor (compare *Isbester v Knox City Council* [2015] HCA 20). Mr Capp did not undertake investigations or oversee the prosecution of the charges and had no 'interest' in the process that might cause him to deviate from proper decision-making. On the contrary: Mr Capp's involvement was more fairly characterised as administrative or ministerial. Therefore, the primary judge erred in concluding that Mr Capp's involvement in the circumstances leading to the decision to impose a penalty on Mr Christie gave rise to any reasonable apprehension of bias on his part.

What types of tribunal decisions are reviewable by a court?

Chief of Navy v Angre [2016] FCAFC 171 (9 December 2016)

ABMT Angre applied to the Defence Force Discipline Appeal Tribunal for leave to appeal and an extension of time to appeal against convictions entered by a General Court Martial. The Tribunal was constituted by Tracey, Logan and Brereton JJ.

As part of those proceedings, the Tribunal, relying on s 23(1) of the *Defence Force Discipline Appeals Act 1955* (Cth) (the Appeals Act), granted AMBT Angre leave to adduce certain

evidence on the hearing of his appeal. The applicant objected to the Tribunal receiving that evidence.

The applicant filed an appeal in the Full Federal Court under s 52 of the Appeals Act in relation to the Tribunal's evidentiary ruling. Section 52 provides, among other things, that an appellant or the Chief of the Defence Force or a service chief may appeal to the Federal Court on a question of law involved in a decision of the Tribunal in respect of an appeal under the Appeals Act.

As a preliminary matter, the Court considered whether it had jurisdiction to hear the application.

The applicant contended, among other things, that the Explanatory Memorandum (EM) to the *Defence Force (Miscellaneous Provisions) Act 1982* (Cth), which inserted s 51 into the Appeals Act, stated that the relevant part would 'provide a wider access to the Federal Court including a right to appeal on questions of law' and s 52(1) provided the right to the appeal to the Federal Court 'from any decision of the Tribunal'. The applicant emphasised the use of the word 'any' in the EM.

The Court held that the principles in *Director-General of Social Services v Chaney* [1980] FCA 108 (*Chaney*) apply to s 52 of the Appeals Act — namely, that, like the Administrative Appeals Tribunal, an appeal from a decision of the Tribunal lies only from an effective decision or determination of the Tribunal. Ordinarily, such a decision will be a final, operative decision.

The Court stated that the point of the decision in *Chaney* is to avoid judicial review by way of an appeal *instanter* and as of right from non-determinative steps, determinations or decisions of the Tribunal. This reflects the undesirability of fragmenting proceedings in the Tribunal by the making of applications to the Federal Court seeking to challenge intermediate directions, determinations or decisions of the Tribunal (*Geographical Indications Committee v The Honourable Justice O'Connor* [2000] FCA 1877).

The Court opined that reliance on statements in extrinsic material, like an EM, cannot govern the construction of legislation, especially where those statements are not present in the legislation itself (*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41).