RECENT DEVELOPMENTS

Katherine Cook

Australian Law Reform Commission completes inquiry into the incarceration rates of Indigenous Australians

On 22 December 2017, the Australian Government received the Australian Law Reform Commission's final report on the incarceration rates of Aboriginal and Torres Strait Islander peoples.

The government announced this inquiry in October 2016 to examine the factors leading to the disturbing over-representation of Indigenous Australians in our prison system and to consider reforms to the law.

This report is the culmination of nearly a year's intensive work on a complex and important issue. The Australian Law Reform Commission consulted widely and released a discussion paper in July of this year.

The Australian Government sincerely thanks the Commission for its report and will now carefully consider the recommendations.

We will work with Indigenous Australians, state and territory governments, the legal profession and the wider community to develop solutions for this complex issue.

The final report will be tabled in Parliament and released publicly in 2018.

<https://www.attorneygeneral.gov.au/Media/Pages/Australian-Law-Reform-Commission-completes-inquiry-into-the-incarceration-rates-of-Indigenous-Australians-22-December-2017.aspx>

New Solicitor-General for Victoria appointed

The Andrews Labor Government has announced the appointment of Kristen Walker QC as the Solicitor-General for Victoria.

Ms Walker replaces outgoing Solicitor-General, Richard Niall QC, who has been appointed as a Judge of the Court of Appeal.

Ms Walker is one of Australia's most distinguished advocates and legal scholars, recognised around Australia as a leading expert in constitutional, administrative and human rights law.

Ms Walker has appeared regularly in the High Court, the Court of Appeal, the Supreme Court and the Federal Court in cases involving constitutional, administrative and human rights law. Prior to her appointment as senior counsel she often appeared as junior to the Solicitors-General for Victoria and the Commonwealth.

Ms Walker has frequently advised the Victorian and Australian Governments on constitutional, statutory interpretation and administrative law issues.

From 2011 to 2012, Ms Walker was legal adviser to the high-profile Independent Inquiry into the Media and Media Regulation, conducted by Ray Finkelstein QC.

Ms Walker is a Principal Fellow at the University of Melbourne, where she has lectured in constitutional, administrative and international law, and written advocacy, since 1994. She was an Adjunct Professor at Columbia University Law School in New York from 1998 to 2000 and a visiting professor at the University of Arizona, James E Rogers College of Law, in 2004. Ms Walker was an associate to Sir Anthony Mason, Chief Justice of Australia, from 1993 to 1994.

Ms Walker was admitted to legal practice in 1993, signed the Bar Roll in 2004 and was appointed senior counsel in 2014. She holds a Bachelor of Laws (Honours) and Bachelor of Science from the University of Melbourne, where she won the Supreme Court Prize for best law graduate.

She also holds a Master of Laws from the University of Melbourne and a Master of Laws from Columbia Law School, New York, where she studied as a Fulbright Scholar.

<https://www.premier.vic.gov.au/new-solicitor-general-for-victoria-appointed/>

Ombudsman releases report into Immigration's processing of applications for Australian citizenship by conferral

Commonwealth Ombudsman, Michael Manthorpe PSM, has released a report on the Department of Immigration and Border Protection's processing of applications for Australian citizenship by conferral.

The report looks at delays in the department's handling of citizenship applications that require enhanced identity and integrity clearance checks.

Last year, the Ombudsman's Office received an increase in complaints from people who had lodged applications for citizenship by conferral and had waited, in some cases, over 18 months for an outcome.

'The report makes four recommendations aimed at improving the quality of information available to delegates in the Australian Citizenship Instructions (ACIs) in order to achieve greater certainty and timeliness in complex identity and character assessments', Mr Manthorpe said.

The department is currently revising its ACIs to improve guidance to delegates. The department has also worked to reduce the total number of citizenship by conferral applications it has on hand for processing.

'The department has achieved a reduction in the overall number of cases under consideration, although we have also seen an increase in the number of applications where a decision has not been made for over two years. The department still has work to do to ensure timely management of these complex cases', Mr Manthorpe said.

The department has accepted the Ombudsman's recommendations. The Ombudsman's Office will continue to work to monitor the implementation of the recommendations in the report.

<http://www.ombudsman.gov.au/news-and-media/media-releases/media-release-documents/commonwealth-ombudsman/2017/18-december-2017-ombudsman-releases-report-into-immigrations-processing-of-applications-for-australian-citizenship-by-conferral>

Which small businesses have mandatory data breach reporting obligations?

From 22 February 2018, the Notifiable Data Breaches scheme (NDB scheme) will require a wide range of organisations to report data breaches that are 'likely to result in serious harm' to the individuals whose personal information is affected by the breach. They will also be required to notify the Office of the Australian Information Commissioner.

The NDB scheme applies to organisations that already have obligations to secure personal information under the *Privacy Act 1988* (Cth). Generally, this does not include small businesses that have a turnover of $3 million a year or less.

However, there are a few exceptions. Organisations that fall under the following categories will have mandatory data breach reporting requirements, regardless of their size:

- health service providers (including, for example, private hospitals, day surgeries, medical practitioners, pharmacists, allied health professionals, gyms and weight loss clinics, childcare centres and private schools);
- organisations that trade in personal information;
- credit reporting bodies;
- credit providers;
- employee associations registered under the *Fair Work (Registered Organisations) Act 2009* (Cth); and
- organisations that opt into being covered by the Australian Privacy Principles under s 6EA of the Privacy Act.

The NDB scheme will also apply to small businesses in these categories that are based overseas if they have an 'Australian link'.

Tax File Number (TFN) recipients (which is any person in possession or control of a record with TFN information) will also need to comply with the NDB scheme in relation to their handling of TFN information. This means that, if TFN information is involved in a data breach, a TFN recipient will be obligated to meet the requirements of the NDB scheme.

Organisations that are not covered by the NDB scheme are encouraged to use the information in our guidance on notifying individuals under the scheme to create or review their data breach response plans.

Being transparent when a data breach occurs is central to meeting community and consumer expectations. Ninety-four per cent of Australians believe they should be told when a business loses their personal information. Informing individuals about a data breach is one step that organisations can take to demonstrate that they take their responsibility to protect personal information seriously.

And, as a practical measure, notifying individuals at risk of harm can provide them with the opportunity to reduce their chances of experiencing harm. For example, individuals can resecure compromised online accounts. This can reduce the potential impact of a data breach overall.

<https://www.oaic.gov.au/media-and-speeches/news/which-small-businesses-have-mandatory-data-breach-reporting-obligations>

Australian Human Rights Commission: time to rebuild the structure of Closing the Gap

Australia is a long way short of closing the gap by 2030 and needs to rebuild the foundations of the strategy as a matter of urgency.

The Close the Gap Campaign welcomes the news that there has been an improvement in several closing the gap targets; however, only meeting three out of seven targets for such a critical national priority is no cause for celebration.

Close the Gap Campaign Co-Chair and Aboriginal and Torres Strait Islander Social Justice Commissioner, June Oscar AO, said the strategy needs a major recommitment to make the accelerated progress needed.

'After 10 years of closing the gap work, we all expected to be further ahead than just managing to meet three out of seven targets', Commissioner Oscar said.

'This is a national shame. In 2018, it is still a fact that our people live nearly a decade less than non-Indigenous peoples in this country.'

Last Thursday, the Close the Gap Campaign released a highly critical review of the last 10 years of COAG's Closing the Gap Strategy.

The federal government is currently leading a refresh process of the Closing the Gap Strategy.

Close the Gap Co-Chair and Co-Chair of the National Congress of Australia's First Peoples, Rod Little, says the refresh process is the last chance to get government policy right in order to achieve the goal of health equality by 2030.

'The analysis of the campaign is that the strategy will not work, or only partially work, if governments fails to resource it and stick to the plan.'

'All Australian governments must return to the first principles and commitments of the Close the Gap Statement of Intent — first signed in 2008. This was an ambitious, landmark and human-rights based compact that we hold governments to', said Mr Little.

The campaign welcomed reports of the success of economic targets relating to Indigenous procurement, which is indicative of the value of targeting setting. Government must continue to be held accountable to national headline targets.

The government is yet to provide any direct response to the health recommendations provided by the campaign last week. For example, Aboriginal Community Controlled Health Organisations (ACCHOs) must be supported to expand much further. It is well established that ACCHOs are best placed to deliver culturally safe health services, which cut unnecessary hospital admissions and lift access across the health system.

There were some detailed and considered recommendations made by the campaign in its review launched on Thursday, 8 February. We look forward to a detailed response to those recommendations from federal, state and territory governments.

The Close the Gap Campaign Review called for the following:

- A new strategy must be co-designed with Aboriginal and Torres Strait Islander health leaders and be underpinned by agreements negotiated between federal, state and territory governments and Aboriginal and Torres Strait Islander health leaders.
- The building blocks of a new strategy must include national funding agreements, implementation plans and clear accountability.
- Maternal and infant health programs and a focus on addressing chronic disease must be retained and expanded.
- Strategy targets must be retained and inputs for good health must be measured. State and territory governments should also report on targets in relation to their jurisdiction.
- The National Aboriginal and Torres Strait Islander Health Plan Implementation Plan should be fully costed, funded and implemented — and focus on identifying and filling health service gaps.
- The strategy should work to an overarching health infrastructure and housing plan that works to build the right physical environment for health to flourish.

<https://www.humanrights.gov.au/news/media-releases/time-rebuild-structure-closing-gap>

Recent decisions

A tribunal hearing conducted in a manner giving rise to reasonable bias

Sharma v Minister for Immigration and Border Protection [2017] FCAFC 227 (North, Logan and Charlesworth JJ) (22 December 2017)

On 23 December 2013, the appellant (Abhishek Sharma) was granted a TU-573 Higher Education Sector visa (the 573 visa) to study a Masters of Commerce (Professional Accounting) (the Masters course). Following the grant of his visa, he failed several subjects in the first semester.

On 1 July 2014, the appellant applied for a TU-572 Vocational Education and Training Sector visa (the 572 visa). On 25 July 2014, following the advice of a migration agent, the appellant obtained a new enrolment to study commercial cookery, which was a subject for which the 572 visa could be obtained.

On 29 July 2014, the appellant's enrolment in the Masters course was cancelled by the education provider.

On 14 August 2014, a delegate of the Minister for Immigration and Border Protection refused the appellant's application for the 572 visa. The delegate found the appellant had not satisfactorily explained why he made such a significant change in direction within such a short time. Consequently, the delegate was not satisfied that the appellant was a genuine applicant for entry and stay in Australia as a student.

On 5 September 2014, the Department of Immigration and Border Protection notified the appellant of its intention to consider cancelling the 573 visa that was linked to the Masters course under s 116(1) of the *Migration Act 1958* (Cth). Section 116(1) of the Act gives the Minister the power to cancel a visa if the Minister is satisfied that the holder has not complied with the condition of the visa. In this case, appellant had not complied with the condition to remain enrolled in the Masters course.

In late September 2014, the appellant enrolled in a Bachelor of Accounting course, which was a qualifying course for a 573 visa.

On 1 October 2014, the Minister's delegate cancelled the appellant's 573 visa.

The appellant applied to the then Migration Review Tribunal for a review of the Minister's decision to cancel his 573 visa. On 29 January 2015, the Tribunal conducted a hearing of the review application. He was assisted by a new migration agent, who was present at the hearing.

At a very early stage of the hearing, shortly after it commenced at 10:06 am, the Tribunal member suggested that the appellant might be making up a story and not answering the member's question. During the hearing, the Tribunal member repeatedly interrupted the appellant before he could finish or elaborate on his evidence.

At 4:49 pm on the same day as the hearing, the Tribunal affirmed the decision to cancel the appellant's visa. The reasons for the decision ran to 31 paragraphs.

The appellant sought judicial review in the Federal Circuit Court. The Federal Circuit Court dismissed his application.

The appellant then appealed to the Full Federal Court (the Full Court). The sole ground of appeal was that the Federal Circuit Court erred in failing to find that the decision of the Tribunal was affected by procedural unfairness in the form of apprehended bias.

The Full Court opined that apprehended bias is shown if a fair-minded lay observer might reasonably apprehend that the decision maker might not bring a fair and impartial mind to the making of the decision: *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [6] (Gleeson, McHugh, Gummow and Hayne JJ).

The Full Court found that, in determining whether the Tribunal member's conduct might be indicative of a mistaken but nonetheless open state of mind, a reasonable observer would form an impression based upon the accumulative effect of hearing as a whole. The Full Court held that the numerous instances in which the Tribunal member peremptorily shut down the appellant's evidence, when considered accumulatively, support a conclusion that a fair-minded observer might reasonably apprehend that the Tribunal might be unwilling to listen to and deal with the evidence in fact given by the appellant. It is not necessary to demonstrate that the observer would reach a settled conclusion that there was an unwillingness to listen: it is sufficient to show that the observer might apprehend that the Tribunal had that state of mind.

Moreover, the Full Court held that the observer may have regard not only to the words said by the Tribunal but also to the tone of voice in which the words are expressed. In that respect, the audio recording of the hearing does not support an inference that the Tribunal was merely mistaken in its view of the evidence. To the contrary: the conclusion that a reasonable observer might apprehend bias on the part of the Tribunal member is only reinforced by the demeaning and dismissive manner in which the Tribunal dealt with the appellant from a very early juncture in the hearing.

The Full Court also noted that some light may also be thrown on the issue by noting the unusual speed in the delivery on Tribunal's reasons. The reasonable lay observer might also regard that circumstance as providing some explanation for the way the hearing was conducted.

The Full Court held that the Federal Circuit Court erred in failing to hold that the hearing in this instance was affected by apprehended bias. The appeal was allowed, the orders of the Federal Circuit Court were set aside, the decision of the Tribunal was set aside and the application was remitted to the now Administrative Appeals Tribunal to be determined in accordance with law.

When is a factual error a failure of a Tribunal to conduct its statutory review function?

SZTSC v Minister for Immigration and Border Protection [2017] FCA 1032 (Greenwood J) (4 September 2017)

These proceedings concerned an appeal to the Federal Court from a decision of the Federal Circuit Court, by which that Court dismissed an application for judicial review of a decision of the Refugee Review Tribunal.

On 5 December 2013, the then Refugee Review Tribunal affirmed a decision of the delegate of the Minister for Immigration and Border Protection not to grant the applicant a Protection (Class XA) visa under the *Migration Act 1958* (Cth).

Before the Tribunal, the appellant claimed to be a Hazara Shia born in 1982 in Afghanistan. In 1989 he moved to Kabul and resided in Marak during winter. The appellant claimed, among other things, that his house in Kabul was attacked at night and the attackers fired shots at the house. However, in its reasons for decision, the Tribunal found that the applicant was '68 years old'. The Tribunal also stated that the fact the appellant 'had not made any claim that he has ever previously been harmed or threatened in Kabul *supports my findings*' that he was not owed protection obligations by Australia.

Before the Federal Court, the appellant contended that the Tribunal fell into factual error when considering his individual circumstances by observing that the appellant was 68 and had not made any claim that he had previously been harmed or threatened in Kabul (the incorrect facts). However, as this ground was not raised before the Federal Circuit Court, the Federal Court need first to decide whether the appellant ought to be given leave to rely upon grounds of appeal raising questions which were not raised before the Federal Circuit Court.

The solicitors for the Minister contend that leave to rely upon the new ground ought to be refused, as the appellant had failed to demonstrate that the proposed new ground had 'clear merit': *Vaux v Minister for Immigration* (2004) 238 FCR 588 (*Vaux*).

The Federal Court opined that leave to argue a ground of appeal not raised before the primary judge should only be granted if it is expedient in the interests of justice to do so: *O'Brien v Komesaroff* [1982] HCA 33. The practice of raising arguments for first time before appeal courts has been particularly prevalent in appeals relating to migration matters. A court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, leave should generally be refused (*Vaux*). Several contextual things should be noted about migration matters and the application of the principles governing leave to rely upon grounds of appeal where matters were not raised before the primary judge (*Vaux*). For example, in migration matters applicants often suffer from language difficulties and the ability to obtain legal advice.

In this case, although the appellant had the same pro bono lawyer in the Federal Circuit Court, the ground the appellant sought to rely upon in the Federal Court concerning the errors in the Tribunal's decision was introduced on the recommendation of counsel, who was

only engaged for this appeal. As such, the Federal Court was satisfied that the new ground arose because his counsel appreciated there was an issue as to whether the Tribunal failed to discharge its statutory review functions.

The Federal Court was further satisfied that the appeal had 'clear merit'. The Federal Court found that, on the basis of incorrect facts, the Tribunal reached a conclusion that it could not be satisfied that there were substantial grounds for believing that, as a necessary and foreseeable consequence of the appellant being removed from Australia to Afghanistan, there was a real risk that he would suffer significant harm; thus, Australia does not owe protection obligations to the appellant.

The Federal Court further found that, in proceeding in this way, the Tribunal failed to discharge the statutory review function required of it and had fallen into jurisdictional error. Sometimes this is said to be a 'constructive failure' to discharge the review function. However, that term is inappropriate in this case, because there was an *actual* failure to discharge the statutory review function and thus jurisdictional error arose.

When is an FOI application an abuse of the right of access?

Adelaide, City of, 2017/11142 [2018] SAOmbFOI 3 (8 January 2018)

On 6 October 2017, the applicant sought access to documents under the *Freedom of Information Act 1991* (SA) (the FOI Act) relating to any certificate issued by the City of Adelaide (the agency) under the *Expiation of Offences Act 1996* (SA) (the EO Act). Section 13 of that Act requires agencies that issue expiation notices to provide certificates to the Fines Enforcement and Recovery Officer (the FERO) if they wish that officer to take action to enforce payment of fines. This was the 15th application made by the applicant in the previous 13 months in relation to a single parking fine issued by the agency.

On 31 October 2017, the agency's chief executive officer, Mr Goldstone, wrote to the applicant advising him that he had decided to refuse to deal with the application under s 18 of the FOI Act on the basis that it was part of a pattern of conduct that amounted to an abuse of the right of access conferred by that Act.

On 3 November 2017, the applicant sought external review of the decision by the South Australian Ombudsman under s 39 of the FOI Act.

The issue for the Ombudsman was whether the agency has demonstrated that the agency's opinion — that the application was part of a pattern of conduct that amounted to an abuse of the right of access — was arrived at on reasonable grounds.

On 30 November 2017, the Ombudsman issued his provisional determination. Subject to the receipt and consideration of submissions from the parties, he proposed to confirm the agency's determination.

In response to the Ombudsman's provisional determination, the applicant contended that his application under the FOI Act was not just for documents related to his parking fine; rather, he sought any document the agency held that amounts to a determination by the FERO for the purposes of s 13(1)(a) of the EO Act. However, the Ombudsman found this was not clear from the wording of his application to the agency. As such, the Ombudsman concluded that it was reasonable for the agency to have interpreted the most recent application as only focusing on the certification process for the applicant's parking fine.

The Ombudsman concluded that it was reasonable for the agency to have formed this opinion and confirmed the agency's determination that the application was part of a pattern of conduct that amounted to an abuse of the right of access. In reaching his conclusion the Ombudsman took the following into account:

(1) This application was the 15th made by the applicant to the agency in a period of 13 months.
(2) Each of the 15 applications constituted requests for access to documents relating to the enforcement of a single parking fine issued to the applicant by the agency.
(3) Ten of the 15 applications constituted requests for access to documents relating to the certificate provided to the FERO.
(4) The requests appear to have been intended to assist the applicant to establish that the FERO had been taking enforcement action against expiation notice recipients without requiring agencies to comply with s 13 of the EO Act.