letters

letters to the editor

From: Ms Angela Cranston
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May 2000

I have read Mr Craig Colborne's article *The Refugee Review Tribunal: a personal view* (*Reform*, Issue 75, Spring 1999) and Dr Peter Nygh's subsequent letter (*Reform*, Issue 76, Autumn 2000) with much interest. Many of Mr Colborne's concerns relate to full and timely disclosure and are the subject of a number of submissions provided to the current Senate Legal and Constitutional Legislation Committee's inquiry into the Operation of Australia's Refugee and Humanitarian Program. The Refugee Advice and Casework Service (RACS) has also submitted its concerns to that inquiry. I make the following comments based on those concerns.

The current edition of the *Refugee Review Tribunal's Practice Directions* makes a distinction between disclosure of personal information and disclosure of country information. Practice Direction 5.2 provides a level of guidance as to disclosure of personal information. It states that the statutory obligation to disclose adverse information that is personal to the applicant will be in writing, will detail the particulars of the information and will give an explanation of why the information is relevant to the applicant's review. However, the Practice Direction permits inconsistent practice in that it then indicates that a request to comment on such material may be made at any stage of the review process, which includes the hearing.

In contrast, Practice Direction 8.5 provides no guidance as to how disclosure of 'adverse material' will be made. Adverse material presumably relates to all material other than personal information. It states that the applicant will be given an opportunity to respond to relevant and significant material that is, or may be adverse, to his or her case. The Practice Direction then provides that it will be up to the presiding Member to consider the appropriate stage at which adverse material is to be brought to the attention of the applicant and the manner in which this should be done.

It has been my experience that adverse country information is disclosed at the hearing. Accordingly, it is not until the hearing that the applicant learns of the issues that trouble the Tribunal and the information it has obtained that it considers to be adverse. It has been my experience that disclosure entails the general thrust of the material and an immediate response from the applicant. Upon request, however, I have been given an opportunity to see the material and make a response by way of considered written submission. In my view an unrepresented applicant would not understand that they could make such a request.

In its submission to the Senate, the RACS indicated that all material should be made available to the applicant prior to the hearing. I note that it has been suggested that this may not be necessary, given that much of the country material is publicly available

and secondly, the Freedom of Information (FOI) procedures allow for access to such material.

In response, I would note three things. Firstly, even if country material was publicly available, then that would not mean that it is available to applicants, who may be in immigration detention or who may not have the necessary research skills or command of English to be able to access the information. Secondly, it is important to remember that much of the country material is not available. In particular, information prepared by the Department of Foreign Affairs and Trade is not available to the public. Thirdly, it would be fallacious to assume that an FOI request necessarily means that an applicant will be able to access country information. This is because

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the subtlety of the FOI process may be lost on those who are not legally represented. In my experience also, even if an FOI request is made, then the applicant is given access to the Tribunal's file, which does not contain the country information that the Tribunal will rely upon to make its determinations. Without a specific request, country information will not be forthcoming.

Dr Nygh has noted that during the period June 1999 to September 1999, 386 FOI requests were made, 10 of which specifically requested research material. This tiny figure of 10 would seem to confirm concerns that applicants are not obtaining country information pursuant to FOI procedures.

In addition, section 431 of the *Migration Act 1958* means that the Tribunal's own decisions are no longer publicly available.[1] Section 431 states that the Tribunal is only required to publish those decisions where the Principal Member considers they are of particular interest. I understand that the Tribunal is currently publishing approximately 10 per cent of its decisions. The Tribunal's Practice Directions do not provide any information as to what the Principal Member considers is of 'particular interest'.

In the past, the Tribunal's decisions which reference relevant country information have played an important role in providing guidance on source material that the Tribunal considers to be important.

In my view, the current access mechanisms operate on the fallacious assumption that protection visa applicants are able to function in a rational and non-emotive way and can, without legal representation, comprehend and manoeuvre their way through the Tribunal's administrative processes. This is simply not the case.

The Tribunal has made a significant contribution to the refugee determination process. It must also be acknowledged that the Tribunal continues to make efforts to make applicants aware of relevant country information. However, there is no consistent practice and the nature of the disclosure is somewhat inadequate in that it usually occurs too late in the process. Given these concerns, then, it would be preferable that country information be made available prior to hearing, it be placed on Tribunal files and disclosure occur outside the FOI.

Endnotes

1. Prior to June 1999 all Tribunal decisions were publicly available.

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Editor's note: As we wish to close debate on this issue in Reform, we have provided Dr Peter Nygh, the acting Principal Member of the RRT with the opportunity to respond to the points raised by Ms Cranston.

From: Dr Peter Nygh
Acting Principal Member
Refugee Review Tribunal

August 2000

As regards the general policy of the Tribunal towards adverse personal information under s 424A of the Act, it is left to Members to decide whether they disclose that material in advance or at the hearing. This will depend on the nature of the information and, very often, the time when this information becomes available. If the material is put to the applicant at the time of the hearing, the applicant must be given the prescribed period in which to comment. This is carefully set out in Paragraph 5 of the Section 420A Directions, which are available on our website at <http://www.rrt.gov.au>.

Non-personal adverse information is governed by Practice Direction 8.5 and Paragraph 7 of the Section 420A Directions. The latter directs that such material 'should be put to the applicant before, during or after the hearing and the applicant given a reasonable opportunity to respond. A response at the hearing may be sufficient.' Members are encouraged to offer a period in which to respond to an applicant in such a case, whether represented or not. Whether material is made in advance is left to the Member in the circumstances of each individual case. It depends on whether that information already appeared in the primary decision, as it frequently does, or is already readily available and, above all, the time at which it became available at the Tribunal or when the relevant issue was raised. Often the submissions and materials on which the applicant relies are not given to the Tribunal until very shortly before the hearing.

As regards the publication of decisions, the following decision was given by me on 31 May 1999 pursuant to s 420A(1) identifying as publishable:

> *'Statements representing a broad cross-section of decisions having regard to factors such as the country of reference, the outcome of the review, whether there is detailed consideration of legal principles, and whether the factual circumstances are complex or unusual, or whether they are common to a large number of cases.*
>
> *Statements which would require extensive editing for the purposes of subsection 431(2) are likely to be difficult to follow and therefore not of particular interest.'*

We aim to publish about 20 per cent of our decisions. To go further would place an undue burden on our limited resources.

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Letters

An Australian Restatement?

From: Ian M Johnstone BA LL.B
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January 2000

The foundation stone of the edifice we call civilisation rests on respect for the law. For there to be respect for the law, the law itself must deserve respect. Unfortunately, and possibly dangerously, many of our laws do not engender respect. Unduly onerous ones are often evaded. Laws seen as absurd are flouted. Needlessly complex laws are disobeyed through ignorance.

It is no longer acceptable for laws to be complicated, jargon ridden, verbose and physically accessible only by means of the very latest in technology. It is time the lawyers of Australia adopted a large project in keeping with the idealism at the start of the new millennium – an Australian Restatement of the Law. The American Restatement which began in 1923 and took 20 years to complete was initiated by a group of prominent American judges, lawyers and law teachers who together determined to do something about the law's two chief defects – its uncertainty and its complexity. In Australia, we now have, in addition to those two defects, the law's enormous bulk, its tendency to change rapidly, and its unreadability for ordinary people.

What is a restatement?

A restatement is an authoritative, comprehensive and condensed statement of the main principles of the law, both statutes and the common law in reported cases, with an explanation linking the law with the policy underlying the law, and with simple examples of how the law works in practice.

The *Oxford Companion to Law*, under the heading of 'Restatement of the Law' reads:

> *'An attempt made by the American Law Institute to have formulated in propositions rather like the articles of a code what are deemed to be the best doctrines and principles on the main branches of the law of the US, particularly the branches still mainly dependent on case-law. The first edition appeared in 1932-57. The volumes are legally unauthoritative and a purely private compilation, though having the substantial authority of the very eminent jurists who acted as Reporters for the various subjects and their committees, and differ from textbooks in not citing case-law and in putting forward not the settled or predominant view on any point but what seemed the most rational view. The volumes of the Restatement, though unauthoritative, have been frequently referred to in the courts and have had persuasive influence on judicial decisions.'*[1]

Some important points need to be emphasised.

• A restatement is not enacted and not binding and is therefore not a code, and it is not a substitute for fuller legal texts with numerous case references. A restatement is an attempt to make the law less unwieldy for lawyers, and understandable and physically accessible for non-lawyers.

• A restatement is not a disguised scheme to restate the law in journalese or newspaper language. It is an attempt to state the law in a plain legal English that is understandable by most literate people.

• A restatement is an attempt to bring law back into the public arena so that it becomes part of our community's shared knowledge.

Condensing and explaining laws is an everyday occurrence. Lawyers are forever summarising and explaining laws to clients. Head-notes of reported cases summarise the decision and state, very often highly accurately, the essence of the law made by the decision. Preambles of Acts can be helpful by providing the context within which the operative clauses can best be understood.

The American Restatement

The American Restatement was produced by the American Law Institute and has been a huge and positive influence in the improvement of law in America. Under the restatement program, Reporters (who were eminent jurists) were asked to prepare drafts for particular areas of law. Advisers then suggested improvements to these Reporters. Between 1923 and 1947 the Institute produced nine restatements comprising 19 volumes and four model statutes, three relating to criminal matters and the fourth, the Model Code of Evidence.[2]

Chief Judge Benjamin Cardozo of the New York Court of Appeals and Vice President of the Institute said of the American Restatement in 1930:

> *'My subsidiary conviction is still strong and unabated that no project so important for the simplification of our common law and for its harmonious development has been launched during all the years of its history upon the soil of the new Pavlovian World.*[3]

The American Law Institute had the benefit of receiving various large benefactions for its work. For example it received $510,000 from the Rockefeller Foundation to produce a Model Penal Code and a grant from another foundation of $750,000 for the Uniform Commercial Code.[4]

In concluding his history of the Institute, Frank stated:

> *'When William Howard Taft and Charles Evans Hughes incorporated The American Law Institute in 1923, they were thinking big. They and their associates believed that American law was in serious disarray and that the bar, the bench, and the schools, by working together through the Institute, could achieve uniformity at least in the common law through Restatements. To a remarkable degree, that vision has been realised.*
>
> *In one important respect, the game has changed. The founding fathers of the Institute were mainly concerned about the common law, and today's flood of statutes was never contemplated. Even with regard to statutes, however, the Institute has had enormous successes. The two greatest have been the Uniform Commercial Code (with the National Conference of Commissioners on Uniform State Laws) and the Model Penal Code.*
>
> *But in the common law target area, the success of the Institute has been immense. In some States, where there is no conflicting statute or earlier case law precedent, the Restatements are the law ... The complaints of 1923 about the scattered nature of the common law are*

now rarely heard. The vision of the founders has been realized.[5]

Why Australia needs a restatement

Most Australian lawyers seem to be in a state of denial about the bulk, obscurity and complexity of our laws. When they do comment, however, they sometimes do so in a colourful way. In 1992, former Chief Justice of the High Court, Sir Anthony Mason, wrote:

> *'Oscar Wilde ... would have regarded our modern Corporations Law not only as uneatable but also as indigestible and incomprehensible ... The vast magnitude of our corporations legislation is a wonder to behold. Its Byzantine complexity is a testimony to the subtlety of mind of those who brought it into existence.*[6]

There is a constant and unavoidable process of compressing the law and extracting the best parts of the best decisions. The problem is that this process is far too slow, given the huge volume of laws we have. Justice Michael McHugh has provided evidence of the accelerating increase in the bulk of legislation.[7]

- The Commonwealth parliament passed 221 Acts in 1973, but only 216 in 1991. Yet while the 221 Acts passed in 1973 took up 1,624 pages of the statute book, the 216 Acts passed in 1991 took up 6,905 pages of the statute book – an increase of 325 per cent.

- In New South Wales, statutes enacted in 1989 occupied three times as many pages as statutes enacted in 1972.

Justice McHugh concludes:

> *'The melancholy truth is that individuals and groups often cannot know their rights and duties because the law cannot be found or is so complex that they cannot understand it.*[8]

Some advantages

The most obvious advantage of an Australian Restatement would be for practising lawyers, solicitors, barristers and judges to have ready access to the main basic principles of the law written in a language everyone can understand. With legal research made so much easier, legal costs would fall. Clients could be given better and faster solutions to their problems and answers to their questions.

A restatement also would bring the law closer to contemporary social policy and to popular understanding. Law, after all, is not an end, but a means. It is there to serve society by maximising freedom while maintaining sufficient orderliness to ensure the exercise of that freedom. There is a tendency for law to come adrift from the rough social policies that generated it in the first place, and to appear as if it is a monolithic stand-alone wall of words, which somehow manages to impede enterprise and innovation. Laws seen as separated, if not divorced, from social policy, become arbitrary technicalities to be avoided in verbally technical ways.

If improvement of our laws means anything at all it means bringing law and justice closer to each other. Laws should not have to be impossibly complex. The principles of law that protect the freedom of people in a small group remain much the same for people in a large group. It simply becomes progressively more important that these principles are sound and well understood, accepted and respected.

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Conclusion

Obviously there are some areas of the law that have been recently reformed and are, as it were, in a reasonable state of repair. However, some areas of law – including contracts law, torts law, and compensation for disablement – are badly in need of simplification, and, in many cases, of reform.

An Australian Restatement would do a lot for the morale of the legal profession. It would greatly reduce the time taken now in finding out what the law is, and thus enable lawyers to return to their true task of using prudence and practical wisdom to guide clients in ways that solve their legal problems and contribute to the overall welfare of our society.

I propose the best way forward is for the Commonwealth government to give a reference to the Australia Law Reform Commission for investigation and report on the feasibility of an Australian Restatement, and on the best method of proceeding with it.

The law in America has been greatly improved by that country's restatement. The present generation of lawyers can, and should, make a concerted effort to improve the laws in Australia in the same way.

Endnotes

1. DM Walker Oxford Companion to Law Oxford Clarendon Press 1980, 1065.

2. 'The American Law Institute, 1923-1998' (1198) JP Frank 26 Hofstra Law Review 615, 622.

3. id 621

4. id 632

5. id 638-639

6. A Mason 'Corporate Law: the Challenge of Complexity' 2 (1992) Australian Journal of Corporate Law, 1.

7. M McHugh 'The Growth of Legislation and Litigation'(1995) 69 Australian Law Journal 37).

8. id 42

Continued from Page 87: 'Reviews'

Common among these papers is the desire for the law and its institutions to develop in a way that reflects fundamental shifts in social circumstance, cultural norms and the moral will of the Australian people.

It is telling, and may have been deliberate, that the central message of both the first and last papers in the collection is the importance of standing compassion side by side with the law, whether in the sphere of international human rights or as a suburban solicitor.

In his foreword, Geoffrey Robertson states that his only regret about this book is that it cannot replicate the live performance of Michael Kirby's speeches and those occasions when 'the wisdom in his words is audible, almost tangible, in the controlled passion of his utterance, leavened with topical (but invariably polite) jokes and snatches of poetry'. When I saw Kirby speak at a recent conference, I was struck by the way in which he was greeted by the audience – not simply as a greatly revered judge of the High Court, not only as a 'statesman', but as a celebrity in the true sense of the word. His stage presence was remarkable, and much of what he conveyed was, as they say, in the delivery. Similarly, that Kirby is often a hilariously funny orator is less apparent among these papers. Of course, this is partly due to the gravity of much of the subject matter, but also because these papers were presented as speeches and inevitably something is lost in the written form.

This being said, this book is an extremely enjoyable and rewarding read. The legal concepts are clearly explained, the arguments compelling and the passion behind them refreshingly apparent. The papers are also factually rich and informative and draw upon a range of the author's personal experiences, as a judge, as an international humanitarian and as a person. Consequently, each paper provides a valuable understanding not only of its topic, but of one of Australia's most remarkable individuals.

– Matt Hall

** The Hon Justice Michael Kirby AC CMG was the inaugural Chairman of the ALRC, and the founding editor of Reform.*