feature

ALRC inquiry into the sentencing of federal offenders

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Crime and fear of crime are significant issues in Australian society. The crimes that most people fear—personal crimes and property crimes—are generally dealt with in our state and territory criminal justice systems. However, since federation certain crimes have been dealt with in the federal criminal justice system.

Federal criminal offences are located in over 500 Commonwealth statutes. They include offences such as drug importation, people smuggling, illegal fishing, terrorism, social security fraud and tax fraud. Federal police (and other federal bodies) investigate these offences, and federal prosecutors prosecute them. It is estimated that about ten percent of criminal activity in Australia falls within the province of the federal criminal justice system.

The Inquiry

The Australian Law Reform Commission (ALRC) is currently examining the law governing an important aspect of the federal criminal justice system: the sentencing of federal offenders. It has been asked to report on whether Part 1B of the *Crimes Act 1914* (Cth) is an appropriate, effective and efficient mechanism for the sentencing, imprisonment, administration and release of federal offenders.

Part 1B was introduced into the *Crimes Act* in 1990. It represented the first major reform of federal sentencing legislation in over 20 years. However, judges applying the provisions in Part 1B have been critical of the structure and drafting of the legislation, which has variously been described as 'convoluted', 'confusing', 'opaque' and 'unnecessarily time consuming'. The ALRC will investigate these criticisms during the course of its inquiry.

The state/federal balance

An interesting feature of the federal criminal justice system is its heavy reliance on the state and territory systems. At federation, the possibility of establishing an entirely separate system of justice for federal offenders (like the system currently operating in the United States) was canvassed. However, the proposal was ultimately rejected on the basis that it was inefficient and costly. Instead, the federal criminal justice system was designed to 'piggyback' on the existing state systems.

The Australian Constitution facilitated the development of this hybrid system. Section 77(iii) authorised the Parliament to confer federal jurisdiction on state courts and s 122 implicitly gave a similar power in relation to territories. Accordingly, to this day, most federal offenders are tried, convicted and sentenced in state and territory courts. Section 120 of the Constitution required every state to accommodate federal offenders in state prisons. Consequently, all federal prisoners are currently housed amongst state and territory prisoners. While there is little available data on the total number of federal offenders, it has been recorded that federal prisoners comprise about four to five percent of the total Australian prison population.

Part 1B of the *Crimes Act* contains numerous provisions relating to the sentencing, imprisonment and release of federal offenders. However, it is not a code. When the provisions of Part 1B are silent on a matter, provisions of the *Judiciary Act 1903* (Cth) (ss 68 and 79) "pick up" and apply state and territory laws. In addition, some provisions in Part 1B expressly provide for reliance on state and territory laws, for example, laws regarding the commencement date of a sentence. As state and territory sentencing laws often differ markedly and change rapidly, there is a real concern that the sentences imposed on like federal offenders may vary from jurisdiction to jurisdiction. This could lead to the perception that the federal criminal justice system operates in an inconsistent or arbitrary manner.

Issues also arise regarding the administration of sentences imposed on federal offenders. Generally speaking, federal offenders are treated in the same manner as their state counterparts: they have the same access to prison facilities and programs, and they experience the same prison conditions. However, different procedures apply in relation to the parole of federal prisoners. All federal prisoners who have been sentenced to more than three years and less than ten years imprisonment are granted automatic parole at the end of their non-parole period.

Parole decisions in relation to federal prisoners who have been sentenced to over ten years imprisonment are made by senior officers in the Commonwealth Attorney-General's Department on behalf of the Attorney-General. Federal prisoners do not have a right to appear before the decision-maker and are not able to seek merits review of an adverse parole decision. This process differs widely from the state and territory parole processes.

The ALRC is currently considering whether the law governing the sentencing of federal offenders should aim to treat all federal offenders equally, regardless of the jurisdiction in which they are dealt with. If this is an important goal, many attendant questions arise. Should a comprehensive sentencing regime be established for federal offenders? Should federal legislation specify the sentencing options available for federal offenders? Should the criminal jurisdiction of the federal courts be expanded? Should a federal parole

Defences to Commonwealth Injury Claims cont...

the employees claim will fail pursuant to s.7(7).

APPLICATION TO DISEASE NOT INJURY

The exclusionary provision of willful and false representation applies to employment related diseases, not to an injury simpliciter, as the provision falls within s.7, diseases.

The practical affect of this is where an employee suffers a frank injury the exclusionary provision under s.7(7) will not apply unless the injury can also be regarded as a disease.

WILLFUL AND FALSE

It has been held in *Newhman v Australian Telecommunications Corporation* (1990) 22 ALD 783 that an incorrect statement is not willfully false. However the failure to disclose a symptom in response to a specific question may be found to be both willful and false (See *Schofield v Comcare* (1995) 38 ALD 124). The Federal Court in *Comcare v Porter* (1996) held that for a misrepresentation to be caught by s.7(7) the representation must be objectively false and made without any belief that it is untrue.

More than one contributing factor

An injured employee may suffer an injury which was materially contributed by more than one event.

Following from this, an employee may suffer an injury which was materially contributed by an exclusionary provision event and which was also materially contributed to by a non-exclusionary provision event.

An example of this is where an employee suffers from a psychological condition which was materially contributed to by the failure to obtain a promotion and which was materially contributed to by an abusive telephone call from a client.

In these circumstances the employee will satisfy the requirement of injury from the abusive telephone call notwithstanding that the employee's condition was also contributed to by the exclusionary provision of failure to obtain a promotion.

The authority for this proposition can be found in *Trewin*. Heerey J in *Trewin,* citing Drummond J from *Mooi v Comcare* (1995) 37 ALD 559 with approval, states:

> "It is implicit in Drummond J's reasoning that if there were four contributing and employment-related factors, of which three were exclusionary and one was not, and if the requirement of "injury" were satisfied, the claim would succeed".

It should be noted however, that following the recent Full Court of Federal Court decision of *Hart* this proposition in *Trewin* must be qualified.

Following *Hart*, it is likely that in order to establish a compensable injury, the second non-contributing factor will have to arise from a separate and distinct set of facts and not be related in any way to the contributing factor the subject of the exclusionary provision.

Common Law

To enable a claim in common law made under s.45 of the SRC Act for non-economic loss, the injured employee must first be entitled to compensation under s.24. It follows that if the employee's injury/ disease is caught by one of the exclusionary provisions the employee will not have an entitlement to compensation under the SRC Act and therefore will not have an entitlement to compensation at common law.

Conclusion

In certain circumstances the SRC Act provides an absolute defence to a claim by an employee that he or she was injured at work. If an exclusionary provision under ss.4(1), 14(2), 14(3) or 7(7) can be proved, the employee will not succeed with his or her claim even if the employee clearly suffered an injury/disease at work which on the face of it would be compensable. However, the injured employee may succeed where there is a further set of separate events, which has also materially contributed to the employees injury, and which is not the subject of an exclusionary provision. ①

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board be established?

The pathway to reform

The ALRC has established an expert Advisory Committee to assist with the Inquiry. The Advisory Committee consists of prosecutors, criminal defence lawyers, judicial officers, academics and government officers. In February 2005, the ALRC released an Issues Paper entitled *Sentencing of Federal Offenders* (IP 29), which identifies the issues to be examined during the course of the Inquiry.

Following the release of IP 29, the ALRC called for submissions from interested individuals and organisations by April 2005. The ALRC has recently conducted nationwide consultations with stakeholders including those in the Northern Territory.

The next stage of the inquiry involves the release of a Discussion Paper in October 2005, which will contain draft proposals for reform. The ALRC's final report is due in January 2006.

The Issues Paper is available online at www.alrc.gov.au. ①