DownUnderAllOver

A regular column of developments around the country

Federal Developments

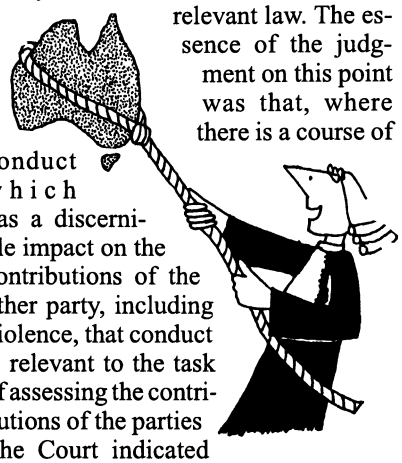
Domestic violence and family law

A front page article in the *Australian* in January reported on a significant recent decision of the Full Court of the Family Court, *Kennon* (1997) FLC 92-757.

While the judgment deals with a number of important issues, including the assessment of contributions to the welfare of the family where significant assets are involved, the case has attracted attention for what the Court has to say on the issue of domestic violence. So far as this issue is concerned, there were two main aspects to the judgment. First, the Court discussed the relevance of the existence of domestic violence to applications for property adjustment under s.79 the *Family Law Act*. Second, the Court dealt with an appeal from a decision of the trial judge to grant tortious damages arising out of domestic violence using the Family Court's cross-vested jurisdiction from State courts.

So far as the first aspect of the case was concerned, the Full Court had indicated in an earlier case (*Doherty* (1996)) that it was prepared to move away from a long history of precedents which indicated that the existence of violence was irrelevant to applications for property adjustment or spousal maintenance. These early cases were subjected to significant critique from women's groups, academics, and the Australian Law Reform Commission in its report, *Equality Before the Law*. In *Doherty*, Baker J indicated that the existence of violence was relevant to one of the considerations in an application for property adjustment, namely, the extent of the contribution of the parties to the welfare of the family. However, the issue was not discussed in any detail and there was no statement that earlier authorities had been overruled. Further, the issue did not make any significant difference to the outcome in that case and was not a ground of appeal. Consequently, the decision in *Doherty* was easily dismissed or regarded somewhat quizzically by practitioners. The decision in *Kennon* provides a firm basis for saying that the law has now changed.

While the relevance of violence for s.79 property adjustments was not significant in the wife's case on appeal in *Kennon*, the Full Court took the opportunity to make a statement of the relevant law. The essence of the judgment on this point was that, where there is a course of conduct which has a discernible impact on the contributions of the other party, including violence, that conduct is relevant to the task of assessing the contributions of the parties The Court indicated that violence was not the only conduct that was relevant, but warned against the use of allegations of misconduct as a general tactical weapon; for example, it suggests that 'incidents of infidelity' are unlikely to be taken into account. The Court is less clear about the relevance of violence to the 'future needs' or 'prospective considerations' aspect of the property adjustment inquiry. Some might argue that the need will only become clear with an exploration of the violence experienced.



In the second part of the case, the Court dealt with an appeal from a decision by the trial judge to award damages arising out of a number of violent assaults which had caused psychological damage to the woman. A number of points of law arose in the appeal, including whether each individual incident of violence had to be alleged and proved, and whether damage suffered had to be attributable to a particular incident. The Court held that each incident of violence must be separately proved, with regret. However, the Court indicated that the trial judge's approach of not requiring that damages or particular portions of damages be related to individual assaults was correct. In finding a need to establish individual assaults, rather than a course of conduct, the Court recognised the inadequacy of tort law for meeting claims based on domestic violence. These comments prompted a second article in the *Australian*, 'Better Chance for Battered Spouses After Law Review' which reported that some State Attorneys-General were considering examining the relevant law with a view to reform. One possibility is the development of a statutory tort which better captures the dynamics of domestic violence, including the fact that it is often ongoing and multifaceted.

The Court also expressed some concerns about the increasing use of cross-vested tort claims in the Family Court. In *Gould v Brown* [1998] HCA 6, the High Court was deadlocked 3:3 as to the validity of the cross-vesting scheme and so the Full Federal Court decision upholding the legislation stands.

The decision in *Kennon* is a welcome confirmation of an end to the 'silence about violence' in decisions under the Family Law Act. It is important, however, not to overstate the significance of this development for survivors of violence and, in particular, to acknowledge their difficulty in harnessing and accessing the legal system to take advantage of this development; significantly, there was a very large property pool in *Kennon* (nearly $9 million). So far as tort claims in relation to domestic violence are concerned, the Court took some steps towards recognising the realities of domestic violence and the need to adapt tort law to them, but it fell short of recognising a 'domestic violence tort', while calling for reform in this area.

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ACT

Access to medical records — landmark legislation

The *Health Records (Privacy and Access) Act 1997* (the Act) came into effect in the ACT on 1 February 1998. It is the first legislation of its kind in Australia. The legislation follows the decision of the High Court in *Breen* v *Williams* (1996) 185 CLR 71 in which it was held that patients do not have a

common law or contractual right to access their medical records.

The Act provides 'consumers' (patients) in the ACT with a general right of access to records concerning them which are held by a health service provider, subject to some limitations. Additionally, the Act provides that it is a term of a contract between the consumer and the health service provider, whether oral or in writing, that the health service provider will allow the consumer to have access to records relating to the provision of the service, in accordance with the Act.

The consumer may exercise her or his right of access by inspecting the record, by receiving a copy of the record or by viewing it and having its contents explained by the relevant record keeper or other suitably qualified health service provider. If the consumer agrees, he or she may also be given access to the record by being given an accurate summary of the record. The Minister is able to set fees for the provision of records by health service providers to consumers. No fees have been determined as yet.

Where a consumer requests access and there are no grounds for non-production, the record keeper has 14 days to provide access. Where a fee is applicable, and there are no grounds for non-production, the record keeper has 14 days to give notice to the consumer that access will be granted on payment of the fee and once the fee is paid, must permit access 7 days after receipt of the fee or 30 days after the request, whichever is the later.

Grounds for non-production of a record are that the record is not in the possession of the record keeper, does not relate in any respect to the consumer, or access would contravene an ACT or Commonwealth law or a court order.

A record keeper is also prohibited from giving a person access if:

- the record keeper believes on reasonable grounds that the provision of the information in the record would constitute a significant risk to the life or the physical, mental or emotional health of the consumer or another person. In these circumstances, provision is made for a suitably qualified health service provider to discuss the record with the consumer where that course is considered desirable.
- the record is subject to confidentiality, for example, where information has been given to the record keeper in confidence by a person other than the consumer, a guardian of the consumer, or the health service provider. Legal professional privilege is also not affected by the Act.

The Act also sets out certain Privacy Principles relating to matters such as the manner and purpose of the collection of personal health information, storage and security of personal health information, access to health records by persons other than the consumer, alteration of health records, and limitations on the use and disclosure of health records.

Complaints may be made to the Community and Health Services Commissioner in relation to a refusal to grant access to a medical record and in relation to a breach of a Privacy Principle. Such a complaint will be dealt with as a complaint under the *Community and Health Services Complaints Act 1993*. The Magistrate's Court has jurisdiction to make certain orders, and rights of appeal to the Supreme Court are provided.

It is an offence under the Act for a person to destroy or damage a health record with intent to evade obligations under the Act, with a penalty of $5000 and/or 6 months imprisonment for individuals and $25,000 for a body corporate. It is also an offence for a person to obtain another person's 'consent' for the purposes of this Act (see the Privacy Principles in particular) by threat or intimidation.

Consumer groups hope that the ACT legislation will increase the pressure on the Federal Government and on other States and Territories to introduce similar legislation. However, the Federal Minister for Health, Dr Wooldridge, was reported as saying that the Federal Government would prefer the medical profession to introduce a code of practice 'with teeth' on consumer's access to medical records instead of a legislative approach. ● **SM**

NSW

Detention after arrest

The *Crimes Amendment (Detention After Arrest) Act 1997* (NSW) has introduced a significant legislative change to the regime of custodial interrogation in New South Wales.

The Act permits a police officer to detain a person for questioning for a period 'that is reasonable having regard to all the circumstances', in order to investigate whether they have committed the offence for which the arrest was made (s.356C). A non-exhaustive list of factors must be taken into account in determining the reasonableness of the period. A ceiling of four hours, or for such longer period as may be granted by a special 'detention warrant', also applies.

The Act applies to detentions of all people (including those under the age of 18 years) who have been arrested by a police officer for an offence. The regulations may modify the application of the legislative regime, for example by reducing the permissible length of the investigation period for people under 18 years, Aborigines or Torres Strait Islanders, people from an NESB background, or people with a disability.

Previous experience of changes to interrogation regimes, such as the introduction of mandatory recording, has shown that police can be remarkably fortunate in locating suspects who either voluntarily or through a combination of circumstances, waive or lose statutory protections theoretically available to them. Accordingly, it will be interesting to monitor use of the detention warrant provisions, which permit application for extension to be made, by telephone if necessary, to authorised justices.

Further, a watchful eye could be usefully cast over use of the 'stop the clock' provisions, which deem certain periods of time, such as the period during which a suspect is conveyed to a police station, to be irrelevant in calculating the duration of the investigation period. ● **JW**

Northern Territory

A significant year

When the definitive legal history of the Northern Territory comes to be written, it is likely that 1997 will prove to have been a significant year.

After the convincing victory of the conservative Country Liberal Party (CLP) in the August 1997 election, the point will soon be reached where the political classification of the NT might have to be changed from 'Westminister style democracy' to 'Singaporean/ Malaysian style democracy' i.e. a one party State. The CLP has been in power since the commencement of self-

government in 1976. The Labor opposition has *lost* seats in each of the past three elections and currently comprises seven members in a 25 member unicameral parliament. It is more accurate to speak of executive sovereignty than parliamentary sovereignty. After the election a former senior *CLP* adviser (Andrew Coward) called for a Royal Commission into the state of democracy in the NT. The response? Over the next few months Chief Minister and Attorney-General Shane Stone: (1) rejected the need for freedom of information legislation in the NT; (2) announced that Cabinet had accepted his application to add *QC* after his name; and (3) announced that as a 'hands on' Attorney he had decided to become *personally* involved in every decision on which members of the private legal profession would receive legal work from the Government.

Many now argue that parliamentary processes have failed to ensure that basic principles of accountability and justice are observed in the NT. During 1997 two significant events occurred in response to this state of affairs. First, a record number of lobby groups sought to mobilise public opinion in an effort to bring about a change in government policy. The commencement of mandatory imprisonment for adult and juvenile property offenders prompted the creation of *Central Australian Youth Justice*, *Top End Youth Justice* and the *Campaign Against Unfair Sentencing*. The *Aboriginal Interpreters Lobby Group* arose after it became apparent that the Government would not continue funding the *Top End Aboriginal Interpreters Service* beyond the successful six-month trial. Plans to demolish the old Alice Springs Gaol and to build high rise apartments in suburban Darwin prompted the immediate mobilisation of effective local lobby groups concerned to preserve the unique heritage and landscape of the Territory.

The second significant event in 1997 was the challenge to government policies in the courts. In *Wynbyne v Marshall* (1997) 117 NTR 11 the Full NT Supreme Court rejected a challenge to the validity of the mandatory imprisonment legislation, so a 23-year-old Aboriginal woman from Kalkaringi with no prior convictions would have to serve 14 days in prison on being convicted for stealing one can of beer and unlawful entry. An application for special leave to appeal to the High Court has been filed. On a more positive note, the demolition of the old Alice Springs Gaol was halted last November after the National Trust (NT) obtained an order from the Supreme Court declaring that the demolition order of the Minister for Lands, Planning and Environment was unlawful.

The merits of using judicial review to restrain the legislature and executive is topical in the NT. The number one elected representative of the NT to the Constitutional Convention was Dave Curtis of the *Just Republic* ticket. His platform included an entrenched Bill of Rights. In April/May 1998, the NT is to have its own constitutional convention as part of a push for statehood. In announcing the convention, the Chief Minister made the following curious statement:

> [T]he constitution should seek to entrench only those rights which are universal. The government is resolute in its view that it is entirely inappropriate, as we approach the cusp of the 21st century, to be framing an enduring constitutional instrument for a new state which either allocates or denies rights on the basis of gender, race, religion or ethnic origin. This government will not entertain the entrenchment of any rights which are at the expense of, or which exclude, any group of Territorians. [*Hansard* 4 October 1997]

In 'NT political speak' this means that the Chief Minister is ruling out entrenching provisions that might be used by Aboriginal people. One wonders how the Chief Minister would respond to a provision such as 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law' (Article 26 *ICCPR*). Such a provision might well be used by Aboriginal people — not least to ensure equal access to services such as interpreters of Aboriginal languages. ● **MF**

Queensland

Two recent important judicial appointments and one early retirement, all involving Queenslanders, show very clearly the difficulty (impossibility?) of taking the politics out of such matters.

Chief Justice retires and so does Fitzgerald

Queensland Chief Justice John Macrossan retired on 16 February 1998. Macrossan recently expressed his pleasure with the Borbidge Government's legislation to re-unify control of the Supreme Court under the Chief Justice. The power of the Chief Justice had been diminished by 1991 legislation passed by the then Goss Government which created the Court of Appeal. Macrossan admitted there had been friction with the Court of Appeal President, Tony Fitzgerald.

Interestingly, Macrossan has been replaced by Justice Paul de Jersey. Justice spokesman for the Labor opposition, Matt Foley stated that convention dictated that the position of Chief Justice should have gone to Fitzgerald as Court of Appeal President, and accused the Government of snubbing Fitzgerald as a payback for his anti-corruption inquiry of the late 1980s. A week after the announcement of De Jersey's appointment, Fitzgerald surprised many by announcing that he will be retiring later this year even though he is 14 years short of the statutory retirement age of 70. While Fitzgerald has refused to make any public comment, it appears clear that he is unhappy with recent developments in relation to the Supreme Court.

Capital 'C' Queenslander

The appointment to the High Court bench of Brisbane barrister, Ian Callinan, was announced shortly before Christmas. This is the first High Court appointment of a barrister direct from the private bar for more than 20 years. After the announcement, Callinan referred to the importance of the High Court deciding cases in an orthodox way. Having previously called for the appointment of a Capital 'C' conservative, Deputy Prime Minister Tim Fischer's response to the announcement was 'No comment with a capital C'. Opposition Justice Spokesman Nick Bolkus described the appointment as 'purely political' and said it would set Australian law back 20 years. On appointment, Callinan has become immediately embroiled in a dispute over whether he should sit on the Hindmarsh case, because of his prior advice on the matter. To the surprise of many, Callinan decided not to step down from considering the case. An appeal was then lodged in relation to Callinan's failure to disqualify himself. However, before the appeal was heard, Callinan reversed his stance after Nick Bolkus provided Callinan with copies of documents indicating that Callinan had given legal advice in 1996 to Aboriginal Affairs Minister, John Herron, about the Hindmarsh case.

Domestic violence laws to be extended

Changes are likely to be made to Queensland's domestic violence legislation with a view to improving the ability of older people to seek protection from abusive family members. Young people are also likely to receive greater protection after concerns were raised when a magistrate refused to grant a protection order to a teenager on the basis that she did not fit the definition of a 'woman' as she was less than 18 years old.

Doctor calls for limits on single mothers

The *Courier-Mail* of 20 January 1998 gave front page attention to a call from a Brisbane GP for young single mothers to be forced to adopt out babies if they could not support them. Dr Judy Stokes' provocative comments included the following:

> I don't think the girls do it for the money, but once they've done it there are so many benefits you would be mad not to take it up.
>
> It is not a matter of catching them with a safety net, it is a matter of thousands of them jumping in.

● **JG**

[Editors Note: We apologise to JG for an error in the Queensland column of DownUnderAllOver, December 1997. Boys were kept in leg irons in Queensland in October last year, even before the Police Minister announced the 'toughest prison regime' in November.]

South Australia

Child labour in South Australia

The Employee Ombudsman has been asked to look into the practice of children being employed to sell lollies door to door for charities. According to newspaper reports children as young as 10 have been working for small amounts of money. The *Advertiser* reported a 14-year-old boy who earned 50 cents for each $2.50 bag of sweets he sold in one suburb while his 10-year-old brother was said to have been taken on a three-day trip to two country towns where he earned $55 selling the sweets.

While most of the concern seems to be around the issue of potential abuse or exploitation of young children, an editorial in the *Advertiser* acknowledged that the matter also raises the issue of 'a fair return for the amount of effort involved'. But the newspaper stepped back from any kind of legislative response. 'At this stage, we do not see any need for heavy-handed legislation or regulations. Rather, there is a need for greater awareness and vigilance for precisely the kind of oversight an ombudsman is appointed to provide', said the editorial. It continued: 'it would be a sad day for South Australia if children and young people working for a bit of pocket money, and perhaps out of genuine altruism, had to be subject to licensing and escorts'.

I beg to differ. If the stories are true that children are working incredibly long hours for a pittance then 'heavy handed legislation' is exactly what is needed. Of course, a legislative response is only seen as 'heavy handed' if one is committed to the idea of self-regulation as opposed to the public interest being set down by the whole community through its elected representatives. Why do we expect those who exploit children to suddenly change their behaviour simply as the result of publicity and exposure? A child skateboards through Rundle Mall and is processed through the juvenile justice system by police. An employer employs a child as a source of cheap labour and we are warned against the need for laws. Are we really heavy handed in the right places?

No pokies

Tim Costello may have put the question of the 'casino culture' on the national agenda but perhaps South Australia can claim another first. Nick Xenaphon was elected to the SA Legislative Council on a 'No Pokies' platform last October. This is notable for a number of reasons. The Government does not have a majority in the Upper House and while the combined strength of Labor and Democrat members can control the Legislative Council's proceedings, it does mean that Mr Xenaphon is not going to be overrun by the Government agenda in the Upper House. Mr Xenaphon has an eight year term — he will be around for a while and it may be that at the next State election his influence will be more significant in determining the balance of power.

In the meantime he has been excluded from a committee enquiring into poker machines, the places on the committee being taken by members of the major parties. While this may have been within Parliamentary rules, it seems absurd that a member of Parliament elected on a 'No Pokies' platform is excluded from being a member of a committee looking into that very issue.

But the Government has also moved to address some of the concerns of the anti-gambling lobby. There are moves to prohibit EFTPOS machines near gaming venues and Mr Xenaphon has suggested slowing down the speed at which machines can be played. A science museum has also claimed that it may have to close because of lost revenue from admissions, blaming expenditure on poker machines for such loss. The Government has said it will not let the museum close. The matter of the culture of gambling and its effect on the community is certainly on the agenda. And there is a Member of Parliament who will be there to constantly remind the Government of the issue. ● **BS**

Victoria

Super tribunal

The Victorian judicial system is set for a shake-up this July with plans to merge over 100 tribunals into one 'super tribunal'. The proposal, reported by the *Age* in February, may cover such tribunals and boards as the Administrative Appeals Tribunal, the Anti-Discrimination Tribunal, the Residential Tenancies and Small Claims Tribunals, and the Prostitution Control Board but not the Department of Human Services boards/tribunals. The super-tribunal has been largely welcomed by the legal profession, with some claiming that the efficiency and consistency of many tribunals would be improved by the plan.

Critics of the plan, however, have suggested that the super tribunal may create a more formal setting in which specialist lawyers would be necessary, making hearings more expensive and thus reducing the public's access to speedy dispute resolution. The suggestion has even been raised that the Attorney-General may use the changes as an excuse to dismiss some tribunal members who have made decisions that the Government found less than satisfactory. But, as a spokesperson for the Attorney-General says, 'lawyers have predicted doom and gloom for every piece of legislation'. Lawyers are waiting gloomily for a detailed explanation of the proposal.

Cause for concern

In a decision which may not have filled the Victorian Government with delight, Mr Brian Barrow, Deputy Chief Magistrate, has recommended that an Aboriginal man not serve any of his nine-month jail sentence in a private prison. Mr Barrow also suggested that the man should have access to a Koori education organisation and receive drug counselling. This was the second time that Mr Barrow has made such a recommendation. The private system has been hailed by the Government as well run and efficient but there is considerable cause for concern. In just over 19 weeks there have been five deaths in the private prison system. ● **MC**

Western Australia

Confusion grows over abortion laws

The circumstances under which a woman may seek a lawful termination of pregnancy in Western Australia have been thrown into question with Western Australian Police charging two medical practitioners with attempting to procure abortion in contravention of s.199 of the WA Criminal Code. The charges, which were authorised by the Director of Public Prosecutions (DPP), reflect an extremely literal interpretation of the Criminal Code.

Section 199 of the Criminal Code makes it a crime, punishable by up to 14 years imprisonment, for a person to *unlawfully* use force (or any other means) with the intent to procure the miscarriage of a woman. Section 200 makes it a crime punishable by up to seven years imprisonment for any woman to permit such force or other means to be applied to herself with the intent to procure a miscarriage. 'Unlawful' is not defined in the Code, nor have the Western Australian courts interpreted it. Courts with similar statutory provisions in other jurisdictions have, however, agreed that an abortion is not 'unlawful' if the accused:

> honestly believed on reasonable grounds that the act done by him was (a) necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; and (b) in the circumstances not out of proportion to the danger to be averted. [*R v Davidson* [1969] VR 667 at 672]
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> *(Adopted by K v T [1983] 1 Qld R 396; R v Bayliss and Cullen, (1986) 9 Qld Lawyer 8; R v Wald (1971) 3 NSWDCR 25; K v Minister for Youth and Community Services [1982] 1 NSWLR 311.)*

This test, known as the *Davidson* test, reflects the standard for a lawful abortion throughout Australia and the UK. Accordingly, it is unlikely that Western Australian courts would depart significantly from this standard if tested. It is therefore puzzling that the DPP announced in February that all abortions in Western Australia are unlawful except for the preservation of the mother's life, that is, to save the mother from imminent death. Section 259 of the Code eliminates criminal responsibility for a surgical operation on an unborn child performed in good faith and with responsible care and skill, for the preservation of the mother's life. It effectively permits termination of pregnancy for the purpose of preservation of the mother's life. However, this is not the only instance of a 'lawful' abortion. The DPP's interpretation excludes the possibility of lawful termination of pregnancy where a foetus is defective, or where the mother was the victim of a sexual assault. If the WA courts agree with this view, abortion laws in WA would be among the most restrictive in the world, resembling those in countries such as the United Arab Emirates, Cambodia, Yemen and Afghanistan.

To the contrary, Western Australia's Attorney-General Peter Foss has declared that the *Davidson* test has been and will continue to be used to determine whether prosecutions pursuant to s.199 should proceed. The legal authority of such a declaration is questionable. However, it highlights the enormous gap between abortion practices and abortion law in Australia. Despite the fact that the *Davidson* test makes abortion on demand unlawful in Australia, abortion on demand has been the practice for years in this State and others (see 'The Inadequacies of Australian Abortion Law', (1991) 5 *Aust J of Fam Law* 37 at 48). With this renewed threat of prosecution, however, abortion on demand will almost certainly become a thing of the past in Western Australia.

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DownUnderAllOver was compiled by Juliet Behrens, Mia Campbell, Martin Flynn, Jeff Giddings, Sonja Marsic, Brian Simpson, Jarrod White, Karen Whitney.

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Conclusion

Although there are many areas of concern under the Code, its real test will be its implementation through the court system. As outlined above, many articles leave a lot of room for interpretation. If these articles are used arbitrarily to punish those who are unpopular for reasons beyond criminal activity, then the Code will have failed to help the progress towards a society which values the protections provided by a strong philosophy of respect for the rule of law. If such articles are interpreted narrowly, in the spirit of protection for all those who are involved in the criminal justice system, both victims and defendants alike, then this new Code could play a part in the process of implementing a just legal process.

References

1. Matilda Bogner is from Adelaide where she worked for the Legal Services Commission while studying Russian. After completing her studies (and a lot of letter writing) she organised a position in Bishkek, the capital of Kyrgyzstan in Central Asia. She wrote this article after finishing a detailed critical analysis of the new Criminal Code of Kyrgyzstan for the Kyrgyz-American Bureau for Human Rights and Rule of Law.
2. Annual Report of the International Helsinki Federation for Human Rights, 1997, (prepared by Paula Tscherne-Lempiainen, edited by Ursula Lindenberg), p.161.
3. Freedom House has a three rating system of 'free', 'partly free' and 'not free'. This information was taken from an article by Foley, K.P., '1997 In Review: Freedom House Sees Human Rights Gains', Radio Free Europe, Radio Liberty, 12-19-97, internet site: <http://www.rferl.org/nca/features/1997/12/F.RU.971218125402.html>
4. Annual Report of the International Helsinki Federation for Human Rights, above, p.157.
5. Annual Report of the International Helsinki Federation for Human Rights, above, p.158.
6. This information was obtained by the Kyrgyz-American Bureau for Human Rights and Rule of Law from the Kyrgyz Supreme Court.
7. Index on Censorship, Vol. 26, No. 6 November/December 1997, issue 179, p.115.