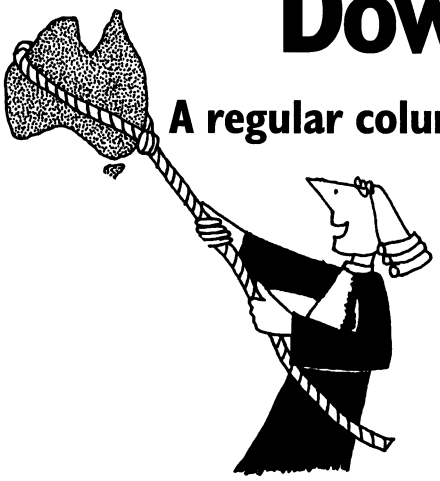
DownUnderAllOver

A regular column of developments around the country



Federal Developments

Refugees — the effective nationality of East Timorese

On 30 October 1998, Justice Finkelstein of the Federal Court handed down his decision in the matter of *Lay Kon Tji v Minister for Immigration and Ethnic Affairs*. The decision has some important implications as to the capacity of East Timorese nationals to seek protection as refugees in Australia.

Lay was an East Timorese national of Chinese descent. He arrived in Australia on 17 April 1992 and sought recognition as a refugee under the *Migration Act 1958*. He claimed that he had been harassed and intimidated by Indonesian forces on account of his Chinese ethnicity and on account of his political activities in support of East Timor's independence from Indonesia.

'Refugee' is defined by Article 1 of the *Convention Relating to the Status of Refugees* (1951) as amended by the *Protocol Relating to the Status of Refugees* (1967). A refugee is a person who, owing to a well-founded fear of being persecuted for reasons of race or political opinion, 'is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'. The country of a person's 'nationality' is defined as 'each of the countries of which he is a national'. This definition is adopted by the *Migration Act*.

The Minister for Immigration and Ethnic Affairs refused to grant Lay a 'protection visa', being the visa that permits those recognised as refugees to remain in Australia. The Minister's decision was based on a finding that Lay did not have a well-founded fear of persecution if he were required to return to East Timor. This decision was affirmed by the Refugee Review Tribunal, but on different grounds. The Tribunal found that, in addition to having Indonesian citizenship, Lay was a Portuguese national. The applicant was accordingly found not to be a refugee as he did not have a well-founded fear of persecution in relation to Portugal.

By way of background, Portugal claimed sovereignty over what is now known as East Timor in 1859. In 1960 East Timor became a non-self-governing territory under the administration of Portugal. This, however, did not bring to an end Portuguese sovereignty over East Timor. In 1975 Indonesia invaded East Timor and in 1976 it was annexed by Indonesia.

On appeal to the Federal Court, the issue was whether Lay had *effective Portuguese nationality*. The full Federal Court has held that the reference in Article 1 of the Convention to the nationality of a person who has more than one nationality is a reference to 'effective nationality' (*Jong Kim Koe v Minister for Immigration and Multicultural Affairs* (1997) 143 695). However, *Jong* did not explain what was required for nationality to be 'effective nationality' beyond indicating that the nationality had to be 'effective as a source of protection' and that it should 'entail the protection necessarily granted to nationals' of the state of the second nationality.

Justice Finkelstein held that, consistent with the purpose of the Convention, 'effective nationality' in relation to a dual national is a nationality which provides all of the protection and rights which a national is entitled to receive under customary or conventional international law. 'Effective nationality' also required that the state of nationality be capable of providing diplomatic protection to the putative refugee.

As to the facts of this case, Justice Finkelstein found that it was open to the Tribunal to find that Lay acquired Portuguese nationality under Portuguese law by reason of his birth in East Timor. However, Finkelstein J noted that the interpretation of the relevant Portuguese laws are the subject of dispute in Portugal. In fact it is not clear whether Portugal itself accepted that Lay had Portuguese nationality. Indeed, the evidence from the Portuguese Ambassador to Australia was that the Portuguese laws concerning the nationality of East Timorese were drafted in recognition of the decolonisation process and were not designed to assimilate East Timorese into Portugal. The Ambassador also said that the nationality laws were only intended to 'avail East Timorese of a free choice to live in Portugal until something better comes along for them'.

Justice Finkelstein also found that it is by no means clear whether, under international law, the international community is obliged to recognise the right of Portugal to intercede on behalf of a national who has become a national of Portugal by reason of his or her birth in East Timor and where that person also holds Indonesian nationality. Accordingly, there was doubt as to whether Portugal had the ability to provide diplomatic protection to a person such as Lay.

Justice Finkelsten concluded that, whilst it was open to the Tribunal to find that the applicant had acquired Portuguese nationality, the evidence did not support a finding that this nationality was 'effective nationality'. The matter was remitted to the Tribunal to be decided in accordance with this finding of law.

The Minister is appealing Finkelstein J's decision. ● **SM**

What's in a name?

A major restructure of the Australian Public Service (APS), brought about by the Administrative Arrangements Orders made on 21 October 1998, has caused a number of headaches throughout the bureaucracy.

Departments have been trimmed, imploded, exploded, dissolved and reconstituted, split and renamed. Some of the former departments are no longer recognisable in their new form. The former Department of Primary Industries and Energy is now (largely) the Department of Agriculture, Fisheries and Forestry; the Department

of Social Security has been replaced by the Department of Family and Community Services and the Department of Employment, Education, Training and Youth Affairs has lost 'employment'.

What's in a name? You may well ask, as it appears the Government puts great store by names, having removed all references to 'social security' (as an interesting aside, the IMF has recently recommended that Australia terminate unemployment benefits after three months). The name changing has resulted in some funny acronyms — the Department of Health and Aged Care becomes HAC and the Department of Agriculture, Fisheries and Forestry is DAFF. In an effort to stop this practice some departments have issued circulars instructing other departments to desist from using the acronymic titles. A bold trend is also emerging whereby the very word 'department' is being dropped from some department's titles in an effort to appear more corporate, so that DAFF becomes Agriculture, Fisheries and Forestry Australia.

Most of the headaches brought about by the restructure are caused by the Government's policy on individual agency bargaining which has given rise to differing terms and conditions of employment across the APS. Some departments have been transformed into quite different entities. In many cases, staff from one department have been transferred en masse to another department. As a result, the application of certified agreements which were entered into between staff and the departments as they formerly existed is very confusing and unclear.

Transformed departments are not only grappling with possible differing pay structures for their staff but also deciding what to do about other non-salary conditions, which were not consistent across the former agencies. What would have otherwise been a routine change of government departments in response to the incoming government's administrative policy has now developed an added element of complexity, even though all public servants work for the same employer. How the bureaucracy is going to deal with the resulting inequities will be interesting to watch.

It seems you can call a department by any other name but, at least for some reassigned public servants, the new administrative arrangements won't smell as sweet. ● **MS**

ACT

Leadership in drug policy

Imagine a situation where addiction to illicit drugs is treated as a health and social problem and not a criminal problem. Imagine a situation where common sense, evidence, science, public health concerns and human rights concerns drive drug policies. Imagine also a situation where members of parliament, both government and opposition work together in a bipartisan way to produce a better drug policy that means fewer families grieve for loved ones lost to drugs.

A forum organised by the ACT Australian Labor Party on 7 November 1998 to assist them develop a policy approach to illicit drugs brought this closer to reality. Chaired by Bob O'Hara, president of the ACT ALP branch and opened by Jon Stanhope, Leader of the Opposition of the ACT Legislative Assembly, it brought together a wide range of speakers including:

- Kim Satler, a youth worker who spoke about the demographics of drug use,
- Archbishop Pat Power from the Catholic Church who spoke about community views and issues, concentrating on human dignity and caring in this issue,
- Maureen Cane from the Drug Referral and Information Centre who talked about the current situation and suggested elements for inclusion in policy,
- Senator Lundy and Annette Ellis from the Federal Parliament who identified possibilities for Federal Parliament,
- Brian McConnell from Families and Friends for Drug Law Reform who talked about the impact of prohibition drug laws on families,
- Robert de Castella from ACTPAC outlined their healthy youth program,
- Dr Jo Mazengarb from the Canberra Hospital Alcohol and Drug Program who described the medical model of drug dependence and treatment options, and
- Michael Moore, ACT Health Minister who outlined current and possible future policies.

The forum was mostly attended by ALP branch members but was advertised widely as an open forum to ensure a wide cross-section of views. This paid dividends, with families who have been affected by drugs, and concerned community members attending.

Dr Mazengarb's medical model of drug dependence was significant for its new perspectives. Heroin addiction was described as a chronic relapsing condition with no cure, not unlike schizophrenia, leukemia, diabetes, and many other conditions where, with the appropriate treatment and management, the most optimistic outcome would be for the condition to go into remission, perhaps for long periods at a time.

If one accepts the medical model, and the weight of evidence and opinion is leaning in that direction, then it is easy to see how the present drug laws get in the way of effective treatment of this condition. Gaol and punishment are unlikely to be effective treatments but are likely to exacerbate matters.

However, the most significant event was the invitation extended to Health Minister Moore, an independent member of the Assembly appointed Health Minister by a Liberal Government. The invitation was unusual because of the traditional adversarial nature of all Australian parliaments. The invitation and its acceptance signalled a strong willingness by both the Government and the Opposition in the ACT to work together to find policies that will truly reduce the harm. Representatives of both Government and Opposition made explicit public statements before and after the forum about this bipartisan approach (for example, a media release by Stanhope on 24 November 1998 entitled 'Labor wants to work with govt on harm minimisation').

If this position can be sustained, there is real hope for rational and effective drug policies. It will take drug policy issues out of the adversarial arena and will relegate the bidding wars to the past. It will mean that the one single issue that has election candidates ducking for cover (that is, drug policies that *may* lose votes regardless of the good they do) would no longer be an issue because both parties would be in broad agreement on the policy approach.

It is now just possible that the ACT will show some leadership in the area of drug policy making that can be emulated in other State and federal jurisdictions.

Brian McConnell
Brian McConnell is President, Families and Friends for Drug Law Reform

Stop press: new abortion law in the ACT

After frantic lobbying by pro and anti-choice lobby groups and an all-night sitting of the ACT Legislative Assembly, a heavily amended version of the *Health Regulation (Maternal Health Information) Bill* was passed on 26 November 1998. The impact of the new law, which will not take effect for six months, is still being assessed. However, most of the worst features of the bill originally tabled by Independent MLA Paul Osborne have been removed. The stated objectives of this law are to 'ensure that adequate and balanced medical advice and information are given to a woman who is considering an abortion ... to ensure that abortions are only performed by appropriately qualified persons and in suitable premises and to provide for the right of persons to refuse to participate in abortions'. An abortion is not to be performed unless certain information has been provided. The information is to be approved by an Advisory Panel to be appointed by the Health Minister, which must include at least three women. It may include foetal pictures, but it must include advice about the risks of proceeding with the pregnancy as well as possible risks of termination. Statistical reports on abortion are to be provided quarterly to the Minister who must table them in the Assembly. Overall, the good news is that the immediate threat to the future of the Clinic where abortions are performed has been lifted. The bad news is that unlawful abortion remains an offence under the ACT *Crimes Act*, pregnancy terminations are subject to more regulation and scrutiny than other medical procedures, and the effects of the scare campaign run by the anti-choice lobby about the risks of abortion will linger on. The ACT Women's Legal Centre may request an investigation into the discriminatory impact of the new law by the ACT Discrimination Commissioner. ● **JE**

NSW

Intellectual cleansing at Macquarie

Macquarie Law School's turbulent history took a dramatic turn recently when the University Council voted 9 to 7 to give Vice Chancellor Di Yerbury power to impose a draconian solution to controversy over a plan to merge the Department of Business Law (currently located within the School of Economic and Financial Studies) into what is left of the existing School of Law.

The Vice Chancellor has announced the creation of a new Division of Law to contain the former School of Business Law and a rump of 'instrumentalists' or 'social engineers' left over from the existing School of Law.

The plan expels from the new Division eight current academic staff, some allegedly dissidents or troublemakers, the others their associates. The 'eight' were indicted for unspecified conduct by four law Professors in a 'Letter to All Law Students', distributed with University approval and at University expense to all law students. Despite the allegations in the Letter no disciplinary action has been taken against the 'eight' nor was the University Council told of this action in a 'confidential' 35-page document submitted to it by the Vice Chancellor.

While this 'intellectual cleansing' process was taking place, six other members of the current, but soon to be dismembered, School of Law have now chosen to be located outside the proposed Division, in solidarity with the 'eight', and in protest at the procedures used and the lack of any academic basis for the proposed Division scheme.

The net effect of the plan is to locate outside a new Division of Law almost all of the existing legal philosophers and historians, those committed to undergraduate teaching in compulsory subjects for admission purposes, junior staff of high promise, and the current Head, Deputy Head and Chair of the School of Law.

For a School with a reputation for critical legal thinking, quality undergraduate education and high employability of its graduates, this seems an extraordinary development. Hardly what is to be expected of a body claiming to be 'Australia's Innovative University'. How accountable the University is for these changes remains to be seen. ● **PW**

Northern Territory

Statehood

To the surprise of most 'experts', particularly those in the CLP Government, a narrow majority of Territorians voted against statehood in the October referendum, held on the same day as the Federal election. The question asked was: 'Now that the constitution for a state of the Northern Territory has been recommended by the Statehood Convention and endorsed by the Northern Territory Parliament, do you agree that we should become a state?' A narrow majority of urban electors (51%) supported the proposition; 70% of the overwhelmingly Aboriginal electors in remote booths rejected it. The result was particularly surprising given that there was no 'No' case presented in the election material, the official reason for this being that all Territory Parliamentarians supported the statehood proposal. It was left to indigenous and community groups to campaign at their own expense against the proposal, which arose from a Statehood Convention conducted in the face of boycotts and walkouts from indigenous groups.

University amalgamations

At the Northern Territory University, it has been decided to amalgamate faculties. The previously independent Law Faculty is to be amalgamated with Arts and Business, and the Faculty of Aboriginal and Torres Strait Islander Studies is to be joined with Foundation Studies, a decision said by some critics to reflect the Government's, and the University's, view of indigenous education as a remedial program. ● **SG**

Mandatory sentencing technicalities

In *R v Hallam* (17 September 1998), the issue arose as to whether, due to the recent amendments relating to mandatory minimum sentences, sentences for a number of property offences should be served concurrently or cumulatively. Hallam had pleaded guilty to 15 property offences, occurring over approximately six months, that were specified in one indictment.

Section 78A of the *Sentencing Act* provides for the mandatory terms of imprisonment for first, second and subsequent property offenders, which are 14 days, 90 days and 12 months respectively.

The most recent amendment to the *Sentencing Act*, in force since April 1998, is s.78A(3A) which was designed to further limit the Court's powers to impose concurrent sentences, already curtailed by ss.50 and 51. A mandatory period of imprisonment is not to be served concurrently with the term of imprisonment for another offence.

If Hallam, who already had a previous conviction for a property offence, was to accumulate mandatory periods of imprisonment for 15 offences, he

would be liable for a mandatory minimum sentence of 14 years and three months!

However, Mildren J noted that all of the findings of guilt are to be treated as a single finding of guilt for the purposes of s.78A if they are specified in the one indictment or are part of a single criminal enterprise (ss. 78A(4) and (5)). Where there is only one finding of guilt there can only be one sentence of imprisonment.

Here, as there was only one indictment, there was only one finding of guilt and hence only one mandatory period of sentencing can be ordered. In the case of Hallam, it was for a sentence of imprisonment for 90 days. ● **KB**

Queensland

'Law and order' issues continue to play a key role in Queensland State politics. This contribution outlines some of the issues which have been significant in recent months as the humidity has intensified and the jacarandas have bloomed.

Review of legal profession

Attorney-General Matt Foley, has announced a wide-ranging review of the legal profession. Reviews of the conveyancing monopoly held by solicitors and the investigative powers of the Legal Ombudsman had already been announced. Issues to be considered include complaint processes, cost dispute resolution mechanisms and the Fidelity Guarantee Fund. As usual with such reviews, the focus appears to be on solicitors rather than barristers. Submissions will be sought from members of the community and Foley has promised extensive consultation with the profession and with community groups. A discussion paper will be released early next year.

Women and criminal justice

A 20-member taskforce has been established to examine how the criminal justice system impacts on women. The taskforce will consider women as defendants and as victims with a focus on court procedures. The establishment of the taskforce was described by Beattie Government Ministers as providing women with an historic opportunity to have their say on the Queensland Criminal Code.

Politicising appeal process

The sentencing in October of two offenders for the torture of a three-year-old boy attracted extensive press coverage. The offences were committed by the boy's mother and her de facto husband and both offenders were sentenced to 9½ years imprisonment. The new offence of torture was added to Queensland's *Criminal Code* in 1997.

The justice spokesperson for the National/Liberal Opposition, Laurence Springborg, moved quickly in calling for Attorney-General Foley to appeal the sentences to seek sentences of greater severity. When Foley indicated that he was awaiting advice from the Director of Public Prosecutions, Springborg protested that Foley was 'snubbing community outrage and hoping the issue will go away'. One Nation MPs were quick to promise that they would support a parliamentary motion calling for an appeal to be lodged. The Attorney-General has now announced that an appeal has been lodged against the sentence.

Naming juvenile offenders

The Beattie Government is reviewing existing laws which prevent the public naming of juvenile offenders. This issue has been raised following the charging of a 12-year-old girl with the murder of her mother at Mapylton. In the absence of research indicating that this type of shaming of young offenders can have positive effects, any such move appears hard to justify. There may be negative effects, such as young people viewing their offender status as a badge of honour. ● **JG**

South Australia

Racism, workplace safety and hanging baskets

In July the South Australian *Racial Vilification Act* came into operation. The Act states that a person 'must not by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of their race by (a) threatening physical harm to the person, or members of the group, or to property of the person or members of the group; or (b) inciting others to threaten physical harm to the person, or members of the group, or to property of the person or members of the group.'

The incitement of racial hatred carries penalties of fines up to $25,000 for bodies corporate; $5000 or three years imprisonment, or both for individuals (s.4)

In this age of increasing racial intolerance from some quarters such laws are absolutely necessary. But what is an appropriate penalty? The State Government has just announced a review of workplace safety penalties. The United Trades and Labor Council has been reported as wanting an increase in the maximum penalty for severe negligence by employers from $50,000 to $500,000. It does raise the question: is the causing of death or serious injury in the workplace worth twice the amount for inciting racial hatred (for a body corporate)? Or 20 times the amount?

But we can't go past the recent letter to the *Advertiser*. A resident returning from a holiday in Victoria, Canada observed that 'Adelaide could emulate Victoria and brighten up its appearance with the simple addition of hanging baskets of flowers from light poles, buildings etc'. Will a city with lots of hanging baskets have less racism, poverty or injustice? Probably not. But something tells me I want to go there .... ● **BS**

Tasmania

New brooms

The newly-elected Labor Government in Tasmania has launched an anti-discrimination policy for state schools and colleges. A previous ban on discussion in schools of issues surrounding homosexuality has been lifted, and a sexuality referral card produced by the Pride Foundation is to be distributed by the Education Department, as a resource for students, teachers and counsellors.

In a similar vein, the Premier, Jim Bacon told the Parliament in November that while the recognition of same-sex relationships was not actively being considered by the Government at the present time (although legislation to protect heterosexual de factos is on the way) he 'respect[ed] a wide range of relationships and accept[ed] them as being valid for the people who enter into those relationships'.

Cautioning young offenders

Tasmania Police has unveiled new guidelines for dealing with young offenders in Tasmania. An existing policy of cautioning or diversionary confer-

encing of first time offenders, for all but the most serious crimes such as murder and manslaughter, sex offences and wounding with intent, will now also be applied to repeat young offenders. The policy decision is stated to have been taken on the basis of statistics showing that there is a lower rate of recidivism through the use of cautioning or conferencing than through placing charges. However, the policy has come in for some criticism, as it allows cautions to be issued where a young offender does not admit guilt. Some police officers are of the view that, as a consequence, files will be closed after a caution or conference of a young person where they may have a record of similar offences, and are reluctant to communicate with the police at all, but were not actually responsible for the offence under caution.

Judicial bias?

A controversial criminal case in Tasmania has now been dropped by the DPP. The accused in a case alleging receipt of stolen goods was unable to afford legal representation and was not provided with legal aid. He enlisted the help of a friend to assist him in his defence. At trial in the Supreme Court, Justice Pierre Slicer criticised both Crown and Tasmania Police handling of the case, and directed the jury to acquit. The Crown successfully appealed the acquittal, the Appeal Court overturning the acquittal on the basis of judicial bias and ordering a retrial, noting that '[i]n his laudable determination to ensure that [the accused] suffered no disadvantage by reason of not being represented by counsel he [Justice Slicer] unconsciously assumed the role of defence counsel'. ● **HG**

Victoria

Law and order

In its latest move to control law and order in Victoria, the Kennett Government has announced proposed legislation which will effectively allow the Court of Appeal to impose extra gaol sentences of up to three months on an accused who loses an appeal against sentencing or conviction. This seems extraordinary punishment for doing nothing more than exercising the basic right of appeal. The plan appears to be the Kennett Government's way of dealing with the problem of the backlog of appeals in the criminal courts without actually confronting the fundamental issues of criminal procedure and legal aid funding. Shadow Attorney-General Rob Hulls described the proposed legislation as like saying, 'Here's an extra three months in jail for trying to prove your innocence'.

Victory for activism

After two years of committed and organised campaigning, the residents of the outer Melbourne suburb of Werribee succeeded in having CSR abandon its plans to build a toxic waste dump in their area. The campaign was spearheaded by a group called WRATD (pronounced 'ratted' — Werribee Residents Against Toxic Dump) and gathered widespread support from the residents of Werribee. In May this year, 15,000 people protested against the dump at the Werribee racecourse and June saw the presentation of a petition containing nearly 100,000 signatures to Federal Environmental Minister, Senator Robert Hill. CSR and the local council participated in three weeks of court-ordered mediation in September, after which came the first indications of a possible backdown by CSR. CSR's final decision was announced in November and Werribee residents appear to be still celebrating. The most notable reaction to CSR's announcement has come, unsurprisingly, from Premier Jeff Kennett. Mr Kennett had supported the plan for the toxic waste dump and was so annoyed by CSR's decision that he described the company as inept, incompetent and appalling. In the meantime, the office of WRATD is receiving calls from other community groups looking for campaigning advice. It seems the people of Victoria still retain some power.

Update: gas and credit cards

There have been notable developments in two areas which have featured in previous editions of this column. *First, the Victorian gas crisis.* Premier Kennett has instituted a Royal Commission into the disaster, accusing the joint venture of Esso and BHP of having 'failed' its obligations to Australian industry and Victorian consumers. The Royal Commission, headed by Daryl Dawson, has already received criticism for the narrowness of its terms of reference. Its findings are due to be handed down in February 1999. *Second, taxpayer-funded credit cards.* Following on from more revelations of official abuse of taxpayer-funded credit cards, Premier Kennett has released new guidelines for their use. The Victorian Auditor-General, who has been consistently critical of the use of the cards by politicians and bureaucrats, considers the guidelines inadequate. He wants them to distinguish more clearly between public and private use. Premier Kennett has remained unmoved. He maintains that credit cards are the most transparent way of following the expenditure of government money: 'People have from time to time made mistakes ... if they make mistakes they've got to repay'. ● **MC**

Abuse of the intellectually disabled

Concerns about sexual abuse of intellectually disabled people have been highlighted in Victoria. Two recent studies have shown that reports of sexual assault by intellectually disabled victims form a significant proportion of reports to Centres Against Sexual Assault (*Age* 9.11.98). The studies also noted that there will be substantial underreporting of such assaults, as 'much of the abuse remains secret because victims confuse sexual assault and rape as the price they must pay for care and because their allegations have carried little weight with the State's justice system'. The *Sunday Age* (8.11.98) has also reported a negligence action against the State, after a severely intellectually disabled woman was made pregnant by a carer in the Department of Human Services. The carer has already been convicted of rape.

Victims of crime miss out on compensation

Payments of compensation to victims of crime dropped from a total of $44 million in 1996–97 to less than $800,000 in 1997–98, following legislative amendments denying compensation for pain and suffering (*Age* 17.11.98). Only 124 payments were made, for medical and other costs, compared with over 5000 under the old scheme. The Attorney-General's spokeswoman said reassuringly that people were now getting counselling, rather than going for monetary compensation. ● **BN**

DownUnderAllOver was compiled by Alt.LJ committee members Karen Bowley, Maddy Chiam, Jenny Earle, Jeff Giddings, Stephen Gray, Helen Gwilliam, Sonja Marsic, Bronwyn Naylor, Brian Simpson, and Madeleine Spies together with invited writers listed under their contribution above.