ATTACKS ON JUSTICE – AUSTRALIA

Highlights

As a consequence of the constitutional protection of separation of powers at both federal and state level, judges and lawyers in Australia enjoy a high degree of independence. However, the integrity of the system is undermined by legislation that limits the exercise of judicial discretion and limits judicial review of administrative decisions. Independence may also be compromised by the absence of appropriate guarantees regarding salary and tenure for state and territory judges, and for tribunal members who effectively exercise judicial power. Australians do not enjoy complete access to justice due to deficiencies in legal aid funding and the refusal of the courts to acknowledge fully the right to legal representation at public expense in criminal proceedings. In addition, new counter-terrorism legislation abrogates internationally recognized due process rights.

BACKGROUND

On 1 July 2004, the Australian Capital Territory's *Human Rights Act* (http://www.austlii.edu.au/au/legis/act/consol_act/hra2004148/), based on the International Covenant on Civil and Political Rights, came into force, provoking debate about the adoption of similar statutes by other states and territories. Academic commentators have observed that the erosion of fundamental rights in Australia by government policy and legislative action demonstrates the need for protection beyond that afforded by the courts and the common law. While many human rights concerns such as immigration and counter-terrorism remain matters for national legislation and action, these commentators suggest that numerous questions – for example, preventative detention and mandatory sentencing – arise at the local level and could properly be addressed through a state or territory bill of rights.

Between **2002 and 2004**, numerous pieces of anti-terrorism legislation were introduced at the federal and state level. Australia's mandatory detention policy under the *Immigration Act 1958* continues to receive international condemnation.

JUDICIARY

Legislation undermining judicial independence

Judicial independence has been challenged during **2003** and **2004** by federal, state and territory government attempts to remove certain decisions from the scope of judicial review by introducing privative clauses into legislation concerning matters such as immigration and employment. These clauses are designed to apply even where a decision made by a tribunal or administrative body was clearly erroneous, or was made in the course of proceedings that failed to comply with the requirements of natural justice. However, in the **February 2003** decision of *Plaintiff s157 v*

Commonwealth (http://www.austlii.edu.au/au/cases/cth/HCA/2003/2.html), the Federal High Court held that privative clauses contained in federal immigration legislation could not be used to prevent judicial review of matters such as failure to apply natural justice principles which may result in jurisdictional error.

In direct response to this decision, in **March 2004** the Federal Government (Commonwealth) introduced to Parliament the *Migration Amendment (Judicial Review) Bill 2004*, which has been referred to the Senate Constitutional and Legal Affairs Committee for inquiry and report. The draft law again seeks to prevent visa applicants from obtaining judicial review of administrative decisions, even where decisions have been made by the Minister or her/his delegates acting beyond the scope of their powers. This is contrary to the principles protected by Articles 3 and 4 of the *UN Basic Principles on the Independence of the Judiciary* (http://www.unhchr.ch/html/menu3/b/h_comp50.htm), which provide that the judiciary shall retain jurisdiction over all issues of a judicial nature without inappropriate or unwarranted interference. The federal government's attempt to remove certain administrative decisions from the scope of judicial review also represents a serious challenge to the doctrine of separation of powers established by Chapter III of the *Commonwealth Constitution*.

There are also recent instances where attempts by the legislature to limit judicial discretion have threatened the integrity of the trial process. For example, both **New South Wales** (in 1994) and **Queensland** (in 2003) have introduced legislation empowering them to apply to the State's Supreme Court for an order to detain a named person or class of persons indefinitely for the purpose of community protection.

The **New South Wales** legislation, which applied to an identified person, was considered by the Federal High Court in 1996 in *Kable v Director of Public Prosecutions for New South Wales,* and was held to be invalid on the basis that it conferred powers upon the state supreme court that were essentially executive and were incompatible with the exercise of the judicial power conferred upon it by the Commonwealth Constitution. The legislation is therefore no longer applicable. The High Court's reasoning indicates that the legislative power of a state may not be used to fundamentally alter the independence of a Supreme Court judge, or the integrity of the judicial system provided for by the Constitution. The *Queensland statute* was considered by the High Court in **October 2004** in *Fardon v Attorney-General*. The legislation was of general application and provided for the court to make an order for indefinite detention in circumstances where there was an unacceptable risk of a serious offence occurring. The legislation was upheld on the basis that it did not impinge upon the institutional integrity of the Queensland Supreme Court by causing it to act as 'a mere instrument of government policy'. The High Court noted that the legislation afforded judges substantial discretion as to whether an order should be made and as to the content of that order, thereby conferring functions that were consistent with the proper discharge of judicial responsibilities. (http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/HCA/2004/46). In *Baker v the Queen* (http://www.austlii.edu.au/au/cases/cth/HCA/2004/45.html), which was also decided by the High Court in **October 2004**, the Court again distinguished the facts of *Kable*, while accepting the principle that the integrity of the judicial system must be maintained.

The distinction between *Kable* and the latter cases remains a narrow one. It should be noted that one member of the High Court, Justice Kirby**,** gave a dissenting judgment in the *Fardon* case on the basis that evidence predicting the likelihood of recidivism is notoriously unreliable and is not a proper basis for detention.

Judicial conduct

In **2002**, the **Australian Institute of Judicial Administration (AIJA)** published a **'Guide to Judicial Conduct'**, prepared at the instigation of the Australian Council of Chief Justices (http://www.aija.org.au). The guide deals with matters such as impartiality, conduct in court, activities outside court, non-judicial activities and conduct and post-judicial activities. While it is based on international standards, it is intended to be a practical guide to assist judges in determining how to handle specific situations that have the potential to compromise their independence and integrity. The guide is not a binding code, but is expected to be influential in enhancing judicial behaviour, particularly as it has been drafted by leading members of the judiciary.

On **13 March 2002**, the Prime Minister indicated that he would act on a recommendation of the Australia Law Reform Commission and would establish a special committee to report on the misconduct or incapacity of a federal judge before taking formal steps for removal under the Commonwealth Constitution. In New South Wales, a similar independent committee had already been established by the *Judicial Officers Act 1986 (NSW)*. However, its findings are not binding and will lead to a judge's removal only if Parliament chooses to act further.

Reaction to these proposals has not been wholly positive. In particular, family court judges have voiced concern that complaints bodies may be abused by disgruntled litigants whose grievances are really related to the outcome of their case rather than to any procedural unfairness or judicial misconduct. The family court judiciary has also been critical of proposals for the establishment of judicial codes of conduct and bodies to enforce them, stating in its response to the Australian Law Reform Commission's 2003 Discussion Paper, "Reform of the Civil Justice System", that such "bureaucratic interference with the proper discharge of the functions of the judiciary … is antipathetic to judicial independence".

Freedom of expression

While there are no reported instances of physical attacks upon judges or lawyers in Australia, and in general, judges enjoy effective internal independence in carrying out the duties of their office, the federal government has continued to be critical of judicial participation in public discourse about judicial independence, particularly where the views expressed are not politically welcome. This has led to a degree of self-censorship in judicial comment and has curtailed the right of judges to hold opinions and communicate them, protected by Article 8 of the *UN Basic Principles on the Independence of the Judiciary* (http://www.unhchr.ch/html/menu3/b/h_comp50.htm). The federal government provided the **Judicial Conference of Australia**, a professional organization for judges (http://www.jca.asn.au), with start-up funds in **1996** so that it could operate as a representative voice for the judiciary in its dealings with the public, the media and other arms of government – action that does not alleviate the challenge the government is posing to the enjoyment of freedom of expression by individual judges.

Judges dealing with criminal matters are frequently criticized by both politicians and the media, particularly in regard to sentencing decisions. However, it does not appear that this has any influence on outcomes.

Security of tenure

While Section 72 of the *Commonwealth Constitution* guarantees security of tenure and remuneration for the federal judiciary, judges of state courts in Australia do not have similar protection, as even where constitutional provision is made for their appointment, tenure and remuneration, the sections concerned may be amended by Parliament by means of ordinary legislation. There have been instances where the absence of constitutional guarantees has allowed states and territories to appoint judges in a way that compromises independence. The frequent use of acting judges in the Supreme Court and District Courts of New South Wales is a cause of concern, as these positions do not enjoy security of tenure. This is a factor that could appear to compromise judicial independence.

In addition to the ordinary court systems that operate at federal, state and territory level, governments have for many years established various **tribunals** to handle disputes arising under specific legislation, including the review of administrative decisions. **Members of tribunals** are appointed using the procedures set out in the specific legislation that creates the tribunal itself. Contrary to Article 12 of the *UN Basic Principles on the Independence of the Judiciary* (http://www.unhchr.ch/html/menu3/b/h_comp50.htm), they do not enjoy constitutionally protected security of tenure and remuneration as they are **appointed on a temporary basis**, and are classed as public rather than judicial officers. The obvious reliance of tribunal members upon the executive for reappointment or subsequent appointment gives rise to the suggestion that their determinations may be capable of being influenced, and undermines the appearance of independent decision-making (see cases below).

Cases

Internal independence

In **June 2003**, charges under the *Criminal Code Act 1899 (Qld)* were brought against **Diane Fingleton**, the **Chief Magistrate of Queensland**. The charges arose out of events surrounding Fingleton's decision to transfer a magistrate, Anne Thacker. A judicial commission was convened to review the decision and members of the Queensland magistracy filed affidavits in support of Ms Thacker. It is alleged that Fingleton sent an email to one of these magistrates, Basil Gribbin, threatening to demote him if he continued to champion Ms Thacker's cause. Fingleton was convicted on charges of retaliating against a witness and sentenced to twelve months in prison. She has completed her sentence and has now been released.

In **October 2004** (http://www.austlii.edu.au/au/other/HCATrans/2004/380.html), Ms Fingleton was granted special leave to appeal to the **Federal High Court** on the grounds that she may be entitled to immunity from prosecution under a Queensland state law applicable to magistrates in the performance of administrative functions. The matter was heard by six judges in **February 2005,** who have reserved their decision. (http://www.austlii.edu.au/au/other/HCATrans/2005/5.html; http://www.austlii.edu.au/au/other/HCATrans/2005/6.html)

It was reported in **July 2003** that **South Australian Chief Justice John Doyle** and **Chief Magistrate Kelvyn Prescott** had placed pressure upon a magistrate, **Brian Deegan**, to resign as a consequence of his public criticism of the Commonwealth government. Mr Deegan, whose son was killed in the October 2002 Bali bombings, had demanded that an inquiry be held to determine the extent of the government's knowledge concerning terrorist threats to Australian citizens. Mr Deegan has since resigned and stood unsuccessfully as an independent candidate in Australia's federal election in October 2004.

Security of tenure

In **June 2004**, the Federal High Court determined an appeal brought by the North Australian Aboriginal Legal Aid Service (NAALAS) concerning the **appointment of Hugh Bradley** as **Chief Magistrate of the Northern Territory** in 2001. NAALAS alleged that the appointment was invalid and was contrary to the Commonwealth Constitution's provisions concerning tenure and remuneration, on the grounds that an undisclosed two-year agreement had been negotiated between Mr Bradley and the Territory government for payment in excess of the usual salary for the office. At first instance in December 2001, the Federal Court dismissed the claim by NAALAS (http://www.austlii.edu.au/au/cases/cth/federal_ct/2001/1728.html) and held that the requirements of the Commonwealth Constitution did not apply to the Northern Territory Magistrates Court, which was not a federal court and did not exercise federal judicial power. The decision was affirmed by a majority of judges on appeal (http://www.austlii.edu.au/au/cases/cth/FCAFC/2002/297.html) and by the High Court unanimously. The High Court ruled that a fixed-term appointment did not of itself compromise judicial independence and render the appointment invalid. In a separate opinion, Chief Justice Murray Gleeson noted the substantial difference in arrangements concerning the appointment, tenure, discipline and removal of judges and magistrates throughout Australia and observed that these models could nonetheless sit comfortably together as there was "no single ideal model of judicial independence." He agreed with the majority that the circumstances of the appointment did not compromise or jeopardize the integrity of the Northern Territory magistracy, nor the integrity of the judicial system.

In **2004**, the Federal Government failed to re-appoint 23 members of the **Refugee Review Tribunal** on the stated ground that there had been a reduction in the level of the Tribunal's work, while making a number of new appointments to the Tribunal. A complaint was made to the Australian Industrial Relations Tribunal in **July 2004** (*Margaret Holmes and Others v Minister for Immigration and Multicultural and Indigenous Affairs*), which determined that it did not have jurisdiction to determine the matter as the members of the Refugee Review Tribunal were not employees, but statutory officers, and the Commonwealth had no right to control the exercise of their statutory functions. This decision pointed to an anomaly, in that the independence in the exercise of functions was recognised despite the lack of security of tenure.

LEGAL PROFESSION

Australian states and territories are required by law to establish disciplinary bodies and tribunals to deal with complaints of unsatisfactory conduct against lawyers or

conduct contrary to professional conduct rules. Traditionally, professional standards have been administered jointly by professional organizations and state and territory governments.

However, an increasing number of states and territories have moved to implement independent systems that exclude professional organizations from the disciplinary process. For example, in **late 2003**, Tasmania's Attorney-General Judy Jackson proposed that the **Law Society of Tasmania** be relieved of its powers to regulate, monitor and discipline the industry in favour of a new six-person board to be established by the state government. The legal profession has criticized proposals to replace self-regulation on the basis that it will compromise independence and increase costs by imposing a new level of bureaucracy.

There are no reported instances of physical attacks upon lawyers in Australia.

ACCESS TO JUSTICE

Immigration detention policy

Australia's mandatory detention policy under the *Immigration Act 1958* **(Cth)** continues to receive international condemnation. The policy requires the compulsory confinement for processing purposes of all immigrants arriving without a valid visa. Critics include **Amnesty International** between 2001 and 2004 (http://web.amnesty.org/library/eng-aus/index), the **United Nations High Commissioner for Refugees** between 2001 and 2004, (http://www.unhcr.ch/), the **United Nations Human Rights Committee** in July 2000 (http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e1015b8a76fec400c125694900433654?Opendocument) and the **Australian Human Rights and Equal Opportunity Commission** in May 2004 (http://www.hreoc.gov.au/human_rights/children_detention_report/index.html). These critics state that the policy is in breach of various provisions of the *UN Convention on the Rights of the Child* (http://www.unhchr.ch/html/menu3/b/k2crc.htm) as well as contravening the *1951 UN Convention on Refugees* (http://www.unhchr.ch/html/menu3/b/o_c_ref.htm) and the *1967 Protocol* (http://www.unhchr.ch/html/menu3/b/o_p_ref.htm), particularly Article 34 which states that there shall be no penalty for illegal entry to a country.

In addition, the **UN Working Group on Arbitrary Detention** reported in October 2002 (http://daccessdds.un.org/doc/UNDOC/GEN/G02/153/91/PDF/G0215391.pdf?OpenElement) that the policy was unlawful in that it provided for automatic, indiscriminate and indefinite detention and did not provide access to a court to challenge the lawfulness of the detention. The working group found that Australia had failed to comply with its obligations as a state party to the *International Covenant on Civil and Political Rights* (http://www.unhchr.ch/html/menu3/b/a_ccpr.htm), specifically Articles 9 and 10(1). Despite these reports, the policy remains unchanged.

Nevertheless, in two separate decisions delivered in **August 2004**, the **High Court** upheld the federal government's policy of immigration detention and found that the conditions within detention centres were humane. In *Al-Kateb v Godwin*

(http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/HCA/2004/37.html), a four-to-three majority of the court held that unsuccessful asylum seekers who wished to leave Australia could continue to be held indefinitely in immigration detention, even though there were no practical prospects of their actual removal. The court ruled that as a purpose of immigration detention was the eventual removal of unlawful non-citizens, the relevant provisions of the federal *Migration Act* were not contrary to the Constitution. In *Minister for Immigration and Multicultural and Indigenous Affairs v Al-Khafaji* (http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/HCA/2004/38.html), a six-to-one majority found that harsh conditions within detention centres were not such as to classify the detention as punitive, and did not justify an asylum seeker's escape from the Woomera Detention Centre. In a dissenting decision, Justice Michael Kirby referred to the substantial body of disturbing evidence concerning intolerable conditions in detention centres, and stated that the applicant should have been given leave to argue his case of inhumane detention.

Further, in **October 2004**, the **High Court** unanimously held that the Commonwealth had the power to legislate for the detention of children as well as adults, as the federal *Migration Act* did not distinguish between unlawful non-citizens who were above and below the age of 18. The application, *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (http://www.austlii.edu.au/au/cases/cth/high_ct/2004/49.html), concerned four Afghan children held at the Baxter detention centre.

Mandatory sentencing legislation

In **March 2002**, the **Senate Legal and Constitutional Committee** undertook an investigation of mandatory sentencing laws operative in **Western Australia** and concluded that their provisions were potentially arbitrary and unfair to juveniles, and were applied disproportionately to indigenous juvenile offenders. Despite this, and despite the repeal of similar laws in the Northern Territory in **2002**, the Western Australian state government has not repealed this legislation.

Legal aid

While Australia has a national legal aid programme, delivered through commissions at state and community level and principally funded by the Commonwealth government, demand for services usually exceeds the supply of staff available and has resulted in an increase in unrepresented litigants before federal, state and territory courts. This is contrary to Article 3 of the *UN Basic Principles on the Role of Lawyers* (http://www.unhchr.ch/html/menu3/b/h_comp44.htm), which requires that governments ensure that sufficient funding is provided for legal services to the poor and disadvantaged. It is also notable that from **1997** until the present date, legal aid funding has not been available for certain federal law matters, including immigration, refugee and social security law proceedings.

While *pro bono* legal work is not required in Australia as a condition of practice, most lawyers voluntarily devote a portion of their time to this work. According to the "Australian Bureau of Statistics' 2001-2 Legal Practice survey", 63% of private solicitor practices and 78% of barristers reported that they did some form of *pro bono* work (http://www.lawcouncil.asn.au/faqitem/1957249953). However, *pro bono* is not a substitute for legal aid, and the existence of a vibrant legal community willing to assist does not alleviate the government's obligation to fund legal aid adequately.

New counter-terrorism measures

Between **2002 and 2004**, Australia introduced numerous pieces of **federal anti-terrorism legislation**, including the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), the *Suppression of the Financing of Terrorism Act 2002* (Cth), the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth), the *Telecommunications Interception Legislation Amendment Act 2002* (Cth), the *Border Security Legislation Amendment Act 2002* (Cth),the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) (**ASIO Act**), the *Anti-Terrorism Act 2004* (Cth), the *Anti-Terrorism Act (No 2) 2004* (Cth) and the *Anti-Terrorism Act (No 3) 2004* (Cth). States and territories have enacted parallel laws insofar as the provisions are applicable to matters within their jurisdiction. (See also "Australia – The Australian Section of the ICJ criticises the Terrorism (Police Powers) Bill 2002", http://www.icj.org/news.php3?id_article=2763&lang=en)

In **August 2004**, members of the Senate Legal and Constitutional Legislation Committee expressed concern regarding the increasingly oppressive nature of the government's counter-terrorism legislation. In particular, they referred to the lack of certainty and clarity in the provisions of the *Anti-Terrorism Act (No 2)* which creates an offence of associating with a banned or proscribed organization and allows any organization classified as "terrorist" to be outlawed upon the motion of the Attorney-General. This law potentially poses a threat to the rights enshrined in Articles 18, 19, 21 and 22 of the *ICCPR* (http://www.unhchr.ch/html/menu3/b/a_ccpr.htm), which protect freedom of thought, conscience and religion, freedom of expression, the right to peaceful assembly and freedom of association. The senate committee stated that existing legislation was wide enough to deal with terrorist offences and noted "with apprehension the tendency towards legislative overreach in relation to counter-terrorism measures in Australia." Amendments to the **ASIO Act** contained in the *2003 amending legislation and the Anti-Terrorism Act (No 2) 2004* **(Cth)** increase the existing powers of the Australian Security Intelligence Organization (**ASIO**) to gather information and produce intelligence for the purpose of advising the government about activities or situations that may pose a threat to Australia's national security. The ***ASIO Act*** now permits the arrest, detention and interrogation of people suspected of being involved in "terrorist activities" without charge and denies them the right to legal representation. It also removes the entitlement of a suspect to remain silent and to refuse to answer questions or provide information, on penalty of imprisonment. This is the case even where the suspect may be incriminated or may be liable to a penalty under the act as a consequence of giving or producing the information sought. The 2004 statute also empowers ASIO to seize passports to prevent anyone suspected of having knowledge of a planned terrorist attack from leaving Australia and permits the government to transfer persons detained on national security matters to special jails.

The counter-terrorism legislation introduced by Australia threatens the due process and fair trial rights protected by Articles 9 and 14 of the *ICCPR* (http://www.unhchr.ch/html/menu3/b/a_ccpr.htm). In addition, the **Advisory Council of Jurists**, a group of eminent jurists in the Asia-Pacific region (http://www.asiapacificforum.net/acj), has denounced the measures adopted, observing in **March 2004** that restrictions imposed by the ASIO Act upon the rights of detained persons to have private access to a lawyer and to communicate with their families upon arrest contravene Articles 5, 8, 15 and 16 of the *UN Basic Principles on*

the Role of Lawyers (http://www.unhchr.ch/html/menu3/b/h_comp44.htm) and that the application of the act to minors between the ages of 16 and 18 is in contravention of the "best interests of the child" principle established in Article 3 of the *UN Convention on the Rights of the Child* (http://www.unhchr.ch/html/menu3/b/k2crc.htm). State counter-terrorism legislation such as the *Terrorism (Police Powers) Act 2002 (NSW)* (http://www.austlii.edu.au/au/legis/nsw/consol_act/tpa2002291/), which applies to children as young as ten years old, is also in contravention of this principle.

LEGAL REFORMS DURING THE PERIOD

2002:	*Civil Liability Bill* (http://www.icj.org/news.php3?id_article=2989&lang=en).
2002:	*Security Legislation Amendment (Terrorism) Act 2002* (Cth); Suppression of the *Financing of Terrorism Act 2002* (Cth);
	Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002 (Cth);
	Telecommunications Interception Legislation Amendment Act 2002 (Cth);
	Border Security Legislation Amendment Act 2002 (Cth).
2003:	*Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) – the so-called **ASIO** Act.
2004:	*Anti-Terrorism Act 2004* (Cth);
	Anti-Terrorism Act (No 2) 2004 (Cth);
	Anti-Terrorism Act (No 3) 2004 (Cth).
25 March 2004:	draft *Migration Amendment (Judicial Review) Bill 2004* presented; referred to the Senate Constitutional and Legal Affairs Committee.
1 July 2004:	*Australian Capital Territory's Human Rights Act*, based on ICCPR, comes into force (http://www.austlii.edu.au/au/legis/act/consol_act/hra2004148/).