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RESEARCH ONLINE

Fare well, Justice Kirby

Abstract
Who can believe it? 'The great dissenter', the judge with a Facebook site dedicated to him,1 the person known affectionately to his associates as 'our Judge', Justice Michael Kirby has reached the end of his federal judicial tenure. Justice Kirby has turned 70 and, as required by section 72 of the Constitution, must leave his office in the High Court of Australia. Analysis of the Judge's jurisprudential influence will flow soon enough. This piece is instead a reflection on the experiences of his associates to provide some different insights, such as into the workings of his High Court chambers. Those chambers consisted of a small team — the Judge, his indomitable personal assistant Janet Saleh and the two associates. There was never any doubt that the associates (who changed annually) were the least expert of the four. But between the Judge and his PA, no-one can say who had the upper hand. Janet, may you enjoy your retirement (that coincides with the Judge's) and may 'The Edit Queen' live on for many happy years without ever having to see another 'edit'.

Keywords
fare, well, kirby, justice

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ON MICHAEL KIRBY

Fare well, Justice Kirby

ELISA ARCIONI provides an insight into life as one of Justice Kirby's associates

Who can believe it? 'The great dissenter', the judge with a Facebook site dedicated to him,[1] the person known affectionately to his associates as 'our Judge', Justice Michael Kirby has reached the end of his federal judicial tenure. Justice Kirby has turned 70 and, as required by section 72 of the *Constitution*, must leave his office in the High Court of Australia.

Analysis of the Judge's jurisprudential influence will flow soon enough. This piece is instead a reflection on the experiences of his associates to provide some different insights, such as into the workings of his High Court chambers. Those chambers consisted of a small team — the Judge, his indomitable personal assistant Janet Saleh and the two associates. There was never any doubt that the associates (who changed annually) were the least expert of the four. But between the Judge and his PA, no-one can say who had the upper hand. Janet, may you enjoy your retirement (that coincides with the Judge's) and may 'The Edit Queen' live on for many happy years without ever having to see another 'edit'.

The well-known workaholic

A Kirby associate's average day shows the breadth and volume of work that travelled through those chambers. Most High Court associates work exclusively on judgments. In addition to the Kirby judgment-load (often greater in page numbers than in other chambers) the Kirby associates had to arrange travel, cups of tea, lunches for numerous people, handle dozens of pieces of correspondence and dabble in some typing. You name it, we did it.

Although our workload sometimes felt overwhelming, the following anecdote from Edward Brockhoff[2] shows that the Judge worked more than we did, managing to fit in an extraordinary amount of extra-judicial activity:

> I once accompanied the Judge on a trip to Adelaide. He was there for exactly 24 hours. In that time, he delivered a speech at a gala dinner for law students; a speech at a breakfast for young lawyers; attended a graduation ceremony; dined with law faculty; delivered speeches at two universities and attended an opening of barristers' chambers. I was exhausted. The Judge was just getting started.

Strength against opposition

The workload was particularly challenging in 2002, due to two external factors. The first was Gaudron J's retirement, which required all outstanding judgments to be delivered before her departure. The second, being the more trying of the two, was referred to by Kirby J in a message inscribed to me at the end of my year:

> The year 2002 had its dark side — in the Court and in the world. The events of March 12th will be written on our hearts — like s 92 of the *Constitution* was written on the heart of Latham CJ. But like the old jurisprudence of s 92, these events and all else pass away… When you look back on your time in the High Court of Australia think of the earnestness and bright spirit with which we tackled so much together.

The 'dark side' to which the Judge referred was the scandalous (and subsequently unreservedly withdrawn) allegations made by Senator Heffernan under the veil of parliamentary privilege. In the wake of Heffernan's attack, Kirby J received thousands of emails, letters and phone calls. All but a handful of these were expressions of support in response to what Robert Manne described as 'the most virulent expression of homophobia Australian public life had witnessed in very many years'.[3]

Characteristically, on the morning following the allegations, Kirby J did not let them distract him from his work. He continued with his judicial and extra-judicial activities and quickly set about responding to every piece of correspondence he had received.

Walking the talk

Perhaps in response to having experienced discrimination, Kirby J sought to assist others in overcoming barriers to success. This was especially true of his method of recruiting associates — much sought-after positions which help open doors into academia and private practice. Unlike most High Court judges, who relied upon recommendations and unsolicited applications, Kirby J advertised at every Law School in the country. Without compromising on standards, he actively sought to employ students from regional or smaller universities.

Justice Kirby thereby opened up the opportunity to all students. This can be contrasted with another judge who has acknowledged that he could be accused of bias towards certain universities, but stated that he could justify his choice of associates on the basis of 'merit'. Justice Kirby's process meant that he also reached out to those equally 'meritorious' applicants who had no relationship with the legal community and who may not even have known that the otherwise unadvertised positions existed.

The contrast between Kirby J's open recruitment process and the approach adopted by many on the Court mirrors that which often emerged between their respective approaches to the law. This contrast is revealed in the following anecdote from Katharine Young.[4]

> I have a memory of the judge explaining his interpretive theory of the *Constitution*. 'I'm a Maximalist, Katie' he said, thrusting his arms in the air as if embracing the world. 'Many on the court are Minimalist, but I'm a Maximalist.'

Judicial 'rock star'

All the Kirby associates soon realised, if they hadn't been aware of it before their appointment, that Kirby

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1. The Justice Michael Kirby Appreciation Society, see facebook.com/group.php?gid=2320132248.

2. Edward is one of the Judge's last two associates, for the year 2008/2009.

3. Robert Manne, 'The descent of Howard', *The Age* (Melbourne) 18 March 2002. See theage.com.au/articles/2002/03/17/1015909916190.html.

J has a huge fan club (as well as some detractors). This celebrity was nowhere more evident than when he visited Australian universities. I recall students asking him to sign anything from a copy of the *Constitution* to the shirt on their back, which was often printed with a logo such as 'We Love Kirby' or 'Kirby Rocks'.

What was more surprising to me was his interaction with other public figures. One day, waiting for a plane in Canberra and sitting in the Qantas Lounge with the Judge, I saw the Dalai Lama. The Judge asked if I'd ever met the spiritual leader of Tibet, to which I, not surprisingly, answered 'no'. In response, the Judge invited the Dalai (with whom he obviously had a friendship) to join us, introduced me and engaged in an inclusive discussion. I never imagined such an experience to be part of the job description of judge's associate.

Humanity

The last stories I relate convey the humanity of Kirby J. The warmth and sociability of the Judge is well-known, and demonstrated to me through his interest in my family. He came to dinner at my house to meet them and sends his best wishes to them whenever I see him. During Court sittings, he would always invite my partner (now-husband) to the monthly Judge and associate dinners. In each of his years on the Court, Kirby J invited his past and present associates and their partners to celebrate his birthday with him. Most recently, that invitation extended to my then 10-month-old daughter.

Justice Kirby expected a lot from his associates, but was never unreasonable. Andrew Leigh remembers the day he forgot to bring a judgment to Court when Kirby J was to deliver it:[5]

> It was my first month on the job. I was standing behind the Judge's chair in Courtroom No 1 when he asked 'Where is it?' My stomach turned over as I realised my omission — I had forgotten the judgment. I wanly whispered that I could give him a pile of papers that might look to the rest of the courtroom like a real judgment. He firmly replied 'No'. I briskly walked from the courtroom in the hope that I might get up to chambers and back with the judgment in time. Needless to say, I failed, and the transcript for the morning reads:
>
> > 'Kirby J: I concur with Chief Justice Brennan, and will deliver my reasons when they arrive.'
>
> I expected him to be furious at lunchtime, but he graciously accepted my apologies, smiled and said 'We all make mistakes Andrew'.

Justice Kirby's humanity was also evident in his dealings with the international community, as remembered by Katharine Young:

> In 2006, Kirby J gave a keynote address to an international gathering of judges at Harvard Law School. The setting was very serious and formal, perhaps even a trifle conservative. Justice Kirby's speech described the trend of judges citing each other's opinions and learning about each other's systems of law and about international law: a trend, of course, which he was part of setting. Towards the end of the speech, the subject turned to the human rights implications of same-sex marriage. Justice Kirby gave an expert summary of equality jurisprudence, and then mentioned his and his partner Johan's thoughts on marriage. It was a celebration of judicial candour, as well as of equality in the law, and I doubt it will be forgotten by many of the judges, law professors and students present.

Fare well

Justice Kirby will be remembered as a unique justice of the High Court of Australia. His associates will remember him as an extraordinary boss and the time working for him as fascinating, demanding and sometimes surprising. I'm sure we will all hear about his activities post-judicial office. From all of us, Judge, fare well but not farewell.

ELISA ARCIONI was Justice Kirby's associate in 2002/2003. She is currently a lecturer in law at the University of Wollongong.

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4. Katharine was Justice Kirby's associate in 2001, currently SJD Candidate and Graduate Fellow, Edmond J Safra Foundation Center for Ethics 2007–2008, Harvard Law School.

5. Andrew was Justice Kirby's associate in 1997/1998 and is currently Associate Professor, Economics Program, Research School of Social Sciences, The Australian National University.

'*Recruiting and Retaining* …' continued from page 35

- Providing financial and/or tax incentives for RRR students and lawyers;
- Addressing salary levels and working conditions within CLCs;
- Responding to demographic change and need within the legal profession; and,
- Increasing the commitment of public sector funding to legal service provision.

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This article reports on the findings of a more detailed report, completed in July 2008, which was initiated by the Northern Rivers Community Legal Centre and supported by the NSW Law & Justice Foundation. The full report can be found at <nrclc.org.au/SiteMedia/w3svc728/Uploads/ Documents/RecruitmentRetentionOfLawyers.pdf>.

ON MICHAEL KIRBY

Justice Kirby and references to the *Alternative Law Journal*

SIMON RICE wonders at the impact of our Journal

In a recent trivia quiz on law reform and social justice, I had to warn contestants that, despite their instincts, the answer to four of the 10 questions was not 'Michael Kirby'. The answer to one was; the answers to the other three were Lionel Murphy, Isaac Isaacs and Professor Michael Coper.

But here is a question I didn't ask, to which 'Michael Kirby' *is* the answer: 'Which High Court judge has referred to Alternative Law Journal articles in their decisions more often than any other judge?' The only other judges to do so are Brennan CJ, McHugh J and Murphy J (once each), the latter two referring to the journal when it was the Legal Service Bulletin (in *Pollitt v R* [1992] HCA 35; (1992) 174 CLR 558 and *Koowarta v Bjelke-Petersen* [1982] HCA 27; (1982) 153 CLR 168 respectively).

Negligence

Chief Justice Brennan's reference was in the same case, and to the same article, as the first of the eight cases in which Kirby J referred to the Alternative Law Journal; *Romeo v Conservation Commission of the Northern Territory* [1998] HCA 5, (1998) 192 CLR 431. Justice Kirby was one of five judges who dismissed an appeal and confirmed that a young woman, aged 16, who had fallen in a nature reserve and become a paraplegic, was not entitled to damages from a public authority. In an earlier High Court decision, *Nagle v Rottnest Island Authority* [1993] HCA 43, (1993) 177 CLR 423, a public authority had been held liable in similar circumstances.

The *Nagle* decision was controversial, and was criticised by Sandra Berns in an Opinion piece, 'Judicial paternalism and the High Court' (1993) 18 *Alt LJ* 202. Berns' view was that '*Nagle* imposes an unrealistic standard of care on public authorities', and that '[t]he court's paternalistic attitude is truly remarkable'. Justice Kirby noted the criticisms of *Nagle* and referred to the Berns' Opinion, but for purposes of deciding *Romeo* he distinguished *Nagle* on its facts. Chief Justice Brennan, who had dissented in *Nagle*, cited Berns' Opinion and, alone of the seven judges, said *Nagle* should be overruled.

The race power

Three months after the decision *Romeo*, the High Court decided the important 'Hindmarsh Island Bridge case', *Kartinyeri v Commonwealth* [1998] HCA 22, (1998) 195 CLR 337. Justice Kirby was in sole dissent. At issue was the constitutional validity of legislation that removed the protection against development that the *Heritage Protection Act* offered to aboriginal land. The majority view was that the legislation was valid under the 'race' power: s 51(xxvi) of the *Constitution*. In Kirby J's view, the race power did not extend to a law that 'is detrimental to, and adversely discriminates against, people of the Aboriginal race of Australia by reference to their race'.

In recounting the background to the litigation, particularly a failed challenge against a South Australian Royal Commission into the indigenous claims concerning Hindmarsh Island, Kirby J referred to Maureen Tehan's article, 'A tale of two cultures' (1996) 21 *Alt LJ* 10, in which Tehan gives an account of legal and related events in the long-running case, including the political background, the Federal Court cases, and Royal Commission inquiry and findings.

Battered woman syndrome

At the end of the same year, 1998 — a busy one for the Alternative Law Journal in the High Court — Kirby J was part of a narrow (3:2) majority in *Osland v R* [1998] HCA 75, (1998) 197 CLR 316, upholding the conviction of Heather Osland for the murder of her husband. Mrs Osland's appeal relied in part on directions given by the trial judge on the defences of provocation and self-defence as they related to battered woman syndrome. On this question all judges agreed that the appeal failed, but Kirby J added lengthy comments on battered woman syndrome, discussing issues about the accuracy of its name, and its status as a scientific phenomenon on which expert evidence could reliably be given.

In considering the extent to which the manifestation of battered woman syndrome is culturally specific, Kirby J referred to Ian Freckelton's Brief: 'Battered Woman Syndrome' (1992) 17 *Alt LJ* 39. Reporting on *Runjancic and Kontinnen v R* (1991) 53 A Crim R 262, the first case in which evidence of battered woman syndrome had been admitted in a superior court in Australia, Freckelton discusses the extent to which women can be assumed to react in a particular way to the experience of living in a violent relationship. He notes that:

> [t]he danger is that women who are the subject of domestic violence come to be expected to exhibit 'classic signs' of battered woman syndrome and in fact, because of their particular personality or background, do not fit the mould (for instance because of their cultural background), their attempts to mount defence of self-defence, provocation and duress will be undermined.

Lawyer's immunity

The following year the case of *Boland v Yates Property Corporation Pty Ltd* [1999] HCA 64, (1999) 167 ALR 575 offered the High Court the opportunity to reconsider the scope of its decision in *Giannarelli v*

Wraith [1988] HCA 52, (1988) 165 CLR 543, in which it had confirmed the legal profession's immunity from claims of negligence for court-related work. Apart from Kirby J, only Gaudron J was prepared to reconsider *Giannarelli*, but as she upheld the appeal on other grounds she felt it unnecessary to do so.

Although Kirby J agreed with the result in the case, allowing the appeal and setting aside the orders of the Federal Court, he was alone in his support for the Federal Court's reservations about the scope of the High Court's decision in *Giannarelli*. Justice Kirby referred to Simone Brookes' article, 'Time to abolish lawyers' immunity from suit' (1999) 24 *Alt LJ* 175, the title of which states clearly Kirby J's own view. Brookes' analysis of the advocates' immunity is based on a comparison with the liability of medical practitioners, an analogy rejected by McHugh J in *D'Orta-Ekenaike v Victoria Legal Aid* (below). Justice Kirby referred to Brookes when commenting on the oft-noted contrast between the 'ever more stringent obligations of care' imposed on other professionals and 'the immunity accorded by the law to its own'.

Some years later, the case of *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, (2005) 223 CLR 1 gave Kirby J the chance to restate his call to reconsider *Giannarelli*. After committal, trial, conviction, appeal, re-trial and acquittal on a charge of rape, Mr D'Orta-Ekenaike sued his lawyers, who relied on the *Giannarelli* immunity. Although Gleeson CJ, Gummow, Hayne and Heydon JJ were blunt in saying '*Giannarelli* should not be re-opened', and McHugh J was of the same mind, Kirby J saw the issue not as a 're-opening' of *Giannarelli*, but as a necessary clarification of its meaning and scope. In a long and detailed analysis Kirby J again referred to Brookes' article.

Fresh evidence

In *Re Sinanovic's Application* [2001] HCA 40, (2001) 180 ALR 448 Kirby J sat alone to decide whether to give leave to an applicant to re-open an application for special leave to appeal after the application had previously been refused by Gummow and Callinan JJ. The applicant was illiterate, indigent and incarcerated, and Kirby J allowed his wife to speak on his behalf. The applicant could show neither exceptional circumstances nor fresh evidence, and so the application was refused.

In his decision Kirby J observed that a:

> good instance of the discovery of … fresh evidence recently arose in [*R v Button* [2001] QCA 13, where] DNA evidence, discovered after a trial and before the hearing of the appeal in that Court, conclusively demonstrated that the prisoner was innocent,

and referred to a note about the case in (2001) 26 Alternative Law Journal 97 at 97–98. The note was a contribution by Jeff Giddings to the national round-up column DownUnderAllOver, and recounts how the Queensland Court of Appeal released a man on the basis of evidence that had arisen after his conviction.

Free speech

In *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63, (2001) 208 CLR 199 Kirby J agreed with the result, allowing an appeal against the decision of the Full Court of the Tasmanian Supreme Court to injunct the ABC's screening of a television program, but on different grounds from the majority. Kirby alone found that the discretion had miscarried because it 'was granted without appropriate consideration of the constitutional principle in *Lange* protecting freedom of communication concerning governmental and political matters'. The other judges found it unnecessary to decide this ground of appeal.

The subject matter of the television program was the commercial 'processing' of brush-tailed possums. Kirby J saw this as being within the scope of the constitutional principle in *Lange*, saying that '[t]he concerns of a governmental and political character must not be narrowly confined', and that 'concerns about animal welfare [and the export of animals and animal products] are clearly legitimate matters of public debate across the nation'. In observing that '[m]any advances in animal welfare have occurred only because of public debate and political pressure from special interest groups', Kirby J referred to an article by one of the McLibel co-defendants, Dave Morris, 'McLibel: do-it-yourself justice' (1999) 24 *Alt LJ* 269. In the article Morris tells the story of the McDonald's Corporation's infamous suit for defamation in response to leaflets that claimed that McDonald's caused animal suffering.

Asylum seekers

Re Woolleys [2004] HCA 49, (2004) 225 CLR 1 was one of the many asylum seeker cases to reach the High Court. Four Afghani children, held with their parents in Baxter Immigration Centre, sought orders for habeas corpus, prohibition and injunction. In seven separate opinions the High Court unanimously dismissed the application. Kirby J agreed that children were lawfully detained, saying that the relevant terms of the *Migration Act* were clear, valid, and 'the result of a deliberately devised and deliberately maintained policy of the Parliament'. In noting that the position in relation to detention of asylum seekers is different in Europe, Kirby J referred to a Brief on asylum seekers by Jane McAdam, 'Australia and Europe – worlds apart' (2003) 28 *Alt LJ* 193 in which McAdam details the many ways in which treatment of asylum seekers was more humane in Europe than in Australia.

In each of these eight decisions, Kirby J referred to material in the Alternative Law Journal to support argument, and to provide background and detail. His use of the Journal illustrates the wide range of topics it covers, from evidentiary rules and criminal defences to asylum seekers and lawyers' negligence, and shows too the useful diversity of ways in which the Journal publishes material: refereed articles, shorter descriptive 'briefs', reporting of current issues, and editorial opinions.

It seems apt that it is the High Court judge who has in his decisions been most attuned to the effect of law on minority groups and the marginalised who has found most to rely on in Australia's 'alternative' law journal.

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HUMAN RIGHTS

The Haneef Case and an independent review of terrorism law

MARK RIX considers the creation of the Office of National Security Legislation Monitor

On 23 December last year, the Rudd Government tabled in Parliament the Honourable John Clarke's Report of the Inquiry into the Case of Dr Mohamed Haneef.[1] In fact, it tabled only Volume One, the public report. Volume Two, which contains what Mr Clarke describes as 'supplementary material' including 'sensitive or classified material', was not tabled and has not yet been made public (if it ever will be). Before briefly considering the public report's recommendations and the Government's response, a quick run down of the details of the Haneef case and setting up and conduct of the Clarke inquiry will be provided.

Dr Mohamed Haneef, an Indian doctor then working at the Gold Coast hospital, was arrested on 2 July 2007 and held without charge for 12 days under provisions of Australia's anti-terrorism legislation (ss 23DA, 23CB *Crimes Act*,). On 14 July he was charged under s.102.7(2) of the *Commonwealth Criminal Code* with the offence of recklessly providing support to a terrorist organisation on the grounds that his mobile phone Subscriber Information Module (SIM) card was connected to failed terrorist attacks in Britain. Dr Haneef was granted bail by a Brisbane magistrate two days after being charged, but within hours of the magistrate's ruling the then Immigration Minister Kevin Andrews cancelled Haneef's work visa because he failed the character test under s 501(3) of the *Migration Act 1958* (Cth), preventing his release from custody. The following day Attorney-General Philip Ruddock issued a Criminal Justice Stay Certificate under s 147 of the *Migration Act* which stopped Haneef from being deported and required him to remain in detention while the criminal proceedings against him continued.

Haneef was held in immigration detention and later home detention for nearly two weeks. On 27 July, the Commonwealth Director of Public Prosecutions withdrew the charge against Dr Haneef on the basis that there was insufficient evidence to support a conviction, and the Attorney-General cancelled the Criminal Justice Stay Certificate. He was allowed to return voluntarily to India on 28 July despite his visa remaining cancelled. Justice Spender of the Federal Court set aside the visa cancellation decision on 21 August 2007, a decision upheld by the Full Bench of the Federal Court in December 2007 dismissing an appeal by Minister Andrews.[2]

In March 2008 the Rudd Government announced that a judicial inquiry into the Haneef affair would be conducted by the Honourable John Clarke QC, a retired NSW Supreme Court Judge. At the top of its terms of reference, the inquiry was asked to examine and report on 'the arrest, detention, charging, prosecution and release of Dr Haneef, the cancellation of his Australian visa and issuing of a criminal justice stay certificate.' Among its other terms of reference, the Clarke inquiry, like the AFP-initiated Street Review into the failed case of terror suspect Izhar Ul-Haque[3], was to examine and report on improving co-operation, co-ordination and 'interoperability' between Commonwealth agencies including the AFP, ASIO and the Commonwealth Director of Public Prosecutions.

The Clarke inquiry was for the most part conducted in private (the opening day of the inquiry was its only public hearing), did not have the power to compel witnesses to give evidence or face cross-examination, and witnesses were not given indemnity against defamation or self-incrimination. On 31 August 2008, the AFP announced that it had formally abandoned its investigation of Dr Mohamed Haneef because there was no evidence against him. The total cost of the AFP's investigation of Haneef was around $8 million.[4]

In all, the Clarke inquiry made 10 recommendations, the most important of these being 'that consideration be given to the appointment of an independent reviewer of Commonwealth counter-terrorism laws.' Before considering this recommendation and the Government's response to it in a little more detail, it should be noted here that the Clarke Inquiry report was not the sole counter-terrorism document tabled in the Federal Parliament on 23 December 2008. On the same day, the Government also tabled, in the words of Attorney-General Robert McClelland, 'the Rudd Government's comprehensive response to outstanding reviews of national security legislation from the term of the former Government'. Specifically, the Government responded to the Australian Law Reform Commission's 'Fighting Words: A Review of Sedition Laws in Australia' (tabled 13 September 2006), the 'Review of Security and Counter-Terrorism Legislation' by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) (tabled 4 December 2006) and the PJCIS's 'Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code' which had been tabled on 20 September 2007.

The Government accepted the Clarke inquiry's recommendation to give consideration to the appointment of an independent reviewer of Commonwealth counter-terrorism laws, but gave its reasons for doing so in its Response to the PJCIS's 'Review of Security and Counter-Terrorism Legislation'.[5]

The PJCIS review called for the 'Government to appoint an independent person of high standing as an Independent Reviewer of terrorism law in Australia', and recommended that the Independent Reviewer

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be able to set his or her own priorities and be given access to all 'necessary information'. The Independent Reviewer would be required to provide an annual report to Parliament. In a related recommendation, the PJCIS called for an amendment to the *Intelligence Services Act 2001* (Cth) requiring the PJCIS to examine the Independent Reviewer's reports tabled in Parliament.

In its response, the Government stated that a new statutory office in the Prime Minister's Portfolio would be established to be known as the 'National Security Legislation Monitor' who would be required to report regularly to Parliament. The Monitor would enable ongoing review of national security laws to be conducted in a more comprehensive, and less *ad hoc* and piecemeal, fashion than had been possible in the past. This would in turn permit 'ongoing improvement' of the laws.

The Government's acceptance of this recommendation is to be commended. Appointment of an *independent* Monitor by statute, and the requirement that they report to Parliament on a regular basis, will be a small but hopefully significant first step towards removal of the ambiguities, sloppy definitions and catch-all offences that are contained in Australia's counter-terrorism laws and which made possible the whole, sorry Haneef 'affair'. To be sure, a number of these issues are dealt with on a largely ad hoc basis in the Government's responses to the PJCIS and Australian Law Reform Commission inquiries and reviews that were tabled on the same day as the Clarke inquiry report and the Government's response to it. However, as the Government acknowledged, a much more wholesale and holistic approach to the reform and improvement of Australia's counter-terrorism legislation is required than could be adopted by these inquiries and reviews. This is why a truly independent Monitor of national security legislation is needed.

The Monitor cannot simply be asked to wait for referrals by parliamentary committees or the like before setting about the task of reviewing the legislation and recommending improvements to bring it more into line with human rights, due process and criminal justice standards. Unfortunately, the Monitor is no substitute for the political will required to put her/his recommendations and improvements into effect. But that said, the creation of the office should at least provide a reliable rear defence when political will has to be demonstrated by the Government in Parliament and in public debate.

Beyond the Clarke inquiry report and the Government's response to its recommendations, the Haneef case is important in other key respects. It demonstrates how the making of a crude association between Islam, Muslims and terrorism — an important element of the political climate created by the Howard Government's counter-terrorism legislation — permitted the AFP to perpetrate abuses of human rights and due process. And it shows how, at the very time when social cohesion and inclusiveness — Australia's best defence against home-grown terrorist violence — is most required, the political climate and the abuses that it allowed to occur, threatened to sow the seeds of division, suspicion and cynicism through the Australian community.

For these reasons, Australia can ill afford to have a repeat of the Haneef affair. The appointment of an independent National Security Legislation Monitor hopefully will not only bring about significant and much-needed improvements to Australia's counter-terrorism legislation, it may also avert the recurrence of such a debacle in future.

MARK RIX teaches at the University of Wollongong.

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EQUAL OPPORTUNITY

What's happening with discrimination in South Australia?

ANNE HEWITT delves into the state's out-of-date anti-discrimination laws

When South Australia introduced the *Prohibition of Discrimination Act* (SA) in 1966 it was at the cutting edge of Australia's anti-discrimination law — this was the very first piece of anti-discrimination legislation in Australia. However, since the 1960s South Australia has fallen to the back of the pack in terms of its regulation of discrimination. No significant amendments have been made to the *Equal Opportunity Act 1984* (SA) since the 1997 introduction of provisions regarding sexual harassment.[1] South Australia is now one of the few states which fail to prohibit discrimination based on religious belief, political opinion or activity, parental status, association with a child, pregnancy or mental illness.

A review of the *Equal Opportunity Act 1984* (SA) was commissioned more than 14 years ago, and amending legislation was first proposed in 2002, but was delayed as a result of the 2002 state elections. Finally, legislation was proposed in 2006 to modernise the Act 'to ensure comprehensive protection of South Australians against unjustified discrimination'.[2] The amending legislation would have extended prohibitions on discrimination to cover (among other things): marital status; identity of a spouse; pregnancy; association with a child (including breast feeding); caring responsibilities; religious appearance or dress,[3] mental illness and non-symptomatic conditions such as HIV.[4]

However, the 2006 Bill didn't progress far, or fast. The Liberal party and Family First both expressed strong opposition to the Bill. The second reading debate in the House of Assembly was completed on 21 February 2007, following which the Bill was referred to Committee. The Bill dropped off the notice paper, was restored on 1 May 2007, and lapsed again due to the prorogation of parliament. A new version of the Bill was introduced on 26 November 2008. The 2008 Bill is similar to the previous version, but some of the more controversial amendments have been reduced or removed.

The delays in passing these important amendments to the law, and the reduction in the scope of the amendments proposed, are both cause for concern. Why has this happened? The answer appears to be that there is substantial opposition to some of the amendments.

So, who is objecting to the amendments and why?

As the parliamentary debates on the 2006 Bill illustrate, there were a number of objections being made to the scope and nature of the proposed amendments. Many of these objections relate to the fact that protection is already offered to victims of particular types of discrimination under Commonwealth legislation, or that the scope of the proposed prohibitions is too broad.[5] Not all of these objections will be considered here. However, it is interesting to consider a number of objections to the proposed amendments expressed by religious groups.

Prior to the introduction of the Bill in 2006 several Christian religious groups in South Australia expressed clear objections to any introduction to a prohibition on religious discrimination in the state. In a 2006 interview, Attorney-General Michael Atkinson explained the opposition to such a prohibition:

> the main Western Christian denominations, the Greek Orthodox archdiocese and the Greek Evangelical Church, opposed it, as did many Christian schools. They feared the new laws would prevent them from freely preaching and practising their religion and from seeking to convert others.[6]

As a result of such objections the government decided not to introduce a prohibition of discrimination based on religion, and instead proposed a limited prohibition on discrimination based on religious dress or appearance in the 2006 Bill. A similarly limited provision appears in the 2008 version of the Bill.[7]

However, despite the limitation in the scope of the proposed amendments in relation to religious discrimination, there remained substantial objection to the 2006 Bill from some religious groups. Many of these objections related to the proposed expansion of the definition of victimisation to include engaging in:

> a public act inciting hatred, serious contempt or severe ridicule of the person or a group of persons of which the person is a member on a ground of discrimination that is unlawful by virtue of this Act.[8]

Some religious groups expressed apprehension that this provision would allow actions be taken against religious leaders who criticize or denounce the beliefs or practices of other religious groups.

There was active campaigning on this issue. For example, a search of the internet revealed several active campaigns against the 2006 Bill in the form it was proposed, encouraging individuals to contact members of the House of Assembly in order to persuade them that passing the Bill would limit free speech and freedom of religion. One website includes a template for a letter writing campaign to upper house MPs, which reads in part 'Please vote against clause 61 of the Equal Opportunity (Miscellaneous) Amendment Bill and other parts which would prevent religious institutions from promoting traditional values.'[9]

REFERENCES

1. *Equal Opportunity (Sexual Harassment) Amendment Act 1997* (SA).

2. Equal Opportunity (Miscellaneous) Amendment Bill 2006 was tabled before the House of Assembly on 26 October 2006. South Australia, *Parliamentary Debates*, House of Assembly, 26 October 2006 (The Hon MJ Atkinson, Attorney-General), Equal Opportunity (Miscellaneous) Amendment Bill 2008 was tabled before the Legislative Council on 26 November 2008.

3. Proposed s 85T(1) of the *Equal Opportunities Act 1984* (SA); see s 61 Equal Opportunity (Miscellaneous) Amendment Bill 2008 (SA). In the 2006 version of the Bill discrimination on the ground of profession, trade or lawful occupation and area of residence were also going to be prohibited, but this has been removed from the 2008 Bill.

4. By the incorporation of new definitions of 'disability' as (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour and (d) the presence in the body of organisms capable of causing disease or illness: proposed additions to *Equal Opportunity Act 1984* (SA) s 5(1); see Equal Opportunity (Miscellaneous) Amendment Bill 2008 (SA) s 5.

5. See South Australia, *Parliamentary Debates*, House of Assembly, 7 February 2007, 1696–1708, (Mrs Redmond), 1708–9 (Mr Pisoni), and 1709–11 (Mr Hamilton-Smith).

6. However Mr Atkinson admitted that Muslim, Jewish, Buddhist, Hindu, Seventh Day Adventist and Scientology leaders were in favour of the introduction of a prohibition on discrimination based on religion. Jeremy Roberts, 'Christian Pressure Waters Down Bill', *The Australian* (Sydney), 20 November 2006.

7. Proposed s 85T(1)(f) of the *Equal Opportunity Act 1984* (SA); see s 61 Equal Opportunity (Miscellaneous) Amendment Bill 2008 (SA). The reasons for and consequences of this limited prohibition are further discussed in Anne Hewitt ' "It's not because you wear hijab, it's because

As similar fear was also reflected in the parliamentary debate regarding the 2006 proposed Bill which demonstrates concern about the possibility of a 'Catch the Fire'[10] style application of the legislation.[11] However, as the 2006 Bill did not actually propose to prohibit discrimination based on religious belief, it is improbable that a 'public act inciting hatred, serious contempt or severe ridicule' of a group defined by religious belief would have constituted victimisation 'on a ground of discrimination that is unlawful by virtue of this Act'. Therefore, this particular concern appears unfounded.

Despite this, the proposed expansion of the definition of victimisation which appeared in the 2006 Bill has been removed from the 2008 version.

There were further objections to the 2006 proposed amendments from religious groups — specifically, that the amendments would limit the ability of religious organisations to engage in certain types of discriminatory action.[12] For example, there were amendments that (if passed) would mean that:

- religious hospitals, childcare centres and other organisations would no longer be able to discriminate on the ground of sexuality;[13]
- religious schools would only be able to discriminate in employing staff on the grounds of sexuality if such a policy were advertised to all current and prospective employees, parents and students, and lodged with the Equal Opportunity Commissioner;[14] and
- religious schools would not be allowed to discriminate against students on any of the prohibited grounds — including sexuality and religion.[15]

Despite the objections made to these provisions in the 2006 Bill, they have remained in the 2008 proposals.

Where to from here?

As is apparent from the brief discussion above, there are a number of specific objections being made to the proposed amendments to the *Equal Opportunity Act 1984* (SA), as well as general objections to its scope. These objections appear to have been successful in slowing the progress of the legislative amendment to date, and in having some of the proposed amendments (especially to victimisation provisions) abandoned. Whatever the merit of the particular objections, it is important that the discussion move back into the public arena. Now that a new version of the amending legislation has been tabled in parliament the time is ripe for informed public debate on these topics.

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you're Muslim": Inconsistencies in South Australia's discrimination laws' (2007) 1 *Queensland University of Technology Journal of Law and Justice* 57.

8. Proposed amendment to s 86 of the *Equal Opportunities Act 1984* (SA); see s 61 Equal Opportunity (Miscellaneous) Amendment Bill 2006 (SA).

9. See <willyouvisitmeinprison.com> at 9 February 2009.

10. In which the Victorian Civil and Administrative Tribunal held that the presentation of a seminar and publication of articles regarding the religious beliefs of Muslims by Pastors of the Catch the Fire Ministries incited hatred and contempt of, and revulsion towards the religious beliefs of Muslims and therefore constituted a breach of s 8 of the *Racial and Religious Tolerance Act 2001* (Vic): *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2005] VCAT 1159. See also *Catch the Fire Ministries v Islamic Council of Victoria Inc* [2006] VSCA 284.

11. South Australia, *Parliamentary Debates*, House of Assembly, 7 February 2007, 1704 (Mrs Redmond).

12. See <willyouvisitmeinprison.com> at 9 February 2009.

13. Proposed deletion of existing exception in s 50(2) of the *Equal Opportunities Act* 1984 (SA); see s 24 Equal Opportunity (Miscellaneous) Amendment Bill 2006 (SA) and s 25 Equal Opportunity (Miscellaneous) Amendment Bill 2008 (SA).

14. Proposed introduction of an exemption on these limited terms in s 34(3) of the *Equal Opportunities Act 1984* (SA); see s 17 Equal Opportunity (Miscellaneous) Amendment Bill 2006 (SA) and s 18 Equal Opportunity (Miscellaneous) Amendment Bill 2008 (SA).

15. Proposed new provision s 85ZE of the *Equal Opportunities Act 1984* (SA); see s 61 Equal Opportunity (Miscellaneous) Amendment Bill 2008 (SA) and s 66 Equal Opportunity (Miscellaneous) Amendment Bill 2006 (SA).