



Redfern Legal

Redfern Legal Centre's bi-monthly e-bulletin

June 2012

Welcome to the June 2012 edition of *Redfern Legal*, bringing you legal updates and developments from our six practice areas and news of the work of Redfern Legal Centre (RLC). Please note cases cited in legal updates are not always RLC matters.

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Discrimination and human rights

Newspaper responsible for offensive reader comments on website

Clarke v Nationwide News Pty Ltd trading as The Sunday Times [2012] FCA 307

A recent decision of the Federal Court in a complaint of racial vilification involved reader comments on a newspaper website.

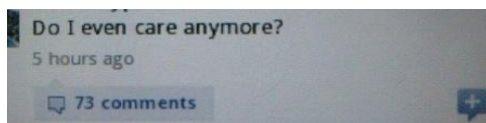


Photo by [garycycles7](#)

The *Sunday Times* in Perth published articles in its newspaper and on its website about the death of four Aboriginal boys in a car accident where the car was stolen.

Readers could make comments on the articles, published on the newspaper's website. The newspaper also had an associated poll on the question "Who's to blame for out of control kids?".

Staff at the *Sunday Times* moderated comments. Several hundred comments were posted, and many comments contained offensive and inflammatory language. The mother of three of the boys, an Aboriginal woman, made a complaint to the Australian Human Rights Commission about some of the reader comments.

Section 18C of the *Racial Discrimination Act 1975* (Cth) makes it unlawful to do an act that is reasonably likely, in all the circumstances, to offend, insult,

RLC in the media

"Care Card" article in Sydney Child

Sydney Child interviewed RLC's Sydney WDCAS and Yellow Card Project for an article aimed at families with young children. The article discussed Police using 'yellow cards' to link victims of family and domestic violence with support services.



Photo by Redfern Legal Centre

Talking domestic violence for cultural diverse communities

RLC's Culturally and Linguistically Diverse Specialist Worker with the Sydney WDCAS spoke with SBS Radio's Thai Program on 5 May 2012 and 12 May 2012. The program focused on definitions and myths in domestic violence, recognising different forms of violence, Apprehended Violence Orders (AVOs) and where to get help. Listen to the [broadcast](#).

RLC publications

New media kit, "Speaking Wisely" launched

"Speaking Wisely" is a kit aimed at community organisations, who wish to speak publicly about their services, the experience of their members and clients and what may need to be changed to achieve a just or sustainable society and environment.

humiliate, or intimidate another person or a group of people, and the act is done because of the race, colour, or ethnic origin of the other person or group. Section 18D provides some defences, including acts done reasonably and in good faith in a debate for a genuine purpose in the public interest, and fair comment on a matter of public interest.

Justice Barker considered 16 reader comments and found that four of them were in breach of s 18C, were not covered by the exception in s 18D, and therefore were unlawful.

The four comments that were found to be unlawful did not expressly mention Aboriginal people, but Justice Barker found that "the context in which the comment was published, in which concerns about the commission of juvenile crime by Aboriginal youths was a topic of general discussion following the stealing of a car by the Aboriginal boys in this case, leads me to infer that it was only made because of the Aboriginal race of the boys".

In considering whether the exception in s 18D was made out, Justice Barker distinguished between a comment that was an "... impolite, badly worded, unsophisticated statement about a matter of public interest" and a comment that was personal abuse or a gratuitous insult.

Justice Barker found that the publishers of the *Sunday Times* were liable for the comments posted by readers. The newspaper had actively sought reader comment, had moderated the reader comments and reserved the right not to publish reader comments. The publishers were ordered to remove the unlawful comments from the website and pay Ms Clarke damages of \$12,000.

RLC Tip: RLC has recently published "*Speaking Wisely*": *Considerations and strategies for managing public comment* and it has a section on unlawful discrimination, which is available on the [RLC website](#).

Credit, debt and consumer complaints

RLC win in responsible lending complaint

Laura came to RLC with a complaint about her credit provider, Big Bank. In March 2011, Laura saw a TV ad for Big Bank's offer of "zero interest on balances transferred" for new customers transferring their credit card debt to a Big Bank card. Laura thought that this would be a good way to pay off her credit card debt, and so she applied for the card.

Laura received phone calls from Big Bank customer service representatives, who told her that her application had been approved and that she would receive it in the mail.



Photo by 401K

Laura received the card and a letter saying she had been approved for a balance transfer of only \$2,500 (not \$6,500 as requested). Contrary to the advertisements, Laura was charged interest on this account. Laura contacted Big Bank and received verbal confirma-

Such organisations do not want to spend time dealing with the fallout from speaking unwisely. The kit has checklists, background explanations, some illustrative case summaries and scenarios as well as suggestions for policy and procedures, and some handy how-to guides. The purpose is to feel confident you are on solid ground and well prepared to speak wisely and boldly.



Image by mystical child

The Repair Kit now in Russian!

RLC has translated its popular *The Repair Kit: Getting Housing NSW to Repair your Home* into Russian. This is now available for download on RLC's [website](#).

RLC community legal education

Helping the Helpers: Legal education for community workers

RLC is presenting a series of workshops for community workers, designed to equip workers with resources and skills to assist their clients, and information on accessing legal resources. Experienced lawyers and specialists will present the workshops, which will cover legal issues in detail and provide a package of materials for each participant. It will also be an opportunity for meeting other workers and discussing practical and local issues.

Future workshops include:

- Fines – Thursday, 28 June
- Domestic violence and AVOs – Friday, 23 July
- Debts and money problems – Thursday, 23 August
- Tenancy and domestic violence – Thursday, 13 September

Please email education@rlc.org.au or refer to the [Workshops Calendar](#) on the RLC website for more details.

tion that a 0% interest rate applied to her account. However, despite requests, she received no written confirmation.

Laura wrote to Big Bank setting out her concerns, and was told that she had not been granted the card for which she had applied, but rather a different card, which did not have the same features as the one she wanted. As Laura did not meet the income requirements for the card she had applied for, she had automatically been downgraded to a different card. A letter advising Laura of this had been sent, but Laura did not receive it until after she had activated the card.

RLC assisted Laura to make a further complaint to Big Bank about its decision to automatically process Laura's application for one card as an application for a different card, without her knowledge or consent. Big Bank told RLC that their "Privacy Consent" form contained a clause that authorised them to do this. In agreeing to the terms and conditions of the Privacy Consent, Big Bank argued that Laura had consented to this.

Big Bank's actions appeared to RLC to be a breach of the responsible lending provisions of the *National Consumer Credit Protection Act 2009* (Cth). It seemed Big Bank failed to assess whether the card granted was suitable for Laura's purposes, having regard to Laura's requirements, objectives and financial situation.

RLC assisted Laura to make a complaint to the Financial Ombudsman Service, and managed to negotiate a satisfactory outcome for Laura. However, it took over a year to resolve this complaint, demonstrating how hard it can be for consumers to fight back against their financial services providers.

RLC Tip: Not all financial services providers are completely in compliance with the new consumer credit regime yet. It is worth investigating whether a complaint may be made on the basis that a financial services provider has failed to comply with its obligations under the Act.

Government and police accountability

Police Integrity Commission and NSW Ombudsman need more teeth

At the recent NSW Police Association biennial conference, Association President Scott Weber made several criticisms of the operation of the Police Integrity Commission. Mr Weber said, "we're talking about an oversight body that has no checks and balances, because the inspector doesn't have the power to actually implement his reports". The Police Association is correct in stating that the Inspector cannot force the Police Integrity Commission to adopt his recommendations – just like the NSW Ombudsman cannot force the NSW Police Commissioner to adopt the Ombudsman's recommendations. RLC hopes the Police Association decides to apply its significant political influence to increasing the effectiveness of both the NSW Ombudsman and the Inspector of the Police Integrity Commission.

RLC Tip: See the full story reported in the [SMH](#).

RLC case work

Making a statement: Is there a history of domestic violence?

A recent Sydney WDVCS case highlights the importance of well-written statements to provide the requisite evidence for an interim or final Apprehended Domestic Violence Order (ADVO) to be granted.

Police had been called to Sally's house after a domestic violence incident and a Provisional Order was applied for and granted. Sally then went to the police station and provided a statement about the incident. At the station, police offered Sally an early referral to support services through the Yellow Card Project. Sally agreed and Sydney WDVCS received the referral from police and contacted her. Sally was given procedural information and referrals prior to the first court date for the ADVO. At the first mention of the ADVO the Magistrate did not believe that there was sufficient evidence to grant an interim AVO, and Sally was then without an ADVO to protect her.

The Sydney WDVCS worker spoke to Sally and heard that there had been a long history of domestic violence by the defendant against her. The worker and Sally discussed the original statement she had given to police, which did not adequately convey the history of violence and the defendant's escalating behaviour. The worker gave Sally information about the importance of reporting the history of violence to police, not just the event that gave rise to the police being called.

Sally returned home and another incident occurred and police were called. This time, when Sally gave her statement to police she told them about all of the events that had occurred during her relationship. She detailed the long history of abuse against her and detailed how the escalating violent behaviour now meant she had fears for her safety. The matter came before the court again and an interim ADVO was granted based on her more comprehensive statement.



No independent investigation into shooting of Indigenous teenagers

The police shooting that took place in Kings Cross in the early hours of 22 April 2012 has attracted intense interest from the media and the general public. Given that Indigenous teenagers were shot by police, immediate requests were made for an independent investigation. However, the only independent agencies that have the ability to investigate do not receive sufficient funding to undertake active investigations of these incidents.

Instead, the NSW Police Force is conducting a Critical Incident Investigation, staffed by members of Harbourside Local Area Command. The NSW Ombudsman is providing oversight of the police investigation.

The Police Integrity Commission has stated that it "has neither the resources nor the structure which would support a capability to investigate incidents of [this] kind". The Commission went on to point to its investigative experience in police corruption, demonstrating that the most powerful police accountability agency in the State is focused on the way police interact with criminals, not how they interact with the public – even where there are allegations of excessive force after a person has been shot.

It is concerning that both independent agencies have been starved of resources to the point where, as the Police Integrity Commission says, "the NSW Police Force is the only agency with the capacity and the necessary powers to effectively respond to and investigate critical incidents in this State". This year has shown that, in NSW, the more serious an incident is, the less able it is to receive independent investigation.

Read the Police Integrity Commission's [statement](#).

SDRO write-off guidelines should be publicly available

RLC has lodged an Information Access Application for the Write-Off Guidelines used by the State Debt Recovery Office (SDRO). This request requires the Finance Minister, Greg Pearce, to either release the Guidelines or provide public interest reasons why the Guidelines should not be released. Making them publicly available would improve the effectiveness of the community and support the sector as a whole, by allowing advocates to know the process used by the SDRO. RLC looks forward to receiving the Guidelines, and hopes that the SDRO will comply with the statutory requirement to make such information freely available on their website.

Housing and tenancy

Housing NSW tenants experiencing domestic violence

The Inner Sydney Tenants' Advice and Advocacy Service (ISTAAS) at RLC has noticed an increase in Housing NSW tenants asking for assistance with domestic violence. Many clients have found that while Housing NSW has good policies relating to domestic violence, many client service officers have a limited understanding of the complexities of domestic violence.

RLC events and projects

Money matters for culturally diverse communities

RLC has been actively reaching out through local community organisations to their client group. The aim has been to extend a simple message – money troubles are often also legal problems and it is useful to get legal advice. The reality is that many people with money problems do not think about getting legal advice, do not know where to go or who to trust and worry about what it will cost to get advice.

Recently RLC worked with the Indonesian Welfare Association at a meeting of their community members at Alexandria Town Hall. There was a lively discussion about money problems, the work RLC does, and how to translate a flyer about money troubles into Indonesian. Events like these provide a two-way conversation, an opportunity to meet the community and hear from them, and establish pathways to advice.

If you would like RLC to come and speak to your culturally diverse group about money matters call: Elizabeth Morley on (02) 9698 7277.

Community notices

Australasian Law Teachers Association Annual Conference 2012

Legal Education for a Global Community (1-4 July 2012)

Sydney Law School is proud to host, for the first time, the 67th Annual ALTA Conference. This exciting international event provides opportunities to share research, to create and strengthen national and international partnerships and to hear from expert practitioners in a wide range of legal fields.

The Hon Kevin Rudd MP will open the Conference with a program that includes a range of plenary sessions, interactive workshops, presentations and seminars, shaped to enhance and inform around Legal Education for a Global Community.

Sessions include: Family Law and Social Justice; Indigenous Inclusion; Legal Research and Communication; Criminal Law; Ethics and Clinical Legal Education; as well as sessions on how to get published.

For more information and to register please go to the Sydney Law School [website](#).

ISTAAS sent a letter of complaint about this issue to the Housing NSW Area Director. After receiving no response, ISTAAS lodged a complaint with the NSW Ombudsman.

After this complaint was made, one ISTAAS client received a new client service officer who was understanding of her situation, acted appropriately, and went out of her way to find secure housing close to the client's support network.

One team of client service officers has held discussions about how to best help tenants experiencing domestic violence and has arranged refresher training for all existing staff. All new Housing NSW staff currently receive domestic violence training during their induction, however the experiences of ISTAAS clients show there is a need for regular refresher training on domestic violence.

ISTAAS is writing a fact sheet on Housing NSW and domestic violence, which will be available at the RLC website soon.

RLC Tip: You can complain to the NSW Ombudsman if you think that Housing NSW is not following its policies. You can find Housing NSW policies on domestic and family violence [here](#).

Greens MP Jamie Parker aware of Housing NSW failure to repair

A delegation of tenant advocates from RLC's ISTAAS, the Inner West Tenants' Service and the Tenants' Union of NSW met with Jamie Parker, Greens MP for Balmain, to discuss the serious failure by Housing NSW to repair clients' properties.

Jamie Parker said that his office receives daily visits from public tenants who have repair issues, and that many members of Parliament are also approached about this issue. He is well aware of this issue, and willing to raise the matter in Parliament. Clover Moore MP has also voiced her support and awareness of this problem.

ISTAAS encourages all public tenants who are finding it difficult to get repairs done to visit their local Member of Parliament, so that they are familiar with this important issue before it is discussed in Parliament.

RLC Tip: If you can't visit your local MP in person, send a letter. You can find a sample letter in The Repair Kit. Drop in to RLC if you need a copy of The Repair Kit or download it [here](#).



Photo by Redfern Legal Centre

Domestic violence

New practice note on domestic violence proceedings

A new Local Court Practice Note (No 2 of 2012), which came into force state-wide on 1 May 2012, will impact on domestic and personal violence court proceedings. RLC's Sydney Women's Domestic Violence Court Advocacy Service (Sydney WDVCS), which operates at Downing Centre, Newtown, Waverley, and Balmain Local Courts, is interested in the impact of this new practice note.

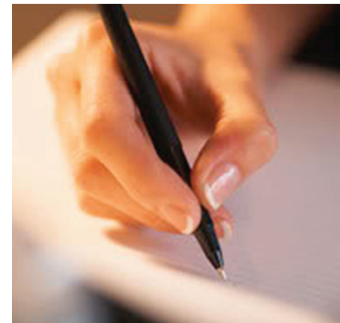


Photo by grantleylynch

Use of written statements at hearing

Before a matter proceeds to a hearing, and where there is no related charge, written statements must be filed by the applicant and served on the defendant, and the defendant must file statements in reply. Unless the court orders otherwise, evidence in chief of a witness at a hearing will be through these written statements.

If the court grants leave, relevant additional evidence may be given orally at a hearing. Cross-examination evidence or re-examination evidence will be given orally by a witness at the final hearing along with final submissions made by parties or their legal representatives.

RLC anticipates that using written statements at a hearing will benefit Sydney WDVCS clients who are making a domestic or personal application. However, we need to consider how clients can be assisted to write and serve statements in personal applications, cross applications, and in applications where the client is the defendant.

Applicants and defendants in APVO matters may find it difficult to provide written statements, particularly those applicants and defendants whose first language is not English, and those with low literacy.

Orders sought in the absence of a defendant

Where an amended order is asked for and the defendant is absent, the applicant must file and serve on the defendant an amended application detailing the orders sought, unless the court is satisfied it is in the interests of justice not to do so.

Previously it was possible to have orders amended in the

absence of the defendant. The amended order was unenforceable until served on the defendant.

RLC Tip: **LawAssist** has a comprehensive website designed to assist both applicants and defendants in AVO proceedings. See also the [practice note](#).

Inadequate protection for complainant in sexual offence proceedings

A person accused of a sexual offence has a fundamental right to test the evidence given against them by the complainant. However, when the accused is self-represented, this right is weighed by the court against the interests of the complainant.

Section 294A of the *Criminal Procedure Act 1989* (NSW) states that a complainant in prescribed sexual offence proceedings cannot be examined in chief, cross-examined, or re-examined by an accused person who is self-represented. A complainant may, however, be examined instead by a person appointed by the court. The appointed person can only ask questions of the complainant that the accused has requested.

The purpose of s 294A is to spare the complainant "the need to answer questions directly asked of him or her by the person said to have committed the offence": *Clark v The Queen* (2008) 185 A Crim R 1.

A recent case has demonstrated that the 2003 reforms to the *Criminal Procedure Act* do not go far enough to protect witnesses where the accused is self represented. In *R v KS* (2011) (unreported), the accused was found guilty of 18 out of a possible 25 criminal charges, including five charges of sexual assault, two charges of shooting at with intent to murder, and a charge of attempting to strangle/suffocate with intent to murder.

During the trial the accused was initially represented, but dismissed his legal team during cross-examination of the complainant. The accused was then provided with a court appointed examiner, who asked approximately 800 questions on behalf of the accused in cross-examination. The accused was allowed to leave the dock and sit at the bar table with the appointed examiner, even though the court knew he had a previous conviction of escaping lawful custody.

During cross-examination some of the questions asked by the accused were written down and passed to the examiner, but others were asked verbally (and sometimes at a volume where the complainant could hear) at the Bar table.

The complainant said more than once that she felt she was being directly questioned by the accused. She also said she found it difficult to look at the examiner from the Bar table during cross-examination, because it meant she also had to look at the accused.

To fulfil the intended purpose of s 294A, and in light of this

case, it should be considered in what manner the accused can conduct cross-examination through the court appointed examiner.

Employment

Extension of time in unfair dismissal applications

People wishing to make an unfair dismissal application with Fair Work Australia have a 14-day limitation period from the day they last worked. This limitation period can only be extended if Fair Work Australia is satisfied there are exceptional circumstances.

An extension of time may be granted under the following circumstances:

- the applicant took prompt action to protect his/her rights;
- the applicant took all the steps which were reasonably open to him/her;
- representative error; or
- psychological or psychiatric injury arising from the dismissal.

Prompt action

In cases where the applicant did not know about the limitation period or did not attempt to get legal help right away, it is unlikely an extension of time will be granted under exceptional circumstances.

In *Paul Andrews v Concept Eleven Pty Ltd t/a MacLean Haulage*, the applicant received five weeks notice of termination a few days before going overseas. The applicant contacted his solicitor, but was not able to meet his solicitor before the trip. The applicant organised an appointment for a week after he returned.

An unfair dismissal application was filed on the same day, but it was four days out of time. Fair Work Australia did not grant an extension of time, reasoning that the applicant was "dilatatory in pursuing the making of the application" as he did not:

- leave a message with his solicitor when he contacted him for the first time;
- did not forward to his solicitor a copy of the termina-



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tion letter; and

- did not inform his solicitor about being dismissed when making the appointment.

All steps reasonably open to the applicant

Fair Work Australia has taken into account the ability of the applicant to obtain legal help. In *Stjepic v Boka Aluminium Windows Pty Ltd*, the applicant approached three solicitors before finding one who specialised in the field and did not require the applicant to pay in advance, which the applicant could not afford. In combination with the applicant’s lack of English, the lack of ability to find legal advice was found to be an exceptional circumstance.

Representative error

The particular situation in which the lateness of the application is fully attributed to the applicant’s solicitor is known as representative error. This situation will sometimes be characterized as exceptional circumstances by Fair Work Australia. See *Alexandra Burns v Ngara Civil and Mining Pty Ltd* (30 April 2012); *Mark Ribbans v Ctel Group Pty Ltd* (18 April 2012).

Psychological distress

Many dismissed workers feel a degree of distress following their dismissal. Mere distressed or upset feelings about the termination of work are not sufficient for the grant of an extension of time. However, in combination with other factors and when the condition of the applicant might be a recognised psychological condition preventing the applicant from acting active steps to protect his/her rights, Fair Work Australia is willing to recognise exceptional circumstances. See *Ellis v Melton Shire Council* (8 February 2012).



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