Redfern Legal

Redfern Legal Centre's bi-monthly e-bulletin

October 2012

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

In this edition:

LEGAL UPDATES

Police and government accountability

Right to Silence to be wound back in NSW

The NSW Government recently released an exposure draft of the *Evidence Amendment (Evidence of Silence) Bill 2012* (NSW). The Bill aims to create a situation where a person's legal defence can be harmed if they do not initially mention to police facts they later rely on. RLC is of the view that the Bill will not be effective, will be a waste of public resources and will undermine the reputation of law enforcement agencies in NSW.

Photo by **Truthout.org**

This Bill allows adverse inferences from the defendant's failure to mention a fact during official questioning. This undermines the right to silence and the presumption of innocence, and contradicts the recommendations of two Law Reform Commission reports on this issue. The Bill is not aimed at organised crime or a "code of silence" – it will affect anyone suspected of charges from damage to property up. These cases are dealt with in the Local Court every day. The Bill will change the way police investigate, because the police will know that the accused is under pressure to tell everything, even if the police have not explained the case against them – including the charges.

The Bill relies on the Police Force for compliance with its safeguards, which is concerning, as their Association has failed to recognise that other safe-

RLC media

Website user testing

RLC is in the process of developing a brand new website. In June, RLC held four community focus groups to find out what our clients and stakeholders want from the new site.

The next step was a "card sort". Members of the community and stakeholders helped us shape the architecture of the new site. The process of user testing has been extremely valuable in making sure we're delivering the information people really want.

Watch this space for updates as to our new website.

RLC community legal education

Workshops for community workers a great success

RLC has completed the first phase of "Helping the Helpers – Supporting Community Workers to Assist Clients".

RLC delivered six workshops at Redfern Town Hall and Redfern Community Centre on topics ranging from how to access free legal advice, to assisting clients with Police problems, to money and debts.

The majority of community workers attended more than one workshop and most said that they had not been familiar with the services offered by RLC prior to attending.

Overall the workshops were a great success and we hope to continue them in the near future.

We'd like to thank the City of Sydney for their generous support of this important project.

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guards in legislation (e.g. custody safeguards) protect both people and the integrity of police investigations, seeing them instead as "red tape".

The Bill also sends a signal to organised crime that the NSW Government does not think its police and prosecutors can win without changing the rules to suit them. The Bill cannot make investigations more comprehensive or evidence more compelling. It will mean police and prosecutors pushing forward with weaker cases. The Bill will cause a burden on court time and resources as it will likely lead to hundreds of appeals. Much court time will be spent talking about whether it was reasonable for the defendant to wait before mentioning information to the police instead of whether or not the accused committed the alleged crime.

Review of the Bill will not take place until five years after implementation, however the impact of the Bill is expected by RLC to be immediate and detrimental to the criminal justice system. It is in no one's interests that this Bill pass, but we expect that it will.

Domestic violence

Announcement of NSW Domestic and Family Violence Framework

The NSW Government has announced that it is preparing a NSW Domestic and Family Violence Framework (DFV Framework) for release in early 2013. The Framework will be aimed at delivering an integrated, whole of government response to domestic violence, focused on primary prevention, offender accountability and long-term reduction of domestic and family violence.

The announcement of the DFV Framework comes in response to the recommendations of the Auditor General's report "Responding to Domestic and Family Violence", which was highly critical of the present system in NSW. The report found that the Department of Family and Community Services, the Department of Attorney General and Justice, the NSW Police Force and the NSW Ministry of Health do not have a strategy for working together across the State in response to domestic violence, that they lack a shared understanding of each others' roles and that there has been a lack of leadership to drive change. Accordingly, the Auditor General made a series of detailed recommendations, including that the key agencies agree, in consultation with non-government organisations, on a framework for responding to domestic violence.

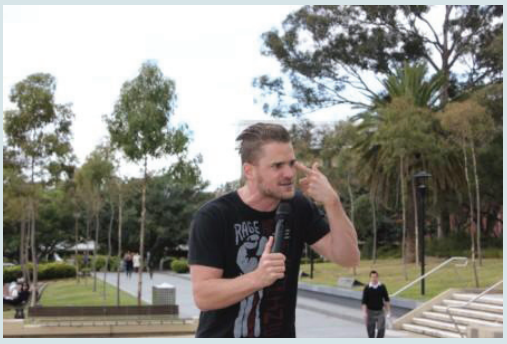
The NSW Government has identified a number of key components of the proposed DFV Framework, including:

- Clearly articulated service roles and responsibilities;
- Referral pathways;
- Information exchange protocols;
- Early identification of domestic violence;
- Risk assessment and management tools; and
- Minimum practice standards.

Sydney Women's Domestic Violence Court Advocacy Service (Sydney WDVCAS) has been involved in a number of consultations with the Department of Attorney General and Justice and the Department of Family and Community Services regarding the new DFV Framework.

Share Housing Survival Guide launch

The 2012 edition of the **Share Housing Survival Guide** is hot off the press and ready for distribution. RLC's Inner Sydney Tenants' Advice and Advocacy Service launched this fantastic new guide to everything legal and non-legal about living in a share house at Sydney University on 8 October. The guide was officially launched by the Commissioner for Fair Trading, Mr Rod Stowe. Prior to the official launch we enjoyed the stand-up comedy of Mathew Wakefield and Kayhan Oncu.



Stand-up comedian, Mathew Wakefield, at the launch of the Share Housing Survival Guide.

Community

Ode to Lawyers

I love lawyers so very much,

I pray the pack of them bites the dust.

They fill me with such confidence and trust,

I pray their entire coterie goes bust.

What a joy it would be for me,

If all lawyers were disbarred legally!

Excerpt from a poem by ***Christopher Rath***

Inquiry into domestic violence

The NSW Parliament's Standing Committee on Social Issues has released its report on **Domestic Violence Trends and Issues**. The Committee has made 89 recommendations, including:

- That the NSW Government adopt a common definition of domestic violence;
- That the NSW Government aim for improved integration and coordination of services among government agencies, and by actively building partnerships with non-government agencies; and
- That the NSW Government actively plan for an increase in demand for services that will arise from the reforms under the NSW Domestic and Family Violence Framework.

One of the main recommendations of RLC and Sydney WDVCAS' submission to the Inquiry was that specialist Apprehended Domestic Violence Order (ADVO) lists be implemented in all NSW courts. The Standing Committee agreed, and the report recommended that in order to facilitate better coordination of support services, the Attorney-General request that the NSW Chief Magistrate ensure that every local court implements a dedicated domestic violence list which runs on a regular basis. The report also recommended that the Department of Attorney General and Justice instruct court services to take steps to co-ordinate the availability of domestic violence support services in consultation with relevant non-government organisations and in accordance with domestic violence lists.

Housing and tenancy

Domestic Violence and Tenancy Workshop for Community Workers

This month, RLC's Inner Sydney Tenants' Advice and Advocacy Service presented a workshop for community workers on domestic violence and tenancy. The workshop was one of the most popular in the series "Helping the Helpers: Supporting Community Workers to Help Clients".

The *Residential Tenancies Act 2010* (NSW) brought in a number of improvements for tenants experiencing domestic violence, especially co-tenants. Unfortunately, many of these improvements have the condition that the person experiencing domestic violence has a final ADVO with an exclusion order. These orders are difficult to get and take a long time to be finalised.

For example, a co-tenant in a fixed term agreement, who has a final ADVO with an exclusion order, can give their landlord a 14-day written termination notice and won't have to pay the landlord compensation for leaving the tenancy during the fixed term. Before this change was introduced, tenants experiencing domestic violence from their co-tenant would still be financially liable for rent and damage after they left the property.

Also under the new Act, once the fixed term of a tenancy agreement has expired, a co-tenant can give the landlord and the remaining co-tenant(s) a 21-day written termination notice and move out.

Occupants who want to remain in the premises (such as a woman with children, whose name is not on the lease) can apply for succession of the tenancy if a final ADVO with an exclusion order is granted against the person on the lease. This means that the tenancy of the perpetrator is ended, and if the victim of violence wants to stay, the Consumer, Trader and Tenancy Tribunal may award her succession of the tenancy. For more information go to **sharehousing.org**.

Employment

Adverse action considered by High Court

Employers have welcomed the High Court's decision in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32. That decision was an appeal from the Full Court of the Federal Court, which concerned how a court ought to consider whether adverse action by an employer was taken because of a prohibited reason.

The case involved adverse action taken against Mr Barclay by his employer, Bendigo Regional Institute of Technical and Further Education (BRIT). Mr Barclay was employed as a BRIT team leader and also held the position of President of the BRIT Sub-Branch of the Australian Education Union (AEU). In his AEU capacity, Mr Barclay sent an email to all AEU members employed by BRIT cautioning them not to agree to be part of any attempt to create false of fraudulent documentation, in relation to an upcoming accreditation audit of BRIT.

At first instance, the decision-maker, BRIT CEO, gave evidence about her state of mind and her intentions in taking the adverse action. Her evidence tended to suggest that the action was not taken for a prohibited reason. The decision-maker's evidence was accepted by the court.

On appeal, the Full Court of the Federal Court decided that, in order to determine whether action was taken because of a prohibited reason, the subjective intention of the decision maker was relevant, but was not decisive. The Full Court determined that a decision maker might have a genuine but incorrect belief as to their own intention in making a

particular decision. The Full Court allowed for the possibility of an unconscious reason for a decision, where the motivation for the decision was not appreciated or understood, even by the decision-maker.

The High Court set aside the Full Court's decision, and disapproved of the search for an unconscious, unappreciated, or misunderstood reason for a decision. The court confirmed the importance of the words of the statute, which establish the relevant question – whether adverse action has been taken because of a proscribed reason. Questions as to whether the test is a subjective or objective one, and whether the reason for the decision was conscious or subconscious, detract from the true statutory test, and do not assist the court.

Employers have celebrated this apparent narrowing of the scope of the Fair Work Act adverse action provisions, and have compared the Full Court's decision to Donald Rumsfeld's famous remarks on the confusing distinction between "known knowns", "known unknowns" and "unknown unknowns".

However, the significant fact in this case was that the decision-maker gave cogent and credible evidence as to her motivations in taking the adverse action. Once that evidence was accepted, the respondent had discharged its obligation to prove the absence of a prohibited reason.

Photo by the **G**

In the (all too common) cases of employers who do not give useful or credible evidence as to their benign reason for taking adverse action, it is still open to the court to find that the employer's stated reason for taking an action is not the real reason for taking an action, and to find against the employer accordingly.

Discrimination and human rights

Do police provide services to alleged offenders?

In *Robinson and El Masri v Commissioner of Police, NSW Police Force* **[2012] FCA 770**, the Federal Court considered whether members of the NSW Police Force provided services to Mr Robinson in the course of arresting him and granting him bail.

Mr Robinson has an acquired brain injury. On 21 March 2009, he was arrested for alleged fraud offences. Soon after his arrest he had a seizure and he was taken by ambulance to Liverpool Hospital. After a few hours he was discharged from hospital and taken to Liverpool Police Station. At the police station he was observed to be shaking, ill and slow to respond. He was taken back to Liverpool Hospital under police custody, given medication, and then returned to Liverpool Police Station and was granted bail.

Mr Robinson claimed that the police had discriminated against him on the ground of his disability in the way he was treated during and after his arrest and when bail was granted, and Ms El Masri (his carer) claimed that the police had discriminated against her as the associate of a person with a disability.

RLC events and projects

UTS law careers networking event

RLC's Tom McDonald (Tenant Advocate) and Jess Jameson (Project Implementation Manager) were delighted to attend the University of Technology Sydney's Law Careers Networking event this month.

The event was held to give law students with an interest in community law and social justice the opportunity to meet with organisations and firms that work in these fields.

Donning nametags, and plied with free wine and deep fried treats, workers from community legal centres and pro bono firms were available to talk to students about what it's like to work and volunteer in the sector.

We look forward to meeting more students at next year's event – we always love talking about what we do here at RLC.

Analysis of need in local area

RLC is currently undertaking an analysis of risk experienced by people living in our catchment area. This project is based on research by Judith Stubbs and Associates that identifies groups of people who commonly access community legal services (such as lone parents, victims of crime, people cohabiting with children, Aboriginal or Torres Strait Islander people, people on Centrelink benefits, people born in non-English speaking countries, tenants, and people with disabilities) and identifies which legal problems are most commonly experienced by these groups. Stubbs then juxtaposes this information with measures of socio-economic disadvantage for the same areas.

Detailed information about this research can be found **here**.

RLC has compiled and analysed centre data as far back as 2006 and compared it to data from the 2006 and 2009 Census. This has provided a picture of the client demographics in our catchment area and helps ensure that we have a clear understanding of the particular legal needs of our community.

To assist us in our research of legal needs we would greatly appreciate if it you could take a few minutes to fill out a **short survey**. This survey is open to everyone and we appreciate input from all. The survey is anonymous.

The claims were dismissed. A key issue was whether the police were providing services to Mr Robinson and Ms El Masri in the course of arresting Mr Robinson, dealing with him after arrest, and granting him bail. Discrimination can only be unlawful if it occurs in one of the areas of public life covered by the *Disability Discrimination Act 1992* (DDA), and the provision of services is one of these areas.

"Services" are defined in s 4 of the DDA to include "services of the kind provided by a government, a government authority or a local government body". Justice Yates reviewed the comments of the High Court in *IW v The City of Perth* [1997] HCA 30 as to whether the granting or refusing of planning approval by the City of Perth was a service, and the comments of the Federal Court in *Rainsford v Victoria* [2007] FCA 1059 as to whether transporting prisoners was a service.

Justice Yates found that the police officers were not providing services to Mr Robinson and Ms El Masri while they were pursuing and arresting Mr Robinson, while maintaining custody over him in the ambulance and at hospital, or while dealing with his bail application at Liverpool Police Station.

Justice Yates found that "the granting of bail is not so much the provision by a government authority of services to accused persons, but the exercise of government authority, in the operation of the criminal justice system, to control such persons and regulate their liberty".

Given this finding in the Federal Court, and similar findings in NSW courts, RLC urges the Federal Attorney-General to extend the areas of public life covered by discrimination laws to include acts of government authorities. This was a recommendation in the **submission** made by the National Association of Community Legal Centres on the consolidation of federal anti-discrimination laws.

Credit, debt and consumer complaints

Case study: Thomas' story

Thomas (not his real name) migrated to Australia from Chile, and had limited English. Over 12 years ago, he had a credit card with a department store, which he used to pay for items amounting to $800. Shortly after, his wallet and the credit card were stolen. Thomas reported the theft to the credit card company on the day of the theft.

Later, Thomas received a letter saying that he owed $1,500 on the credit card. When asked for a breakdown of these fees, it was revealed that $700 of this was for the retrieval of 70 identical statements at a cost of $10 each. Thomas was not sure what to do, but agreed to pay the amount claimed in installments. Thomas paid a total of $1,200 over time.

Thomas lost his job, and was unable to continue with his payments. The credit card company sought and was awarded default judgment in the amount of $3,700. When Thomas asked the credit card company's lawyers why he owed this much, he was informed that it was due to enforcement costs and interest, which amounted to a much higher amount than the original debt of $800. The debt was sold to a debt collector, who pursued Thomas for payment.

Photo by **Phillip Taylor PT**

RLC assisted Thomas to write a complaint to the credit card company and the debt collector to request that the debt be waived. RLC argued that:

- Section 99 of the Uniform Consumer Credit Code indicates that credit providers must not recover enforcement expenses from a debtor in excess of those reasonably incurred by the credit provider.
- Thomas had made a genuine attempt to repay the debt with a payment plan, which he had to cease, as he was unable to find work. He still managed to pay 1.5 times the amount of the original debt.
- The $3,700 requested was entirely made up of interest and enforcement fees, as the original debt had already been paid off entirely. These fees are far in excess of those that could be said to be reasonably incurred.
- The debt should be waived, as Thomas did not have the capacity to pay the debt given his financial circumstances (low income, no assets and a dependent).

This request was rejected. RLC assisted Thomas to make a complaint against the debt collector to the Australian Securities and Investment Commission. This was unfortunately rejected, partly due to time limitations.

RLC Tip: Although s 99 of the Uniform Consumer Credit Code appears to offer some protection for consumers, the boundaries of when expenses are "reasonably incurred" remain unclear. RLC argued that attempting to recover enforcement costs well in excess of the original debt was unreasonable. RLC was unsuccessful in persuading the debt collector to waive the debt on this basis.

Unfortunately, making a complaint to the Ombudsman was not an option, given that default judgment had already been obtained. A better outcome may have obtained a better outcome had Thomas sought help earlier, before judgment had been entered. Taking action early on debt matters is the best way to resolve them.

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