Australia: new Labor government in Victoria defends Kennett's gagging laws in the Supreme Court

Mike Head
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In her Supreme Court action, Geraldine Rawson, represented by David Grace QC, sought declarations that two key clauses of TSO 140 under which she was dismissed last year were unconstitutional and invalid. Grace submitted that, firstly, the clauses infringed the implied freedom of political communication guaranteed by the federal and Victorian Constitutions. Secondly, he argued that both provisions were *ultra vires* (beyond the power of) the Teaching Service Act.

In opening Rawson's case, Grace quickly established its political context. Her case had as its "genesis the promulgation in 1993 of Teaching Service Order 140 by the Minister for Education". TSO 140 had provoked "quite a deal of public discussion" because the previous Kennett government had "muzzled members of the teaching profession from making public comments about the teaching service" while simultaneously announcing "radical changes" to the education system.

The new Bracks Labor government, through Dr Chris Jessup QC, immediately objected, claiming that there was nothing in the evidence to support those statements of fact. From the outset of the hearing, the government sought to prevent any reference to the use of TSO 140 to attack and intimidate teachers and parents.

Jessup objected again moments later when Grace sought to introduce *Hansard* reports of state parliament, in which Labor leaders—now government ministers—had given details of entire school communities being threatened under TSO 140 for criticising Kennett's education cuts. This material was "highly prejudicial to the way in which we wish to advance the case for our part," Jessup said.

Grace also attempted to table a report from the *Australian* newspaper of November 29, which quoted Labor's Education Minister Mary Delahunty saying that teachers had been "napalmed" under TSO 140 if they "dared speak out" about what was happening in their schools. Jessup said the statements were irrelevant to the case. As a result, the judge refused to allow Delahunty's statement or the *Hansard* records to be used as evidence.

Grace then read to the court in full Rawson's Open Letter of July 30, 1996, in which she appealed to her fellow teachers, parents and students to support her stand against the victimisation of herself and hundreds of other teachers.

In the letter, Rawson explained the underlying political processes at work in her dismissal. She wrote that, like many others, her school, Buckley Park Secondary College, had been designated as a "School of the Future". "As you know, great pressure is being exerted on school administrations to cut costs. Replacement teachers cost money, and therefore cut into the overall budget. As far as the school is concerned, I am now a financial liability. Far better for them to get rid of me and replace me with a young contract teacher on a far lower salary."

The letter gave four examples of the trivial "complaints" that had been solicited from students and parents about her teaching methods in order to initiate the TSO 140 procedure against her. Her letter said the allegations would be "laughable" if they were not being used to carry out "such a flagrant attack on democratic rights".

Rawson's document became the central focus of the Supreme Court hearing. When he delivered the government's submission, Jessup denied that the letter had any political content. Jessup insisted that it was merely Rawson's complaint about the way she had been unfairly treated as an individual.

Jessup argued that her reference to the financial pressure being exerted on school administrations was a criticism of the Education Department, not the government, and was therefore not a political statement.

In reply, Grace re-read key passages from the letter, highlighting its many explicit political comments, as well as the political thread that ran through it as a whole. In the letter, he drew out, Rawson had denounced the allegations against her as a "fundamental attack on my democratic and civil rights", referred to the complaints process as a "kangaroo court" and stated she was not only defending her rights, but those of all teachers.

Grace referred to recent leading cases, including the *Rabelais* student newspaper case of 1998, and *Lange's* case and *Levy v Victoria* (decided together in 1997), in which the High Court and the Full Federal Court had elaborated on the implied freedom of political communication.

Grace said the courts had specified that the constitutional protection of political comment extended to all levels of government, federal, state and local.

He cited part of the judgment of Justice French in the *Rabelais* case, which, after reviewing leading High Court cases, summarised the scope of political comment as follows:

"Political matters are not limited to matters concerning the functioning of government. They may include broad discussion about the social and economic organisation of society as well as about its laws and proposals for their change."

Grace submitted that both clauses under which Rawson was charged—Clauses 3.7 and 4.19—failed the relevant constitutional test of being "reasonably appropriate" to a legitimate purpose of government. These "confidentiality" clauses went far beyond anything required to protect the integrity of the disciplinary procedure.

Similarly, Grace argued that the clauses were *ultra vires* because they were outside the objects of the Teaching Service Act and were not "reasonably proportionate" to the legitimate purposes of the Act.

In opening the government's submission, Jessup said it would not follow the expected course of starting with the Commonwealth and Victorian Constitutions, followed by the legislation and then the facts. Instead, "we propose first to deal with the facts of the case".

At some length, Jessup referred the judge to each of the written

complaints laid against Rawson. This was despite the fact that Rawson has consistently denied each allegation, none of which have been verified before the Industrial Relations Commission or any other tribunal or court.

In the internal Departmental hearing that culminated in her dismissal, the government denied Rawson the right to question the complainants against her, or even the investigating officers, in order to test the credibility of their evidence. In legal terms, she was deprived of natural justice (or procedural fairness), which includes the right to face one's accusers and cross-examine them.

Jessup argued that "the facts of this case do not disclose a circumstance in which the plaintiff would derive any practical protection from the implied freedoms upon which she seeks to rely".

He contended that Rawson had not been charged with making political comments, but with revealing details of the complaints against her. He sought to rely on the wording of the final charges against Rawson, in which the Deputy Secretary (Director of Schools) Peter Allen alleged that her Open Letter "set out details of complaints that had been made against you".

In doing so, Jessup tried to gloss over other charges that Rawson had addressed meetings "in relation to the complaints process". Moreover, an earlier version of the allegations—the version that Rawson was actually required to answer—referred to "discussing the complaints process," not disclosing any details of complaints.

In response, Grace pointed out that Rawson had been charged under both Clauses 3.7 and 4.19 of TSO 140.

Clause 3.7 stated: "No member shall, without the express permission of the Chief Executive, use for any purpose, other than the discharge of the member's officials duties, disclose or use information gained by or conveyed to the member through his or her connection with the Teaching Service. Members shall ensure that confidentiality is observed in relation to any information gained during the course of their employment."

Grace said this was a permanent "blanket prohibition" on the disclosure of any information, regardless of whether its use would be adverse to the interests of students or the teaching service as a whole, and irrespective of the source of the information. The clause was not necessary to the fairness or integrity of the complaints process.

The same applied to Clause 4.19, which stated: "All persons involved in the complaints process outlined in Clauses 4.1 to 4.16 of this Order shall keep all information collected during the course of the process confidential except to the extent required to obtain advice or to support or answer the allegations." This imposed a blanket confidentiality requirement that was not "reasonably appropriate" to the complaints procedure.

Grace pointed out that the broad allegations laid against Rawson for "discussing the complaints process" reflected the sweeping wording of Clause 3.7.

Moreover, Grace said Rawson's Open Letter had reported several details of the complaints against her only in order to show that they were trivial. This had been necessary to expose the political victimisation that was taking place.

At the core of the government's case, Jessup argued that schoolteachers were no more than "servants" who had no right to make any comment or disclose any information obtained in their employ. Instead, the "master" or employer had an absolute discretion to determine what information was confidential.

After the judge observed that Clause 3.7 seemed to be a sweeping provision that could ban the use of any information that a teacher acquired on the job, Jessup adamantly defended the measure. Clause 3.7 was necessary to ensure that nothing was "overlooked". An "emphatic" regime was required to ensure that things did not "get out of control" in the teaching service.

Jessup argued that the rules of confidentiality applied even more strictly to public employees than to private servants. Under the Westminster system of government, their duty was simply to provide loyal and efficient service to the state. He quoted an English case that spoke of the need for "single minded loyalty" to the state.

Replying, Grace pointed to another English case where Lord Denning declared that servants had an obligation to breach confidentiality rules to report on employers who perpetrated a crime, a fraud or some other "misdeed". Denning said the public interest would sometimes excuse, or even demand, that an employee go to the media to alert the community about such conduct.

Jessup also insisted that the government of the state of Victoria had the right to disregard or override the implied freedom of political speech in the federal Constitution. He argued that "in principle" the Commonwealth Constitution could not prevail over clear state laws, at least not Victorian ones. He suggested that the judge could disregard the recent High Court cases on this point as mere statements of opinion.

In dealing with the *ultra vires* aspect of Rawson's case, Grace presented a detailed history of TSO 140 and the applicable section, Section 11, of the Teaching Service Act. He showed that Section 11 was intended to cover industrial matters, not disciplinary procedures. The Section should be interpreted narrowly, he said, because the Education Minister's order-making power under it was not subject to any parliamentary scrutiny. Further, prior to 1993, previous complaints provisions had contained no gagging clauses.

Jessup argued the opposite, relying on amendments to the Teaching Service Act by the previous Cain Labor government in 1987. He referred the judge to a parliamentary speech by one of Delahunty's predecessors as Education Minister, Ian Cathie, explaining the Cain government's desire to widen the order-making powers of the Education Minister to all "matters relating to employment".

Despite the width of that amendment, it was on this final point that the judge ultimately declared Clause 3.7, but not 4.19, to be invalid. His judgment stated: "In my opinion, Clause 3.7 goes far beyond the ambit of 'any matter relating to employment in the teaching service' and is not capable of being read down so as to reasonably relate to or fall within its statutory source of power".

However, the judge said the invalid clause was severable from the balance of TSO 140. Thus the remainder of TSO 140 was upheld, effectively allowing the Bracks government to retain virtually all its measures.

After the hearing a spokeswoman for the Education Department was reported in the *Australian* as saying that the department was seeking advice before considering an appeal. She said the ruling had no bearing on Rawson's application to the Industrial Relations Commission (IRC) for reinstatement on the grounds of unfair dismissal.

Yet in the IRC earlier this year, the previous government insisted that Rawson's application be adjourned to allow the constitutional and legal issues to be decided first in the Supreme Court, precisely because they would affect the outcome of the IRC hearing.

This was not the only twist in the Labor government's approach. In the IRC the Kennett government tried to have Rawson's case dismissed as an "abuse of process" on the grounds that she was mounting a political attack on TSO 140. In the Supreme Court the Bracks government argued the opposite. In an effort to prevent an examination of how TSO 140 was used to gag and threaten public school teachers and parents, it maintained that Rawson had made no political comments at all.

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