Legal Bulletin

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1. Introduction and forthcoming seminar details

Welcome to the February/March 2005 edition of the Legal Bulletin, covering developments in domestic and international human rights law during the period 1 November 2004 - 31 January 2005.

For our next Legal Bulletin Seminar, HREOC is very pleased to present a panel discussion entitled 'Are human rights principles relevant to the war on terror?' That topic is closely related to some of the issues discussed in this legal Bulletin (see section 2.2 and 4.3 below).
We have a highly qualified panel to speak on that topic, consisting of:

- Mr Dennis Richardson AO, Director-General of ASIO. Dennis was first appointed to that position in 1996 and re-appointed for a further five years from October 2001. Dennis was Deputy Secretary in the Department of Immigration and Multicultural Affairs from 1993 to 1996.

- Ms Devika Hovell, Director, International Law Project, Gilbert + Tobin Centre of Public Law. Devika lectures in international humanitarian law at the University of New South Wales. She is also a director at the Gilbert + Tobin Centre of Public Law, where she is working on a three-year project on the relationship between international law and Australian law. Devika has a Master of Laws from New York University, and was previously employed in the legal department at the International Court of Justice in the Hague.

- Mr Simeon Beckett, barrister. Simeon was admitted to the New South Wales Bar in 1997 and practises in areas relating to human rights law. Simeon is also President of Australian Lawyers for Human Rights and has appeared before Committees of the Australian Parliament in inquiries into counter terrorism legislation. Prior to going to the bar, Simeon was a Federal Government advisor on the drafting of Native Title Act and Indigenous issues.
- The President of the Commission, the Hon John von Doussa QC will chair the panel.

Unfortunately for those who have not yet rsvped, the seminar is already full. If you have already rsvped and can no longer make the seminar please email legal@humanrights.gov.au or telephone Craig Lenehan on 9284 9617 so that those on the waiting list may be notified to attend in your place.

For those who have rsvped, we remind you that admission is free and the seminar will take place on Tuesday 5 April 2005 at 5 – 6:30 pm (please ensure that you arrive by 4:50pm for a prompt start).

The venue is:

Hearing Room,
Human Rights and Equal Opportunity Commission
Level 8 Piccadilly Tower
133 Castlereagh Street Sydney

We look forward to seeing you there.

2. Selected general Australian jurisprudential and legislative developments relevant to human rights

2.1 Jurisprudence

There are no relevant cases on which to report in the period covered by this bulletin.

2.2 Legislative

There are two interesting inquiries which are being or have been conducted by Parliamentary Committees:

The Senate Legal and Constitutional Committee held an inquiry into the Criminal Code Amendment (Trafficking in Persons) Bill 2004. The Commission made a submission to that inquiry which appears on the Committee's website at: http://www.aph.gov.au/senate/committee/legcon_ctte/trafficking/submissions/sublist.htm

The Committee's report is available at: http://www.aph.gov.au/senate/committee/legcon_ctte/trafficking/index.htm

The Committee made extensive reference to the Commission's written submissions and oral evidence and accepted many of the Commission's recommendations.

The Joint Parliamentary Committee on ASIO, ASIS and DSD is conducting an inquiry into the operation, effectiveness and implications of Division 3 Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth). Submissions are due on 24 March 2005.

3. Developments in Australian Discrimination Law

Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council [2004] FMCA 915

- http://www.austlii.edu.au/au/cases/cth/FMCA/2004/915.html

Background

The applicant organisation in this matter complained that a number of facilities provided by the respondent Council were inaccessible to people with disabilities.

The complaint related to an outside entertainment area at a local community centre; round concrete picnic tables in a foreshore area; and toilets in a number of locations which provided hand basins placed on the outside of the facility and could therefore not be used with dignity by persons with disabilities who have particular toileting needs.

The applicant claimed that the conditions under which the Council provided access to the various facilities constituted indirect discrimination as defined by s 6 of the *Disability Discrimination Act 1992* (Cth) ('DDA'), made unlawful by s 23 which prohibits discrimination in access to premises.

The Acting Disability Discrimination Commissioner, Dr Sev Ozdowski, ('the Commissioner') was granted leave to appear in the matter and make submissions as *amicus curiae* on a number of issues surrounding the correct interpretation and application of the DDA.
Baumann FM upheld the application in relation to the toilet hand basins. The application was otherwise dismissed.

Decision

Baumann FM cited with apparent approval the submission of the Commissioner that 'in determining whether or not an applicant can 'comply' with a requirement or condition for the purposes of s 6(c), the Court should look beyond 'technical' compliance to consider matters of practicality and reasonableness'.
On the question of 'reasonableness' for the purposes of s 6 of the DDA, his Honour adopted the summary of the law provided by Madgwick J in *Clarke v Catholic Education Office* [2004] 202 ALR 340, as follows:

(1) The onus of showing that the impugned requirement or condition is not reasonable rests on the person aggrieved by it.

(2) Reasonableness is to be determined having regard to all the circumstances of the case. These include, but are not limited to:
   - the nature and extent of the effect of the discriminatory requirement or condition;
   - the reasons advanced in favour of it;
   - the possibility of alternative action; and
   - matters of "effectiveness, efficiency and convenience".

(3) The test is an objective one – neither the preferences of the aggrieved person nor the mere convenience of the service supplier can be determinative, though both may be relevant factors.

(4) The test of reasonableness is "less demanding than one of necessity, but more demanding than a test of convenience". Thus, if the aggrieved person can show that it may have been convenient for the discriminator to impose the requirement or condition but it was not reasonable in all the circumstances, that will suffice. Likewise, if it appears that although it was not necessary for the discriminator to impose the requirement or condition, but the aggrieved person does not establish that it was unreasonable to do so, there is no indirect discrimination, as statutorily defined.

(5) The test is reasonableness not correctness; that is, a decision of the putative discriminator to impose the requirement or condition, may be a reasonable one although not everyone, or even most people, would agree with it.

Baumann FM cited with approval the submissions of the Commissioner in relation to the relevance of the Building Code of Australia (BCA) and Australian Standards under the DDA and concluded as follows:

> I regard the Australian Standards and the BCA as being a minimum requirement which may not be enough, depending on the context of the case, to meet the legislative intent and objects of the DDA.

Baumann FM found that all three areas fell within the definition of 'premises' for the purposes of s 4 of the DDA, and concluded, upon a balancing of the evidence, that the requirement/conditions imposed in relation to Community Centre and the picnic tables were *not unreasonable*. In relation to the toilet facilities, however, his Honour found that the requirement/condition was *unreasonable* and that persons were *unable* to comply with it.

On the question of unjustifiable hardship, Baumann FM found that the benefits of the alteration work required to prevent the discrimination were 'real and important'. His Honour noted that the benefits extended not only to local residents but also visitors to the area. His Honour also took into account the embarrassment and lack of dignity potentially caused by having to use the facilities in their current state following an 'accident'. Baumann FM accepted that the Council has 'many priorities', but that it could make necessary adjustments to its budget to meet the estimated cost ($75,250 being the highest quote in evidence).

The Court ordered that the respondent shall, within 9 months, construct and install internal hand basins in the various toilets the subject of the complaint.

Islamic Council of Victoria v Catch the Fire Ministries Inc [2004] VCAT 2510.

- http://www.austlii.edu.au/au/cases/vic/VCAT/2004/2510.html

Victoria makes both religious discrimination and vilification unlawful under the *Racial and Religious Tolerance Act 2001*(Vic). On 17 May 2001, Premier Bracks gave his second reading speech on the then Bill and explained that it 'is confined to prohibit only the most noxious form of conduct which incites hatred or contempt for a person or group on the basis of their religion'. He also said that '[T]he Bill strikes an appropriate balance with freedom of expression by imposing liability upon only the most repugnant behaviour which actively urges and promotes hate. Freedom of expression has never been an untrammelled freedom of any person to do or say what they please.'

The following decision of the Victorian Civil and Administrative Tribunal (VCAT) is the first decision under the Victorian Act since it took effect on 1 January 2002.

The Islamic Council of Victoria brought the action in a representative capacity, alleging a breach of s 8 of the Act, which prohibits conduct 'that incites hatred against, serious contempt for, or revulsion or severe ridicule of" others on the grounds of religious belief. It complained of an all-day seminar organised by Catch the Fire Ministries Inc in March 2002, which was billed as an 'Insight into Islam'. Judge Higgins found that Pastor Scot, who led the seminar, made statements such as:

- the Qur'an promotes violence, killing and looting, encourages domestic violence and that Muslims are liars and demons;
- Muslims use money to induce people to convert to Islam and have a plan to overrun western democracy by the use of violence and terror, and Muslims intend to take over Australia and declare it as an Islamic nation;
- people we call terrorists are true Muslims; and
- Muslims in Australia are increasing at substantial rates and have influence or control over the migration of people to Australia (quoting incorrect figures).[1]

A newsletter written by the second respondent, Pastor Nalliah, described Muslims as 'the enemy' and included an article entitled '*2002 - Will Australia be a Christian Country?'* His Honour found that the article included statements such as 'Muslims obtain visas from the very countries where Christians are being raped, tortured and killed', and goes on to ask: 'What stops the Muslims from doing the same in Australia?'[2]

In addition, an article entitled '*An Insight Into Islam by Richard'* was found to suggest that Islam is an inherently violent religion and implied that Muslims endorse the killing of people based upon their religion. While the article was not written by Pastor Nalliah, he did place it on the Catch the Fire Ministries Inc website.[3]

Judge Higgins took into account expert evidence that the seminar did not provide a fair representation of Islamic religious beliefs and, having listened to tapes of the seminar, found that the ordinary, reasonable person would understand from the seminar that they were being incited to hatred towards or serious contempt or ridicule for Muslims.[4] His Honour found that the seminar, the newsletter and the article all constitute acts which incited hatred, ridicule and contempt of Muslims, in breach of s 8 of the Act.[5]

1 Ibid [383].
2 Ibid [391].
3 Ibid [394].
4 Ibid [382], [384].
5 Ibid [395].

The Act provides exceptions to the vilification provisions under s 11, where the conduct was engaged in reasonably and in good faith, for example for any genuine academic or religious purpose, or in the public interest. However His Honour held that the seminar, newsletter and article were neither reasonable nor acts done in good faith.[6] Orders about remedies will be made in 2005 after VCAT has heard further submissions from the parties.

This case attracted considerable media attention, with debate centred on the issue of freedom of speech. However, the s 11 exceptions to the Act are specifically concerned to protect aspects of freedom of speech. As the second reading speech makes clear, the legislation was drafted to carefully draw the boundary between the competing rights of freedom of expression and the right to be free of offensive behaviour based on religious hatred.

A person who believes they have been discriminated against solely because of their religion has no legally enforceable rights in NSW or South Australia.[7] A person who believes they have been vilified because of their religion has no legally enforceable rights in the ACT, NSW, South Australia, Western Australia or the Northern Territory.[8] At the federal level, HREOC has limited powers in relation to discrimination on the basis of religion in employment and acts by the Commonwealth, but does not have the power to order legally enforceable remedies.[9]

[6] Ibid [388]-[390]; [393]-[394].

[7] Discrimination on the basis of religion is unlawful in the ACT, Western Australia, Queensland, the Northern Territory, Tasmania and Victoria: *Discrimination Act 1991* (ACT) s 7(1)(h); *Equal Opportunity Act 1984* (WA) s 53; *Anti-Discrimination Act (1991)* (QLD) s 7(i); *Anti-Discrimination Act 1992* (NT) s 19(1)(m); *Anti-Discrimination Act 1998* (Tas) ss 16(o) and 16(p); *Equal Opportunity Act 1995* (Vic) s 6(j). In NSW, discrimination on the ground of religion is not unlawful, however discrimination on the ground of ethno-religious origin is. A recent decision of the Administrative Decisions Tribunal indicates that in order to establish a complaint under the ethno-religious ground, a person cannot rely solely on their religion, such as Islam: *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131.

[8] Vilification based on 'religion' is against the law in Queensland, while vilification based on 'religious belief or activity' is against the law in Victoria and Tasmania (the Tasmanian provisions also cover vilification based on 'religious affiliation'): *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A; *Anti-Discrimination Act 1998* (Tas) s 19; *Racial and Religious Tolerance Act 2001* (Vic) ss 8, 25.

[9] The President, on behalf of HREOC, may report to the federal Attorney-General concerning his findings, reasons and any recommendations, and this report is tabled in Parliament.

4. Selected Developments in International Law

4.1 Human Rights Committee

Hudoyberganova v Uzbekistan (Communication No. 931/2000) (18/01/2005)

- http://www1.umn.edu/humanrts/undocs/html/931-2000.html

The author was a student at the Faculty of languages of the Tashkent State Institute for Eastern Languages and later the Islamic Affairs Department. In September 1997 the Institute "invited" students wearing the hijab to leave the Institute and go and study at the Tashkent Islamic Institute. In January 1998 the author claimed that the Dean of Ideological and Educational matters informed her that new regulations of the Institute had been adopted under which students were prevented from wearing religious dress and she was requested to sign them. She signed them though she noted that she disagreed with them. However, she continued to wear the hijib and consequently was excluded from the students' residence. She was also transferred from the Islamic Affairs Department to the Faculty of Languages, the Islamic Affairs Department having been closed by the Institute. She claimed that students were told that that department would only re-open if students ceased wearing the hijab. In March 1998 the author was excluded from the Institute.

On 15 May 1998 a new law "On the Liberty of Conscience and Religious Organisations" entered into force in Uzbekistan prohibiting Uzbek nationals wearing religious dress in public places.

The author claimed that her expulsion from the Tashkent State Institute for Eastern Languages because she wore the hijab for religious reasons violated her rights under article 18 (freedom of thought, conscience and religion) and article 19 (hold opinions without interference) of the ICCPR.

The Committee upheld the author's complaint of a violation of article 18. The Committee held that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion and that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18(2). The Committee reiterated that policies or practise that have the same intention or effect as direct coercion are inconsistent with article 18(2) (see the Committee's General Comment No.22 (paragraph 5)).

However, the Committee noted that under article 18(3), the freedom to manifest one's religion or beliefs is not absolute; it may be subject to limitations which are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.

In the present case Uzbekistan did not invoke any specific ground for which the restriction would be necessary within the meaning of article 18(3). In the absence of any such justification the Committee therefore concluded that there had been a violation of article 18(2).

The Committee did not consider the application of article 19.

Mr Hipolito Solari-Yrigoyen dissented on the basis that the evidence provided by Uzbekistan in response to the complaint revealed that the true basis for her exclusion from the university was her "rough immoral attitude toward a teacher" and not her religious dress.

4.2 European Court of Human Rights

There are no relevant cases on which to report.

4.3 Other Jurisdictions

United Kingdom

A (FC) and others (FC) v Secretary of State for the Home Department [2004] UKHL 56

- http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm

The nine appellants had been detained by the Home Secretary under the *Anti-Terrorism, Crime and Security Act 2001*. All of the appellants were non-UK nationals and none were the subject of any criminal charges in the United Kingdom (UK) or elsewhere.

The appellants challenged the lawfulness of their detention on the basis that:

- the provisions of the *Anti-Terrorism, Crime and Security Act 2001* pursuant to which they were detained were inconsistent with the UK's obligations under the European Convention on Human Rights (ECHR) (as given domestic effect in the *Human Rights Act 1988*);
- the UK was not legally entitled to derogate from its obligations under the ECHR (as it had done pursuant to the *Human Rights Act (Designated Derogation) Order 2001* (SI 2001/3644)) (the Derogation Order), but if it was, the purported derogation was inconsistent with the ECHR and hence ineffective.

The UK National Council of Civil Liberties and Amnesty International appeared as interveners.

The majority of the Court allowed the appeals, Lord Walker of Gestingthorpe dissenting. Lord Bingham of Cornhill delivered the main judgement with which the other members of the majority concurred.

The impugned legislative provisions
In response to the terrorist attacks in New York on September 11 2001, the UK parliament enacted a new Part 4 in the *Anti-Terrorism, Crime and Security Act 2001*. Part 4 empowered the Secretary of State to certify and indefinitely detain non-UK nationals as a 'suspected international terrorist' if the Secretary 'reasonably' believed that the person's presence in the UK was a risk to national security and 'reasonably' suspected that the person was a terrorist.

At the time of its enactment, the government (and the Parliament) accepted that Part 4 put the UK in breach of its obligations under article 5(1)(f) of the ECHR as that article required the detention of non-UK nationals regardless of whether they were persons in respect of whom 'action [was] being taken with a view to deportation'. Article 5(1)(f) provides that:

> **Article 5**
> (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> f) the lawful arrest or detention of … a person against whom action is being taken with a view to deportation.

Consequently, pursuant to s 14 of the *Human Rights Act 1998*, the Home Secretary made a Derogation Order indicating its intention to derogate from article 5(1)(f) of the ECHR within the terms of article 15. The Secretary-General of the Council of Europe was then formally notified of the derogation. (Corresponding steps were also taken by the Home Secretary to derogate from article 9 of the *International Covenant on Civil and Political Rights* (ICCPR)).

Was the purported derogation a valid derogation?

Did a 'public emergency threatening the life of the nation' exist?

Article 15(1) of the ECHR allows States Parties to derogate from their obligations in certain circumstances:

Article 15

Derogation in time of emergency

(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

The appellants argued that there was no 'public emergency threatening the life of the nation' within the meaning of article 15(1) entitling the UK to derogate from its obligations under the ECHR on the basis that:

- the emergency must be 'actual' or at least 'imminent', which could not be shown in this case;
- the emergency must be of a temporary nature, which could not be established in relation to the 'war on terrorism'; and
- none of the other States Parties to the ECHR had similarly sought to derogate from their obligations, suggesting that there was no public emergency which called for derogation.

In reply the Home Secretary argued that:

- an emergency could properly be regarded as 'imminent' if 'an atrocity was credibly threatened by a body such as Al-Qaeda which had demonstrated its capacity and will to carry out such a threat and where the atrocity might be committed without warning at any time';
- the Government did not have to wait for a disaster to strike before taking necessary preventative measures;
- the Court should not impose any artificial temporal limit to an emergency of the type posed by Al-Qaeda; and
- little guidance could be gained from the practice of other States Parties. It was submitted that it is for each national Government to make its own judgement on the basis of the facts known to them. Insofar as any difference in practice between the UK and other States Parties called for justification, it was to be found in the UK's prominent role as "an enemy of Al-Qaeda and an ally of the United States". It was further submitted that this issue was one pre-eminently within the discretionary area of judgement reserved to government and the Parliament, exercising their judgement with the benefit of advice.

The majority of the Court held that the appellants had not established that the Special Immigration Appeals Commission or Court of Appeal committed an error of law in finding, as a matter of fact, that a 'public emergency threatening the life of the nation' existed post 11 September 2001. Lord Bingham noted that that finding of the lower courts was not inconsistent with relevant jurisprudence of the European Court of Human Right and that in cases involving national security, 'great weight' should be given to the judgement of the Government and Parliament in such matters.

Were the derogating measures "strictly required by the exigencies of the situation"?

The question for the Court was then whether the derogating measures (*ie* Part 4 of the *Anti-Terrorism, Crime and Security Act 2001*) were authorised by article 15 in that they were measures "strictly required by the exigencies of the situation". The majority of the Law Lords found against the Home Secretary on this point.

The majority affirmed the test of "strict necessity" or "proportionality" as being that set out in the Privy Council decision *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69; in determining whether a limitation is arbitrary or excessive, the court must ask itself:

> [W]hether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

The appellants argued that even if the legislative objective of protecting the British people against the risk of catastrophic Al-Qaeda terrorism was sufficiently important to justify limiting the fundamental right to personal freedom of those facing no criminal charge, the *Anti-Terrorism, Crime and Security Act 2001* was not designed to meet that objective and not rationally connected to it because (a) it did not address the threat posed by UK nationals; (b) it permitted foreign nationals suspected of being Al-Qaeda terrorists or their supporters to pursue their activities abroad if there was any country to which they were able to go; and (c) the Act permitted the certification and detention of persons who were not suspected of presenting any threat to the security of the UK as Al-Qaeda terrorists or supporters. The appellants further argued that the legislative objective of the Act could have been achieved by means that did not so severely restrict the fundamental right to personal freedom.

In relation to the first argument, the Court upheld the appellant's argument that Part 4 of the *Anti-Terrorism, Crime and Security Act 2001* did not address the potential terrorist threat presented by UK nationals, Part 4 only providing for the detention of non-UK nationals. The majority also agreed that allowing a suspected international terrorist to leave the UK for another country to 'pursue his criminal designs [was] hard to reconcile with a belief in his capacity to inflict serious injury to the people and interests of the UK' (Lord Bingham). In addition, the majority accepted that the appellant's submission that the *Anti-Terrorism, Crime and Security Act 2001* was capable of applying to those with no link to Al-Qaeda or those who support the general aims of Al-Qaeda 'reject its cult of violence'.

Accordingly, the House of Lords held that the relevant provisions in Part 4 of the *Anti-Terrorism, Crime and Security Act 2001* were disproportionate to the objective sought to be achieved by the legislation and, hence, incompatible with the UK's obligation under article 15 of the ECHR to ensure that any derogation from its obligations be limited to those 'strictly required by the exigencies of the situation'.

In relation to the weight that the Court ought to give to the judgement of the Executive and Legislature in relation to matters of proportionality, Lord Bingham (the other members of the majority concurring) stated that while 'courts are not specialists in the policy-making realm' and due regard must be had to the judgement of the Government and the Parliament in cases involving national security, the courts' role under the *Human Rights Act 1998* is 'as the guardian of human rights' and 'national security must not be used to protect governmental actions from close scrutiny and accountability':

> [J]udges nowadays have no alternative but to apply the *Human Rights Act 1998*. Constitutional dangers exist, no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts.

Lord Bingham (the other members of the majority concurring) also rejected the assumption that 'judicial decision-making is somehow undemocratic' saying:

> [T]he function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself.

Were the derogating measures discriminatory and hence contrary to article 14 of the ECHR?

The appellants also argued that the indefinite detention provisions of the *Anti-Terrorism, Crime and Security Act 2001* violated article 14 of the ECHR (prohibition against discrimination) because they only applied to non-UK nationals suspected of being international terrorists. They argued that, as such, those provisions could not be characterised as being 'strictly required' within the meaning of article 15.

However, the Home Secretary had not derogated from article 14 of the ECHR (or the corresponding article 26 of the ICCPR). Accordingly, the question for the Court was not whether the differential treatment was 'strictly necessary' (under article 15), but whether it was 'reasonable and justifiable' within the meaning of article 14.

The majority reaffirmed that the rights contained in the ECHR applied to non-UK nationals in the UK and accepted that the indefinite detention provisions of the *Anti-Terrorism, Crime and Security Act 2001* discriminated against non-UK nationals on the basis of "nationality" or "immigration status".

The majority found that the discriminatory treatment of non-UK nationals was not 'justified and reasonable' having regard to the objective of the legislation 'since the threat presented by suspected international terrorists did not depend on their nationality or immigration status'. Hence, the majority of the Court held that the indefinite detention provisions of the *Anti-Terrorism, Crime and Security Act 2001* breached article 14 of the ECHR (and the corresponding article 26 of the ICCPR).

5. Australian and International Privacy Law

5.1 Australian Privacy Law Developments

Federal Court

Australian Institute of Private Detectives Ltd v Privacy Commissioner [2004] FCA 1440 (5 November 2004)

- http://www.austlii.edu.au/au/cases/cth/federal_ct/2004/1440.html

The Australian Institute of Private Detectives Ltd (the Institute), which represents the interests of 600 licensed private inquiry agents and commercial agents, claimed to be aggrieved because the *Privacy Act 1988* (Cth) ('Privacy Act') prevents organisations divulging

certain kinds of information that the members of the Institute wished to obtain on behalf of their clients.

The Institute sought to address this grievance by claiming the following declaratory relief against the Privacy Commissioner:

> '1. The disclosure by an organization of personal information to the plaintiff or its members for the purpose of enabling the plaintiff or member to investigate, on behalf of private citizens and corporations, matters concerning litigation, or potential litigation, constitutes disclosure or use "required or authorised by or under law" within the meaning of National Privacy Principle 2.1(g) and is not a disclosure or use which is contrary to the provisions of the Privacy Act 1988.
>
> 2. The disclosure of personal information by the plaintiff or its members which has been obtained by them for the purpose of enabling them to investigate, on behalf of private citizens or corporations, matters concerning litigation, or potential litigation, constitutes disclosure or use "required or authorised by or under law" within the meaning of National Privacy Principle 2.1(g) and is not a disclosure or use which is contrary to the provisions of the Privacy Act 1988.'

The Court dismissed the application because it did not have jurisdiction to grant the declarations sought by the Institute. It rejected the Institute's submission that s 55 of the *Privacy Act* gave the Court jurisdiction as that section is concerned with the enforcement of a determination made by the Privacy Commissioner following the investigation of a complaint-circumstances that did not occur here. The Court stated that if the Court has jurisdiction it must be pursuant to s 39B(1A)(c) of the *Judiciary Act 1903* which provides:

> *'The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter: ...*
>
> *(c) arising under any laws made by the Parliament ...'*

The Court held that the proceedings did not involve a 'matter' within the meaning of s 39B(1A)(c). This was because, "In effect the Institute, seeks an advisory opinion from the Court without reference to any concrete facts. The declarations, if made, would not determine finally the rights of the parties and could not amount to a binding decision creating a res judicata between them. They would not establish any 'immediate right, duty or liability' as between the parties."

As the proceedings did not involve a 'matter' within the meaning of s 39B(1A)(c) the Court held that it lacked jurisdiction to entertain the applicant's claim.

Administrative Appeals Tribunal

Rummery and Federal Privacy Commissioner and Anor [2004] AATA 1221 (22 November 2004)

- http://www.austlii.edu.au/au/cases/cth/aat/2004/1221.html

The applicant sought a review of the decision of the Privacy Commissioner not to award him compensation after having found his privacy complaint substantiated.

In December 1998 Mr Alan Rummery was an employee of the Australian Capital Territory Department of Justice and Community Safety. On 30 December 1998 Mr Rummery made a public interest disclosure to the ACT Ombudsman under the *Public Interest Disclosure Act 1994* (ACT) alleging that the Department had failed to enforce provisions of the *Liquor Act 1975* (ACT). The Department disclosed personal information relating to Mr Rummery to an officer of the Ombudsman during the investigation.

Mr Rummery made a complaint to the Federal Privacy Commissioner that his privacy had been interfered with. The Commissioner found (in accordance with s 52(1)(b)(i)(B) of the *Privacy Act 1988* (Cth)) that Mr Rummery's complaint was substantiated as the Department's disclosures to the Ombudsman's Office were not authorised by Information Privacy Principle (IPP) 11.1(a) or IPP 11.1(d). The Commissioner declared that the Department should apologise to Mr Rummery. A written apology was issued by the Department. The Commissioner decided not to make a declaration as to compensation (pursuant to s 52 of the *Privacy Act*) as the disclosures were made to two staff members of the Ombudsman's Office and the disclosures did not occur outside the confines of the investigating team and were not more widely known.

The Tribunal accepted that Mr Rummery suffered injury to his feelings and humiliation as a result of the disclosures. The Tribunal stated that once loss is proved, there would need to be good reason shown to the Tribunal as to why compensation for that loss should not be awarded and in this case no such reason appears.

In assessing the injury to Mr Rummery's feelings and humiliation the Tribunal had regard to the fact that the breach of Mr Rummery's privacy was serious. It declared that Mr Rummery was entitled to $8000.

Federal Privacy Commissioner Case Notes

In December 2004 the Federal Privacy Commissioner published case notes 16, 17, 18 and 19 in respect of finalised complaints:

Z v Credit Provider [2004] PrivCmrA 16

- http://www.privacy.gov.au/publications/casenotes/ccn16_04.doc

The complainant attended a bank branch and presented a cheque marked to 'cash' to the bank teller. The bank teller asked the individual for identification and recorded the information on the back of the cheque.

The complainant argued that the bank did not need to collect the personal information because the cheque was made out to cash and could be exchanged only for cash.

Under National Privacy Principle 1.1, organisations must not collect personal information unless the information is necessary for one or more of its functions or activities. National Privacy Principle 8 provides that wherever it is lawful and practicable, individuals must have the option of not identifying themselves when entering transaction with organisations.

The Commissioner's view was that, given the potential liability for the cashing bank (eg if it refused to pay the cheque), the collection of identification details is necessary for one or more of the functions and activities of the organisation. In the circumstances the Commissioner was of the view that it would not be practicable for the complainant to have the option of not identifying themselves in this transaction.

The Commissioner decided under s 41(1)(a) of the *Privacy Act 1988* to cease investigation of the matter on the grounds that the collection of personal information to identify an individual who wanted to exchange a cash cheque did not breach National Privacy Principles 8 and 1.1.

C v Service Provider [2004] PrivCmrA 17

- http://www.privacy.gov.au/publications/casenotes/ccn17_04.doc

The complainant was stopped by the police, required to attend hospital for a blood test and advised that he could not drive his car. He was given the choice of being driven to hospital in the police vehicle or using an ambulance. He chose the ambulance.

The complainant did not receive any information about payment arrangements prior to using the ambulance service. Later, the complainant received an invoice for the cost of the ambulance journey which allowed 30 days to pay. He did not pay the account. The ambulance service attempted to collect the debt and as it was not paid, listed a payment default on the individual's consumer credit information file.

The Commissioner took the view that there was no contract, arrangement or understanding between the service provider and the complainant that he was applying for credit at the time he used the ambulance service and that listing the payment default was a breach of s 18E(1)(b)(vi) of the *Privacy Act 1988*. Section 8E(1)(b)(vi) permits a credit reporting agency to include information in an individual's credit information file that shows the individual has been provided with credit by a credit provider and that the individual is at least 60 days overdue in making a payment and the credit provider has taken steps to recover the whole or part of the amount of credit (including any amounts of interest) outstanding.

In addition the Commissioner was of the view that the purported payment default listing did not meet the requirements of s 18E(8)(c) which provides that a credit provider must not give a credit reporting agency personal information relating to an individual if it did not, at the time of, or before, acquiring the information advise the individual that the information might be disclosed to a credit reporting agency.

The ambulance service accepted these views and removed the default listing from the complainant's credit report. It also advised that it would cease the practice of listing payment defaults in relation to its customers.

H v Credit Provider [2004] PrivCmrA18

- http://www.privacy.gov.au/publications/casenotes/ccn18.doc

The complainant, when applying to be engaged as a consultant with the respondent, was asked to complete

a standard loan form rather than a form specific to his engagement as a consultant. The complainant later found that that the respondent had accessed his consumer credit information file.

The Commissioner's investigation revealed that the complainant's consumer credit information file contained a record of an enquiry by the respondent in relation to a real property mortgage for an unspecified amount. The respondent organisation told the Privacy Commissioner that the complainant had been made aware that each consultant would be provided with a loan for payment of his or her share of professional indemnity insurance, and that as a condition of granting the loan each consultant would be required to undertake a credit check. The respondent denied the complainant's allegation that he was told that the information on the form would only be used for employment purposes.

The Commissioner's investigation found that the terms of engagement did not refer to professional indemnity insurance. The respondent company was asked to provide evidence that it paid for the complainant's indemnity insurance and that the complainant was required to repay his share of the insurance, but it failed to do so. The respondent also failed to produce evidence of a contract, agreement or understanding between itself and the complainant for the provision of a loan.

In addition to arguing that the complainant was aware of and consented to the loan application for the purpose of contributing to the indemnity insurance, the respondent also argued that the credit given was commercial credit, and its 'mistake' was merely listing it on the complainant's consumer file. The Commissioner found that no such arrangement was in place, and that the complainant had not obtained a loan for professional indemnity insurance with the respondent. The respondent could not supply contemporaneous evidence of a commercial loan with the respondent. In any case, the Commissioner formed the view that the provision of professional indemnity insurance did not fall within the definition of 'credit' for the purposes of the *Privacy Act 1988*.

At the conclusion of the investigation the Privacy Commissioner formed the view that the conduct complained about did not comply with the requirements in section 18E(8)(a) of the Act, because the respondent had provided information to a credit reporting agency which was not information relating to the complainant's application for credit as required under section 18(E)(1)(b)(i). Further, the respondent was aware that it had provided inaccurate information to the credit reporting agency.

The Commissioner therefore formed the view that the information provided by the respondent to the credit reporting agency was incorrect and that it had failed to take steps to ensure that the information was accurate, up-to-date and not misleading, thereby breaching section 18E(8)(b) and 18G(a) respectively. The Commissioner also formed the view that by providing incorrect information to the credit reporting agency the respondent had breached paragraph 2.5 of the Credit Reporting Code of Conduct.
Following conciliation, the respondent agreed to advise the credit reporting agency that the information it supplied regarding the complainant was inaccurate. It also agreed to pay the complainant $2,500 in resolution of the complaint.

E v Motor Vehicle Retail Organisation [2004] PrivCmrA 19

- http://www.privacy.gov.au/publications/casenotes/ccn19_04.doc

The complainant received direct marketing material sent by the respondent. The material advertised the respondent's retail business and targeted the complainant as an owner of a particular type of motor vehicle. The complainant complained about the use of his personal information in this way without his consent.

Enquiries of the respondent revealed that the respondent had collected the personal information as part of a marketing list specifically obtained from another organisation for the purpose of direct marketing.

National Privacy Principle 2.1 of the *Privacy Act 1988* provides that personal information collected for a primary purpose may only be used or disclosed for a secondary purpose if one of a number of exceptions in National Privacy Principle 2.1(a)-(h) applies. The effect of this provision is that an organisation may use and disclose personal information for the primary purpose of collection.

The respondent advised that it had collected the personal information from another organisation in the form of a direct marketing list. It was apparent that the personal information had then been used for the purpose of direct marketing. The issue for the Commissioner was whether the respondent's use of the complainant's personal information was within the primary purpose of the collection of the personal information.

The Commissioner was of the view that the respondent collected the complainant's personal information for the

primary purpose of direct marketing and used the personal information for this same purpose. There was therefore no breach of National Privacy Principal 2 as the respondent's use of the personal information was within the primary purpose of the collection.

The Commissioner declined to investigate the complaint on the basis that there was no interference with privacy since the use of the complainant's personal information was permitted under the Act.

However, subsequently, both the respondent and the organisation that supplied the complainant's personal information to the respondent agreed to remove the complainant's information from their database.

Federal Privacy Commissioner

Temporary Public Interest Determinations

On 10 February the Privacy Commissioner issued Temporary Public Interest Determinations 2005-1 and 2005-1A.

- http://www.privacy.gov.au/act/publicinterest/index.html#3

Temporary Public Interest Determination 2005-1

The purpose of Temporary Public Interest Determination 2005-1 is to determine that the Applicant (a general practitioner in private practice) will not be committing a breach of National Privacy Principle 10 of the *Privacy Act 1988* in certain limited circumstances. This is where the Applicant is collecting information about the Pharmaceutical Benefits Scheme (PBS) history of a patient from the Health Insurance Commission's (HIC) Prescription Shopping Project Information Service (the Information Service) without the consent of that individual.

National Privacy Principle 10 concerns the collection of sensitive information including information about an individual's health. NPP 10 provides that, subject to certain prescribed exceptions, sensitive information cannot be collected by an organisation.

The Applicant submitted that in order to provide appropriate diagnosis, assessment and treatment of an individual, there may be occasion where there is a need to collect information through the Information Service. The Applicant envisaged that collection would occur in the context of providing a health service to an individual, where the individual is suspected by the Applicant of seeking prescriptions for PBS medicines in excess of their therapeutic need, including where they may have a drug dependency. The Applicant submitted that such an individual may be unwilling, if asked, to provide their consent to the collection of health information from the Information Service, as this collection may disclose their status as an 'identified' person in the Prescription Shopping Project.

The Privacy Commissioner was satisfied that the public interest in the Applicant collecting health information from the Information Service outweighs to a substantial degree the public interest in the Applicant adhering to National Privacy Principle 10 in these circumstances. This is because the information sought by the Applicant may immediately and directly affect the health care and treatment of an individual. The central public interest objective being served by this determination is the provision of quality health care to the individual and ultimately good public health outcomes for the community.

Temporary Public Interest Determination 2005-1A

The purpose of Determination 2005-1A is to give general effect to Temporary Public Interest Determination 2005-1 so that other organisations, in the same circumstances as set out in the application, may carry out the same act or practice as the Applicant without breaching National Privacy Principle 10 of the *Privacy Act*.

These Temporary Public Interest Determinations are effective until 9 February 2006.

5.2 International Privacy Law Developments

European Court of Human Rights

Case of Wood v United Kingdom (Application no 23414/02) 16 November 2004.

- http://cmiskp.echr.coe.int////tkp197/viewhbkm.asp?action=open&table=285953B33D3AF94893DC49EF6600CEBD49&key=41221&sessionId=1121414&skin=hudoc-en&attachment=true

Between 4 July 1998 and 1 April 1999 a series of robberies and burglaries took place in the Coventry area. As a result of their investigations, the police considered that there were some nine persons involved in the commission of these offences, including the

applicant and his three co-defendants. The police had difficulty obtaining evidence against those who they thought were responsible, and therefore sought the authority from the Chief Constable for the West Midlands to carry out a covert operation ("Operation Brassica"). The operation was to be carried out by arresting the suspects in groups, on suspicion of having committed different offences, and detaining them together in a police cell which had been specially fitted with covert audio equipment. It was hoped that the suspects would discuss the reasons for their arrest and that their ensuing conversation would be incriminating.

The authority was granted and the operation took place. The applicant and two others were arrested on 20 May 1999. Their conversations, whilst in police detention, were covertly recorded on 21 and 22 May 1999 and again on 16 and 17 June 1999. The tapes formed the basis of the prosecution against the applicant.

The applicant submitted at the trial that the method of obtaining the evidence contravened, inter alia, Article 8 of the Convention and that the judge should exercise his discretion under the *Police and Criminal Evidence Act 1984* to exclude the tapes.

Article 8 provides in so far as relevant:

> *1. Everyone has the right to respect for his private ... life...*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

The judge stated that, "A man in a police cell is entitled to privacy just as much as a man sitting at his fireside at home". However, the judge noted the importance of the evidence and exercised his discretion under the *Police and Criminal Evidence Act 1984* to admit the tapes in evidence. The applicant was sentenced to eight years imprisonment.

The Court of Appeal dismissed the applicant's appeal. It stated however that there had been a violation of Article 8 because the surveillance was not conducted according to law. Lord Woolf CJ said:

> "This is because of the lack of any legal structure to which the public have access authorising the infringement. If there had been such authorisation there would have been no breach." [§ 65]

He went on to say:

> "The non-compliance with Article 8 does not, however, mean that the tape-recordings cannot be relied upon as evidence.
>
> ...
>
> It is the responsibility of the Government to provide remedies against this violation of Article 8. However, the remedy does not have to be the exclusion of the evidence. The remedy can be the finding, which we have now made, that there has been a breach of Article 8 or it can be an award of compensation. The European Court of Human Rights recognises that to insist on the exclusion of evidence could in itself result in a greater injustice to the public than the infringement of Article 8 creates for the appellants. The infringement is, however, a matter which the trial judge was required to take into account when exercising his discretion under section 78 of PACE." [§§ 66-67]

The European Court of Human Rights found that the covert surveillance measures constituted an interference which was not in accordance with the law and was in breach of Article 8. The Court held that "the finding of the violation constitutes in itself sufficient just satisfaction for any non pecuniary damage sustained by the applicant. It further held that the UK should pay EUR 550 to the applicant in respect of the costs of his preparation for the hearing.