Human Rights and Equal Opportunity Commission - www.humanrights.gov.au/legal

Human Rights Law Bulletin

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1. Introduction and forthcoming seminar details

Welcome to the October/November edition of the Human Rights Law Bulletin, covering developments in domestic and international human rights law during the period 1 July – 30 September 2005.

Upcoming Seminar:

International Protection of Rights of People with Disability

On Monday 7th November the HREOC Legal Section is conducting a seminar that will focus on the draft UN Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities. The seminar will feature two speakers: Graeme Innes and Rosemary Kayess.

- Graeme Innes is the Deputy Disability Rights Commissioner at the Human Rights and Equal Opportunity Commission. Graeme has been active in the disability field for twenty-five years. He is a member of the Australian delegation to the UN Ad Hoc Committee which is developing the draft Convention. Graeme will speak about:

  The current text: How we got there and an Australian assessment

- Rosemary Kayess is an adjunct lecturer in law at the University of NSW and the Chairperson of the NSW Disability Discrimination Legal Centre. She is an NGO representative on the Australian government delegation to the UN Ad Hoc Committee. Rosemary will speak about:

  The UN Convention: The experience of education, and the informal facilitation process.

Admission is free and the seminar will take place on 7th November 2005 at 5 – 6:30 pm. The venue is:

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

Reservations are essential. Please email Ms Gina Sanna at legal@humanrights.gov.au if you wish to attend this seminar.

We look forward to seeing you there.

2. Selected general Australian jurisprudential developments

- ***S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* [2005] FCA 549 (5 May 2005).**

The applicants were both long term detainees in Baxter Detention Centre. Both applicants had been diagnosed with major depression. The applicants sought an injunction to restrain the Commonwealth from so detaining the applicants as to prevent or inhibit their immediate presentation for assessment for admission to a mental health facility.

Finn J held that the Commonwealth had a non-delegable duty of care to the applicants who, by reason of their detention, could not take care of themselves. This duty included providing a level of medical care that was reasonably designed to meet the mental health care needs of detainees.

Finn J observed that the Commonwealth's complex outsourcing arrangement for the provision of mental health services resulted in fragmentation of the provision of mental health services. His Honour concluded [at 259]:

> The service provision was so structured that there was a clear and obvious needs for regular and systematic auditing of the psychological and psychiatric services provided if the Commonwealth was to inform itself appropriately as to the adequacy and effectiveness of these services for which it bore responsibility. There has to date been no such audit.

The transfer of the applicants to a mental health facility made it unnecessary to grant injunctive relief sought, but Finn J stated such relief would otherwise have been granted.

Read this case:
http://www.austlii.edu.au/au/cases/cth/federal_ct/2005/549.html

- ***QAAH of 2004 v Minister for Immigration and Multicultural Affairs*** **[2005] FCAFC 136 (27 July 2005)**

The Full Federal Court held that the Commonwealth Government must establish the country of origin is now safe before it can refuse to extend a temporary protection visa. Justice Wilcox stated [at 69]:

> In an original application for refugee status, relying on Article 1A(2), the Minister (or her delegate or the Tribunal) must be satisfied of facts that support the inference that the applicant has a well-founded fear (including that there is a real chance) of persecution for a Convention reason if returned to his or her country of nationality. If the facts do not go so far, the claim for a protection visa will fail. The situation is different in relation to an inquiry under Article 1C(5) as to possible cessation of refugee status. If the facts are insufficiently elucidated for a confident finding to be made, the claim of cessation will fail and the person will remain recognised as a refugee.

In this case, the appellant was originally recognised as a refugee because of his fear that the Taliban would kill him. This fear was not dependant on the Taliban's status as a governing authority in Afghanistan. In determining an issue involving cessation of refugee status the tribunal needed to be satisfied that there was now no such chance. Wilcox J (Madgwick J agreeing) held that the tribunal's failure to properly address the cessation issue constituted a jurisdictional error.

Read this case:
http://www.austlii.edu.au/au/cases/cth/FCAFC/2005/136.html

- ***Minister for Immigration & Multicultural Affairs v Alam*** **[2005] FCAFC 132 (23 July 2005)**

This case involved the meaning of the regulation of a student visa limiting the visa holder to a maximum twenty hours of work 'per week'. Significantly, Allsop J found the respondent's visa was wrongfully cancelled in the following circumstances [at 29]:

1. A search of the respondent's home and belongings without apparent cause or warrant;
2. the restraining (though without the application of force) of the respondent while the search proceeded;
3. The arrest of the respondent without apparent lawful warrant and his removal to Lee Street;
4. The holding of the respondent at Lee St and his interrogation there; and
5. the removal of the respondent into incarceration at Villawood detention Centre for nearly three weeks

His Honour added that as a non-citizen holding a valid visa the respondent was entitled to be treated according to the law, stating "there was no entitlement in officers of the Department to subject him to search without warrant, to arrest, to interrogation and to incarceration otherwise than providing to the law".

Stone J agreed with Allsop J, commenting [at 39]: "Such behaviour is unnecessary and must give rise to a legitimate grievance on the part of the respondent". Wilcox J was also

critical of the way in which the regulation was enforced, stating that nothing in the *Migration Act* 1958(Cth) empowered DIMIA officers to search the appellant's home and take away his pay slips.

Read this case:
http://www.austlii.edu.au/au/cases/cth/FCAFC/2005/132.html

3. Selected Developments in Australian Federal Discrimination Law

A detailed summary of all the below decisions be found in the September supplement to *Federal Discrimination Law* 2005 @ http://www.hreoc.gov.au/legal/fed_discrimination_law_05/

- ***Vanstone v Clarke*** **[2005] FCAFC 189**

The Court held that the determination applied to a range of officers and positions held by both Indigenous and non-Indigenous persons and agreed with the submission of the appellant that "it is no answer to the structure and text of the Act to engage in speculation that holder of such officers were likely to be Indigenous". On the basis of this reasoning the court concluded that "[t]here is no inconsistency of treatment based upon race within either the Act or the 2002 Determination".

Read this case:
http://www.austlii.edu.au/au/cases/cth/FCAFC/2005/189.html

- **Baird v State of Queensland [2005] FCA 495**

The applicants are Indigenous people who were employed on church run missions funded by the Queensland Government. They claimed that they were paid under-award wages between 1975 and 1986 and that this constituted race discrimination, contrary to ss9 and 15 of the RDA.

Justice Dowsett rejected the application under s 15 (discrimination in employment) on the basis the Government did not employ the applicants: they were employed by the Lutheran Church against whom the applicants had discontinued their application at an earlier stage in proceedings. His Honour also rejected the applicant's argument the wages paid involved discrimination by the Government contrary to s 9, concluding that the calculation and payments of grants were not 'based on race'. His Honour also expressed the view that the word "act" in s9 does not include an omission to act.

Note that this matter is on appeal to the Full Federal Court to be heard in February/March 2006. The Human Rights and Equal Opportunity Commission has been granted leave to intervene in the matter to make submissions as to the interpretation and application of s 9 of the RDA.

Read this case:
http://www.austlii.edu.au/au/cases/cth/federal_ct/2005/495.html

- ***San v Dirluck Pty Ltd & Anor*** **[2005] FMCA 844**

The applicant alleged she was sexually harassed during her employment by her manager. Raphael FM found that the conduct of her manager , which involved regularly greeting the applicant with the question 'How's your love life' and on one occasion stating 'I haven't seen an Asian come before' was conduct of a sexual nature and unwelcome.

The fact the applicant occasionally answered the comments and made few direct complaints did not mean she accepted them as banter and was not offended. Nor could the applicant's own alleged use of swear

words or remarks excuse any breaches of the Act: "Her conduct could only go to consideration of whether the sexual remarks directed at her were likely to offend, humiliate or intimidate her."

Read this case:
http://www.austlii.edu.au/au/cases/cth/FMCA/2005/750.html

- ***Ware v OAMPS Insurance Brokers Ltd* [2005] FMCA 664 (29 July 2005)**

The applicant, who suffered from Attention Deficit Disorder and depression, claimed that the respondent had directly discriminated against him by demoting and then dismissing him. The respondent claimed the applicant's poor work performance was the reason.

Driver FM stated that, whilst it was not necessary for the applicant to establish that the respondent had intended less favourable treatment, 'motive may nevertheless be relevant to determine whether or not an act is done "because of" a disability'.

Driver FM held that the respondent had treated the applicant less favourably than a hypothetical comparator who exhibited the same work practices but was not disabled. This was because the respondent had not acted with reference to the performance indicators it had told the applicant he would be assessed under; instead, it had dismissed the applicant due to his unauthorised absences from the workplace.

Read this case:
http://www.austlii.edu.au/au/cases/cth/FMCA/2005/664.html

4. Selected Developments in International Law

4.1. Human Rights Committee

- **Bozena Fijalkowska v Poland Communication No. 1061/2002: *Poland. 04/08/2005.* (CCPR/C/84/1061/2002)**

The author was committed to a psychiatric institution without legal representation and without receiving a copy of the committal order until after the deadline to file an appeal was expired.

The Committee held that the State party has an obligation to protect vulnerable persons within its jurisdiction, including the mentally impaired. Because the author had diminished capacity which might have affected her ability to effectively participate in proceedings, the court should have ensured she was assisted or represented in a way sufficient to safeguard her rights throughout the committal proceedings. In the absence of such measures the author's committal was in violation of article 9(1) of the International Covenant on Civil and Political Rights (ICCPR).

The Committee also held that the State party's failure to serve the committal order until after the deadline for an appeal rendered ineffective the author's right to challenge her detention and therefore constituted a violation of article 9 (4) of the ICCPR.

Read this decision:
http://www.ohchr.org/english/bodies/hrc/hrcs84.htm

4.2. Committee on the Elimination of Racial Discrimination

- ***The Jewish communities of Oslo and Trondheim, Kirchner, Paltiel, the Norwegian Antiracist Centre and Butt v. Norway*. Communication No. 30/2003. (CERD/C/67/D/30/2003)**

The authors, who were both members of the Jewish community in Oslo, Norway, claimed to be the victims of violations by Norway of articles 4 and 6 of the International

Convention on the Elimination of Racial Discrimination (ICERD).

In 2001 Mr Terge Sjolie made a speech in which he stated said "everyday immigrants rob, rape and kill Norwegians" and that "everyday our people are being plundered and destroyed by Jews". Mr Sjoile told the audience they should "follow in the footsteps" of Adolf Hitler and Rudolf Hess. Mr Sjoile was subsequently charged and convicted under a racial vilification provision of the Norwegian penal code. On appeal to the Supreme Court Mr Sjolie's conviction was overturned on the grounds that penalising approval of Nazism would involve prohibiting Nazi organisations, a measure that would be incompatible with the right to freedom of speech.

The authors' claimed they were the victims of violations by Norway of articles 4 and 6 of ICERD because, as a result of the Supreme Court decision, they were not afforded a remedy (as required by the ICERD) against the dissemination of ideas of racial discrimination, as well as incitement to such acts.

The Committee disagreed with the Supreme Court's view that Mr Sjoile's statements were protected by freedom of speech. The Committee considered Mr Sjoles' statements contained ideas based on racial superiority or hatred and the praise given to Hitler and Nazi principles "must be taken as incitement to racial discrimination, if not violence". The Committee found Mr Sjoile's statements were of an "exceptionally/manifestly offensive character" and were not protected by the "due regard" clause in article 4. On this basis the Committee concluded Mr Sjoile's acquittal by the Supreme Court was a violation of article 4 and 6 of ICERD.

Read this decision at:
http://www.ohchr.org/english/bodies/cerd/cerds67.htm

4.3. Other Jurisdictions

- ***Khadr v Canada*** **[2005] FC 1076 (8 August 2005)**

Mr Khadr, a 17-year old Canadian citizen detained in Guantanamo Bay, sought a declaration that his right to silence and right not to be interviewed had been breached during interrogations by Canadian Security agents. He also sought an injunction against further questioning.

In the Federal Court, Justice von Finckenstein found that the balance of convenience lay in favour of the plaintiff, because he was in captivity, probably had little useful information, and was not likely to be able to choose whether to be interviewed or not. Finckenstein J held that "the present case is one of these rare exceptional cases where granting an injunction is required to prevent a potential grave injustice." He issued an injunction preventing prohibiting the Canadian government from conducting any further interviews with the Plaintiff pending the outcome of the trial.

Read this case:
http://www.canlii.org/ca/cas/fct/2005/2005fc1076.html

5. Australian Privacy Law

- ***Matheson v Scottish Pacific Business Finance Pty Ltd*** **[2005] FCA 670**

A bankruptcy notice was issued to the appellant when he failed to pay a judgment debt. On appeal, the debtor claimed the originating proceedings breached the *Privacy Act* 1988 (Cth) and that this unlawful conduct rendered the judgment debt order and the subsequent bankruptcy notice void. Kiefel J held that, even if there had been a breach of the *Privacy Act*, it did not affect the validity of the debt on which the District Court judgment founded.

Read this case:
http://www.austlii.edu.au/au/cases/cth/federal_ct/2005/670.html

6. Upcoming Human Rights Events

8 November

Seminar: Five years of a Human Rights Act - victories, losses and lessons from the UK

The Australian Human Rights Centre, the Public Interest Advocacy Centre and the Public Interest Law Clearing House are convening this seminar in Sydney on Tuesday 8 November. The keynote speaker Mr Roger Smith is the Executive Director of JUSTICE in the United Kingdom.

More information about this event can be viewed at:
http://www.ahrcentre.org/documents/Roger_Smith.pdf

16 November

Alternative Careers Night

The Australian Human Rights Centre will host an alternative careers evening in Surry Hills on Wednesday 16 November with special guests Mara Moustafine, Director of Amnesty International Australia and Micheal Raper, Director of the Welfare Rights Centre.

More information about this event can be viewed at: http://www.ahrcentre.org/

16 November

National Conference: Peaceful Coexistence – Victims Rights in a Human Rights Framework

A one day national forum organised by the ACT Victims of Crime Coordinator and Human Rights Office on victims' rights in a human rights framework will be held in Canberra on 16 November 2005. It will discuss the intersection of human rights and the rights of victims in crime.

Program details and registration forms are available at
http://www.hro.act.gov.au/newsevents.html.

22 November

Conference: 'Moving On': Forced Migration and Human Rights

The conference will be held on Tuesday 22 November at the auditorium of NSW Parliament, Sydney. The keynote speaker will be Dr Guy Goodwin-Gill from the University of Oxford, one of the world's leading scholars in international refugee law.

Topics include: terrorism and asylum, separated children, trafficking and slavery, offshore processing of asylum claims, and judicial interpretations of the refugee definition.

Confirmed speakers include: Justice Tony North (Federal Court of Australia), Olivier Delarue (UNHCR), Assoc Prof Arthur Glass (UNSW) Assoc Prof Mary Crock (Sydney), Assoc Prof Susan Kneebone (Monash), Dr Penelope Mathew (ANU), Dr Savitri Taylor (La Trobe), Dr JP Fonteyne (ANU), Dr Ben Saul (UNSW), Dr Jane McAdam (Sydney) and Jennifer Burn (UTS)

You can view the conference program and register online at:
http://www.law.usyd.edu.au/scigl/Events.htm

2 December

Conference: Human Rights 2005: The Year in Review

The Castan Centre for Human Rights Law is convening this Conference on Friday 2nd of December 2005 at the CUB Malthouse, 113 Sturt Street, Southbank, Melbourne.

You can view the conference program and register online at: http://www.law.monash.edu.au/castancentre/events/2005/conference2005.html

9 December

Human Rights Day gala luncheon awards ceremony

The Human Rights and Equal Opportunity Commission will celebrate Human Rights Day by announcing the winners of the Human Rights Medal, the Law Award, Community Award, Print Media Award, Television Award, Radio Award and the Arts Non-Fiction Award on 9 December at Sheraton on the Park Hotel, Sydney.

For further information and reservation of tickets for the luncheon please visit: http://www.humanrights.gov.au/hr_awards/index.html

HREOC Events Calendar

Other events of the Human Rights and Equal Opportunity Commission can be viewed at http://www.humanrights.gov.au/events/

If you have a human rights event that you wish to publicise in the *Human Rights Law Bulletin* please email francessimmons@humanrights.gov.au