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

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1. Introduction and forthcoming seminar details

Upcoming Seminar: Developments in Citizenship Law: A Human Rights Perspective

On Friday 7th April the HREOC Legal Section is conducting a seminar on recent developments on citizenship law. The seminar will focus on recent developments in High Court jurisprudence, as well as the potential human rights implications of the Australian Citizenship Bill 2005.

The seminar will be chaired by the Human Rights Commissioner and Acting Disability Discrimination Commissioner, Mr Graeme Innes AM and will feature two speakers:

- Professor Kim Rubenstein, Director of the Centre for International and Public Law, ANU College of Law, ANU. Professor Rubenstein will speak about the High Court case *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Ame* [2005] HCA 36 (4 August 2005) and recent developments regarding the rights associated with the legal status of Australian citizenship.
- Bruce Levet of the New South Wales Bar. Mr Levet will speak on the aliens power contained in Section 51 (xix) of the Australian *Constitution*, particularly as it affects Australian- born children, and will discuss recent and developing case law on the issue together with the likely effects of the Citizenship Bill 2005 on future jurisprudence in the area.

Admission is free and the seminar will take place on 7th April 2006 at 1:00 – 2:30 pm. The venue is:

The 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

- ***Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72 (6 December 2005)**

The Refugee Review Tribunal (RRT) upheld the Minister's decision to refuse the applicant and his partner's application for a protection visa. Before the RRT decided to affirm DIMIA's decision, the RRT received an unsolicited letter containing information which contained allegations the appellant did not have a well founded fear of persecution. The RRT did not inform the appellant of the existence of the letter or the substance of the allegations but stated in its reasons for decision that 'no weight' had been given to the letter. The issue for the High Court was whether procedural fairness required the tribunal to inform the appellant of the existence of the letter and give the appellant the opportunity to respond to the allegations.

In a joint judgment the High Court (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ) held that to meet the requirements of Procedural Fairness the RRT had an obligation to give the appellant the opportunity to respond to the substance of the allegations. The RRT's statement that it gave 'no weight' to the letter and made the decision to refuse the protection visa on other bases did not discharge the requirements of procedural fairness. The High Court added that while procedural fairness required that the RRT provide the appellant with the opportunity to respond to the substance of the allegations it was not necessary to give the appellant a copy of the letter containing the allegations

You can read the case at:
http://www.austlii.edu.au/au/cases/cth/HCA/2005/72.html

- ***R v GJ* [2005] NTCCA 20**

The respondent in this case (Mr GJ) was convicted of unlawful assault and sexual intercourse with a child under 16. The Director of Public Prosecutions appealed against the sentence.

The Northern Territory Court of Criminal Appeal unanimously held that the original sentence (a total of 24 months imprisonment suspended after one month) was manifestly inadequate. The sentence was set aside and a new sentence of 3 years and 11 months imprisonment, to be suspended after serving 18 months, was imposed. The Court also provided reasons in relation to the refusal of the Human Rights and Equal Opportunity Commission's application for leave to appear as intervener or amicus curiae.

Mildren J, with whom Riley J agreed, suggested that the Court may not have power to grant leave to intervene in criminal proceedings but, in any event, HREOC did not have a sufficient interest in the matter such that it would be appropriate for it to be granted leave to intervene. His Honour accepted that the Court has the power to admit counsel as *amicus curiae* but he was not satisfied that the Court would be significantly assisted by the submissions of HREOC. He stated:

> In my opinion, the sentencing principles to be applied in this case are well known and no new sentencing principle is involved. If there is a proper case to take into account in a sentencing matter international conventions to which Australia is a party, this is not that case.

Southwood J agreed with Mildren J and made additional comments. He noted that the matters raised by HREOC were 'important propositions', but stated that 'their voluminous assertion is of no assistance when it comes to the complex and difficult task of sentencing Aboriginal offenders who have acted in accordance with Aboriginal customary law.'

Mr GJ has lodged a special leave application in the High Court.

You can read the full case at:
http://www.nt.gov.au/ntsc/doc/judgements/2005/ntcca/ntcca020.html

You can read HREOC's submissions to the court at:
http://www.hreoc.gov.au/legal/intervention/queen_gj.html

- ***Rush v Commissioner of Police*** **[2006] FCA 12**

The four applicants were arrested in Bali for alleged involvement in heroin trafficking to Australia. Finn J rejected their application for a preliminary discovery order against the AFP on the basis that the applicants had failed to identify a potential cause or action against the AFP for exposing them to the death penalty that was not speculative or devoid of prospects of success. Finn J concluded:

1. There was no reasonable cause to believe the applicants would be entitled to obtain relief on the basis that the AFP acted without lawful authority in making decisions which exposed the applicants to the death penalty in Indonesia. Finn J rejected, inter alia, an argument that the powers provided by AFP Act should be construed restrictively in the context provided by the *Death Penalty Abolition Act 1973,* the Mutual Assistance Act, Australian government policy opposing the death penalty and Australia's signing of the Second Optional Protocol of the International Convention on Civil and Political Rights (ICCPR).

2. There was no possible cause of action resulting from the applicants' contention that, as Australians, they had a substantive legitimate expectation as Australian citizens that the Australian Government and its agencies would not act in a way as to expose them to the risk of the death penalty. His Honour observed that the doctrine of substantive legitimate expectation, which is an expectation arising from a promise, practice or policY of government that a benefit will be provided or a threatened disadvantage will not be imposed, is not part of Australian law[1] and therefore can not support a cause of action.

3. There was no prospect of successful action resulting from the applicants' contention that the first applicant's father, by providing information to the AFP, created a duty on AFP officers not to use that information in a way that would expose at least the first applicant to the risk of the death penalty. His Honour found any such duty of care would be precluded by the greater public interest accorded to unimpeded investigation by the AFP.

4. There was no evidential basis for the applicants' contention that the AFP committed in the tort of misfeasance in public office. While his Honour stated it was a foreseeable and likely consequence of AFP actions that the applicants would be arrested in Indonesia and, consequently, risked exposure to the death penalty, there was no material to suggest that the possible consequences of the AFP's actions where not a valid exercise of official power.

You can read the full case at:
http://www.austlii.edu.au/au/cases/cth/federal_ct/2006/12.html

3. Developments in Australian Federal Discrimination Law

A detailed summary of developments in Federal Discrimination Law can be found in the periodical supplements to *Federal Discrimination Law* 2005. The January 2006 supplement can be found at:
http://www.humanrights.gov.au/legal/fed_discrimination_law_05/supplement_200601.html

[1] See *Minister for Immigration and Multicultural Affairs v Teoh* (1995) 183 CLR 273 and *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR1

- ***Baird v Queensland* [2005] FCA 1516**

The applicants complained of racial discrimination dating back to 1975. The complaints were made to HREOC in 2002 and 2003. They were terminated by the President in March 2003 and proceedings were commenced in the Federal Court under s 46PO(1) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('HREOC Act') within 28 days of termination, as required by s 46PO(2) of the HREOC Act.

The Court considered the application of the *Limitation of Actions Act 1974* (Qld aCT). Dowsett J assumed, without deciding, that s 10(1)(d) of the Qld Act applied to discrimination matters. That section imposes a time limit of '6 years from the date on which the cause of action arose' in relation to 'an action to recover a sum recoverable by virtue of an enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.'

Dowsett J held that a 'cause of action' is every fact which it would be necessary for the plaintiff to prove in order to support a right to the judgment of the Court. [2] Dowsett J noted that HREOC and its President have no power to grant relief under the HREOC Act, such power being vested in the Court and deriving from s 46PO of the HREOC Act. His Honour concluded that 'there is no suggestion in the [HREOC Act] that any right to relief existed prior to the termination of the complaint' and accordingly 'a cause of action accrued to each applicant at the time of such termination'.[3]

The effect of this decision is that an applicant will be statute-barred only where more than six years passes between the termination of a complaint by the President of HREOC and the commencement of proceedings in the Federal Court or Federal Magistrates Court. Note, however, that s 46PO(2) of the HREOC Act still requires the proceedings are commenced within 28 days 'or such further time as the court allows'.

You can read the full case at:
http://www.austlii.edu.au/au/cases/cth/federal_ct/2005/1516.html

- ***Gama v Qantas Airways Ltd* [2006] FMCA 11**

A different approach to that in *Baird* was taken in this decision of the Federal Magistrates Court, and no reference to *Baird* is made in the decision. The respondent made an application to strike out aspects of the applicant's claim on grounds including that allegations of matters that had taken place before 1998 were statute-barred.

Raphael FM was of the view that the proceedings fell within s14(1)(b) of the *Limitation Act 1969* (NSW) which provides that a cause of action for damages for breach of statutory duty is not maintainable if brought more than six years after the cause of action first accrues to the plaintiff. His Honour concluded that the nature of the rights and duties contained in the Commonwealth anti-discrimination acts and the form of relief which may be granted under s 46PO(4) HREOCA where 'easily included within the definition for damages for breach of statutory duty' (at [6]).

Although deciding the matter on another basis, his Honour concluded that the pre-1998 allegations were statute barred and this would have provided a basis for summarily dismissing those elements of the application. His Honour did not discuss what determines when a 'cause of action' accrues.

You can read the full case at:
http://www.austlii.edu.au/au/cases/cth/FMCA/2006/11.html

For further discussion these decisions and the issue of time limits for unlawful discrimination claims, see Jonathon Hunyor, *Time Limits in Unlawful Discrimination Claims*, in the forthcoming April edition of the NSW Law Society Journal.

- ***Hollingdale v North Coast Area Health* [2006] FMCA 5**

The applicant complained of disability discrimination in employment. Driver FM cited with approval the decision of the NSW Supreme Court decision *Duhbihur v Transport Appeal Board*[4] in finding there was nothing in the nature of the application that required the application of the higher standard of evidence contemplated by the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336.[5]

The Court found that the respondent did not discriminate against the applicant in requiring that she obtain a medical assessment following a period during which the applicant exhibited inappropriate behaviour by reason of a bi-polar disorder. Driver FM held that the hypothetical comparator would have been treated in

[2] [2005] FCA 1516, [2].
[3] [2005] FCA 1516, [9].
[4] [2005] NSWSC 811 [59]-[66]
[5] For discussion of the application of the test in *Briginshaw* to discrimination matters, see *Federal Discrimination Law 2005* (HREOC, 2005), pp 253-259.

the same way. His Honour also found that respondent had made appropriate accommodations for the applicant's visual disability and had not discriminated against her in this regard. The Court further found that the respondent had not discriminated against the applicant in terminating her employment because of her refusal to attend work. Driver FM held that the basis for the decision was the respondent's belief that the applicant was 'malingering' and therefore had no medical reason for non-attendance at work.

You can read the full decision at:
http://www.austlii.edu.au/au/cases/cth/FMCA/2006/5.html

- ***Tyler v Kesser Torah College* [2006] FMCA 1**

The applicant in this matter was temporarily excluded from the respondent school following disruptive behaviour which, it was claimed on behalf of the applicant, resulted from his disability. Driver FM held, on the facts, that the respondent did not expel the applicant as was claimed and that the applicant's temporary exclusion was not discriminatory. His Honour was of the view that although the College did not apply its normal discipline policy to the applicant's temporary exclusion, the non-application of this policy was part of a special educational service provided. It was necessary to compare the applicant's treatment with another student in the same circumstances and s 5(2) of the DDA required this comparison to assume that the other student against whom the applicant was compared was also subject to that special educational service.

Driver FM noted the lack of medical evidence that the applicant's behavioural difficulties were the consequence of his disability.[6] However, even if such evidence had existed, Driver FM was of the view that the respondent's actions were not discriminatory because the sole reason for the respondent's action was to discharge the respondent's duty of care to its staff and students.[7] His Honour stated that, even if this finding was wrong, the respondent's actions were not discriminatory because there was no evidence that the respondent would have treated a hypothetical comparator differently than it treated the applicant.

Driver FM further concluded that, on the facts of the case, it was unnecessary to consider whether an order requiring the readmission of the plaintiff to the college was appropriate. However, his Honour suggested that the Court had the power to make such an order, stating:

> Section 46PO (4) of the HREOC Act is not an exhaustive statement of orders that can be made by the Court and I would not regard resort to s15 of the *Federal Magistrates Act 1999(Cth)* as unavailable.[8]

His Honour added that it was 'strongly arguable that the language of s46PO(4)(b) was wide enough to authorise an order, the consequence of which is to compel a contract for the provision of services, if that consequence would be reasonable.'[9]

You can read this decision at:
http://www.austlii.edu.au/au/cases/cth/FMCA/2006/1.rtf

4. Selected Developments in International Law

4.1 Human Rights Committee

- ***Bernadette Faure v Australia, Communication No.* 1036/2001, U.N Doc. CCPR/C/85/D/1036/2001 (2005)**

The author argued before the Human Rights Committee (HRC) that the requirement she attend the Work for the Dole Program or face a reduction or a suspension of her unemployment benefits was a violation of article 8.3 of the International Covenant for Civil and Political Rights (ICCPR) which requires that which states that "no-one shall be required to perform forced or compulsory labour". The author also claimed, with particular reference to HREOC's decision to decline to investigate her complaint[10], that she did not have a remedy for her complaint, in violation of article 2(2) and (3) (a) (b) and (c) of the ICCPR.

The HRC stated that, pursuant to the decision in *Kazantzis v Cyprus*[11], article 2(3)(b) obliges state parties to ensure determination of the right to a remedy by a competent judicial, administrative or legislative authority if the alleged victim's "claims are sufficiently well-founded to be arguable under the covenant". The HRC found that the author's allegation of a breach of article 8 was "sufficiently well founded to be arguable" and that the absence of a remedy to test an arguable

[6] [2006] FMCA 1, [105].
[7] His Honour noted the similarity of the matter to *Purvis v New South Wales* (2003) 217 CLR 92: see [2006] FMCA 1, [95], [105].
[8] [2006] FMCA 1, [108].
[9] Ibid [109].
[10] HREOC declined to investigate the complaint on the basis it fell outside its statutory mandate, adding that the nature of punishment and the degree of involuntariness involved in the Work For the Dole program did not reach the threshold required to violate breach article 8(3)(a) of the Covenant.
[11] Communication No 972/2001

claim under article 8 of the ICCPR was a violation of article 2.3 read together with article 8. The HRC concluded "it was and remains impossible for a person such as the author to challenge the substantive elements of the work for Dole program".

After considering the definition of 'forced or compulsory labour' and, in particular the lack of degrading or a dehumanising aspect of the work performed under the work for the dole program, the HRC found that the Work for the Dole program did not violate the article 8 prohibition on "forced or compulsory labour". While under article 2(3)(a) the State party is under an obligation to provide the author with an effective remedy, in this case the HRC held that its views on the merits of the claim constituted sufficient remedy, although Australia was under an obligation to ensure similar violations did not occur in the future.

You can read this decision at:
http://www1.umn.edu/humanrts/undocs/1036-2001.html

4.2 Other jurisdictions

- ***May v Ferndale Institution*** **2005 SCC 82 Supreme Court, 22 December 2005**

The appellants, who were serving life sentences for murder and or manslaughter, were involuntarily transferred from minimum to medium security detention on the basis of a re-classification of their security ratings by the Correctional Services Canada (CSC). CSC used a computerised Security Reclassification Scale (SRS) scoring matrix to assist the classification review process. The Court considered two issues: (a) whether the court the Supreme Court of British Columbia has habeas corpus jurisdiction and (b) whether the prisoners had been unlawfully deprived of their residual liberty.

The Court held that Supreme Court of British Columbia had properly exercised its habeas corpus jurisdiction and that prisoners should be able to challenge their detention either by way of habeus corpus or judicial review. The Court granted habeas corpus on the basis that the failure of the CSC to provide inmates with the information (e.g the SRS scoring matrix) upon the decisions to transfer them were made resulted in an unlawful deprivation of their residual liberty. The failure to provide this information breached procedural fairness requirements as well as CSC's statutory duty of disclosure, and rendered its decision to transfer void for lack of jurisdiction.

Full text at
http://www.canlii.org/ca/cas/scc/2005/2005scc82.html

- ***A & Ors v Home Secretary*** **[2005] UKHL 71**

The Law Lords held that evidence which has or may have been procured by torture is not admissible in UK courts and tribunals regardless of who or what authority inflicted the torture or where it was inflicted. They held that the admission of such evidence was contrary to the UK common law as informed by the principles embodied in the European Convention of Human Rights (especially article 6(1) which guarantees the right to a fair trial) and the Torture Convention.

In relation to the Torture Convention, the House of Lords agreed with the International War Crimes Tribunal for the Former Yugoslavia (in *Prosecutor v Furundzija* [1998] ICTY 3) that that the prohibition against torture has entered into customary international law.

You can read the case at:
http://www.bailii.org/uk/cases/UKHL/2005/71.html

- ***Axon, R (on the application of) v Secretary of State for Health & Anor*** **[2006] EWHC 37 (Admin) (23 January 2006)**

The applicant sought declarations that a health professional is under no obligation to keep confidential advice and treatment which he proposes to provide in respect of contraception, sexually transmitted infections and abortion to a young person under 16 and the health professional must, therefore, not provide such advice and treatment without the parent's knowledge unless to do so might prejudice the child's physical or mental health so it is in the child's best interest not to do so. In the alternative the applicant claimed that, at the very least, this is the health professional's duty in respect of abortion.

Silber J dismissed the applicant's claim (*Gillick v West Norfolk and Wisbech Health Authority* [1986] 1AC 112 applied). Silber J held that a medical professional is entitled to provide medical advice and treatment on sexual matters to young persons under 16 years of age without parent's knowledge or consent provided he or she is satisfied that:

  - The young person understands all aspects of the advice;
  - The medical professional cannot persuade the young person to inform his or her parents or allow the medical professional to inform the parents that their child is seeking advice and/or treatment on sexual matters;
  - The young person is very likely to begin or to continue having sexual intercourse with or

without contraceptive treatment or treatment for a sexually transmissible illness;

- That unless the young person receives advice and treatment on the relevant sexual matters, his or physical mental health are likely to suffer; and
- The best interests of the young person require him or her to receive advice or treatment on sexual matters without parental consent or notification.

You can read the case at:
http://www.bailii.org/ew/cases/EWHC/Admin/2006/37.html

5. Book Review

Annemarie Devereux*, Australia and the Birth of the International Bill of Human Rights 1946 -1966,* Federation Press, 2005

This book provides an important insight into Australia's approach to human rights in the formative post war period when the International Bill of Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights were developed.

Devereux charts how, in the space of two decades of policy making, Australia's approach to international human rights shifted from active support for the state's role in protecting human rights, to a reluctance to institute government action to guarantee rights.

Drawing on extensive archival material, this well-documented study reveals the extent to which Australia's policy responses to human rights issues were the product of the political values of Ministers, senior officers and diplomatic representatives.

Devereux's book is a rich resource for scholars of human rights: readers will enjoy her account of Australia's retreat from its initial enthusiasm for international enforcement of human rights, as well as the insight into the depth of Australia's resistance to the rights of minorities and the rights of peoples to self-determination.

The concluding chapter, "Back to the Future", powerfully observes the resonances between the policy shifts during the post war period and current debates about Australia's interpretation and implementation of human rights obligations. The result is a challenge to the reader to consider the philosophical underpinnings of Australia's approach to human rights, then and now.

6. Upcoming Human Rights Events

a. **Centre for Comparative Constitutional Studies*: An international conference on* Legislatures and the Protection of Human Rights: Melbourne, 20-22 July 2006**

This major international conference is designed to encourage exploration of the role and effectiveness of legislatures in protecting human rights. Speakers include: Professor David Feldman (University of Cambridge, and former legal adviser to the UK

Parliament's Joint Committee on Human Rights); Professor Janet Hiebert (Queen's University, Kingston Ontario); Professor George Williams (Director, Gilbert+Tobin Centre of Public Law, UNSW); and Elizabeth Kelly (Acting Chief Executive, ACT Department of Justice and Community Safety; oversaw the implementation of the ACT Human Rights Act 2004).

The Conference will be held at Melbourne Law School, 185 Pelham Street at the University of Melbourne on the 20-22 July 2006.

For registration information email
cccs@law.unimelb.edu.au

- **Australian Human Rights Centre Annual Public Lecture**

The Australian Human Rights Centre Annual Public lecture will be held from 6:00-7:30pm on the 16th of May 2006 at the Metcalfe auditorium at the NSW State Library. The keynote speaker will be Professor Conor Gearty, Rausing Director, Centre for the Study of Human Rights, London School of Economics.

For more information please contact
ahrc@unsw.edu.au

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