HUMAN RIGHTS LAW BULLETIN

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1. Selected general Australian law

- ***Batistatos v Roads and Traffic Authority of New South Wales; Batistatos v Newcastle City Council [2006] HCA 27***

The plaintiff in this case suffered mental and physical disabilities at the time that he was involved in a car accident which left him quadriplegic. He commenced an action in tort against the defendants in relation to the accident almost 30 years after the event. The defendants sought to have the claim struck out as an abuse of process.

The High Court considered the relationship between:

1. statutory limitation periods which apply to plaintiffs who are under a disability at the time that a cause of action accrues, and

2. the exercise of the court's power to strike out proceedings as an abuse of process.

The four majority judges found that the court's power should be exercised on an objective consideration of the effect of the continuation of the proceedings on the parties. The statutory limitation period does not form part of this consideration.

The three dissenting judges found that the court's power should be exercised consistently with the objects and purposes of the statutory limitation period and was constrained by the plaintiff's right to a trial. Kirby J found that this right was a human right finding expression in, e.g., Article 14 of the International Covenant on Civil and Political Rights.

You can read the full decision at:
http://www.austlii.edu.au/au/cases/cth/high_ct/2006/27.html

- ***Koroitamana v Commonwealth of Australia [2006] HCA 28***

The applicants were two children born in Australia to Fijian parents. The applicants had not applied for Fijian citizenship, although were entitled to do so under the Fijian Constitution. The central issue in the case was whether the applicants were 'aliens' for the purposes of s 51(xix) of the Constitution which empowers the Federal Parliament to makes laws with respect to naturalisation and aliens.

The facts of the case were very similar to *Singh v Commonwealth* where the applicant was born in Australia to Indian parents. The Court held in that case being born in Australia does not of itself mean that a person is not an alien and therefore beyond the reach of s 51(xix). The applicants in *Koroitamana* sought to distinguish *Singh* on the basis that in *Singh* the applicant was automatically granted Indian citizenship under the Indian Constitution because her parents were Indian and, accordingly, already owed an allegiance to a foreign state at birth. The applicants also argued that they were not aliens by virtue of being stateless, as they were born in Australia.

The Court unanimously rejected the claim. The Court held in essence that the applicants were aliens because they were born to foreign parents, even though they were born in Australia. With the exception of Kirby J, the Court held that the applicants were born stateless which was also sufficient to render them aliens for the purposes of s 51(xix). Kirby J held that the applicants were not stateless, as they were entitled to register for Fijian citizenship. His Honour, however, rejected the claim on the basis that birth in Australia did not of itself give rise to an entitlement to citizenship.

You can read the full decision at:
http://www.austlii.edu.au/au/cases/cth/high_ct/2006/28.html

- ***R v Joseph Terrence Thomas [2006] VSCA 165***

Jack Thomas, an Australian citizen, was apprehended and detained by Pakistani authorities at Karachi in January 2003. He remained in Pakistani custody until June 2003 when he was released and returned to Australia.

He was arrested in Melbourne at the end of 2004. Mr Thomas was charged with a number of offences and was ultimately convicted of the offences of receiving funds from a terrorist organisation and of possessing a falsified Australian passport.

The Victorian Court of Appeal quashed the convictions against Mr Thomas, on the basis of the Court's finding that the Australian Federal Police's ('AFP') interview with Mr Thomas, conducted in Pakistan in March 2003, was inadmissible as evidence.

Central to the Court's reasoning was its consideration of the entrenched legal principle (as set out in the *Crimes Act 1914* (Cth)) that a confessional statement made out of court by an accused person is not admissible unless it is voluntarily made. The Court concluded that nothing occurred in the AFP interview itself that operated to overbear Mr Thomas' will. However, taken in the context of his detention, the various inducements and threats made to him by Australian, American and Pakistani authorities, and the prospect of his indefinite detention, Mr Thomas' choice to participate in the AFP interview, and the manner in which he did so, was not made freely.

You can read the full decision at:

http://www.austlii.edu.au/au/cases/vic/VSCA/2006/165.html

2. 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. See: http://www.hreoc.gov.au/legal/fed_discrimination_law_05/.

- ***L v HREOC [2006] FCAFC 114***

L challenged an order requiring her to appoint a litigation guardian. The Full Federal Court upheld the appeal on the basis that Driver FM did not afford L procedural fairness before making the order. In the course of its judgement, the Court made the following observations:

- "the fact that a litigant has put forward a case that reveals no reasonable cause of action may say nothing at all about the litigant's capacity to present such a case. The presumption that an adult person is capable of managing their own affairs is hardly likely to be displaced merely because a case has been commenced that has no prospect of success".

- medical evidence will ordinarily be required to be placed before the court before the court can determine whether a person needs a litigation guardian. However, there may be cases where medical evidence is not available, as for example, when a person refuses to submit to submit to a medical examination, or where the lack of capacity is so clear that the medical evidence is not required. In such cases, "the court is entitled to rely on its own observation".

You can read the full decision at:
http://www.austlii.edu.au/au/cases/cth/FCAFC/2006/114.html

- ***Wiggins v Department of Defence (Navy) [2006] FMCA 800***

The Court held the Navy discriminated against Ms Wiggins because of her depression by demoting her when she was on sick leave. The Navy was deemed to have known about Ms

Wiggins' depression even though the officer who demoted her did not actually know the nature and extent of her illness. This is because the officer had the opportunity to access Ms Wiggins' medical records before making the decision to demote her, but chose not to do so. Ms Wiggins was awarded $25,000 damages for hurt, humiliation and upset.

You can read the full decision at:
http://www.austlii.edu.au/au/cases/cth/FMCA/2006/970.html

- ***Hurst v State of Queensland [2006] FCAFC 100***

The appellant was a deaf child fluent in the sign language known as Auslan. She had complained to HREOC and then the Federal Court that her school's requirement that she be taught in English without an Auslan interpreter indirectly discriminated against her, contrary to the *Disability Discrimination Act 1992* (Cth) ('the Act'). At first instance, Lander J found that the requirement that Ms Hurst be taught without an Auslan interpreter was not discriminatory because she was unable to demonstrate that she was 'not able to comply' with the requirement. His Honour found that Ms Hurst was able to comply with the requirement in the sense that she could 'cope' without an Auslan interpreter as evidenced by her ability to 'keep up' with her hearing peers.

The Full Court found that Lander J had misconstrued the meaning of a person's being 'not able to comply' with an impugned requirement. The Full Court said:

> In our view, it is sufficient to satisfy that component of s6(c) that a disabled person will suffer serious disadvantage in complying with a requirement or condition of the relevant kind, irrespective of whether that person can 'cope' with the requirement or condition. A disabled person's inability to achieve his or her full potential, in educational terms, can amount to serious disadvantage

The Full Court found that, on the evidence provided at first instance, the appellant had demonstrated that she would not 'realise her full potential, in educational terms' if she was not taught with an Auslan interpreter and that in her case this did amount to a 'serious disadvantage'. The Full Court found that the school had indirectly discriminated against Ms Hurst and that she was entitled to a declaration that the respondent had breached the Act.

You can read the full decision at:
http://www.austlii.edu.au/au/cases/cth/FCAFC/2006/100.html

- ***Vickers v Ambulance Service of NSW [2006] FMCA 1232***

Mr Vickers is a diabetic who claimed the Ambulance Service of NSW unlawfully discriminated against him, contrary to the *Disability Discrimination Act 1992* (Cth), by deciding not to offer him a job on account of his disability (type 1 diabetes). Mr Vickers challenged both the manner in which his application was assessed and the decision not to give him the job.

The Court concluded that:

1. The assessment of Mr Vickers' application was *not* discriminatory; but

2. The decision not to offer Mr Vickers a job was discriminatory.

The Court took the view that Mr Vickers' individual circumstances were considered by the Ambulance Service of NSW in assessing his application and there was no evidence of a policy to exclude people with diabetes. However, the decision not to offer Mr Vickers employment (a decision that the respondent conceded was taken because of Mr Vickers' diabetes) was discriminatory in that the respondent did not satisfy the Court that Mr Vickers could not perform the 'inherent requirements' of the job.

Mr Vickers was awarded $5,000 in general damages and $5,000 in costs. The Court ordered that his job application proceed to the next stage.

You can read the full decision at:
http://www.austlii.edu.au/au/cases/cth/FMCA/2006/1232.html

- ***AB v Registrar of Births, Deaths and Marriages [2006] FCA 1071***

The applicant is a post-operative transsexual who applied to alter the record of her sex in her birth registration. Her request was rejected on the basis of the *Births, Deaths and Marriages Registration Act 1996* (VIC), which provides that the Registrar cannot make the alteration in a person's birth registration where the applicant is married.

The applicant complained that the Victorian Registrar of Births, Deaths and Marriages engaged in unlawful discrimination in the provision of services on the ground of marital status, contrary to s 22 of the *Sex Discrimination Act 1984* (Cth) ('the Act').

Under s 9(10) of the Act, s 22 only operates to the extent that the provision gives effect to the Convention on the Elimination of all forms of Discrimination Against Women ('CEDAW'). A key issue in this case was whether CEDAW extends to discrimination against women on the basis of their marital status.

Heerey J dismissed the Application. In interpreting the definition of discrimination under CEDAW, he stated: 'the definition does not extend to discrimination against all persons, male or female, simply on the ground of marital status, and is confined to discrimination against women' ([36]). Heerey J concluded: 'The action of the Registrar in the present case had nothing to do with the applicant's being a woman. Had the applicant been a man, the result of the application would have been the same' ([60]). Accordingly, Heerey J held that, s 22 of the Act did not operate in relation to the Registrar's conduct.

You can read the full decision at:
http://www.austlii.edu.au/au/cases/cth/federal_ct/2006/1071.html

3. Selected Developments in International Law

3.1 Human Rights Committee

- *D & E v Australia, Communication No 1050/2002 UN Doc CCPR/C/87/2D/1050/2002 (25 July 2006).*

The authors of the complaint were an Iranian family, including 2 young children, who were detained in Curtain Immigration Detention Centre for three years and two months. During this time two applications for asylum were refused. The Minister declined to exercise his discretion to grant a favourable outcome under s417 of the Migration Act 1958 (Cth).

The authors claimed their prolonged detention was arbitrary in breach of article 9(1) and (4) of the International Covenant of Civil and Political Rights (ICCPR). The authors also claimed that the prolonged detention of the two children violated article 24(1) of the ICCPR which provides that every child shall have the right to such measures of protection as are required by his status as a minor.

In submissions Australia argued that the complaint was inadmissible because, inter alia, the family had not exhausted domestic avenues in the form of judicial review in the High Court or the Federal Court. However, the United Nations Human Rights Committee (UNHRC) found that, because Australia's High Court had held the policy of mandatory detention was constitutional, this remedy was not effective.

In concluding that the family's detention was in breach article 9(1) the UNHRC reaffirmed its previous jurisprudence that detention will become arbitrary if it continues beyond the period for which a state party can provide appropriate justification. The UNHRC held in this particular case 'whatever justification there may have been for an initial detention' Australia had failed to demonstrate:

- 'that their detention was justified for such an extended period' or
- that compliance with Australia's immigration policies could not have been achieved by less intrusive measures.

In relation to the complaint that the prolonged detention of children breached article 24, the UNHRC found that, in light of the Australia's explanation of the efforts to provide educational and recreational programs for children in immigration detention, this claim was insufficiently substantiated to be admissible.

You can read the full decision at:
http://www.unhchr.ch/TBS/doc.nsf/0ac7e03e4fe8f2bdc125698a0053bf66/9dbcb136a858ebc5c12571cc00532f41?OpenDocument

3.2 Other jurisdictions

- ***Salim Ahmed Hamdan v Donald H Rumsfeld, Secretary of State* 546 U.S.__(2006)**

The Supreme Court held that the military commissions established by the President to try Guantanamo Bay detainees were not of the type authorised to be set up by Congress. Congress has only authorised the establishment of military commissions that comply with the common law of war and common article 3 to the Geneva Conventions. These laws require military commissions to have the same rules and procedures of military courts-martial, unless practical need requires commissions to have other rules and procedures. The Court held that as no such 'practical need' exists to try Guantanamo Bay detainees, the existing commissions are beyond the President's power.

The effect of this decision is that the Guantanamo Bay commissions will have to have the same rules and procedures of courts-martial, unless Congress expressly and specifically agrees otherwise.

In the course of its findings, the Court expressed its view that the right of an accused to "be present for his trial and privy to the evidence against him, absent disruptive conduct or consent" is "indisputably part of customary international law".

You can read the full decision at http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf

- ***Canada (Minister of Citizenship and Immigration) v Harkat 2006 FCA 215***

The applicant sought orders staying judgment at first instance, pending the hearing of the applicant's appeal against that judgment. The judgment found that Mr Harkat was 'inadmissible to Canada' under the anti-terrorism provisions of the Immigration and Refugee Protection Act. Relevantly to the application, the judgment also found that Mr Harkat be released from detention on certain conditions on the basis that he would not be removed from Canada within a reasonable period.

The Court refused to grant orders staying the judgment releasing Mr Harkat from detention. Central to this finding was the failure by the applicant to provide evidence in support of its application. The Court found that, in the absence of evidence, the trial judge was in a better position to make a finding as to the threat that Mr Harkat allegedly posed to the public interest.

The Full Federal Court upheld the trial judge's decision [*Canada (Minister of Citizenship and Immigration) v Harkat* 2006 FCA 259].

You can read the full decision at: http://www.canlii.org/ca/cas/fca/2006/2006fca215.html

- ***Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others [2006] UKHL 26***

The claimants alleged that they had been tortured whilst in the Kingdom of Saudi Arabia. The central issue for the House of Lords was whether the English court has jurisdiction over a proceeding brought against a foreign state and its officials for acts of torture committed in that foreign state.

The main basis of the claim was that the rule of state immunity does not extend to cases of torture, as the prohibition of torture is a peremptory norm of international law or *jus cogens* from which no derogation is permitted and which takes precedence over the rule of state immunity.

The Court accepted that the prohibition of torture was *jus cogens*. However, the Court held that this did not override the rule of state immunity in civil proceedings. The Court noted that whilst the Torture Convention created universal criminal jurisdiction over public officials guilty of torture, it did not create an exception to state immunity in respect of civil proceedings. The Court also held that the rule of state immunity covered state officials, even in relation to acts of torture.

You can read the full decision at:
http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/jones-1.htm

4. Upcoming Human Rights Events

- **Same-Sex: Same Entitlements Hearings – Human Rights and Equal Opportunity Commission**

The Human Rights and Equal Opportunity Commission is conducting an inquiry into discrimination against same-sex couples in relation to financial and work benefits. As part of the Inquiry, HREOC is holding public hearings around the country in September, October and November. To check out when a hearing is being held in your state or territory visit http://www.humanrights.gov.au/samesex/index.html

- **Human Rights Medal and Award 2006 – Human Rights and Equal Opportunity Commission.**

The 2006 *Human Rights Medal and Awards* will be presented on Thursday 7 December 2006, at a luncheon ceremony at the *Sheraton on the Park* hotel, Sydney from 12 noon to 3pm.

To find out more about the awards, including nominations for the human rights medal, visit http://www.humanrights.gov.au/hr_awards/index.html

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