

HUMAN RIGHTS LAW BULLETIN

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1. Human Rights Law Bulletin Seminar

All under control? Recent issues in Australia's legal response to terrorism.

13 November 2006, 1pm

The HREOC Legal Section is pleased to present a forum entitled 'All under Control? Recent issues in Australia's legal response to terrorism.'

The Forum will feature a distinguished panel of three speakers:

1. **The Hon. Philip Ruddock MP, federal Attorney General**
2. **The Hon. John von Doussa QC, President of the Human Rights and Equal Opportunity Commission.**
3. **Professor George Williams Director, Gilbert + Tobin Centre of Public Law, UNSW**

The forum will be chaired by Mr Jonathon Hunyor, Acting Director of Legal Services, HREOC.

The forum will take place on **13th November 2006** from 1:00–2:30pm at:

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

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

For those who have responded, please arrive at 12:50pm for a prompt 1pm start.

2. Selected general Australian law

- ***Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom [2006] HCA 50***

Mr Nystrom was born in Sweden in 1973, although had lived his entire life in Australia since he was 27 days old. The Minister cancelled Mr Nystrom's transitional (permanent) visa on character grounds pursuant to s 501 of the *Migration Act 1958* (Cth), based on Mr Nystrom's substantial criminal record.

Mr Nystrom successfully appealed the Minister's decision to the Full Federal Court. The Court accepted that the Minister had fallen into jurisdictional error by failing to take into consideration the fact that Mr Nystrom also held an absorbed person visa. Alternatively, if Mr Nystrom held *only* an absorbed person visa and not a transitional (permanent) visa, as Mr Nystrom contended, the Minister had cancelled a non-existent visa which was not a valid exercise of power.

The High Court unanimously set aside the decision of the Full Federal Court. The Court held that: (1) Mr Nystrom held two visas simultaneously; (2) by operation of s 501F the Minister's cancellation of Mr Nystrom's transitional (permanent) visa automatically cancelled his absorbed person visa as well; and (3) there were no material considerations which the Minister should have taken into account in cancelling Mr Nystrom's absorbed person visa compared with his transitional (permanent) visa.

An important additional issue was whether the Minister's broad power under s 501 to cancel a person's visa on character grounds, including for substantial criminal record, was limited by the Minister's specific power under s 201 to deport a non-citizen for serious criminal offences. It was accepted that s 201 did not apply to Mr Nystrom, as he had lived in Australia for more

than 10 years before committing any relevant offence. Nevertheless, the Court accepted that the Minister's broad power to cancel a person's visa on character grounds under s 501 was separate and distinct from the Minister's specific power to deport under s 201. This was the case even though:

- the exercise of either power would ordinarily result in the removal of a non-citizen from Australia; and
- there was an overlap between the powers in relation to the removal of a non-citizen for criminal activity.

You can read the full decision at

http://www.austlii.edu.au/au/cases/cth/high_ct/2006/50.html

- ***New Zealand v Moloney [2006] FCAFC 143***

New Zealand sought the extradition of the respondents, who were alleged to have committed sexual offences against young boys in the 1970s. The decision of a Magistrate to grant that extradition had been quashed by the Federal Court. The judge at first instance applied *Bannister v New Zealand* (1999) 86 FCR 417 and found that the court could not extradite the respondents unless satisfied that they would receive a fair trial in New Zealand. The judge concluded that they would not receive a fair trial, because of:

- the fact that New Zealand courts did not strictly give a *Longman* warning to juries in sexual offence trials involving a long passage of time since the alleged offence; and
- the differences between Australian and New Zealand law regarding similar fact evidence and trials involving multiple offences against different victims.

New Zealand successfully appealed to the Full Federal Court. The Full Court declined to overrule *Bannister* as urged by New Zealand but noted that *Bannister* involved particularly unusual facts that justified the court refusing New Zealand's extradition request on that occasion. In the present case, the Full Court held that the primary judge had incorrectly applied *Bannister*. Whilst it was correct to consider whether the respondents would receive a fair trial, the judge erred in concluding that the differences in practice and procedure between Australia and New Zealand (noted above) meant that the respondents would not receive a fair trial.

You can read this decision at: <http://www.austlii.edu.au/au/cases/cth/FCAFC/2006/143.html>

- ***MCT v McKinney & Ors [2006] NTCA 10.***

This case concerned the interpretation of s 23(1) of *Juvenile Justice Act* (NT). Section 23(1) provides a discretionary power for a court to suppress the publication of 'a report of or information relating to proceedings in, or the result of proceedings against a juvenile before the court'. MCT, a 15 year old boy who had pleaded guilty to charges of assault and theft, appealed against the refusal of the Chief Magistrate to suppress his name in relation to the 'less serious charges'.

In the Court of Appeal, Angel J held that s 23(1) is directed towards the publication of a report relating to what has happened in court proceedings against a juvenile, not the names of the parties of proceedings.

On appeal, the Full Court of the Court of Appeal (Martin CJ, Mildren and Thomas JJ) held that the *Juvenile Justice Act* (NT) does allow courts to make an order suppressing the identity of offenders in juvenile offenders. Their Honours also held that while s 23(1) did not provide any statutory guidance to the circumstances in which a suppression order should be made, the court was obliged to take account of all relevant factors, including:

the fact now almost universally acknowledged by international conventions, State legislatures and experts in child psychiatry, psychology and criminology, that the publication of a child offender's identity often serves no legitimate criminal justice objective, is usually psychologically harmful to the adolescents involved and acts negatively towards their rehabilitation.

The Full Court concluded that the proper exercise of the discretion under s 23(1) was to suppress the publication of MCT's name. The Full Court took into account the fact that MCT was very young, had no prior convictions, showed remorse, had a history of neglect and had positive plans for his rehabilitation. In light of the fact there was no evidence that MCT was still a danger to the community, the Court concluded that the best interests of the community lay in the prospects of MCT's rehabilitation and these prospects that could be adversely affected by the publication of his identity.

You can read the full decision at:

<http://www.nt.gov.au/ntsc/doc/judgements/2006/ntca/20061020ntca10.html>

- ***Regina v Khazaal [2006] NSWSC 1061***

Lawyers acting for a man accused of terrorism offences (Mr Khazaal) sought access to a police affidavit which formed the basis for granting a search warrant used to obtain evidence against Mr Khazaal. The trial judge, who apparently was not aware that the affidavit might contain confidential material, made an order allowing the applicants to inspect the affidavit in the Supreme Court registry.

The Commonwealth is seeking a permanent injunction to restrain the applicants from acting for Mr Khazaal on the basis that:

- the fact that applicants have viewed highly sensitive information creates a conflict between the applicants' duties to represent the interests of the accused and their obligations to a court; and
- the applicants' actions in accessing and examining the police affidavit revealed a 'high degree of impropriety and or lack of understanding of their obligations'.

The Commonwealth's application for a permanent injunction is supported by a number of confidential materials, including the police affidavit.

This decision concerns preliminary proceedings brought by the lawyers for Mr Khazaal ('the applicants'). The applicants submitted that access to the confidential materials should be granted to at least one of the applicants' legal representatives, on the condition that they undertake not to disclose the material to any person, including the applicant. In the alternative, the applicants submitted access to confidential material should be granted to a court appointed Special Counsel.

Justice Whealy refused the application for access on the basis of the overwhelming need to protect confidential and highly sensitive security material. While his Honour stated there was no suggestion that the legal representatives involved would violate their undertakings not to disclose the documents, 'the risk to national security flowing from inadvertent disclosure in area of the public forum was simply too high'.

His Honour held that in the circumstances it was not necessary for the court to appoint special counsel. In his Honour's view the 'real possibility of a threat to national security' outweighed the interests of the disclosing the materials 'not only to legal representatives but to special counsel as well'.

You can read the full decision at:

http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2006/1061.html

- ***Australian Broadcasting Corporation v O'Neill [2006] HCA 46***

The High Court held by majority (4:2) that an interlocutory injunction to restrain the ABC from broadcasting a documentary called 'The Fisherman' should not have been granted. The documentary imputed that Mr O'Neill, who is currently serving a life sentence for murdering a young boy, was also responsible for murdering other children.

Mr O'Neill successfully applied to the Supreme Court of Tasmania for interlocutory relief to prevent the ABC from broadcasting the documentary pending the hearing of an action for defamation. On appeal, the Full Court of the Supreme Court of Tasmania upheld Justice Crawford's decision that an injunction should be granted on the grounds that the publication was not in the public benefit.¹

In lifting the injunction, the majority of the High Court held that prior restraint of publication in defamation actions requires exceptional caution: *Bonnard v Perryman* [1891] 2 Ch 269. The majority held the judgments in favour of Mr O'Neil erred in their approach to the Court's discretionary power to grant an interlocutory injunction on the basis that:

- They failed to give sufficient weight to the value of free speech; and
- They failed to give sufficient weight to the fact that even if a defamation action was successful only nominal damages might be awarded.

The majority found that Justice Crawford and the Tasmanian Court of Appeal fell into error by holding it is not for public benefit for there to be 'trial by media'. Gleeson CJ and Crennan J stated such a conclusion wrongly characterised the criminal trial process as the only proper context for ventilating matters of criminal misbehaviour.

You can read the full decision at:

http://www.austlii.edu.au/au/cases/cth/high_ct/2006/46.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 HREOC's publication *Federal Discrimination Law* 2005. See: http://www.hreoc.gov.au/legal/fed_discrimination_law_05/.

- ***Hurst v State of Queensland (No. 2) [2002] FCAFC 151***

On 28 July 2006 the Full Federal Court found that the appellant, Tiahna Hurst, had been indirectly discriminated against by the Education Department when it refused to teach her with the assistance of an Auslan interpreter: see *Hurst v State of Queensland* [2006] FCAFC 100. The Full Court made a declaration to this effect but did not decide on the issue of substantive relief. The relief which the appellant had sought at first instance was an injunction.

In submissions to the Full Court, the appellant sought an injunction and general damages in the sum of \$20,000, or remittal to a single judge to make a determination for damages or compensation under s 46PO(4) of the HREOC Act.

The Full Court decline to grant the injunction or order general damages.

The Court characterised the injunction sought by the appellant as a quia timet ('because he fears') injunction, designed to 'prevent or restrain an apprehended or threatened wrong'. The Court refused the injunction for the following reasons:

¹ The ABC relied on a statutory defence provided by s15 of the *Defamation Act 1957* (Tas) that the documentary was true and of public benefit. It is noted that the *Defamation Act 2005* (Tas) the defence of justification is made out by proof of truth of defamatory imputations. Public benefit is no longer part of the defence.

1. There was insufficient proof that the respondent would discriminate against the appellant again.
2. Since the respondent had discriminated against the appellant in May 2002, the circumstances of both the appellant and respondent had changed considerably.
3. The injunction sought imposed significantly more obligations upon the respondent than the evidence before the primary judge would warrant. As the injunction sought relief beyond that which would rectify the alleged discrimination, the Full Court suggested that such orders are beyond the scope of s 46PO(4) of the HREOC Act.

The Court declined to award general damages as there had been no challenge to the decision of the primary judge that the appellant had not established any loss or damage, nor the primary judge's finding that if compensation had to be assessed it would be no more than nominal.

You can read the full decision:

<http://www.austlii.edu.au/au/cases/cth/FCAFC/2006/151.html>

- ***Douglas v State of Queensland (No.2) [2006] FCA 1288***

The Aboriginal applicants in this matter seek compensation for the underpayment of wages on Church-run missions from 1975 until the mid-1980s, which they claim constituted racial discrimination.

In this decision, the Federal Court ordered a permanent stay of significant aspects of the proceedings. The State of Queensland argued successfully that the passage of time had resulted in evidence not being available which resulted in an abuse of process, applying the principles set out in the High Court decision of *Batistatos v Road Traffic Authority of New South Wales* [2006] HCA 27. In particular, there was an absence of documentary records, some witnesses had died and others were unable, due to old age, to provide satisfactory evidence.

You can read the full decision:

http://www.austlii.edu.au/au/cases/cth/federal_ct/2006/1288.html

4. HREOC Interventions

- ***Inquest into the Death of Mulrunji on Palm Island***

Mulrunji died in a police cell on Palm Island on 19 November 2004. An inquest into the death was conducted by the Queensland Deputy State Coroner.

Mulrunji was arrested for disorderly behaviour as he walked along a street on Palm Island after having spoken words to a police officer and a Police Liaison Officer. Upon being removed from the police wagon at the police station, Mulrunji struck the arresting officer, Senior Sergeant Hurley, and a scuffle ensued which resulted in the two men falling to the floor of the police station.

The Deputy State Coroner found that Senior Sergeant Hurley hit Mulrunji while he was on the floor. This broke 4 of Mulrunji's ribs and caused his liver to rupture, the consequent severe bleeding resulting in his death.

HREOC intervened in the inquest to examine witnesses and make submissions concerning systemic human rights issues surrounding the arrest and detention of Mulrunji, including matters raised by the Royal Commission into Aboriginal Deaths in Custody.

The HREOC's final submissions included 40 suggested recommendations aimed at protecting human rights and preventing future deaths. The recommendations covered issues concerning

arrest and policing, diversion from custody, assessment and monitoring of health, supervision and monitoring of welfare in custody and the investigation of Mulrunji's death.

The Coroner adopted HREOC's 40 recommendations.

The submissions are available at:

<http://www.humanrights.gov.au/legal/intervention/mulrunji.html>.

You can read the **Coroner's decision at:**

<http://www.justice.qld.gov.au/courts/coroner/findings/mulrunji270906.doc>.

5. Upcoming Human Rights Events

- **What Price Security? Taking Stock of Australia's Anti-Terror Laws**

A panel of speakers including Andrew Lynch, George Williams, Frank Moorhouse and Julianne Schultz will discuss George Williams and Andrew Lynch's new book 'What Price Security'. The event will take place at Gleebooks, 49 Glebe Rd, Sydney at 7pm on 23 November 2006. To reserve your place contact Gleebooks on 9660 2333.

- **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

- **The Castan Centre Human Rights Year in Review Conference**

The *Human Rights 2006: Year in Review* conference run by the Castan Centre will be held on Friday 1 December 2006 at the CUB Malthouse from 9.15 am to 4.30 pm. The 2006 conference will hold a spotlight to many of the year's most important human rights issues including the World Water Crises; Corruption in South East Asia; Justice for Timor-Leste; Australia's approach to West Papua; Offshore processing of Asylum Seekers; Counter-terrorism laws; Religious Freedom and Religious Hatred; the Victorian Charter of Human Rights and Responsibilities; and Human Rights Education.

Full details can be found at -

<http://www.law.monash.edu.au/castancentre/events/conferences.html>.

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