

HUMAN RIGHTS LAW BULLETIN

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1. Human Rights Law Bulletin Seminar

Northern Territory (Emergency Response) Legislation
17th September 2007, 1:00-2:30pm

The HREOC Legal Section is pleased to present its next Human Rights Law Bulletin Seminar entitled 'Human rights and the Northern Territory National Emergency Response Legislation'. The Seminar will feature two distinguished speakers:

1. Ms Olga Havnen, University of New South Wales. Ms Havnen will discuss the potential land rights implications of the legislation; and
2. Dr Sarah Pritchard, NSW Barrister. Dr Pritchard will give a broad human rights assessment of the legislation.

The Seminar will be chaired by Mr Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner and Acting Race Discrimination Commissioner.

The Seminar will take place on **17th September 2007** 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

Entry is free but places are limited. Please RSVP to Associate@humanrights.gov.au.

2. Selected General Australian Law

***AB v Minister for Immigration and Citizenship* [2007] FCA 910 (21 June 2007)**

The former Minister for Immigration and Multicultural Affairs refused to grant the applicant's visa pursuant to her discretion under s 501(1) of the *Migration Act 1958* ('the Act'). Prior to the decision to refuse the visa, the Department indicated to the applicant that, in making her decision, the Minister would consider whether refusing the visa would 'constitute a breach of Australia's international obligations under the Refugee Convention, the Convention Against Torture (CAT) or the International Covenant on Civil and Political Rights (ICCPR)'.

Although the discretion conferred on the Minister by s 501 of the Act is unfettered, the applicant submitted that once the Minister determined that she would take into account Australia's treaty obligations in exercising her discretion, she was obliged to apply the relevant obligations in accordance with their terms. He argued that the Minister had misinterpreted Australia's obligations under the ICCPR and CAT and that this amounted to a jurisdictional error.

Tracey J held that although Australia's international treaty obligations are matters that decision-makers are entitled to have regard to when exercising the discretion under s 501 of the Act, in the absence of any legislative requirement they are not bound to do so. Accordingly, if a decision maker chooses to have regard to a treaty obligation, but in some way misunderstands the full extent or purport of that obligation, this will not constitute jurisdictional error.

A copy of the full decision is available at:

http://www.austlii.edu.au/au/cases/cth/federal_ct/2007/910.html

***Thomas v Mowbray* [2007] HCA 33 (2 August 2007)**

The plaintiff, Mr Joseph Thomas, challenged the constitutional validity of an interim control order made against him by Federal Magistrate Mowbray under Division 104 of the *Criminal Code 1995* (*Cth*).

Division 104 gives federal courts the power to make a control order imposing certain obligations, prohibitions and restrictions on a person for the purpose of protecting the public from a terrorist act. Such an order can only be made if the court is satisfied on the balance of probabilities that:

- making the order would substantially assist in preventing a terrorist act, or that the person has provided training to, or received training from, a listed terrorist organization; and
- each of the obligations, prohibitions or restrictions imposed by the order are reasonably necessary, appropriate and adapted for the purpose of protecting the public from a terrorist attack.

The questions agreed on by the parties for determination by the High Court were:

- Is Division 104 invalid because it confers on a federal court non-judicial power contrary to Chapter III of the Constitution?
- In so far as Division 104 confers judicial power on a federal court, does it authorise the exercise of that power in a manner contrary to Chapter III?
- Is Division 104 invalid because it is not supported by one or more express or implied heads of legislative power under the Constitution?

By a 5:2 majority the High Court upheld the constitutional validity of Div 104. The majority held:

- Division 104 does not confer non-judicial power on the federal court contrary to Chapter III. The power to restrict or interfere with a person's liberty on the basis of what a person might do in the future, rather than on the basis of judicial determination of what a person has done, is not a power which can only be exercised legislatively or administratively.

- Division 104 does not authorise the use of judicial power in a manner contrary to Chapter III. In particular, considering what is 'reasonably necessary' and 'reasonably appropriate and adapted' for the purpose of protecting the public is not inherently too vague for use in judicial decision-making.
- The defence power alone is sufficient to support Division 104.

You can read the full decision at: <http://www.austlii.edu.au/au/cases/cth/HCA/2007/33.html>

Trevorrow v State of South Australia (No 5) [2007] SASC 285 (1 August 2007)

The Supreme Court of South Australia found that the state of South Australia was liable for injury suffered by the plaintiff, an Aboriginal man, that resulted from removal from his family as a child without their knowledge or consent.

On 6 January 1958, the Aborigines Department, on behalf of the Aborigines Protection Board ('APB'), authorised the placement of the plaintiff – who was then 13 months old – in foster care, without his parents' knowledge or consent.

Despite repeated requests by the plaintiff's natural mother for his return, the plaintiff remained with his foster family for ten years. When he was eventually reunited with his natural family in 1967, he was a seriously disturbed child. Within approximately 14 months, the plaintiff was removed from his family and placed in a boys' home. He then spent the remainder of his adolescence in various institutions.

The plaintiff claimed to have suffered injury, loss and damage, attributable to his separation from his natural family and the resulting loss of Aboriginal culture, community, religion, spirituality and identity. The plaintiff claimed to have developed significant psychiatric disorders as a result.

Justice Gray found the Aborigines Department and the APB, were emanations and agents of the State and that the State was liable for the injury, loss and damage that the plaintiff suffered as a result of his removal.

His Honour held that the State was liable for:

- Misfeasance in public office – by removing the plaintiff from his family, without their knowledge or consent and in circumstances where it is reasonably foreseeable that such a removal would create risks for the child's health;
- Wrongful imprisonment – the State had no legal justification for removing the plaintiff and the removal was therefore *ultra vires*. The plaintiff was therefore subject to total deprivation of freedom of movement, without lawful justification;
- Breach of fiduciary duty – as the plaintiff's legal guardian, the State owed the plaintiff a duty to look after his best interests, including to inform him of the circumstances of his removal and to ensure he was given access to legal advice;
- Negligence – the State breached its duty of care to the plaintiff. It was reasonably foreseeable that the plaintiff's removal from his natural family, his placement with a foster family, the refusal to allow his natural mother to have contact with him and the manner in which he was returned to his natural family would cause him harm. The plaintiff's injuries and losses were a direct result of his removal.

His Honour awarded the plaintiff the sum of \$450,000 for his injuries and losses and the sum of \$75,000 in exemplary damages for his unlawful removal and detention (in relation to misfeasance in public office and false imprisonment).

A full copy of the decision is available at:

<http://www.austlii.edu.au/au/cases/sa/SASC/2007/285.html>

3. Developments in Australian Federal Discrimination Law

Comprehensive coverage of developments in Federal Discrimination Law can be found in the periodical supplements to HREOC's publication *Federal Discrimination Law 2005*. See: www.hreoc.gov.au/legal/fed_discrimination_law_05/.

Access for All Alliance v Hervey Bay City Council [2007] FCA 615 (2 May 2007)

Access for All Alliance (Hervey Bay ('AAA') brought a claim against the Hervey Bay City Council ('the Council') alleging that a number of bus stops did not comply with the *Disability Standards for Accessible Public Transport 2002* ('the Disability Standards'). The Council claimed that AAA lacked standing to bring the proceedings on the basis that the *Disability Discrimination Act 1992* ('DDA') did not create a right to commence proceedings for a breach of the Disability Standards. Furthermore, AAA did not have the fiat of the Attorney-General or a 'special interest' in the matter to ground a claim for standing under general law.

Justice Collier held that:

- the DDA, together with the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), create a statutory scheme which gives the right of a person 'aggrieved' by a breach of the DDA to commence proceedings. The person need not rely on general law principles of standing.
- As a body corporate, an incorporated association must establish that it, not only its members, is aggrieved by the alleged breach of the DDA.
- In this case, AAA had merely an intellectual or emotional interest in the subject matter of the proceedings which is not sufficient to make it a 'person aggrieved'. However, her Honour acknowledged that AAA's members may be 'persons aggrieved' in their individual capacity.

A full copy of the decision is available at:

http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal_ct/2007/615.html?query=Hervey%20Bay

Forest v Queensland Health [2007] FCA 936 (22 June 2007)

Mr Forest claimed that the respondent discriminated against him by refusing to provide him access to, and services at, Cairns Base Hospital and Smithfield Community Health Centre, while he was accompanied by one or both of his dogs. The applicant has a psychiatric disability and argued that he relies on his two dogs as assistance animals (within the meaning of s 9(1)(f) of the DDA) to alleviate his psychological difficulties.

In respect of both applications, the Federal Court, found that:

- The respondent discriminated against the applicant within the meaning of ss 6 (indirect discrimination) and 9(1)(f) (guide dogs/ assistance animals) of the *Disability Discrimination Act 1992* (Cth) ('DDA'); and
- The respondent's conduct was unlawful within the meaning of ss 23(1)(a), 23(1)(b) (access to premises); and 24(1)(a) and 24(1)(b) (goods, services and facilities) of the DDA.

In reaching her conclusions, Collier J accepted the submissions of the Disability Discrimination Commissioner (who appeared in the matter as *amicus curiae*) in relation to the meaning of an assistance animal under s 9 of the DDA. In doing so, she expressed her concern about the broad scope of this provision and its lack of clarity.

Collier J made the following orders:

1. No apology ordered.
2. Damages in the amount of \$5,000 and interest at 5% per annum ordered in respect of the incident at Cairns Base Hospital.

3. Damages in the amount of \$3,000 and interest at 5% per annum ordered in respect of the incident at Smithfield Community Health Centre.

A full copy of the Court's decisions is available at:

http://www.austlii.edu.au/au/cases/cth/federal_ct/2007/936.html and
http://www.austlii.edu.au/au/cases/cth/federal_ct/2007/1236.html

4. HREOC Legal Submissions

ALRC Inquiry into Legal Professional Privilege

The Australian Law Reform Commission is conducting an Inquiry into Legal Professional Privilege (LPP). In a written submission to the Inquiry, HREOC submitted that the recognition of LPP is important for the protection of the following human rights:

- the right to a fair hearing; and
- the right to defend oneself through legal assistance of one's own choosing in the determination of criminal charges.

In protecting these rights, HREOC submitted it was relevant to consider the following principles:

- need to protect confidentiality in all communications between a lawyer and their client;
- and the need to ensure effective access to legal services.

HREOC recommended that legislative abrogation of LPP should only occur in exceptional circumstances and to the extent necessary. HREOC submitted exceptional circumstances may arise where abrogation of LPP serves a higher public interest, prevents the commission of a crime or fraud, and is necessary as a matter of public emergency or national security. HREOC emphasised that care must be taken to ensure that any abrogation of LPP does not undermine the right to a fair trial.

You can read HREOC's full submission at:

http://www.humanrights.gov.au/legal/submissions/legal_professional_privilege.htm

Queensland Industrial Relations Commission's Inquiry into Pay Equity

HREOC made a submission to the Queensland Industrial Relations Commission. The S/Age Unit made a submission to the Queensland Industrial Relations Commission's (QIRC) Inquiry into Pay Equity on 20 June 2007.

The submission draws on recent work undertaken by HREOC in the area of pay equity and primarily addresses Commonwealth legislation that impacts on pay equity for Queenslanders. The submission gives a brief summary of Australia's human rights obligations on pay equity; an overview of HREOC's prior work in pay equity issues, particularly the findings of the recent paper, *It's About Time: Women, men, work and family*; and outlines HREOC's position on pay equity.

The submission recommends that the QIRC consider ways to implement the recommendations from HREOC's *It's About Time* final paper and track changes in pay equity in Queensland over time; and that the Queensland government develop its own data collection and system of monitoring of pay equity, including through the establishment of a pay equity unit.

Northern Territory National Emergency Response Legislation

On 10 August 2007, HREOC made written and oral submissions to the Senate Standing Committee on Legal and Constitutional Affairs. While HREOC welcomed action being taken to

address social and economic disadvantage in Indigenous communities and the aim of protecting children, it stressed that all measures should be consistent with the right to racial equality.

HREOC noted that it did not support the NTNER measures being exempt from the RDA and submitted that for them to qualify as 'special measures', effective consultation with Indigenous people was required.

HREOC recommended that a review mechanism be established to ensure proper monitoring and reporting and to avoid a range of potential unintended negative consequences arising from the measures.

A copy of HREOC's submission can be found at:

http://www.humanrights.gov.au/legal/submissions/2007/NTNER_Measures20070810.html

5. Recent Parliamentary Committee reports

The Senate Standing Committee on Legal and Constitutional Affairs – Native Title Amendment (Technical Amendments) Bill 2007

The Native Title Amendment (Technical Amendments) Bill 2007 ('the Bill') proposes a large number of technical and minor amendments to the Native Title Act 1993 ('NTA'), but in particular, it focuses on changes in the following areas:

- technical amendments to the NTA to change some of the existing processes and to add new processes for native title litigation and negotiation;
- measures to alter provisions relating to representative Aboriginal and Torres Strait Islander bodies, including the removal of some corporate governance obligations and changing the process for reviewing decisions of representative bodies;
- measures to improve the functioning of Prescribed Bodies Corporate ('PBC'), including the introduction of the option of charging third-parties fees for costs associated with negotiations; and
- changes to the NTA consequential to the operation of the Legislative Instruments Act 2003.

Most of the evidence received by the Committee expressed general support for the Bill. However, some concerns were raised in relation to the following issues:

- internal review of registration decisions;
- amendments relating to PBC's;
- defects in authorisation processes;
- determinations for part of an area;
- alternative state regimes.

Additional concerns were raised by Senators from the Australian Labor Party ('ALP'), Senator Andrew Bartlett and the Australian Greens relating to (amongst other things):

- amendments to the alternative state regimes – it was submitted that the amendments would operate so as to retrospectively validate actions done in contravention of the provisions of the Act;
- default PBC – it was submitted that the Federal Court only should decide the appropriate body to be the default PBC;
- membership of PBC's – the ALP submitted that it is not appropriate for non-Indigenous people to be members of a PBC.

The Committee made a number of recommendations to the Bill, subject to which, it recommended that the Senate pass the Bill.

A full copy of the report can be found at:

http://www.aph.gov.au/Senate/committee/legcon_ctte/native_title_tech/report/index.htm

Australian Citizenship Amendment (Citizenship Testing) Bill 2007

The *Australian Citizenship Amendment (Citizenship Testing) Bill 2007* empowers the Minister to introduce a 'citizenship test' for prospective Australian citizens. HREOC made a submission in relation to the Bill (discussed above).

The Legal and Constitutional Affairs Committee acknowledged that the Bill conferred an extremely wide discretion on the Minister in devising the citizenship test. The Committee also noted the support in the submissions for the test being subject to disallowance by Parliament. However, it accepted the Department's submission that this would be unduly cumbersome and impractical and could lead to confusion and uncertainty.

The Committee made the following main recommendations:

- The operation of the citizenship testing regime be reviewed three years after the Bill's commencement to gauge the regime's impact on citizenship application and conferral rates and on certain groups within society, particularly refugee and humanitarian entrants.
- The test questions be tabled in public, although not subject to disallowance.
- The Bill be amended to clarify that the test questions must be specifically related to the eligibility requirements of citizenship.
- Subject to the above recommendations, that the Bill be passed.

A copy of the Committee's report can be found at:

http://www.aph.gov.au/Senate/committee/legcon_ctte/citizenship_testing/report/index.htm

Northern Territory (National Emergency Response) Bill 2007

On 13 August 2007 the Senate Standing Committee on Legal and Constitutional Affairs reported on its inquiry into the Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response.

The majority of the Committee (comprised of Government Senators) recommended that the bills pass. The majority also made recommendations including that there be:

- continuous monitoring and annual reporting on the measures;
- a review of the operations of the measures after two years, resulting in a report to parliament;
- a culturally appropriate public information campaign conducted as soon as possible;
- close examination of the need for additional drug and alcohol rehabilitation services in the NT and additional funding support if necessary.

The Opposition Senators made additional comments and recommendations, while the Australian Democrats and the Australian Greens made dissenting reports.

The Committee's report is available at:

http://www.aph.gov.au/senate/committee/legcon_ctte/nt_emergency/report/index.htm

6. International Developments

Al Skeini and Others v Secretary of State for Defence [2007] UKHL 26

The applicants in this case were the families of six Iraqi civilians who were killed by members of the British Armed Forces in Basra between August and November 2003. The proceedings sought to challenge the refusal of the Secretary of State for Defence ('Secretary') to order an independent inquiry into the civilian deaths and his refusal to accept liability for their deaths. The applicants claimed that the UK authorities in Iraq had breached their obligations under the Human Rights Act.

The civilians were killed in different circumstances which ranged in nature from a woman who was allegedly killed inadvertently in a cross-fire to a male receptionist who (after having been seized from the Basra hotel in which he worked) was taken to a British military detention unit, held as a prisoner, brutally beaten and who later died of his injuries.

The claims of the first five appellants were dismissed. The sixth appellant's case (the claim brought in respect of the male receptionist's death) was remitted to the Divisional Court to be decided in the light of up to date evidence and amended pleadings. At paragraph 54, the Court stated:

The purpose of the 1998 Act is to provide remedies in our domestic law to those whose human rights are violated by a United Kingdom public authority. Making such remedies available for acts of a United Kingdom authority on the territory of another state would not be offensive to the sovereignty of the other state.

The decision seems to recognise that there are exceptional cases where, 'on a fair interpretation' of its provisions, legislation will apply extraterritorially.

Ultimately, however, the crucial issue in this case was not whether the Human Rights Act could operate extraterritorially, but whether there was any basis upon which the UK could assert its jurisdiction.

Based on their conclusion that the UK was not in effective control of Basra and its surrounds (for the purposes of the European Convention on Human Rights), the House of Lords concluded that the UK had no jurisdiction in five of the six applications. Jurisdiction was recognised in the case of the receptionist's death which occurred in a UK military detention unit.

A full copy of the decision can be found at:
<http://www.bailii.org/uk/cases/UKHL/2007/26.html>

***R v Hape* 2007 SCC 26**

Canadian police officers worked alongside the Turks and Caicos Police Force in an investigation where material was seized from the accused's office and admitted into evidence at trial. The accused sought to have this evidence excluded pursuant to s 24(2) of the *Canadian Charter of Rights and Freedoms* (the '*Charter*') on the basis that the evidence was obtained in violation of his right under s 8 to be secure against unreasonable search and seizure.

The key issue in the case was whether the *Charter* applied extra-territorially in relation to search and seizures conducted by Canadian officers. The Supreme Court unanimously dismissed the appeal but split on the issue of the extra-territorial application of the *Charter*.

The majority proposed a methodology for determining the instances in which the *Charter* applies to foreign investigations.

- The first stage is to determine whether the activity in question falls within the terms of s 32(1) – namely whether a Canadian state actor is involved, *and* the activity in question is a matter 'within the authority of' Parliament.
- The second stage is to determine whether the evidence which has been obtained through the foreign investigation ought to be excluded at trial on the basis of *Charter* provisions which govern trial processes in Canada.

It was therefore held that the *Charter* would generally not apply extraterritorially, although there may be rare exceptions – such as where the host state consents to the *Charter's* applicability. This decision was reached on the basis that the Canadian Parliament cannot *enforce* the Charter outside Canada.

The full judgment of this case may be found at
<http://www.canlii.org/en/ca/scc/doc/2007/2007scc26/2007scc26.html>

Minister for Justice, Equality and Law Reform v Brennan [2007] IESC 21

In this case a convicted felon who had absconded to Ireland challenged the constitutionality of his European arrest warrant to be extradited to England. He argued that the term of imprisonment in respect to escaping lawful custody imposed a mandatory minimum sentence without any discretion, and would therefore fail to take into account the particular circumstances of the case in order to ensure a proportionate sentence of imprisonment.

The Supreme Court of Ireland dismissed the appeal, holding that Arrest Warrant makes it clear that the offence of escaping from lawful custody is triable before a judge and jury and that the length of the sentence was at the discretion of the trial judge.

The judge noted in *obiter* comments that if a form of minimum sentence, without any discretion being left to the court, was contained in an extradition arrest warrant, the surrender of the appellant to the extraditing country would be contrary to his or her constitutional rights, in particular the right to due process. It was noted, however, that the mere fact that procedures and principles differ from those of Ireland does not necessarily result in the denial of the fundamental rights of the applicant.

The full judgement of this case may be found at <http://www.bailii.org/ie/cases/IESC/2007/S21.html>

7. Upcoming Human Rights Events

National Indigenous Legal Conference - Panel discussion on significance of the 1967 referendum

Date: September 14-15 2007

Location: Brisbane

Further Information: Kevin Smith (ph) 07 3226 8244 (email) enquiries@reconciliation.org.au

Global Gender Inequities and Women's Mental Health – Public Lecture

Date: September 11 2007

Time: 6-7pm

Location: Sunderland Lecture Theatre, Medical Building, The University of Melbourne, Parkville

Further Information: Janice Powell (ph) +61 3 8344 8058 (email) j.powell@unimelb.edu.au

This presentation will describe some global disparities between the sexes and how both sex and gender affect physical and mental health and wellbeing. The steps in developing, obtaining approval, and advocating for an International Consensus Statement on Women's Mental Health will be described. Finally it will include a brief overview of a funded international study which builds local capacity and monitors women's health in low, middle and upper income countries.

Professor Donna Stewart is the Lillian Love Chair in Women's Health at the University Health Network and the University of Toronto.

Anti-Poverty Week

Date: 14-20 October 2007

Further Information: <http://www.antipovertyweek.org.au/events.php>

Various events are being held nationwide throughout the week – see the website above for further details.

Dementia Awareness Week

Date: 16 - 21 September 2007

Further Information: Sue Benson on 8875 4640 or sbenson@alznsw.asn.au

Dementia Awareness Week will be launched in Newcastle on Monday 17 September with a one day symposium exploring the latest research and developments in the benefits of the arts for people living with dementia and their carers. The symposium will be held at the Newcastle Region

Art Gallery and will feature a keynote address by Professor Ken Rockwood from Dalhousie University in Canada.

Launch of Antonio Buti's biography on former HREOC President Sir Ronald Wilson

Date: September 21 2007

Time: 6pm for 6:30 start

Location: Gleebooks 49 Glebe Pt Rd, Glebe.

Further Information: 02 9660 2333

Sir Anthony Mason will launch Buti's biography of the past HREOC President and former High Court Justice.

Australia and 'the long war'- a counter-terrorism progress report

Date: September 13 2007.

Time: 6-7pm

Location: Exhibition space, Level 1, Building H, Caulfield campus, Monash University

Further Information: <http://www.monash.edu.au/research/researchmonth/events/20070906-long-war-lecture.html>

This lecture will assess Australia's performance in combating terrorism and explore possible scenarios for the future. Is there a risk that Australia will be drawn into the cycles of terrorist violence currently confined to areas far from its shores? What is the likelihood that terrorist violence might occur within our own community? These and other issues will be addressed in this important public forum.

Presented by Associate Professor David Wright-Neville, Global Terrorism Research Centre, Monash University

12th International Metropolis Conference

Date: 8 - 12 October 2007

For more information: www.metropolis2007.org

This coming October, the prestigious Metropolis conference will be held for the first time outside the Northern hemisphere - and Melbourne has won the right to host it.

Metropolis International 2007 is a globally significant research-based conference that focuses on immigration and settlement issues. It will be an event of major importance for Australia and places Melbourne in good company, with previous host cities including Milan, Copenhagen, Washington, Vancouver, Rotterdam, Oslo, Vienna, Geneva and Toronto. This year, the theme of the week-long event will be Migration, Economic Growth and Social Cohesion. Metropolis 2007 will feature Australian and global leaders and officials, renowned academics and key stakeholders who will gather to examine these important themes of settlement and immigration. Of special interest will be the launch of a major set of studies on social cohesion, and newly released research that compares policies by different countries to encourage migrant settlement in regional areas.

The 12th International Metropolis Conference 2007 is organised by the Monash Institute for the Study of Global Movements and the Australian Multicultural Foundation, in collaboration with the Commonwealth and Victorian Governments, the City of Melbourne and the private sector. Registrations are now open for Metropolis 2007.
