HUMAN RIGHTS LAW BULLETIN

Inside this issue **December 2007 – March 2008**

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1. Human Rights Law Seminar

Homelessness and Human Rights
7 April, 2008, 12.30-2.00pm.

The Human Rights and Equal Opportunity Commission (HREOC) Legal Section is pleased to present its next Human Rights Law Seminar on 'Homelessness and Human Rights'. The Seminar will feature three distinguished speakers:

- Cassandra Goldie, Director of the Sex Discrimination Unit at HREOC: Cassandra has recently completed a PhD on this issue and will examine how to implement a rights-based approach to housing and homelessness.
- Robin Banks, Executive Director of the Public Interest Advocacy Centre (PIAC): Robin will discuss the advocacy work that PIAC has been involved with in this area.
- Sue Cripps from Homelessness NSW: Sue will speak about the legal and policy reforms that are needed to deal effectively with homelessness.

The Seminar will be chaired by the Human Rights Commissioner Graeme Innes.

The Seminar will take place on Monday **April 7** from 12.30-2.00pm 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

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2. Selected General Australian Law

Gray v DPP [2008] VSC 4 (16 January 2008)

In this case the Victorian Supreme Court considered the relevance of ss 21(5)(c) and ss 25(2)(c) of the Victorian *Charter of Human Rights and Responsibilities* ('the Charter') to the question of bail.

Mr Gray was charged with a number of indictable offences, one of which was aggravated burglary. Section 4(4)(c) of the *Bail Act 1977* (Vic) provides that where a person is charged with aggravated burglary the court is to refuse bail unless the person can satisfy the court that his continuation in custody is not justified. Mr Gray argued that one of the reasons that his continuation in custody was not justified was the delay likely to be experienced before the matter was finalised. Bongiorno J concluded that it was uncertain whether the applicant would serve more time in gaol on remand than he would be required to serve under any sentence imposed by the County Court if he were not granted bail.

His Honour then considered the relevance of ss 21(5)(c) and 25(2)(c) of the Charter. Section 25(1)(c) provides that a person who is arrested or detained on a criminal charge that cannot be promptly brought before a court or brought to trial without unreasonable delay must be released. Section 25(2)(c) provides that a person charged with a criminal offence has a right to be tried without unreasonable delay. In this regard his Honour held (at [12]):

> If the Charter in fact guarantees a timely trial, the inability of the Crown to provide that trial as required by the Charter must have an effect on the question of bail…The only remedy the Court can provide an accused for a failure by the Crown to meet its Charter obligations in this regard (or to ensure that it does not breach those obligations so as to prejudice the applicant), is to release him on bail - at least the only remedy short of a permanent stay of proceedings.

Bongiorno J concluded that the applicant had established that his continued incarceration was not justified and ordered that he be released on bail.

You can read the full decision at:
http://www.austlii.edu.au/au/cases/vic/VSC/2008/4.html

Ragg v Magistrates' Court of Victoria & Corcoris [2008] VSC 1 (24 January 2008)

Mr Corcoris, who had been charged with a number of tax evasion offences, summonsed Mr Ragg, an Australian Federal Police Officer, to produce certain specified documents to assist with his defence at committal. Mr Ragg sought orders from a magistrate striking out most of the paragraphs of the summonses on the grounds that they were irrelevant to Mr Corcoris's defence and therefore an abuse of process. The orders were refused. Mr Ragg then sought judicial review of that decision in the Supreme Court.

Bell J held that the magistrate had not erred in refusing to strike out the challenged paragraphs. In reaching his decision, his Honour relied heavily on international human rights principles relating to the right to a fair trial as informing the scope and application of the court's power to strike out summonses to produce.

Bell J held that the principle governing the court's power is that:

> [A]n accused person is entitled to seek production of such documents as are necessary for the conduct of a fair trial between the prosecution and the defence… [T]he accused must identify expressly and with precision the forensic purpose for which access to the documents is sought. A legitimate purpose is demonstrated where… there is a reasonable possibility the documents will materially assist the defence.

Bell J stated that this principle gives effect to the underlying fundamental duty of the Court to ensure a fair trial and is consistent with the human rights of an accused person to equality before the law and a fair hearing, as specified in Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

You can read the full decision at: http://www.austlii.edu.au/au/cases/vic/VSC/2008/1.html

***Minister for Immigration & Citizenship v Haneef* [2007] FCAFC 203 (21 December 2007)**

This was an appeal by the Minister of Immigration and Citizenship against the decision of Spender J to set aside the Minister's decision to cancel Dr Haneef's visa on character grounds.

On 2 July 2007 Dr Haneef, who was working as a doctor in Queensland, was arrested by the Australian Federal Police following the attempted terrorist bombings in London on 29 June 2007. After being detained and questioned on 14 July, Dr Haneef was charged with having intentionally provided resources (a SIM card) to a terrorist organisation which included his second cousins, Dr Sabeel Ahmed and Dr Kafeel Ahmed.

On 16 July 2007, Dr Haneef was granted bail by a Queensland magistrate. Immediately after bail was granted, the Minister cancelled his visa pursuant to s 501(3) of the *Migration Act 1956* (Cth) on the grounds that Dr Haneef did not pass the 'character test' because he had had or had 'had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct', namely the Ahmeds. On 27 July 2007, the charge against Dr Haneef was dismissed.

The Full Federal Court unanimously upheld Justice Spender's decision that the Minister had fallen into jurisdictional error by misinterpreting the character test and applying a test that was too wide and therefore incorrect.

Applying the common law principle that where constructional choices are available statutory provisions should not be construed to encroach on fundamental rights, the Full Federal Court found that s 501 should not be construed as authorising the Minister to 'reasonably suspect that [a person] does not pass the character test' merely on the basis of an innocent association with persons whom the Minister reasonably suspects have been or are involved in criminal conduct.

The Full Court concluded that the 'association' referred to in s 501(6)(b) of the *Migration Act 1956* (Cth) must involve some sympathy with, or support for, or involvement in, the criminal conduct of the person, group or organisation with whom the visa holder is said to have associated. The association must have *some* bearing upon the person's character.

The Court therefore dismissed the Minister's appeal with costs.

You can read the full case at:
http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCAFC/2007/203.html

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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: http://www.hreoc.gov.au/legal/FDL/fed_discrimination_law_05/index.html

***Iliff v Sterling Commerce (Australia) Pty Ltd* [2007] FMCA 1960 (3 December 2007)**

The applicant, Ms Iliff, was employed by the respondent for two years prior to becoming pregnant in April 2004. Following discussions with her manager, it was agreed that Ms Iliff would return to

work on a casual basis before resuming her full time duties, subject to changing needs of the business and potential restructuring.

Upon attempting to return to work, Ms Iliff was informed that her position no longer existed and that she was to be made redundant. She was advised that changes had occurred within the structure of the respondent's business and that the employee who had replaced her in her absence, Ms Matthews, was better qualified for the new tasks these changes entailed.

Burchardt FM concluded that if Ms Iliff had not gone on maternity leave it was *more than probable* that she would have continued in her employment, notwithstanding the various changes that took place in relation to the conduct of the business. His Honour went on to state, however, that whilst it was clear that Ms Iliff would not have been dismissed if she had not taken maternity leave, this did not necessarily entail that the *reason* for her dismissal was the fact that she was on maternity leave. Applying *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186, the comparator against whom Ms Iliff's treatment should be compared was a person who went on unpaid leave in December 2004 with an enforceable understanding that they were entitled to return to work following the end of that leave in 2005.

Despite taking an unfavourable view of the manner in which the respondent company dealt with Ms Iliff, Burchardt FM held that the *real reason* why Ms Iliff was not permitted to return to work was because management had formed the view that Ms Matthews was a better employee for the job. Accordingly, this element of the sex discrimination claim failed.

Burchardt FM concluded, however, that the respondent had discriminated against Ms Iliff in requiring her to sign a release to be paid redundancy payments as such a requirement would not have been imposed had she not been on maternity leave. The respondent was ordered to pay the amount withheld.

His Honour further held that the respondent had breached the return-to-work provisions contained in the *Workplace Relations Act 1996* (Cth) and imposed the maximum penalty available under the legislation – $33, 000.

You can read the full case at:
http://www.austlii.edu.au/au/cases/cth/FMCA/2007/1960.html

***Rainsford v State of Victoria* [2008] FCAFC 31 (11 March 2008)**

This was an appeal against the decision of Sundberg J. Mr Rainsford, who had a back injury, claimed that he indirectly discriminated against on the grounds of his disability in the provision of prison transport and accommodation in breach of s 24(1)(c) of the *Disability Discrimination Act 1992* (Cth). Mr Rainsford alleged he was required to comply with:

- an unreasonable requirement or condition that he be transported without facilities to protect his back; and
- an unreasonable requirement or condition that he be confined in a cell without exercise amenities to protect his back from pain.

The Full Court agreed with Sundberg J that no requirement or condition was imposed on the provision of accommodation and transport with which Mr Rainsford could not reasonably comply. The Court found:

- the relevant requirement imposed for prison transport was that any prisoner who was medically unfit for regular transportation must obtain a medical certificate before alternative arrangements would be made; and
- the relevant requirement imposed in the provision of accommodation was that that Mr Rainsford take steps to demonstrate that he was medically unfit for his cell.

The Court held both of these requirements were reasonable. Therefore the Respondent's conduct did not fall within the definition of indirect discrimination in s 6 of the DDA.

In light of this finding, the Full Court found it was unnecessary to decide whether Sundberg J erred in finding the provision of transport and accommodation in a prison was not a 'service' for the purposes of s 24 of the DDA. However the Court noted that while the issue was not argued in depth, there was 'some strength in the view that the provision of transport and accommodation, even in a prison, may amount to a service or facility'.

You can read the full case at: http://www.austlii.edu.au/au/cases/cth/FCAFC/2008/31.html

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4. Recent HREOC Reports

Report of a Complaint by Mr Frank Ottaviano against the South Australia Police **[2008] HREOC Report No 38**

Mr Ottaviano brought a complaint against South Australia Police (SA Police) for discrimination in employment on the basis of his criminal record. Mr Ottaviano was convicted in 1991 for receiving stolen goods and sentenced to perform community service with SA Police. He was then employed by SA Police as a groundsperson until around 2001 when his position was made redundant and he was retrained as a security guard within SA Police. However, when formally offered that position a criminal record check was performed which showed up his original conviction and he was refused the position on that basis.

The President accepted SA Police's argument that a security guard required a high level of integrity and honesty. However, he concluded that Mr Ottaviano had amply demonstrated that he possessed those qualities, notwithstanding his criminal conviction almost a decade prior. The President noted that Mr Ottaviano's criminal record was for an isolated conviction only, with no custodial sentence imposed. Mr Ottaviano had also produced glowing references from his superiors within SA Police for his high quality work and level of honesty shown over the previous decade.

You can read the full report at:
http://www.humanrights.gov.au/legal/HREOCA_reports/hrc_report_38.pdf

Report of Complaint by Mr Huong Nguyen and Mr Austin Okoye against the Commonwealth of Australia and GSL (Australia) Pty Ltd **[2008] HREOC Report No 39**

The two complainants were amongst five immigration detainees transferred from Maribyrnong Immigration Centre to Baxter Immigration Detention Facility on 17 September 2004. The President of HREOC found that the respondents had breached Articles 7 and 10(1) of the *International Covenant on Civil and Political Rights* (ICCPR) by subjecting the detainees to degrading treatment and a lack of respect for human dignity during the first seven hour leg of that transfer.

The President's findings were based, firstly, on the conditions of the van in which the detainees were conveyed. The detainees were kept in small, cramped, overheated and generally dark steel compartments, with no toilet facilities. Secondly, the President's findings were based on the manner in which the journey was conducted by the officers involved. In particular, the detainees were given either little or no food or fluids and the drivers of the van did not take any breaks during the seven hour journey despite the CCTV cameras providing repeated and obvious indicators that the detainees were distressed and urinating in their compartments, as well as banging on the walls and calling out.

The President's recommendations included that the respondents pay $15,000 in compensation to each of the respondents, as well as an additional $5,000 to Mr Okoyoe based on a separate finding that he suffered the indignity of drinking his own urine to relieve his excessive thirst. The President also recommended payment of an additional $5,000 to Mr Nguyen. This was on account of

separate findings that the respondents breached Article 10(1) of the ICCPR in relation to his forcible removal from his cell to the van prior to the journey, and Articles 17(1) and 23(1) in relation to the respondent's arbitrary interference with his family life in the transferring him to Baxter without due regard to his family ties in Melbourne.

You can read the full report at:
http://www.humanrights.gov.au/legal/HREOCA_reports/hrc_report_39.pdf

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5. Recent HREOC Submissions

***Submission made by HREOC to the NSW Standing Committee inquiry into the prohibition on the publication of the names of children involved in criminal proceedings* (7 December 2007):**

In its submission to the NSW Standing Committee on Law and Justice inquiry into the prohibition on the publication of the names of children involved in criminal proceedings, HREOC affirmed that Australia's human rights obligations clearly require that the names of juveniles involved in criminal proceedings not be published. HREOC further recommended to the Committee:

i. that the current prohibition on the publication of the names of juveniles involved in criminal proceedings remain; and
ii. that the current exemptions to the general prohibition on the publication or broadcasting of a young person's name should only occur with the consent of a court after it has made the 'best interests' of the child a primary consideration.

HREOC noted that the effect of the community stigma created by publication of a juvenile's name is counterproductive to the best interests of the child, diminishes a young person's sense of dignity and worth and is contrary to the principle of rehabilitation.

You can read the full submission at:
http://www.hreoc.gov.au/legal/submissions/2007/names_of_children_involved_in_criminal_proceedings.html

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6. International Developments

***Dybeku v Albania* [2007] ECHR 41153/06 (18 December 2007)**

The applicant, Mr Dybeku is serving a life sentence in Albania. He suffers from a worsening condition of chronic paranoid schizophrenia. Mr Dybeku alleged that the conditions of his incarceration and the level of medical treatment he received were inadequate in view of his mental health. This, he claimed, amounted to 'inhuman or degrading treatment or punishment', contrary to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).

The Court reiterated that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The Court also observed that

> although Article 3 of the Convention cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance (at [41]).

The Court held that the lack of resources for upgrading prison facilities did not excuse Albanian authorities from providing medical care sufficient to ensure compliance with the Convention.

The Court concluded that the nature, severity and duration of Mr Dybeku's ill-treatment and the cumulative effects of these factors on his already poor health were sufficient to render his treatment inhuman and ordered that the State pay Mr Dybeku €5000 in non-pecuniary damages.

You can read the full case at:
http://www.ius-software.si/EUII/EUCHR/dokumenti/2007/12/CASE_OF_DYBEKU_v._ALBANIA_18_12_2007.html

***E.B. v France* [2008] ECHR 43546/02 (22 January 2008)**

E.B. was a French national living in a stable homosexual relationship. Her applications for authorisation to adopt a child were repeatedly refused by French administrative and judicial bodies. The official reasons for refusing her application were that (a) any potential adopted child would lack a paternal referent; and (b) that E.B's partner had an ambivalent attitude toward the adoption and would thus provide a destabilising familial dynamic in which to raise the child. However, E.B. alleged that her application was refused on the basis of her sexual orientation. This, she claimed, gave rise to a breach of Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'). Article 8 guarantees the right to respect for private and family life, while Article 14 provides that the enjoyment of such rights must be secured without discrimination on any grounds.

The Court found that French domestic law widened the scope of the right to respect for private and family life to include the right of a single person to apply for adoption. Thus, the French authorities were obligated to ensure that E.B's enjoyment of this right was not hindered by discrimination on the basis of her sexual orientation.

The Court found that standing alone the ambivalence of E.B's partner would have provided a proper basis for denying adoption authorisation. However, the decision was tainted by other improper considerations. In particular, the Court commented that the need for a paternal referent for the adoptive child was an inappropriate consideration in that it rendered the French legislative provision for single persons to apply for adoption authorisations somewhat illusory. Furthermore, contrary to the Government's assertions, the Court found that E.B's sexual orientation was at least implicitly at the centre of deliberations at every stage of the relevant administrative and judicial proceedings. This amounted to unjustifiable discrimination and a contravention of the Convention. Non-pecuniary damages and legal costs were ordered in E.B's favour.

You can read the full case at:
http://www.asil.org/pdfs/ilib080125_1.pdf

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7. Upcoming Human Rights Events

The Apology to the Stolen Generation: Where to now? A public seminar on practical reconciliation.
Date: 2 April 2008
Time: 5.30pm
Location: Assembly Hall, University of Sydney Law School, Phillip St
Contact: Louise Klamka, louiseklamka@gmail.com

Lawyers as defenders of Human Rights – A Dialogue with Hina Jilani
The LIV, in partnership with the University of Melbourne, is hosting an event with Hina Jilani, UN Special Representative on Human Rights Defenders, and Brian Walters SC, former President of Liberty Victoria.
Date: 3 April 2008
Time: 1:00-2:00pm
Location: Law Institute of Victoria, 470 Bourke St Melbourne
Cost: $10 for Law Institute of Victoria members, $20 for non-members (sandwich lunch included)

Contact: Lucy Rosza (03) 9607 9504
RSVP: by Tuesday 1 April at http://www.liv.asn.au/events/calendar/HRDefenders08.pdf

Human Rights Law Resource Centre 2008 Human Rights Law Diner with Gay McDougall, UN Independent Expert on Minority Issues and Tom Calma, Social Justice Commissioner
Date: 4 April
Time: 7:00 for 7:30pm start
Location: Owen Dixon Chambers East, Level 1, 205 William Street, Melbourne
Cost: $90 / $50 for community organisations (Includes 3 course meal and drinks at bar prices)
RSVP: by March 20 at
http://www.hrlrc.org.au/html/s02_article/article_view.asp?id=271&nav_cat_id=140&nav_top_id=60

The Fight against Racism and for the Rights of Minorities in the 21st Century - Gay McDougall, UN Independent Expert on Minority Rights & Distinguished Scholar, Washington College of Law
Date: 8 April 2008
Time: 5.30-7:00pm
Location: HREOC Offices, Level 8, Piccadilly Tower, 133 Castlereagh St, Sydney
RSVP: by 5pm Tuesday 1 April 2008 to Li Zhou at lizhou@humanrights.gov.au or 02 9284 9696.

A Charter of Rights or a Charter of Wrongs? NSW Attorney General and Minister for Justice, The Hon. John Hatzistergos MLC
Date: 10 April 2008
Time: 5.30 for 6.00pm
Venue: NSW State Parliament House Theatrette, Macquarie Street, Sydney
Cost: $10 or $5 for students
RSVP: from 28 March at The Sydney Institute on 9252 3366 or mail@thesydneyinstitute.com.au

The United Nations Human Rights Council – Chris Sidoti, Immediate Past Director, International Federation for Human Rights Service, Geneva
Date: 22 April 2008
Time: 5.30-6.45pm
Location: Minter Ellison Room, Level 13, University of Sydney Law School
Contact: Sydney Centre for International Law at law.scil@usyd.edu.au

Disability Discrimination Law (for members of the public) – Disability Discrimination Legal Service
Date: 15 May 2008
Time: 12:00-1:15pm
Location: Bendigo (exact location TBA)
Contact: Steve Womersley (03) 5444 4364,

The UN Declaration on Indigenous People - Megan Davis, Director, Indigenous Law Centre, UNSW
Date: 4 June 2008
Time: 5.30-6.45pm
Location: Minter Ellison Room, Level 13, University of Sydney Law School
Contact: Sydney Centre for International Law at law.scil@usyd.edu.au

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