Legal Bulletin

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INSIDE THIS ISSUE:

1. Introduction and forthcoming seminar details

Welcome to the November 2003 edition of the Legal Bulletin, covering developments in domestic and international human rights law during the period 31 July 2003 to 30 October 2003.

Most readers will be aware that the HREOC Legal Section is now conducting seminars in connection with the publication of each new edition of the Bulletin. Those seminars will focus upon one or more developments in domestic or international human rights law discussed in each new edition.

The next seminar will be held on Monday 8 December 2003, from 5pm – 6pm in the Hearing Room, Picadilly Tower, 133 Castlereagh St. Sydney. That seminar will be given by Michelle Hannon, pro-bono solicitor at Gilbert and Tobin, who recently acted in a complaint to the United Nations Human Rights Committee (*Young v Australia*). That complaint was made pursuant to the First Optional Protocol to the *International Covenant on Civil and Political Rights*. The Committee's views in that matter are discussed in section 3.1. Michelle's talk will deal with that decision.

In other interesting developments:

- the High Court handed down its decision in *Purvis on behalf of Daniel Hoggan v State of NSW (Department of Education and Training) & HREOC* , which is a significant decision regarding the interpretation and application of the *Disability Discrimination Act 1992* (Cth) (see section 4);
- the government of the Australian Capital Territory has announced that it will introduce a Human Rights Bill (see section 2.2); and
- the Human Rights Committee adopted views finding Australia had violated various articles of the *International Covenant on Civil and Political Rights* in *Baban v Australia*, *Cabal and Pasini v Australia* and *Bahtiyari v Australia* (see section 3.1).

2. Selected general Australian jurisprudential / legislative developments relevant to human rights

2.1 Jurisprudence

B and B and Minister for Immigration and Multicultural and Indigenous Affairs [2003] FamCA 621

This decision of the Full Court of the Family Court involved an appeal from a decision by Strickland J, in which his Honour had held that the release of five siblings from immigration detention was not necessarily in the children's best interests.

Strickland J's decision concerned applications filed by the five children and their father seeking interim orders that the children be released from detention and also allowed contact with their parents. These applications were filed after the Full Family Court's decision in *B and B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604, in which the majority of a differently constituted Full Family Court (comprised of Nicholson CJ and O'Ryan J, Ellis J dissenting) held that the Court did have the power to order the release of children from unlawful detention. Our last legal bulletin included a summary of that decision. An appeal from that decision has recently been heard by the High Court (on 30 September and 1 October 2003 – the High Court reserved its decision).

In the present matter, the Full Family Court (Kay, Coleman and Collier JJ) overruled Strickland J's decision and ordered that the Minister release the children immediately. Their release was ordered on an interlocutory basis, pending a final hearing. At the time of the judgment, the five children were living in detention with their father, while their mother was in hostel accommodation in Adelaide for reasons related to her health.

The court found that Strickland J's application of the 'best interests' test from *Cowling and Cowling* (1998) FLC 92-801, which sets out principles upon which courts should base their decision-making in cases involving interim orders for children's living arrangements, was incorrect. One of those principles involves recognising that children's best interests are usually best met by ensuring stability in their lives, and in maintaining the status quo when they are well settled in their living environment.

Looking at the factual findings of the trial judge, including expert evidence from psychologists and

from the children themselves, the Full Court held that the children could not be said to be well settled in the detention environment. Thus, there was no strong argument for the preservation of the status quo.

The Full Court found that Strickland J had incorrectly focused only upon the possible harms that separation from their parents upon release might cause to the children, instead of weighing this up against the very real harm currently suffered by the children in detention. The Full Court further held that his Honour had failed to give any weight to the fact that he had found the children's detention to be *prima facie* unlawful.

The court preferred this 'best interests' approach to the one advocated by the father's representation, which urged that once a *prima facie* finding of unlawful detention was made, the court would have no option but to release the children.

HR and DR and The Minister for Immigration & Multicultural & Indigenous Affairs [2003] FamCA 616

This matter involved a family in immigration detention seeking interim orders that the Minister be restrained from keeping the family in the detention centre facility in which they were then detained and that he instead accommodate them, for the purposes of immigration detention, in the private premises of a member of the community, or in such other location as the court might recommend. The orders would have operated until the final hearing of the proceedings (in which essentially very similar orders are being sought). The applicants also sought orders that, while they remained in immigration detention, the Minister provide them with medical and social services as recommended by their medical advisers and various State government departments, such as the Department of Family and Youth Services. The Minister opposed these applications and the Child Representative supported them.

The principal legal issue before the Court was whether the court had the power to make the orders sought by the applicants. The Court identified two main questions which needed to be answered in order to address this issue. The first question was whether s 474 of the *Migration Act* (the privative clause), which provides that certain Ministerial decisions are final and unreviewable, would prevent the Court from making the orders sought by the applicants. The second question was whether the Court's power extended beyond making orders that deal with children, and could encompass making orders about adult family members as well.

In respect of the first issue, his Honour held that the most likely interpretation of the Full Court's statements on jurisdiction in *B and B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604 was that the Family Court can make orders relating to the welfare of children in detention to the extent that those orders do not conflict with s 474. In such cases, he held, the operative question for the court will then be to determine whether the facts suggest that the case involves a class of decision-making to which s 474 does not apply.

In the present matter, Chisholm J held that the applicants were unable to show that their case for review fell within any of the classes of decisions to which s 474 does not apply. These limitations to s 474 were discussed by the High Court in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24.

In relation to the issue of whether the courts could make orders for adult family members as well as children, his Honour held that the court did not have the capacity under s 67ZC of the *Family Law Act* to make orders for the release of adult members of a child's family. His Honour had concluded that that the court's welfare jurisdiction, whilst broad, would not permit the court to release adult family members from detention on the grounds that it was in the child's best interests to have them released. His Honour drew a comparison with a court relying upon its welfare jurisdiction to release a child's parent from prison, saying that such action would 'clearly fall outside the Court's power'.

Despite finding that the court lacked the jurisdiction to make the orders for release, Chisholm J noted in *HR and DR* that it was 'within the Minister's legal powers to arrange for this.' His Honour asked that the Minister 'give careful and compassionate consideration to the urgent needs of the family.'(at [234])

AI and AA and The Minister For Immigration & Multicultural & Indigenous Affairs [2003] FamCA 943

As in *HR and DR*, this matter involved a family in immigration detention seeking interim orders from the court that would release family members from the detention centre facility in which they were being detained while further legal appeals progressed through the courts. There was a strong overlap between relevant factual issues and legal issues in the two cases.
The applicants sought the following orders (similar to those sought in *HR and DR*):

- that the Minister be restrained from keeping the family in the Detention Centre facility in which they were then detained and that he instead accommodate them, for the purposes of immigration detention, in the private premises of a member of the community (or such other location as the court might recommend); and
- that, while they remained in immigration detention, the Minister provide the family with medical and social services as recommended by their medical advisers and various government departments, such as the Department of Family and Youth services and the Child and Adolescent Mental Health Service.

The applicants further submitted that, if the court were to find it did not have the power to make orders in respect of the adult family members, then it should proceed to make orders in similar terms relating to the children alone. As in *HR and DR*, the minister opposed these applications and the Child Representative supported them.

The principal legal issue before the court was whether the court had the power to make the orders sought by the applicants. Chisholm J referred to his decision in *HR and DR and The Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FamCA 616 in noting that he had already ruled that the court would not have the power to make the orders sought by the applicants *unless* the detention is arguably illegal. This was because of the limits imposed by s 474 of the *Migration Act* (the privative clause).

Accordingly, the first issue before the court was the lawfulness of the detention. The applicants in this matter argued that their detention was indefinite and therefore illegal. Specifically, they submitted that 'the immigration detention of children is indefinite and illegal unless the children have the capacity to bring it to an end,' and they sought to rely on *B and B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604 in support of this proposition.

Chisholm J held that the statement upon which the applicants sought to rely was not *ratio decidendi* and therefore not binding upon him. Further, he found it unlikely that the Full Familiy Court had intended to assert the proposition as formulated by the applicants. To express the principle in that way, he reasoned, would have required the court to find that the detention of the children had terminated in law the parental responsibility of their parents. This was a result that he thought it was unlikely the court had contemplated. Instead, he held that it was more likely that the position of a child's parents was one factor relevant to assessing whether the detention of that child is indefinite in a legal sense.

Further, Chisholm J held that the detention was not illegal or indefinite in any other regard, as it will cease when the legal appeals related to the applicants' status cease. In this respect, the court agreed with the respondents' submission that *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 197 ALR 241 should be distinguished.

Having determined the detention to be lawful, his Honour considered the effect of s 474 of the *Migration Act* (the privative clause). In respect of the privative clause, the applicants submitted that the administrative decision which led to their being placed in the detention facility was not a 'valid decision' and therefore could not be afforded protection from judicial scrutiny under s 474. In arguing that the decision was not 'valid', the applicants had sought to rely upon *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598. Chisholm J, however, distinguished the current matters from that early case because of the very different facts involved.

Chisholm J further held that the applicants were unable to show that their case for review fell within any of the classes of decisions to which s 474 does not apply. His Honour found that the bar imposed by s 474 extended to the order regarding medical treatment as well as to the other orders sought, even though on its face the former had looked as though it might fall under an exception for decisions relating to the 'medical treatment of persons in detention' provided in s 474(4). Chisholm J pointed out that the regulation (Reg 5.35) which further defines the terms used in s 474(4) makes clear that the medical treatment referred to in subsection 4 only encompasses medical treatment given without the detainee's consent.

Despite finding that the court lacked the jurisdiction to make the orders for release, Chisholm J made the following observations, calling for about 'compassionate consideration' to be had and 'appropriate measures' to be taken by the Minister:

> Whatever might have been the situation in the past, in my view it is now abundantly clear that the children will remain at serious risk unless they are in some fashion released into the community. It is also clear that such a step will inevitably lead to a new set of problems. Whatever the precise arrangements might be, the family will require a great deal of patient and professional support. I understand that

> the appropriate mechanism would be through a bridging visa. I urge the respondent Minister to give urgent and compassionate consideration to allow appropriate measures to be taken to provide for the needs of these unfortunate children. (at [317])

Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002 [2003] HCA 60 (8 October 2003)

This matter was heard in the original jurisdiction of the High Court. It concerned an exchange that occurred during a 2001 hearing by the Refugee Review Tribunal (RRT) after which the Tribunal Member had held that the applicant, a Sri Lankan woman of Tamil ethnicity, was not a Convention Refugee.

During the course of her hearing, the applicant stated that she had been raped by the Sri Lankan police:

> *They took me. Later I was kept in the police. One thing happened to me Sir. So far I have not revealed this to my mother because my mother has pressure problems. And in the future she should not know about this. They raped me. Owing to this fear, I asked my mother to take me away. I cannot tell this.*

The Member responded:

> *Ok. I don't need to ask you any further questions about that particular incident. Now, after that you went to the Maldives and you became established there with employment and after a period with a relationship with a person who became your husband?*

When the Tribunal handed down its decision, the Member commented negatively on the applicant's failure to mention the rape prior to the hearing, and ultimately concluded that she had not been raped by the police.

In November 2002, an application was made in the original jurisdiction of the High Court, and Gaudron J granted orders nisi on the ground that the applicant had been denied natural justice and procedural fairness. In relation to the Member's statement that he didn't need to ask anything more about the rape, her Honour commented:

> If I had been appearing for the applicant and the presiding member had said that to me, I would have thought that has been accepted as fact ….
>
> It is not a question of what the Tribunal was thinking. I am not in the least bit concerned what the Tribunal is thinking. The question from a procedural fairness point of view is what the applicant, but perhaps more significantly her representative, thought was indicated by that. Ordinarily, if a court says that to you, a wink is as good as a nod and you sit down.

When the matter came before the Full Court, the majority (Gleeson CJ, Gummow, Callinan and Heydon JJ) found that Gaudron J's order nisi should be discharged as there was no denial of procedural fairness.

In a dissenting decision, Kirby J found that the curtailing of the evidence about the rape did constitute procedural unfairness, and that it required that the orders nisi be made absolute. He set his findings in an international law context, noting that the High Court had repeatedly said in similar instances in the past that:

> the issues raised by applications of this kind are serious and important for the applicant, for the Australian population and for the nation, fulfilling its obligations under international law. (at [108]) (In support of this, Kirby J referred to *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 69-70)

Erubam Le (Darnley Islanders) 1 v State of Queensland [2003] FCAFC 227

This was a matter in which the applicants sought a determination of native title over the land portion of the island of Erub. Erub is located in the east Torres Strait, and is also known as Darnley Island.

The applicants had applied to Drummond J for an order pursuant to Order 29 Rule 2 of the Federal Court Rules that separate questions in the proceeding be referred to a Full Court. Drummond J made an order that those separate questions should be decided by a Full Court prior to the trial in the proceeding.

The separate questions to be determined by the Full Court concerned the issue of whether the public works constructed on the land that is the subject of the claim had extinguished native title rights and interests.
The land in question was subject to a Deed of Grant in Trust, whereby the Crown had granted fee

simple to the Darnely Island council to be held 'in trust for the benefit of Islander inhabitants'. The fee simple grant was made in 1985. Between 1977 and 2002, a number of public works (including a windmill, a reservoir, water and sewerage works and residential houses) had been constructed on the land that was subject to the native title claim.

Dates were of central importance in determining whether or not extinguishment of native title had occurred when the public works were constructed. The Full Court held that public works that had been constructed prior to 23 December 1996 did effectively extinguish native title. Conversely, public works constructed after 23 December 1996 did not extinguish native title.
This differential outcome arises from the fact that Part 2 of the *Native Title Act* 1993 (Cth) draws distinctions between acts depending on what date they were undertaken.

The applicants' argument that s23B of the *Native Title Act* should overcome the extinguishing effect of the pre-23 December 1996 public works failed. Relevantly, s23B provides that the granting or vesting of anything for the benefit of, or to a person to hold on trust for the benefit of, Aboriginal people or Torres Strait Islanders will not be a 'previous exclusive possession act' that extinguishes native title. However, the court held that the construction or establishment of public works could not be characterised as either 'granting' or 'vesting'. Therefore, s23B did not apply.

For similar reasons, s 47A of the *Native Title Act* (which provides for certain extinguishing acts to be disregarded if land is subject to a grant for the benefit of indigenous people) did not operate to nullify the extinguishment. The court also held that the public works could not be construed as fitting within the 'creation of a prior interest' in the land which s 47A(2)(b) allows as a ground for disregarding extinguishment.

2.2 Legislative Developments

A bill of rights for the Australian Capital Territory

On 22 October 2003 the Chief Minister of the ACT announced that the ACT Government would introduce a Bill of Rights in the form of a Human Rights Act, the first such legislation to be enacted in Australia.

The Human Rights Act would:

- include the rights contained in the *International Covenant on Civil and Political Rights (ICCPR)*;
- require courts and tribunals to interpret laws to be compatible with the Human Rights Act as far as possible;
- require pre-enactment scrutiny of all legislation, including a statement from the Attorney-General about whether legislation is compatible with the Human Rights Act; and
- establish a Human Rights Commissioner to review existing legislation and conduct education programs relating to human rights.

The legislation derives from the recommendations made by the ACT Bill of Rights Consultative Committee in its Report - "*Towards an ACT Bill of Rights*".
http://www.jcs.act.gov.au/prd/rights/documents/report/BORreport.pdf (the publication of that report was discussed in volume 4, Issue 7 of the Legal Bulletin).

The legislation will not implement all the recommendations contained in the Report. For example the legislation will not provide coverage of the rights contained in the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, nor will the legislation provide for direct enforcement via the courts.

3. Selected International Human Rights Jurisprudence

3.1 United Nations Human Rights Committee

Young v Australia, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (18 September 2003)

The author, Mr Edward Young, was in a same-sex relationship with a Mr C for 38 years. Mr C was a war veteran, for whom the author cared in the last years of his life. Mr C died on 20 December 1998. On 1 March 1999, the author applied for a pension under s 13 of the *Veteran's Entitlement Act 1986* (Cth) ("VEA") as a veteran's dependant. On 12 March 1999, the Repatriation Commission denied the author's application on the basis that he was not a dependant as defined by the VEA as Mr Young was not considered a "member of a couple" within s 5E(2) of the VEA. This provision requires that a member of a couple be either a person legally married to another person, or a person living with a person of the opposite sex "in a marriage-like relationship". Mr Young claimed that the refusal to grant him a pension on this ground violated his right to non-discriminatory treatment

under article 26 of the ICCPR on the basis of his sexual orientation.

After considering extensive submissions made by the parties concerning the admissibility of the communication, the Committee decided that it was admissible. The Committee then went on to consider the merits and recalled its earlier jurisprudence that the prohibition against discrimination under article 26 includes discrimination based on sexual orientation (*Toonen v Australia*, Communication No. 488/1992 (31 March 1994)). It also noted that in previous communications, the Committee had found that differences in the receipt of benefits between married couples and heterosexual unmarried couples were reasonable and objective as the couples in question had the choice to marry with all of the entailing consequences (for example, *Danning v Netherlands* Communication No. 180/1984 (9 April 1987)). However, in the current matter, it was clear that the author, as a same sex partner, did not have the possibility of entering into marriage and nor was he recognised as a cohabiting partner of Mr C, for the purpose of receiving pension benefits, because of his sexual orientation.

In relation to the Committee's long line of jurisprudence that a distinction will not necessarily amount to prohibited discrimination under article 26 of the ICCPR if it is based on reasonable and objective criteria, the Committee noted that the State party in this matter had not provided any argument concerning the basis of the distinction made between same sex partners, who are excluded from pension benefits under the VEA, and unmarried, heterosexual partners, who are granted such benefits. Nor was any evidence provided by the State party which would point to the existence of factors justifying such a distinction. In these circumstances, the Committee found that the State party had violated article 26 of the ICCPR by denying the author a pension on the basis of his sex or sexual orientation.

***Baban v Australia*, Communication No. 1014/2001, U.N. Doc. CCPR/C/78/D/1014/2001 (18 September 2003)**

The author, Mr Omar Sharif Baban, brought the communication on his own behalf and that of his son, Bawan Heban Baban. Both are Iraqi nationals of Kurdish ethnicity. The author and his son arrived in Australia without travel documentation in June 1999 and were detained in immigration detention under s 189(1) of the *Migration Act 1958* (Cth). Both made applications for refugee status which have been refused to date. In September 2000, the author lodged an application for special leave to appeal to the High Court. In June 2001, the author and his son escaped from Villawood Detention Centre and, as at the date that the Committee considered this communication, their whereabouts were unknown. In October 2001, the High Court adjourned the hearing of the author's appeal until the author and his son were located.

The author claimed that he and his son were victims of violations by Australia of various articles of the ICCPR, specifically articles 7, 9, 10(1), 19 and 24(1), arising out of the conditions and the fact of their continued detention. Apart from the allegations relating to a breach of article 9, the remainder of the claims were declared inadmissible by the Committee.

In relation to article 9, the author claimed that the State party's mandatory detention of himself and his son upon arrival in Australia and the inability of courts or administrative authorities to order their release was a violation of articles 9(1) (No one shall be subjected to arbitrary arrest or detention) and article 9(4) (Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful). The author relied on the Committee's views in the matters of *A v Australia* (Communication No. 560/1993 (3 April 1997) and *C v Australia* (Communication No. 900/1999 (28 October 2002) in support of this submission.

The Committee recalled its jurisprudence (in *A v Australia* and *C v Australia*) that, in order to avoid a characterisation of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification. In the present case, the author's detention as a non-citizen without an entry permit continued, in mandatory terms, until he was removed or granted a permit. While the State party advanced particular reasons to justify the individual detention, the Committee observed that the State party had failed to demonstrate that those reasons justified the author's continued detention in the light of the passage of time and intervening circumstances such as the hardship of prolonged detention for his son or the fact that during the period under review the State Party apparently did not remove Iraqis from Australia. In particular, the Committee found that the State party had not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions.

The Committee also noted that in the present case the author was unable to challenge his continued detention in court. Judicial review of detention would have been restricted to an assessment of whether the author was a non-citizen without valid entry documentation, and, by direct operation of the relevant legislation, the relevant courts would not have been able to consider arguments that the individual detention was unlawful in terms of the ICCPR. In the Committee's view, judicial review of the lawfulness of detention under article 9(4) was not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the ICCPR, in particular those of article 9(1).

In the present case, the author and his son were held in immigration detention for almost two years without individual justification and without any chance of substantive judicial review of the continued compatibility of their detention with the Covenant. Accordingly, the Committee found that the rights of both the author and his son under article 9, paragraphs 1 and 4, of the ICCPR were violated.

See similarly *Bakhtiyari v Australia*, Communication No. 1014/2001, U.N. Doc. CCPR/C/79/D/1069/2002 (29 October 2003)

Cabal and Pasini v Australia, Communication No. 1020/2001, U.N. Doc. CCPR/C/78/D/1020/2001 (19 September 2003)

The authors were detained in a high security unit of Port Philip Prison, Victoria awaiting extradition to Mexico and claimed a violation of article 10(2)(a) of the ICCPR in that the State party had failed to segregate them from convicted persons, and failed to treat them separately in a manner appropriate to their status as unconvicted persons. They acknowledged that Australia had a reservation to article 10 which reads "In relation to paragraph 2(a) the principle of segregation is accepted as an objective to be achieved progressively". However, they argued that since 20 years had passed since this reservation was made, and the State party was no closer to achieving its objective, this part of the claim, which concerns segregation, should be found to be admissible. In addition, the authors considered that the right under this article to be treated separately from convicted prisoners was not covered by the reservation which in their view only covered segregation.
The authors also claimed violations of articles 7 (torture or cruel, inhuman or degrading treatment) and 10(1) (treat with humanity and respect) for the treatment received including shackling, being stripped and subjected to cavity searches and being placed in a holding cell referred to as a "cage" where the authors were required to alternately stand and sit.

First, the Committee considered whether the State party's obligations under the ICCPR applied to privately-run detention facilities, as is the case in this complaint, as well as State-run facilities. The Committee noted its jurisprudence in which it indicated that a State party is not relieved of its obligations under the ICCPR when some of its functions are delegated to other autonomous organs (*B.d.B v The Netherlands*, Communication No. 273/88 (30 March 1989); *Lindgren v Sweden*, Communication No. 298-299/88 (9 November 1990)). It considered that the contracting out to the private commercial sector of core State activities which involve the use of force and the detention of persons does not absolve a State party of its obligations under the Covenant.

On the issue of the reservation to article 10 as it relates to the issue of segregation, the Committee recognised that there is no rule under the ICCPR on the timeframe for the withdrawal of reservations and therefore could not find that the reservation is incompatible with the object and purpose of the ICCPR. This part of the claim was, therefore, considered inadmissible.

The Committee indicated that the reservation does not extend to cover the separate treatment element of article 10(2)(a), as it refers to convicted and accused persons. However, it found this part of the claim inadmissible as the authors had failed to substantiate that they had not been treated separately.

On the issue of possible violations of 7 and 10(1) of the ICCPR, the Committee found a violation of article 10(1), with respect to the authors' detention for one hour in the triangular "cage" but found that Australia had sufficiently provided explanations of the authors' flight risk to warrant the other treatment of which the authors complained.

Judge v Canada, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/2001 (19 September 2003)

The author escaped from the United States to Canada after being sentenced to death for murder. He committed two robberies in Canada and was sentenced to 10 years imprisonment which he completed. He was then deported back to the United States within hours of a failed appeal to the Superior Court of Quebec, in which he requested a

stay on the implementation of the deportation order. Due to the haste with which he was returned, the author could not appeal his case to the Court of Appeal.
The Committee considered the question of whether Canada, which has abolished the death penalty, had violated the author's right to life guaranteed in article 6, firstly by returning him to face the death penalty without seeking assurances that it would not be carried out and secondly by returning him to the United States before he could exercise his right to appeal the rejection of his application of a stay of his deportation before the Quebec Court of Appeal. The Committee decided in the affirmative on both questions.

The first question had been considered by the Committee for the first time 10 years ago in the case of *Kindler v. Canada, Case No.470/1990* (30 July 1993), where the Committee considered that as Canada itself had not imposed the death penalty but had extradited the author to the United States to face capital punishment, a State which had not abolished the death penalty, the extradition itself would not amount to a violation by Canada unless there was a real risk that the author's rights under the Covenant would be violated in the United States. In reaching this decision the Committee read article 6, paragraph 1 (the inherent right to life) with paragraph 2 (countries which have not abolished the death penalty may impose it for the most serious crimes). In the present case, and in light of the broadening international consensus in favour of the abolition of the death penalty and Canada's review of its own domestic law on this issue, the Committee decided to review its application of article 6. The Committee concluded that for countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, by deporting the author to the United States where he was under sentence of death, Canada established the crucial link in the causal chain that would make possible the execution of the author and therefore violated article 6 of the Covenant.

The Committee also found a separate violation of article 6, together with article 2, paragraph 2 of the Covenant in relation to the author's deportation to the United States before he could exercise his right to appeal. By foreclosing that right to appeal, Canada failed to sufficiently consider the author's contention that his deportation to a country where he faced execution would violate his right to life.

3.2 United Kingdom

Regina v Secretary of State for the Home Department ex parte Amin [2003] UKHL 51 (16 October 2003)

In March 2000, Zahid Mubarek, a nineteen year old prisoner serving a sentence in Feltham Young Offender Institution, was killed by Robert Stewart, with whom he shared a cell. Mr Stewart was subsequently convicted of murder. The issue considered by the House of Lords was whether the United Kingdom had complied with its duty under article 2(1) of the European Convention on Human Rights ("[e]veryone's right to life shall be protected by law…") to investigate the circumstances in which the murder was committed.

The proceedings in this matter commenced when the family of Mr Mubarek sought judicial review of the following decisions: (a) a decision of the Commission for Racial Equality not to allow the family to participate in its investigation into racial discrimination in the Prison Service (with a specific reference to the circumstances leading to the murder of the deceased and any contributing act or omission on the part of the Prison Service) or to hold any significant part of its investigation in public, (b) the decision of a Coroner not to resume an inquiry into the death of Mr Mubarek after the finalisation of the murder trial and (c) the decision of the Home Secretary not to hold an inquiry in public into the death.

Their Lordships referred to and applied jurisprudence of the European Court of Human Rights to the effect that the obligation to protect the right to life under article 2(1), read in conjunction with the State's general duty under article 1 to 'secure to everyone within its jurisdiction the rights and freedoms defined in the Convention', also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force ((*Edwards v United Kingdom* (2002) 35 EHRR 487; *Jordan v United Kingdom* (2001) 37 EHRR 52). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, minimum standards were articulated in *Edwards* and *Jordan* (and were adopted by their Lordships), which are to be applied whatever form the investigation takes. Those standards can be summarised as follows:

1. The investigation must be independent.
2. The investigation must be effective.
3. The investigation must be reasonably prompt.
4. There must be a sufficient element of public scrutiny.
5. The next of kin must be involved to an appropriate extent.

Their Lordships concluded that in the present case, the investigations conducted, whether singly or together, were inadequate to satisfy article 2(1).

See also International Privacy Law developments section (section 5.2 below), for discussion of the decision of the H*ouse of Lords in Wainwright and another v Home Office* [2003] UKHL 53 and the decision of the European Court of Human Rights in *Goral v. Poland* (38654/97).

4. Australian Anti-discrimination law

4.1 Jurisprudence

Purvis on behalf of Daniel Hoggan v State of NSW (Department of Education and Training) & HREOC [2003] HCA 62

Background

The applicant, Mr Purvis, alleged that the State of New South Wales (Department of Education and Training) had discriminated against his foster son, Daniel Hoggan, on the ground of his disability, contrary to the *Disability Discrimination Act 1992* (Cth) ('the DDA').

Daniel Hoggan was born on 8 December 1984. He sustained severe brain injury when he was 6 or 7 months old and, as a result, suffers from behavioural problems and other disabilities. In 1989 he came into the foster care of Mr and Mrs Purvis.

In 1996 Daniel was enrolled at South Grafton High School ('the School'). He attended with sporadic interruptions from April 1997 until December 1997 when he was permanently excluded because of his antisocial and violent behaviour, which included verbal abuse, and incidents involving kicking and punching.

Mr Purvis claimed that the respondent had discriminated against Daniel by subjecting him to a 'detriment' in his education and by suspending and eventually excluding him from the School because of his misbehaviour.

Before the Human Rights and Equal Opportunity Commission (sitting, as it did at the time, as a tribunal), Commissioner Innes held that Daniel's behaviour was so closely connected to his disability that less favourable treatment on the ground of his behaviour was discrimination on the ground of his disability. The Commissioner held that to determine the discrimination issue, Daniel's treatment had to be compared to that of a student without a disability and therefore without the disturbed behaviour.

The Commissioner went on to find that the State through its agents had treated Daniel less favourably than it would have treated another student in circumstances that were the same or not materially different. This amounted to direct discrimination on the ground of disability in the area of education. The Commissioner found that the State had treated him less favourably by failing to:

- adjust its policies to suit his needs;
- provide him with teachers with the skills to deal with his behavioural problems; and
- obtain expert assistance to formulate proposals to overcome those problems.

The Commissioner declared that the State should pay compensation of $49,000 to Mr Purvis for the discriminatory treatment of Daniel.

The Federal Court (Emmett J) set aside the declarations made by Commissioner Innes. Emmett J drew a distinction between a disability and the conduct which it causes. He held that, because Daniel had been suspended and excluded from the school by reason of his misbehaviour, the State had not discriminated against him on the ground of disability. His Honour also held that the State had no legal obligation to accommodate the needs of Daniel and that, in determining whether he had been less favourably treated than other students, the comparator was a student without a disability who had misbehaved in the same way.

The Full Court of the Federal Court dismissed an appeal against the orders made by Emmett J.

Mr Purvis appealed to the High Court. Three main issues arose on the appeal:

(a) The definition of disability in s 4 of the DDA;

(b) The appropriate 'comparator' for the purposes of s 5 of the DDA; and

(c) Causation: less favourable treatment 'because of' a disability.

The Court, by majority (Gleeson CJ, Gummow, Hayne, Heydon and Callinan JJ, McHugh and Kirby JJ dissenting), dismissed the appeal.

Issues before the High Court

(a) The definition of disability in s 4 of the DDA.

Paragraph (g) of the definition of disability in s 4 of the DDA defines disability as 'a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour'.

The issue was therefore whether the definition of disability in paragraph (g) refers only to the underlying disorder suffered by Daniel, that is, his brain injury (the approach adopted by the Federal Court), or whether it includes the behavioural manifestation of that disorder (the approach adopted by the Hearing Commissioner).

All members of the Court (apart from Callinan J who did not consider it necessary to reach a conclusion (see [272])) upheld the approach of the Hearing Commissioner and found that the definition of disability in s 4 of the DDA can include the functional limitations that may result from an underlying condition.

Kirby and McHugh JJ noted (at [80]):

> It is his inability to control his behaviour, rather than the underlying disorder, that inhibits his ability to function in the same way as a non-disabled person in areas covered by the Act, and gives rise to the potential for adverse treatment. To interpret the definition of 'disability' as referring only to the underlying disorder undermines the utility of the discrimination prohibition in the case of hidden impairment.

Gummow, Hayne and Heydon JJ also noted that to identify Daniel's disability by reference only to the physiological changes which his illness brought about in his brain, and not the behaviour it causes, would describe his disability incompletely (at [211]). Furthermore, they stated (at [212]):

> to focus on the cause of the behaviour, to the exclusion of the resulting behaviour, would confine the operation of the Act by excluding from consideration that attribute of the disabled person (here, disturbed behaviour) which makes that person 'different' in the eyes of others.

(b) The appropriate 'comparator' for the purposes of s 5 of the DDA.

Section 5 of the DDA provides:

> (1) For the purposes of this Act, a person (***discriminator***) discriminates against another person (***aggrieved person***) on the ground of a disability of the aggrieved person if, because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.
>
> (2) For the purposes of subsection (1), circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability.

A majority of the Court (Gummow, Hayne and Heydon, Callinan JJ and Gleeson CJ, McHugh and Kirby JJ dissenting) upheld the approach of the full Federal Court which required a comparison for the purposes of s 5 between the treatment accorded to Daniel with the treatment that would have been accorded to a student who was not disabled but who had acted as Daniel had acted.

Gummow, Hayne and Heydon JJ (Callinan JJ agreeing) held that the 'circumstances' referred to in s 5(1) are all of the objective features which surround the actual or intended treatment of the disabled person by the alleged discriminator (at [224]). They stated that it would be artificial to exclude from consideration some of the circumstances because they are identified as being connected with that person's disability. Therefore, in this case, the circumstances in which Daniel was treated as he was, included, but were not limited to, his violent actions towards teachers and others.

The apparent basis for this distinction is perhaps best understood from the decision of Gleeson CJ, in which he stated (at [11]):

> The circumstances to which s 5 directs attention as the same circumstances would involve violent conduct on the part of another pupil who is not manifesting disturbed behaviour resulting from a disorder. It is one thing to say, in the case of the pupil, that his violence, being disturbed behaviour

> resulting from a disorder, is an aspect of his disability. It is another thing to say that the required comparison is with a non-violent pupil. The required comparison is with a pupil without the disability; not a pupil without the violence... The law does not regard all bad behaviour as disturbed behaviour; and it does not regard all violent people as disabled.

McHugh and Kirby JJ, in dissent, referred to and adopted a line of authority to the effect that the circumstances of the person alleged to have suffered discriminatory treatment and which are related to the prohibited ground are to be excluded from the circumstances of the comparator and held that the proper comparator was a student who did not misbehave (at [129]). They noted that the comparator adopted by the Federal Court would have been appropriate if the case was concerned with discrimination on the ground of race or sex because, in those cases, the behaviour of the person alleged to have been discriminated against is not related to the prohibited ground. However, the purpose of a disability discrimination Act would be defeated if the characteristics of the disabled person to be attributed to the comparator.

Their Honours suggested that the structure of the Act generally required that an alleged discriminator accommodate the disabilities of a disabled person unless it would impose 'unjustifiable hardship' as defined in s 11 of the Act on the discriminator. In the present case, the provisions of s 22 relating to discrimination in the field of education made available the defence of unjustifiable hardship only in relation to the decision to admit a student. The defence was not available in the present case where the discrimination took place after the student had been accepted. McHugh and Kirby JJ described this as an anomaly which required correction by Parliament.

Members of the Court also considered whether or not it could be said that s 5(2) of the DDA imposes an 'obligation to provide accommodation'. A majority (McHugh, Kirby, Gummow, Hayne and Heydon JJ) held that the section imposed no such obligation. McHugh and Kirby JJ suggested that the provision 'recognises rather than imposes' an obligation of accommodation:

> [Section] 5(2) has the effect that a discriminator does not necessarily escape a finding of discrimination by asserting that the actual circumstances involved applied equally to those with and without disabilities. No doubt as a practical matter the discriminator may have to take steps to provide the accommodation to escape a finding of discrimination. But that is different from asserting that the Act imposes an obligation to provide accommodation for the disabled.

(c) Causation: less favourable treatment 'because of' a disability.

Gummow, Hayne and Heydon JJ commented on this aspect of the appeal, although it was not strictly necessary to do so in light of their findings in relation to the comparator issue. They stated (at [236]):

> [W]e doubt that distinctions between motive, purpose or effect will greatly assist the resolution of any problem about whether treatment occurred or was proposed 'because of' disability. Rather, the central question will always be - *why* was the aggrieved person treated as he or she was? If the aggrieved person was treated less favourably was it 'because of', 'by reason of', that person's disability? Motive, purpose, effect may all bear on that question. But it would be a mistake to treat those words as substitutes for the statutory expression 'because of'.

McHugh and Kirby JJ stated that the weight and course of authority no longer accepts that the 'but for' test is the accepted test of causation in the context of anti-discrimination legislation. The focus should be on the 'real reason' for the alleged discriminator's act. However, it is not necessary for the discriminator to have acted with a discriminatory motive (at [166]).

Gleeson CJ said that the relevant statutory provisions are concerned with the 'true basis' of a decision. In the present case, there was no reason for rejecting the principal's statement of the basis of his decision to expel Daniel as being the violent conduct of Daniel and concern for the safety of other students and staff members. His Honour stated that (at [14]):

> [I]t is not contrary to the scheme and objects of the Act to permit a decision-maker to identify a threat to the safety of other persons for whose welfare the decision-maker is responsible, resulting from the conduct of a person suffering from a disorder, as the basis of a decision.

Evans v National Crime Authority [2003] FMCA 375

Background

The applicant in this matter alleged that her employer had unlawfully discriminated against her on the basis of her sex and family responsibilities, contrary to the *Sex Discrimination Act* 1984 (Cth) ('SDA').

Ms Evans commenced employment as an intelligence analyst at the National Crime Authority ('NCA') on 1 July 1999 pursuant to a one-year contract. On 1 July 2000 her contract was extended to 30 September 2000. Between 1 April 2000 and 1 July 2000 Ms Evans took some of her accrued personal leave, including carer's leave. Ms Evans was criticised by her employer for taking carer's leave and was repeatedly asked to agree that she would not take any further personal leave or carer's leave. In early August 2000, as a result of concerns about her taking further personal leave, Ms Evans was, without notice, transferred into another investigation team within the NCA. Following her transfer and continued pressure not to take any further personal leave or carer's leave, Ms Evans resigned from the NCA in mid August 2000.

Ms Evans alleged that she had been directly discriminated against on the grounds of sex and family responsibilities in that she was:

- criticised for taking carer's leave, marked down in her performance review because she took carer's leave, harassed and pressured not to take any further personal leave or carer's leave and her contract was not renewed after 30 September 2000 because of concerns about her taking of 'excessive' personal leave (ss 7A and 14(2)(d) SDA); and
- constructively dismissed from her employment due to the requirement that she not take any further personal leave, including carer's leave (ss 7A and 14(3A) SDA).

Ms Evans also alleged that in criticising her for taking personal leave and carer's leave and pressuring her not to take any further personal leave or carer's leave, the NCA had breached the contract of employment between the parties.

Findings

Raphael FM found that Ms Evans had been transferred into another investigation team and her contract not renewed on 30 September 2000 because of concerns about her taking further personal leave, including carer's leave. He found that these actions, as well as the criticism of Ms Evans for taking carer's leave and the harassment and pressure exerted on her not to take any further personal leave, including carer's leave, constituted less favourable treatment within the meaning of s7A of the SDA.

In making his findings, Raphael FM rejected the respondent's submission that Ms Evans had not been treated less favourably because another employee had been similarly criticised for taking carer's leave, finding that the proper comparison was with an employee without family responsibilities who took personal leave within his or her entitlements. His Honour stated that the relevant characteristic that is prohibited under the SDA must be excluded when considering what the same or materially similar circumstances are, citing *IW v City of Perth* (1997) 191 CLR 1, 33(Toohey J) and 67 (Kirby J), *Commonwealth v HREOC (Dopking No 1)* (1993) 46 FCR 191 and *HREOC v Mt Isa Mines* (1993) 46 FCR 301.

His Honour found that as a result of the NCA's less favourable treatment of Ms Evans, she had suffered detriment and therefore been discriminated against by the NCA in breach of s 14(2)(d) of the SDA.

Raphael FM also found that Ms Evans had been constructively dismissed when she was transferred into another investigation team without notice. His Honour held that in so dismissing Ms Evans because of concerns about her taking further personal leave the NCA had discriminated against her in breach of s14(3A) of the SDA.

As regards the breach of contract of employment claim, his Honour found that the NCA's treatment of Ms Evans constituted a 'significant breach' of the contract of employment between the parties because the contract provided for her to take personal leave, including carer's leave: '[Given this,] she should not have been subject to any of the treatment meted out to her by the NCA'.

Order for Damages

Adopting the dicta of Driver FM in *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209 in relation to damages awards for non-economic loss, Raphael FM awarded $25,000 plus interest to the applicant in respect of the clinical depression suffered by her as a result of being dismissed from her position at the NCA. Raphael FM also ordered that the applicant be paid the sum of $17,493.41 plus interest by way of special damages for the economic loss suffered by her as a result of being dismissed.

The applicant also sought an apology from the respondent. However Raphael FM declined to make an order that the respondent apologise: '*I do not believe there is much utility in forcing someone to apologise. An apology is intended to come from the heart. It cannot be forced out of a person. If the person does not wish to give it then it is valueless*'.

Rispoli v Marck Sharpe & Dohme & Ors [2003] FMCA 160

Background

The applicant, Ms Rispoli, alleged that she had been unlawfully discriminated against on the basis of her sex, potential pregnancy or actual pregnancy by her employer, the first respondent, and by two of her supervisors, the second and third respondents. She also claimed her contract of employment had been breached.

Ms Rispoli was employed by the first respondent between May 1987 and November 2000. From November 1996 to May 1998, when she took maternity leave, she was employed as Manager, Technology Support. When she recommenced employment in February 1999, Ms Rispoli was only offered the position of Business Improvement Facilitator, a role she worked in until November 2000.

Although Ms Rispoli's remuneration did not change, her position was downgraded from the level of M05 to that of M07, and she was excluded from a new management committee. The respondents submitted that while the new position was nominally of a lower grade, it was augmented by additional duties and responsibilities. To alleviate Ms Rispoli's concerns about her new position, the first respondent invited her to participate in an important new project ("the AMRAD project"). Ms Rispoli accepted this offer with enthusiasm but resigned in November 2000 following a confrontation with one of her supervisors.

The applicant complained that by effectively demoting her the respondents had breached ss.5(1), 7(1) and 14(1) of the SDA and an implied term of her contract of employment which guaranteed that she would be provided with a comparable position upon returning from maternity leave. She further complained that the respondents had constructively dismissed her.

Findings

Driver FM found that because HREOC had not yet terminated the complaints against Ms Rispoli's supervisors, the second and third respondents, s.46PO(3) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('HREOC Act') precluded him from considering the claims against them. Driver FM gave the applicant liberty to apply for further or other relief against the second and third respondents in the event HREOC terminated the complaint against them.

Driver FM accepted that by placing the applicant in a position which was inferior in status, she had been treated "less favourably than a comparable employee would have been who was not pregnant and who was returning after nine months leave and with the rights of the kind reflected in the maternity leave policy." As such, the first respondent was in breach of ss 7(1)(b) and 14(2)(a) of the SDA. His Honour cited with approval *Thompson v Orica* (2002) 116 IR 186 in making this finding. His Honout went on to find that, although the opportunity to be involved with the AMRAD project provided Ms Rispoli with the potential for future career advancement, this was insufficient to remedy the breach of the SDA.

In relation to the alleged breach of contract, Driver FM held that the first respondent's parental leave policy formed part of the contract for employment which gave the applicant the right to return to a comparable position. However, Driver FM held that by remaining in her position as Business Improvement Facilitator and accepting the offer to work on the AMRAD project, Ms Rispoli "forgave" the first respondent's breach of contract. Her conduct was therefore inconsistent with the acceptance of a repudiation of contract by the first respondent, even if that conduct had amounted to a fundamental breach.

Driver FM also declined to make a finding of constructive dismissal, finding instead that the applicant's resignation was of her own accord and that the confrontation with her supervisor was unrelated to the earlier discrimination.

Order for Damages and Apology

Damages of $10,000 were awarded for the non-economic loss suffered by the applicant between the time that she returned from maternity leave and when she accepted the AMRAD project. Interest was ordered at 10.5%, starting from the date that the first respondent confirmed her loss of status. The first respondent was also ordered to provide a written apology

Clarke v Catholic Education Office & Anor [2003] FCA 1085

Background

The applicant, Mr Clarke, brought proceedings on behalf of his son, Jacob, who has been profoundly

deaf since birth. He alleged that the first respondent, the Catholic Education Office ('CEO') had indirectly discriminated against Jacob on the ground of his disability in the terms and conditions on which it was prepared to admit him to the Mackillop Catholic College ('the College') contrary to s 22(1)(b) (provision of services generally) or s 24(1)(b) (provision of education services) of the DDA.

Central to the complaint was that the proposed 'model of learning support' for Jacob, put forward by the respondents as part of the terms and conditions upon which enrolment at the College was offered, did not include the provision of Australian Sign Language ('Auslan') interpreting assistance. Instead, the 'model of learning support' relied upon the use of note-taking as the primary communication tool to support Jacob in the classroom.

Findings

Madgwick J considered whether or not the applicant had satisfied the following elements of the definition of indirect discrimination in s 6 of the DDA:

(a) Did the terms and condition upon which enrolment was offered require Jacob to comply with a 'requirement or condition'?

Madgwick J found that the CEO imposed a relevant requirement or condition, being that Jacob 'participate in and receive classroom instruction without the assistance of an interpreter' (at [42]). His Honour expressed the view that this characterisation made a 'cogent and fair distinction between the service provided, namely education by classroom instruction or teaching, and in imposed requirement or condition, namely that Jacob participate in such instruction without the assistance of an Auslan interpreter' (at [45]). It was not inherent in the education of children in high schools that such education be undertaken without the aid of an interpreter.

(b) Was this a requirement or condition with which a substantially higher proportion of people without the disability comply or are able to comply?

His Honour held that the 'appropriate base group' (*Australian Iron & Steel v Banovic* (1987) 168 CLR 165 at 178-179) against which Jacob was to be compared was either those students attending year seven at the College, or enrolling in classes at the College, in the relevant year (at [46]). A substantial proportion of people in this group without Jacob's disability were able to meet the requirement or condition.

(c) Was Jacob able to comply with this requirement or condition?
His Honour found that 'compliance must not be at the cost of being thereby put in any substantial disadvantage in relation to the comparable base group' (at [49]). He found that Jacob could not meaningfully receive classroom education and therefore could not comply with the requirement or condition.

(d) Was the requirement or condition reasonable in the circumstances of the case?

In assessing 'reasonableness' Madgwick J (at [51]) set out the following principles, citing *Secretary, Department of Foreign Affairs and Trade v Styles and Anor* (1989) 23 FCR 251, *Waters v Public Transport Corporation* (1991) 173 CLR 349 and *Commonwealth Bank v Human Rights & Equal Opportunity Commission* (1997) 150 ALR 1:

(1) The onus of showing that the impugned requirement or condition is not reasonable rests on the person aggrieved by it.

(2) Reasonableness is to be determined having regard to all the circumstances of the case. These include, but are not limited to:

- the nature and extent of the effect of the discriminatory requirement or condition;
- the reasons advanced in favour of it;
- the possibility of alternative action; and
- matters of "effectiveness, efficiency and convenience".

(3) The test is an objective one – neither the preferences of the aggrieved person nor the mere convenience of the service supplier can be determinative, though both may be relevant factors.

(4) The test of reasonableness is "less demanding than one of necessity, but more demanding than a test of convenience". Thus, if the aggrieved person can show that it may have been convenient for the discriminator to impose the requirement or condition but it was not reasonable in all the circumstances, that will suffice. Likewise, if it appears that although it was not necessary for the discriminator to impose the requirement or condition, but the aggrieved person does not establish that it was unreasonable to do so, there is no indirect discrimination, as statutorily defined.

(4) The test is reasonableness not correctness; that is, a decision of the putative discriminator to impose the requirement or condition, may be a reasonable one although not everyone, or even most people, would agree with it.

The applicant submitted that the relevant factors to be taken into account in determining reasonableness were:

- Jacob's dependence on Auslan assistance;
- the limited effectiveness of communication provided by note-taking;
- an offer of assistance by the Clarkes to pay $15,000 for a teacher's aide to provide signing support for Jacob or arrange volunteer support; and
- the importance of enrolling Jacob in a school where many of his friends would be going and the continuation of his religious education.

The respondent submitted that:

- Jacob was a 'total communicator' who was not Auslan dependent and non-Auslan strategies would have enabled classroom participation;
- the long term goal was for Jacob to be an independent learner and to live as fully as possible in a 'hearing' (non-Auslan) world;
- the model of support offered was based on expert advice and was either suitable or reasonable thought to be so;
- no staff with Auslan skills were available at the school;
- resources to assist Jacob were not unlimited;
- the Clarkes' offer of a grant to assist could not be accepted because of possible inequity issues concerning other families and possible funding implications; and
- the agreed model of support did not rule out Auslan support and this may have been part of the overall, evolving model of support.

Madgwick J found that the requirement or condition was not reasonable in all of the circumstances of the case. He stated there were two predominant factors in the imposition of the requirement or condition: the view held that Jacob would need to get through adult life without an Auslan interpreter and further classroom dependence on an Auslan interpreter would be inimical to this; and a reluctance to make the adaptations necessary to accommodate the flexible and unusual arrangements likely necessary to keep a supply of interpreting services up to Jacob.

As to the view that Jacob should no longer depend on an interpreter, his Honour found that this was both wrong and unreasonable given Jacob's dependency on Auslan and the harm that would be caused by separating from that language in the classroom. The reluctance of the school to adapt was found by his Honour to be 'strange and unreasonable' particularly given the positive experience that Jacob had had in a primary school run by the CEO with the use of an Auslan interpreter.

His Honour held that financial considerations did not 'play a major part in the equation'. His Honour did not explicitly deal with the issue of 'unjustifiable hardship', but having noted the availability of the defence can be taken to have considered that the defence was not available.

Damages

His Honour rejected submissions, 'faintly' made, that there were policy reasons why damages for a breach of the DDA should be substantial and that an award should not be so low that it might be eaten up in non-recoverable costs, stating that damages 'are compensatory and no more'. For the distress and confusion caused to Jacob he ordered damages of $20,000 with interest of $6,000 be paid by the respondent.

4.2 Legislative Developments

Sex Discrimination Amendment (Pregnancy and Work) Act 2003

This Act was passed by the Senate on 15 October 2003.

It amends the *Sex Discrimination Act* 1984 (Cth) (the SDA) to clarify certain provisions regarding discrimination on the grounds of pregnancy, potential pregnancy and breastfeeding. The amendments respond to concerns raised in the Human Rights and Equal Opportunity Commission Report, *Pregnant and Productive: It's a Right not a Privilege to Work While Pregnant* that some areas of the SDA's coverage are not well understood.

The Act implements Parliament's acceptance of recommendations 36, 37 and 43 of *Pregnant and Productive*. Specifically, the amendments clarify that:

- discrimination against women who are breastfeeding is prohibited by the SDA,
- questions regarding pregnancy or potential pregnancy may not be asked during recruitment processes, and that medical information collected from pregnant women may only be used for appropriate purposes, such as for genuine occupational health and safety reasons and not in a discriminatory manner.

A copy of Explanatory Memorandum is available at:
http://scaleplus.law.gov.au/html/ems/0/2002/0/20020214sexem.htm

5. Australian and International Privacy Law

5.1 Australian Privacy Law Developments

Publication of case notes 10 and 11 by the Federal Privacy Commissioner

On 22 September 2003 the Federal Privacy Commissioner published case notes 10 and 11 regarding the use of personal information by Commonwealth agencies. The Federal Privacy Commissioner publishes case notes of finalised complaints that he considers would be of interest to the general public. Most cases chosen for inclusion in case notes involve new interpretation of the Act or associated legislation, illustrate systemic issues, or illustrate the application of the law to a particular industry.

- In *L v Commonwealth Agency [2003] PrivCmrA 10*, the complainant raised concerns relating to the security of his personal information held by the agency. The complainant had asked for a password to be used to identify him when contacting the agency. However, on numerous occasions when he called the agency, he was not asked for his password. As a result of investigations by the Office, the agency made several changes to work practices and paid the complainant $250 compensation for breach of Information Privacy Principle 8.
- In *M v Commonwealth Agency [2003] PrivCmrA 11*, the complainant alleged that several inappropriate disclosures of his/her personal information had been made between two government agencies in relation to an accident claim and an employment opportunity. The Office found no breach of the Information Privacy Principles (IPPs) and found that Agency A had dealt adequately with the security issue under the IPPs.

New South Wales Administrative Decisions Tribunal Appeal Panel

Vice-Chancellor, Macquarie University v FM (GD) [2003] NSWADTAP 43 (23 September 2003)

Background

These proceedings involved an appeal from a decision of the Administrative Appeals Tribunal in *FM v Vice-Chancellor, Macquarie University* [2003] NSWADT 78. The decision appealed from related to an application for review of the conduct of a public sector agency brought by the applicant (`FM') under the provisions of the *Privacy and Personal Information Protection Act 1998* (Privacy Act). FM was a former student of the respondent University (`Macquarie'). His complaint related to the disclosure by it of information relating to his period of enrolment as a student in 1999. The information was disclosed to the University of New South Wales (UNSW) after he had obtained enrolment there (and been granted a scholarship) in 2001. The enrolment was cancelled.

The Tribunal found that two academic staff members of Macquarie had unlawfully disclosed information relating to the FM in contravention of the information protection principle set out in s 18 of the Privacy Act (IPP s 18, the Disclosure Limitation Principle).

FM had been a postgraduate student at Macquarie University in 1999. He was the subject of internal proceedings. On 5 March 2002 he was accepted as a postgraduate student at UNSW. UNSW subsequently became aware he had been a student at Macquarie and sought information from it about his academic history. A person (A) from UNSW spoke by phone to two people at Macquarie (B), and (C). B had been the supervisor of A. C had been the relevant Department Head when FM enrolled. B and C told A about alleged incidents FM had been involved in at Macquarie which resulted in his candidature as a postgraduate student being terminated. On 17 April 2002 UNSW wrote to FM noting that he had not declared in his application his previous enrolments at various other universities. On 23 April 2002 it terminated his enrolment and scholarship.

The appeal

The Appeal Panel did not accept Macquarie's contention that the Privacy Act only refers to 'information' held in material documentary form such as a paper record or in electronic form such as computer records. It agreed with the Tribunal that s 18 covers both documentarily held information, and mentally held information that is disclosed orally.

The Appeal Panel rejected Macquarie's submission that the information was unsolicited and therefore not subject to the Privacy Act. It said the information acquired by B both by observation and from C in relation to FM's conduct became the subject of a disciplinary inquiry and therefore

there was no doubt it was in the possession or control of the University.

Macquarie asserted that the disclosure was covered by the exception relating to imminent threat to health or safety. The Appeal Panel noted this involved a factual inquiry. On that basis, it declined to disturb the Tribunal's findings that the exception was not made out.

The Appeal Panel rejected Macquarie's submission that the disclosure was permitted because FM 'expressly consented' to the disclosure. It said the express consent provision should be strictly applied. Macquarie had not obtained express consent from FM.

Macquarie asserted that if a collecting agency obtains an authorisation to collect information from another public sector agency then the other agency can lawfully make a disclosure provided it is within the authorisation. The Appeal Panel said it was open to FM to complain that the oral disclosures went beyond what was authorised and he could not have anticipated the information conveyed orally would be covered by that authorisation.

On 28 December 2001 the Privacy Commissioner issued a *Direction on Processing of Personal Information by Public Sector Agencies in relation to their Investigative Functions*. This Direction applied to both Macquarie and UNSW. The Direction provided a relevant agency need not comply with sections 9, 10, 13, 14, 15, 17, 18 or 19(1) if compliance might detrimentally affect the agency's investigative functions. The Appeal Panel determined that it will further consider the issue of whether to have required compliance with s 18 of the Act would have detrimentally affected the University's investigative functions. It will hold a directions hearing in February 2004.

The Appeal Panel accepted Macquarie's contention that the order made by the Tribunal at first instance restraining Macquarie from disclosing information in relation to students was too wide and that orders should be confined to the parties to the proceedings.

FM who had not been granted monetary compensation by the Tribunal also appealed the Tribunal's decision. The Appeal Panel said there was no financial loss to which FM could point and dismissed his appeal.

http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/nsw/NSWADTAP/2003/43.html?query=%7e+%20breach+of+privacy

5.2 International Privacy Law Developments – European Court of Human Rights

Goral v. Poland (38654/97) 30 October 2003 - Article 8 - "private life-correspondence"

On 23 May 1996 Mr Goral was taken into custody by the police. He was charged with hiding a stolen car and possession of a counterfeit banknote. Mr Goral made a number of unsuccessful applications for bail. A hearing of the charges took place in October/November 1997 during which Mr Goral was released on bail. A conviction and appeals followed. He was ultimately found guilty of car theft and in August 2002 was sentenced to 2 years imprisonment.

On 13 October 1997 Mr Goral mailed a letter to the European Commission of Human Rights. That is, he handed a sealed envelope containing the letter to the prison authorities. In accordance with Article 89 § 2 of the Code of Execution of Criminal Sentences 1969 the authorities submitted the letter to the Lublin Regional Court where the letter was opened and read. On 20 October 1997 the court returned the letter to Mr Goral. Subsequently, he did not send the letter through the prison service but instead mailed it through third persons to the Commission.

Mr Goral complained that the monitoring of his correspondence with the Commission was in breach of Article 8 of the Convention:

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Government denied there action was in breach of Article 8. It asserted that the Lublin Regional Court monitored the letter in accordance with Article 89 § 2 of the Code of Execution of Sentences 1969 and returned it to the Detention Centre so that it could be mailed to the Commission.

The Court considered that the monitoring of Mr Goral's letter of 13 October 1997 was an "interference by a public authority", within the meaning of Article 8 § 2 of the Convention, with the exercise of Mr Goral's right to respect for his correspondence. It was of the view that the Polish law (that then applied) did not indicate with reasonable clarity the scope and manner of exercise of discretion conferred on public authorities. It followed that the monitoring of the applicant's correspondence was not "in accordance with the law".

The Court also upheld Mr Goral's allegations that there had been violations of other articles of the Convention in relation to his detention and the length of the proceedings.

http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=1119044323&Notice=0&Noticemode=&RelatedMode=0

House of Lords

Wainwright and another –v- Home Office [2003] UKHL 53

On 15 August 1996 Mrs Wainwright and her son, Alan visited her other son, Patrick O'Neil, who was held in custody in Armley Prison, Leeds on a charge of murder. Due to a suspicion that Patrick O'Neil was dealing in drugs whilst in custody, any visitor who wanted an open visit had to agree to a strip search. Mrs Wainwright and Alan reluctantly agreed and found the experience upsetting. A psychiatrist concluded that Alan (who had physical and learning difficulties) had been so severely affected that he suffered post traumatic stress disorder, whilst Mrs Wainwright suffered emotional distress.

The County Court found the searches were not justified because (i) strip searching of the Wainwrights amounted to an invasion of privacy that exceeded what was necessary and proportionate to deal with the drug smuggling problem and (ii) the prison authorities did not comply with their own rules. The issue was whether the searches or the manner they were conducted gave the Wainwrights a cause of action. It was conceded before the County Court that there was an incident of inappropriate touching of Alan which amounted to' trespass to the person' namely, a battery. The judge found the requirement for the Wainwrights to take off their clothes was also a form of 'trespass to the person'. In support of this finding the judge noted that whilst Mrs Wainwright had not suffered a psychiatric injury the law of tort should give a remedy for any kind of distress caused by an infringement of the right to privacy protected by Article 8 of the *European Convention for the protection of Human Rights and Fundamental Freedoms* (the Convention). The judge was of the view that just as Courts would interpret statutes to conform to the Convention it was permissible for him to adapt the common law to the Convention. The judge awarded damages to both Wainwrights.

The Court of Appeal upheld the County Court judge's finding that there had been a battery to Alan Wainwright but otherwise reversed the decision.

The Wainwrights appealed to the House of Lords. They argued that in order to enable the UK to conform to its international obligations under the Convention the House of Lords should declare that there is and always has been a tort of invasion of privacy under which the searches of the Wainwrights was actionable and damages for emotional distress recoverable.

The Court rejected the invitation to declare the existence of a previously unknown tort of invasion of privacy. Lord Scott of Foscote stated, ". . . whatever remedies may have been developed for misuse of confidential information, for certain types of trespass, for certain types of nuisance and for various other situations in which claimants may find themselves aggrieved by an invasion of what they conceive to be their privacy, the common law has not developed an overall remedy for the invasion of privacy". The Court also noted that there was nothing in the jurisprudence of the European Court of Human Rights that suggests the adoption of some high level principle of privacy is necessary to comply with Article 8 of the Convention.

Note: The incidents involving the Wainwrights occurred prior to the enactment of the *Human Rights Act 1998* (UK). The Court pointed out that, for alleged infringements of Article 8 by a statutory authorities after that time, a statutory remedy will be available.

http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldjudgmt/jd031016/wain-1.htm