Human Rights and Equal Opportunity Commission

Legal Bulletin

Volume 7, Issue 10 November 2003 – February 2004

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1. Introduction and forthcoming seminar details

Welcome to the February/March 2004 edition of the Legal Bulletin, covering developments in domestic and international human rights law during the period 1 November 2003 - 31 January 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 focus upon one or more developments in domestic or international human rights law discussed in each new edition.

The next seminar is to be given by Sarah Pritchard and Jenni Millbank and will be held on Tuseday 16 March 2004 from 5 - 6 pm. Admission is free and the venue is:

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

That seminar will focus upon the recent decision of the High Court in *S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71 (summarised in section 2.1 below). Sarah appeared as Junior Counsel on behalf of Amnesty International, which was granted leave to appear as amicus curiae in the matter. Jenni Millbank was also involved in the preparation of the matter for Amnesty.

Please RSVP To: ginasanna@humanrights.gov.au or telephone on (02) 9284 9645.

In other interesting recent developments:

- The ACT legislature has passed the *Human Rights Act 2004* (see section 2.2 below);
- The Massachusetts Supreme Court has considered a number of issues regarding same sex couples who wish to marry (see section 3.3.2 below); and
- The long running native title case of *Ward* has been finalised (see section 2.1 below).

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

2.1 Jurisprudence

S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 78 ALJR 180

The appellants in this matter arrived in Australia from Bangladesh in 1999. They applied for protection visas claiming they feared persecution in Bangladesh because they were homosexual. The delegate of the Minster for Immigration and Multicultural Affairs refused their applications and the Refugee Review Tribunal ("the Tribunal") affirmed the delegate's decisions. A single judge of the Federal Court of Australia (Lindgren J) dismissed their applications for review of the Tribunal's decisions and the Full Court of the Federal Court dismissed the appellants' appeals from the orders of Lindgren J. They were then granted special leave to appeal to the High Court.

The majority of the High Court (McHugh, Kirby, Gummow and Hayne JJ) considered the central issue before the Court to be whether the Tribunal had properly applied the definition of "refugee" contained within the 1951 Convention relating to the Status of Refugees.

For the purposes of the Convention a refugee is a person who:

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country…"

The Tribunal found that the appellants were homosexuals and that in Bangladesh homosexual men are a particular social group for the purposes of the Convention. The central question was whether there was a well founded fear of persecution. The Tribunal found that in Bangladesh it is not possible to live openly as a homosexual. If a homosexual male (and perhaps a homosexual female) does so, that person runs the risk of suffering serious harm including the possibility of being bashed or blackmailed by police officers. However, Bangladeshi men can have homosexual relationships provided they are discreet. The Tribunal found that while living in Bangladesh, the appellants had suffered no serious harm or discrimination by reason of their homosexuality. This was because much of the evidence given by both men was found to be lacking in credibility. The Tribunal said the appellants had "clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home now". Accordingly, the Tribunal held that the appellants had no well founded fear that they would be persecuted if they returned to Bangladesh and that they were not refugees within the meaning of the Convention.

The majority of the High Court (albeit in two separate judgments) considered the assumption that homosexual men in Bangladesh will not be submitted to persecution if they act "discreetly" to be a central part of the Tribunal's reasoning. [1]

The majority found that the Tribunal had erred in law in three respects:

- by impliedly dividing homosexual men into two particular social groups, discreet and non-discreet homosexual men;
- by failing to consider whether the need to act "discreetly" to avoid the threat of serious harm constituted persecution; and
- by failing to consider whether the appellants might suffer harm if members of the Bangladesh community discovered they were homosexuals.

That is, the majority found that the Tribunal erred in not asking why the appellants lived "discreetly". It did not ask whether the appellants lived "discreetly" because that was the way in which they would hope to avoid persecution. The Tribunal was therefore diverted from addressing the fundamental question of whether there was a well founded fear of persecution by considering whether the appellants were likely to live in a way that would not attract adverse attention. McHugh and Kirby JJ made clear that in so far as decisions in the Federal Court contained statements that asylum seekers were required, or could be expected, to take reasonable steps to avoid persecutory harm, they were wrong in principle and should not be followed. The majority held that that the Tribunal's decision should be set aside and made orders remitting the appellants' applications to the Tribunal for redetermination.

Gleeson CJ's judgment in dissent emphasised that on judicial review a decision of the Tribunal must be considered in the light of the basis upon which the application was made. Gleeson CJ stated that the appellants' claim was that they had been subjected to violence, and sentenced to death, and for that reason they feared that if they returned to Bangladesh they would be killed or seriously injured. The claim was rejected because the assertions of the appellants were comprehensively disbelieved by the Tribunal. Gleeson CJ stated that the appellants did not claim that they wanted to behave less "discreetly" about their sexual relationship

[1] The majority did not, however, accede to the appellants' argument that the Tribunal had required them to be discreet about their membership of a group.

and that their inability to do so involved persecution. Gleeson CJ considered the Tribunal's reference to discreet behaviour was no more than a factual element in the evaluation of their claim. A similar view was taken by Callinan and Heydon JJ in their dissenting judgment.

Attorney-General (WA) v Marquet (2003) 78 ALJR 105

These proceedings were brought in the Supreme Court by Mr Marquet, the Clerk of the Parliaments of Western Australia, for the determination of two questions, namely whether it was lawful for him to present for Royal Assent the Electoral Distribution Repeal Bill 2001 (WA) ("the Repeal Bill") and the Electoral Amendment Bill 2001 (WA) ("the Amendment Bill"). The two questions raised the issue of whether it was sufficient for the two Bills to complete their passage through both Houses of Parliament, in the usual way, by a simple majority of the members present and voting; or whether, in this particular case, it was essential for the validity of the Bills that they should have passed by a vote of an absolute majority of the members of both Houses. Neither of the Bills was passed with the concurrence of an absolute majority of the members of the Legislative Council. The provision that was said to give rise to the necessity to obtain the affirmative vote of an absolute majority was s 13 of the *Electoral Distribution Act 1947* (WA) ("the Electoral Distribution Act"). Section 13 provides as follows:

> 'It shall not be lawful to present to the Governor for Her Majesty's assent any Bill to amend this Act, unless the second and third readings of such Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and Legislative Assembly respectively.'

The majority of the High Court (Gleeson CJ, Gummow, Hayne and Heydon JJ) found that s 13 of the Electoral Distribution Act, on its proper construction, did apply to the Repeal Bill and the Amendment Bill and that because each of those Bills was for "a law…respecting the constitution…of the Parliament" of Western Australia, s 6 of the *Australia Act 1986* (Cth) required compliance with the manner and form provisions of s13.

The issue of the proper construction of s 13 gave rise to an interesting analysis by the High Court of the principles that should be applied in statutory interpretation, particularly in relation to the possible relevance civil and human rights.

The applicants' central contention was that s 13 of the Act spoke only of "a Bill to amend this Act" and it did not refer to a Bill to repeal the Act. The applicants' argument was that in s 13 "amend" meant "amend" not "change" or "repeal" and s 13 should not be construed as extending to a Bill which itself did no more in relation to the Electoral Distribution Act than repeal it. The argument proceeded that the Repeal Bill was not governed by s 13 of the Act.

The majority of the High Court concluded that the Repeal Bill and the Amendment Bill were attempts to "amend" the Act. The majority conducted a review of the legislative origins of the Electoral Distribution Act and concluded that the critical consideration was that defining electoral boundaries was legally essential to enable the election of the Parliament. Accordingly, "amend" must be understood as including changing the provisions which the Electoral Distribution Act makes, no matter what legislative steps are taken to achieve that end. The Court stated that "the form in which the legislative steps to effect the change is framed is not determinative; the questions is, what is their substance?" The majority held that to read "amend" as "amend" only and not "repeal" would be to defeat the purpose of the legislation, namely to ensure that no change could be made to electoral districts save by absolute majority of both Houses.

The majority went on to say:

> 'Section 13…must be given the same meaning no matter whether the proposed legislation would advance or diminish the rights of particular electors. The construction question cannot be resolved by classifying the particular proposals that are made for

> new electoral boundaries as "desirable" or "undesirable", or as advancing human or other rights of electors in Western Australia…To assign a different meaning to s 13 according to the qualitative assessment that is made of the desirability of the proposed laws under consideration constitutes fundamental legal error'

The majority referred to the decision of the High Court in *McGinty v Western Australia* (1996) 186 CLR 140 where it was held that the Constitution contains no implication affecting disparities of voting power among the holders of the franchise for the election of members of a State Parliament. The majority stated that "that outcome was not to be gainsaid by reference to international instruments and their elevation to control constitutional interpretation".

Kirby J in dissent held that "amend" should be construed narrowly and should not extend to "repeal" and that the s 13 requirements attaching to any 'Bill to amend" the Electoral Distribution Act did not apply to the Repeal Bill.

Kirby J acknowledged that the normal approach of the Court to the interpretation of legislation was to give effect to the purpose of the written law but stated that statutory construction was not a mechanical task and when a court's jurisdiction was invoked, it required judicial analysis and the assessment of many factors.

His Honour stated that it remained the law that the High Court would construe ambiguities in Australian legislation so as to avoid serious derogations from the international law of fundamental human rights. He went on to state that that law included requirements expressed in a treaty adopted by Australia in terms of Article 25 of the *International Convention on Civil and Political Rights* ("ICCPR"). Kirby J considered that the apportionment of electoral districts in Western Australia, given effect by the Electoral Distribution Act, appeared to be inconsistent with the jurisprudence of the United Nations Human Rights Committee on the fundamental rights of the citizen to equal political participation in a democratic state provided for in the ICCPR. Accordingly, in the context of the ambiguity surrounding the term "amend", his Honour concluded that the Court should prefer a construction of the Electoral Distribution Act that avoided an effective derogation from Article 25 of the ICCPR to a construction that would entrench that derogation. Kirby J considered that the Court should not provide a more ample meaning for the word "amend" than was required because to do so had consequences inimical to fundamental human rights.

His Honour also considered a number of other relevant principles of interpretation in concluding that s 13 should be construed strictly in accordance with the words used in that section.

Attorney-General of the Northern Territory v Ward [2003] FCAFC 283

This decision of the full court of the Federal Court brings to a conclusion a very significant and long running piece of litigation.

In April 1994 a native title application was lodged, on behalf of the Miriuwung and Gajerrong peoples, in relation to a claim area covering approximately 7900 square kilometres of land predominantly in Western Australia but extending into the Northern Territory. The claim was heard in the Federal Court before Lee J with the trial running for more than 80 days. In November 1998, Lee J delivered judgment and made a determination that native title existed in relation to the whole of the area under claim (other than certain areas where native title had been extinguished), including the Northern Territory claim area.[2] Several parties appealed against aspects of Lee J's decision. In March 2000, the Full Court of the Federal Court (comprising Beaumont, von Doussa and North JJ) set aside the judgment of Lee J and substituted their own determination of native title. [3]

[2] *Ward v State of Western Australia* [1998] FCA 1478.

[3] *Western Australia v Ward* [2000] FCA 191.

Pursuant to special leave granted by the High Court, certain matters were then taken on appeal to that Court which delivered its judgment in August 2002. [4] The Commission was granted leave to intervene in that case. The matter was not finally disposed of at that stage as the High Court felt it was necessary to refer certain matters back to the full Federal Court for further hearing and determination.

Following the referral of the matter back to the Federal Court, the parties engaged in a series of mediation conferences in an endeavour to reach agreement on the outstanding issues. Agreement was reached about the Western Australian land and an 'in principle' agreement was reached between the parties concerned with the Northern Territory claim area. The agreements provided for the recognition of native title in some, but not all, of the claim areas. On the basis of the High Court's decision, the appellants accepted that native title had been extinguished in some parts of the claim area. Accordingly, the hearing before the Full Federal Court was limited to some disputed aspects of the Northern Territory determination. That is, counsel identified seven issues in relation to the form of the Northern Territory determination. The parties agreed there should be a determination in the proposed form but subject to such amendments as the Court may think appropriate in relation to the seven identified issues.

In its most recent judgment the full Federal Court made the orders set out in the Minute of Proposed Consent Determination of Native Title in Respect of Land and Waters in Western Australia having satisfied itself that it had the power to make the orders proposed by the parties. The Court also made the orders in relation to the Northern Territory claim area in the form agreed by the parties, but subject to some rearrangement in structure and amended in accordance with its rulings in respect of the matters that could not be agreed between the parties. The Court commented that the making of these orders was a formal recognition under the laws of Australia of the ancient rights and interests of the Miriuwing and Gajerrong peoples in their land.

[4] *Western Australia v Ward* [2002] HCA 28.

2.2 Legislative Developments

On 2 March 2004, the ACT legislature passed the *Human Rights Act 2004*. The development of that legislation has been discussed in previous editions of the Legal Bulletin. At the time of publication, the text of the act was yet to be made available on the ACT Government's website. However it was available as a bill at: http://www.legislation.act.gov.au/b/db_8266/default.asp

The Australian Human Rights Commission Legislation Bill 2003 and the Age Discrimination Bill 2003 (both discussed in previous editions of the Legal Bulletin) remain before the Commonwealth Parliament.

At the time of publication, the Sex Discrimination Amendment (Teaching Profession) Bill 2004 has been introduced into the Commonwealth Parliament.

3. Selected International Human Rights Jurisprudence

3.1 United Nations Human Rights Committee

Rameka and Ors v New Zealand, Communication No. 1090/2002, U.N. Doc. CCPR/C/79/D/1090/2002 (15 December 2003)

Mr Rameka, Mr Harris and Mr Tarawa were separately convicted of serious sexual offences and sentenced to 'preventative detention' under the *Criminal Justice Act* 1985. The authors alleged that their detention violated, inter alia, article 9(4) of the *International Covenant on Civil and Political Rights ('ICCPR')* which provides a right to approach a court for a determination of the lawfulness of detention.

The *Criminal Justice Act* allowed for indefinite 'preventative detention', subject to release by the Parole Board, where there was a

"substantial risk of reoffending" or a need to protect the public. There was a general non-parole period of 10 years, subject of the discretion of the Parole Board to consider the case earlier.

The Committee found that Mr Tarawa's claim was inadmissible as, by failing to apply for a re-hearing of his sentence, he did not exhaust available domestic remedies.

The Committee accepted that Mr Rameka and Mr Harris were 'victims' for the purpose of the ICCPR, even though the preventative aspect of their sentences had not yet commenced. The Committee took the view that the preventative aspect of the sentence commenced at the expiry of the minimum sentence the authors would otherwise have served. That minimum sentence was 14 years for Mr Rameka and seven and a half years for Mr Harris.

The Committee found that there was no breach of Article 9(4) once the non-parole period (generally 10 years) had expired. At that time, the Parole Board was required to assess the lawfulness of detention on an annual basis and was able to release the prisoner if it believed they were no longer a significant danger to the public. The decisions of the Parole Board were subject to judicial review.

The Committee found that there was, however, a violation of Article 9(4) in respect of the two and a half year gap between the completion of Mr Harris' minimum sentence (seven and a half years) and the end of his non-parole period (10 years). Even though the Parole Board had the power to examine the lawfulness of Mr Harris' detention before the expiry of the non-parole period, if it chose to do so, the State Party was unable to give an example of this occurring. As such, Mr Harris was deprived of the right to seek judicial review of the legality of his detention for those two and a half years. No such breach arose with respect to Mr Rameka, as his non-parole period (10 years) expired before the end of his minimum sentence (14 years)

Note: Nine of the sixteen Committee members who examined the communication issued dissenting opinions.

3.2 European Court of Human Rights (ECHR)

Grieves v United Kingdom 57067/00 (16 December 2003)

The applicant, Mark Grieves, was a member of the Royal Navy. In 1998, a naval court-martial convicted him of unlawfully and maliciously wounding with intent to do grievous bodily harm and sentenced him to, *inter alia*, three years' imprisonment. He alleged that his court-martial violated Article 6§1 of the European Convention on Human Rights, which provides a right to a fair and public hearing by an 'independent and impartial' tribunal.

The Court considered the concepts of independence and impartiality to be closely linked and considered them together. The Court identified four considerations that govern whether a Tribunal is independent: the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the appearance of independence. The concept of impartiality was found to comprise both subjective and objective freedom from personal prejudice or bias.

In the case of *Cooper v United Kingdom* 00048843/99 (16/12/2003) the Court found that an air-force court martial did not breach Article 6§1. The Court examined the differences between courts martial conducted by the air-force and the navy and found the naval court-martial to be less independent in several respects. Chief among these was the appointment of a serving naval officer, rather than a civilian, to the position of Judge Advocate. The Court found that the naval court-martial violated Article 6§1 as the lack of a civilian in this pivotal role deprived the court-martial of one of the most significant guarantees of independence enjoyed by other services' courts-martial.

3.3 Decisions of overseas domestic courts

3.3.1 Supreme Court of Canada

Canadian Foundation for Children, Youth and the Law v Attorney General 2004 SCC 4

The Canadian Foundation for Children, Youth and the Law ('the Foundation') challenged the legality of s 43 of the Canadian Criminal Code which provided that parents, guardians and teachers may use force against children by way of correction so long as the force is reasonable in the circumstances.

The Foundation submitted that s 43 violated the *Canadian Charter of Rights and Freedoms* for a number of reasons, the most important being that s 43 was unconstitutionally vague.

The majority rejected the contention that s 43 was excessively vague. They were of the view that the section clearly defined who may use the force, and was limited, by the phrase 'by way of correction', to sober, reasoned uses of force that address the actual behaviour of the child and are designed to restrain, control or express disapproval of their behaviour with the purpose of educating or disciplining the child. As the child must be capable of understanding why the force is being used, the law would not extend to using force against children under 2 years of age. In relation to the phrase 'reasonable in the circumstances', the Court found that the criminal law is thick with the notion of 'reasonableness'. They said that international treaty obligations may be used to decide what is reasonable and referred to Articles 5, 19(1) and 37(a) of the *Convention on the Rights of the Child*. After examining the jurisprudence of the Human Rights Committee and the European Court of Human Rights on this issue, as well as societal consensus, the majority described at length the nature and extent of the force permitted by s 43.

Three dissenting opinions were delivered: Arbour J held that s 43 was unconstitutionally vague and Deschamps J and Binnie J held that s 43 violated children's right to equality. Binnie J thought that this breach was justified in relation to force imposed by parents and guardians but not in relation to force imposed by teachers.

3.3.2 Massachusetts Supreme Judicial Court

Goodridge & Ors v Department of Public Health & Anor 440 Mss. 309

The Massachusetts Supreme Judicial Court was asked to consider whether the protections, benefits and obligations conferred by civil marriage may be denied to two individuals of the same sex who wish to marry.

The majority (Marshall CJ, Ireland, Cowin JJ) found that the marriage licensing law in question could not be construed so as to permit same-sex couples to marry. They then turned to the question of whether the marriage licensing law violated the Massachusetts Constitution. They found that the law violated the right to equality before the law and the protections of liberty and due process, which gave the plaintiffs the right to marry their chosen partner. The majority held:

> "Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family – these are among the most basic of every individual's liberty and due process rights."

The majority went on to find that the State Government had failed to articulate a rational basis for denying this right to same-sex couples. They construed civil marriage to mean the voluntary union of two persons as spouses. The judgement was stayed for 180 days to allow the Legislature to take appropriate action.

Greaney J reached the same conclusion as the majority, on the basis of the traditional protection of equality. Spina, Sosman and Cordy JJ dissented on the basis that the power to regulate marriage lies with the

legislature, who clearly intended civil marriage to be gender specific.

Note: the Senate of Massachusetts subsequently requested advice from the Massachusetts Supreme Judicial Court as to the legality of a bill which prohibited same-sex couples entering into marriage but allowed them to enjoy the benefits, protection, rights and responsibilities of marriage. The majority of the Court (Marshall CJ, Greaney, Ireland, Cowin JJ) found that the same defects of rationality were evident in, if not exaggerated by, the proposed bill.

4. Australian Anti-discrimination law

Kelly v TPG Internet Pty Ltd [2003] FMCA 584

Background

The applicant, Ms Kelly, alleged that her employer unlawfully discriminated against her on the basis of her sex and family responsibilities by (inter alia):

> (i) offering her a promotion on a permanent basis, and then revoking this offer once the respondent became aware that the applicant was pregnant and replacing it with an offer that she be promoted to the position on an acting basis; and
>
> (ii) only offering the applicant full-time work after the completion of her maternity leave.

The applicant also argued that the respondent's refusal to offer part-time work constituted constructive dismissal.

Decision

(a) Permanent promotion

This part of the applicant's claim alleged direct pregnancy discrimination within the meaning of s7(1) of the *Sex Discrimination Act 1984* (Cth) ('SDA').

Raphael FM found that the applicant would have been offered a permanent promotion if she had not told the respondent she was pregnant. His Honour held the evidence established that the applicant was treated less favourably as compared to other employees who were not pregnant (in circumstances which were not materially different to the circumstances attending the respondent's treatment of the applicant). His Honour awarded general damages for hurt and humiliation in respect of this claim (see (c) below).

His Honour also noted that the applicant may have been entitled to special damages for loss of earnings as a result of not obtaining the permanent promotion but that entitlement was lost when, at the conclusion of her maternity leave, the applicant sought to return to her previous position.

(b) Part time work

The applicant's claim in respect of part time work alleged discrimination as defined in s5(2) of the SDA (indirect sex discrimination) or alternatively discrimination on the ground of family responsibilities (see s7A of the SDA).

As regards the latter claim, Raphael FM noted that discrimination on the ground of family responsibilities is only made unlawful in respect of dismissal from employment (s14(3A) SDA). His Honour concluded that because Ms Kelly was offered a return to her original employment and there was no requirement that she work full-time, 'only a refusal to allow a variation of the contract', there was no constructive dismissal in relation to the failure to offer part-time work.

As to the indirect sex discrimination claim, Raphael FM distinguished the cases of *Hickie v Hunt and Hunt* [1998] HREOCA 8 and *Mayer v ANSTO* [2003] FMCA 209, where similar claims had been upheld. His Honour noted that in both of those cases the applicants had been refused benefits that had either been made available to them (as in *Hickie*) or that were generally available (as in *Mayer*). In the present case, there were no part-time employees in managerial positions

employed with the respondent. His Honour stated:

> Section 5(2) makes it unlawful for a discriminator to impose or propose to impose a condition requirement or practice but that condition requirement or practice must surely relate to the existing situation between the parties when it is imposed or sought to be imposed. The existing situation between the parties in this case is one of full time employment. No additional requirement was being placed upon Ms Kelly. She was being asked to carry out her contract in accordance with its terms.

In those circumstances, his Honour held that the behaviour of the respondent constituted a refusal to provide the applicant with a benefit, rather than the imposition of a condition or requirement that was a detriment: 'there was in reality no requirement to work full-time only a refusal to allow a variation of the contract to permit it'. As such the conduct was not discrimination within the meaning of s5(2) of the SDA.

(c) Damages

Raphael FM ordered the respondent to pay the applicant $7,500 in general damages for hurt and humiliation in respect of that part of the claim which was upheld.

Darcy Power v Aboriginal Hostels Ltd [2003] FCA 1475

Background

The appellant, Mr Power, was employed as an assistant manager in one of the respondent's hostels on a part-time probationary basis. It was a condition of his employment that he 'sleep over' at the end of some of his shifts and that he be available to answer the phone and perform some other duties during that time.

As his employment was probationary, the appellant was required to obtain a medical report. His doctor initially formed the view that the appellant was medically capable of performing his job, however changed this view after one of the appellant's colleagues wrongly informed him that the appellant had recently been diagnosed as suffering from clinical depression (the appellant had suffered from depression many years ago, and had recently taken sick leave suffering from an adjustment disorder of anxiety and depression). As a result of the doctor's report, the respondent terminated Mr Power's employment.

Trial

Brown FM found that although the respondent had discriminated against Mr Powers on the basis of imputed disability, the respondent had a defence pursuant to s15(4)of the *Disability Discrimination Act 1992* (Cth) ('DDA'), which provides (inter alia):

> Neither paragraph (1)(b) nor (2)(c) [which proscribes dismissal constituting discrimination on the ground of disability] renders unlawful discrimination by an employer against a person on the grounds of the person's disability, if taking into account the person's past training, qualifications and experience relevant to the particular employment and, if the person is already employed by the employer, the person's performance as an employee, and all other relevant factors that it is reasonable to take into account, the person because of his or her disability:
>
> > (a) would be unable to carry out the inherent requirements of the particular employment…

Brown FM concluded that the termination of employment was lawful because Mr Powers would be unable to carry out the inherent requirements of the job.

Appeal

As a preliminary point Selway J noted that Brown FM erred by failing to follow the approach adopted by the High Court in *Purvis v State of New South Wales (Department of Education and Training)* (2003) 202 ALR 133,

which had not been handed down at the time of Brown FM's decision. As discussed in the last edition of the Legal Bulletin, that decision considered the definition of 'direct' discrimination in s5(1) of the DDA. Selway J noted that the effect of that decision was that:

> If the employer would treat any employee the same who was absent from work for some weeks (whether or not the employee had a disability or not) then this would not constitute discrimination under the DDA. On the other hand, if the employer terminates the employment of an employee who has a disability (including an imputed disability) in circumstances where the employer would not have done so to an employee who was not suffering a disability then this constitutes discrimination for the purpose of the DDA.

His Honour considered that the material before Brown FM suggested that this matter fell into the first category and that, on the basis of *Purvis*, there was no discrimination within the meaning of s5(1) of the DDA. However, on appeal, the respondent conceded that it dismissed Mr Power because of his imputed disability.

Selway J therefore went on to consider whether s 15(4)(a) of the DDA conferred a defence upon the respondent.

Selway J identified two principal questions for the purposes of section 15(4)(a). First, it was necessary to identify the 'inherent requirements of the particular employment'. Brown FM had correctly concluded that these included a requirement that Mr Power be on call several nights a week.

Second, the court should consider whether Mr Power was unable to perform those duties because of his disability. Selway J held that Brown FM had erred by considering whether the termination may have been justifiable reasons other than Mr Power's disability and had therefore effectively failed to consider this question.

Selway J noted that there were two possible approaches to the interpretation of 'disability' in the context of s15(4):

> The first is that the `imputed disorder' of depression is the relevant disability. Alternatively, his actual condition of an adjustment disorder (from which he seems to have recovered) is the relevant disability.

His Honour was unable to find any authority on the question of what was meant by 'disability' in this context, and held that as the DDA was directed at discrimination, and not 'fair outcomes', disability in the context of s15(4) must include 'imputed disability'.

The evidence in relation to that question was not particularly satisfactory and Selway J determined that the appropriate manner in which to proceed was to remit the matter to Brown FM for further determination consistent with Selway J's reasoning.

5. Australian and International Privacy Law

5.1 Australian Privacy Law Developments

Publication of case notes 12 and 13 by the Federal Privacy Commissioner

On 16 January 2004 the Federal Privacy Commissioner published case notes 12 and 13 regarding the use of personal information by an insurance company and a large retail outlet. 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 a new interpretation of the Act or associated legislation, illustrate systemic issues, or illustrate the application of the law to a particular industry.

- In *N v Private Insurer [2003] PrivCmrA 12* the complainant raised concerns that an organisation had unnecessarily collected personal information during a claims process

and that the organisation had a privacy collection form that was too broad. Following an investigation by the Office of the Federal Privacy Commissioner (OFPC), the private insurer altered its forms to make them clearer. The OFPC closed the case as adequately dealt with by the private insurer.

- In *O v Large Retail Organisation [2003] PrivCmrA 13*, a retail company had disclosed hundreds of customer email addresses. In response to the investigation by the OFPC the retailer contacted all the people whose email address had been exposed, changed procedures for mass email messages, ensured experienced staff were available while mass email messages were sent out and developed templates for future email messages. Following this response, the Federal Privacy Commissioner was satisfied that the company had taken appropriate steps in the circumstances to rectify the situation and commended it on its quick action to remedy the problem.

See:
http://www.privacy.gov.au/news/04_01.html

5.2 European Court of Human Rights

Case of Lewis v The United Kingdom (1303/02) 25 November 2003

Between April and June 1997 Mr Lewis had been the subject of surveillance at his home by covert recording devices installed by the police. He was ultimately convicted of drug related charges. Mr Lewis alleged the covert surveillance was in breach of Article 8 of the European Convention on Human Rights, which provides:

> Article 8
>
> 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 UK Government conceded, in the light of Khan v. the United Kingdom (no. 35394/97, ECHR 2000-V, §§ 26-28), that the installation of a recording device in the applicant's home by the police amounted to an interference with the applicant's right to private life guaranteed by Article 8 and that these measures were not “in accordance with the law” for the purposes of Article 8 § 2. In that regard the Court noted that, as in the Khan case, at the relevant time there existed no statutory system to regulate the use of covert recording devices by the police. The interference with the applicant's right to private life was therefore not “in accordance with the law” as required by the second paragraph of Article 8 and there has accordingly been a violation of Article 8.

Case of B.B v The United Kingdom (53760/00) 10 February 2004

Mr B.B had been arrested and charged in relation to homosexual relations with a male of 16 years of age contrary to Sexual Offences Act 1956. The applicant was committed for trial by the Magistrates Court but subsequently the Crown Prosecution Service decided not to proceed and he was formally acquitted by the Central Criminal Court.

The UK Government conceded that the existence of, and prosecution of the applicant under, legislation providing for different ages of consent for homosexual and heterosexual activities constituted a violation of Article 14

taken together with Article 8 of the Convention. Art 14 relevantly provides

> *The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, ... or other status"*

The UK Government stated that: it was regrettable that there was a policy of maintaining different ages of consent according to sexual orientation; the age of consent for homosexual and heterosexual activities had been equalised since 2001; and, it was now engaged in a comprehensive review of the law relating to sexual offences to ensure, inter alia, that legislation did not differentiate unnecessarily on the grounds of gender or sexual orientation.

The Court found that the existence of, and the applicant's prosecution under, the legislation applicable at the relevant time constituted a violation of Article 14 taken in conjunction with Article 8 of the Convention.