Human Rights and Equal Opportunity Commission

Legal Bulletin

Volume 8 February - April 2004

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1. Introduction and forthcoming seminar details

Welcome to the April/May 2004 edition of the Legal Bulletin, covering developments in domestic and international human rights law during the period 1 February 2004 - 30 April 2004.

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 will be given by Ms Kate Eastman of the New South Wales Bar on Thursday 27 May 2004 from 5-6 pm. Ms Eastman will discuss the *Human Rights Act 2004*, which was recently passed by the legislature of the Australian Capital Territory. The Act adds further focus to the debate surrounding Bills of rights in Australia. A discussion of the provisions of the Act appears below in section 2.2.

Ms Eastman is a barrister specialising in human rights matters and has appeared in a number of landmark High Court cases dealing with human rights issues. Kate was also centrally involved in the original draft bill proposed in the report entitled 'Towards an ACT human right Bill', which preceded the passing of the Human Rights Act 2004.

Admission is free and the venue is:

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

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

2.1 Jurisprudence

***Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20 (29 April 2004)**

The respondent children (two boys and three girls) were unlawful citizens within the meaning of the *Migration Act* 1958 (Cth) (MA) and detained in immigration detention. By their mother as their next friend, the respondent children commenced proceedings in the Family Court seeking an order under s67ZC of the *Family Law Act* 1975 (Cth) (FLA) that the Minister release them from immigration detention. A single judge of the Family Court dismissed the application on the basis that the Family Court did not have jurisdiction to make the orders sought. The respondents successfully appealed to the Full Court of the Family Court and the matter was remitted for a rehearing before another judge, who dismissed the application. The respondents again successfully appealed to the Full Court of the Family Court who ordered that the children be released from immigration detention on an interlocutory basis. Following the decision of the first Full Court, the applicant successfully applied to the Family Court for a certificate under s95(b) of the FLA, the grant of which allowed the applicant to appeal to the High Court without further application. Amnesty International intervened in the proceeding before the High Court.

The Full Court certified four questions were involved in this case:

1. The scope of the 'welfare' jurisdiction of the Family Court under s67ZC and/or s68B of the FLA, in particular whether that jurisdiction extends to:

   (i) determining the validity of the detention of a non-citizen child (who is the child of a marriage) under s196 off the MA; and

   (ii) making orders directing officers in the performance of their functions under the Migration Act in relation to such a child.

2. Whether the provisions of Pt VII of the FLA were supported by s51(xxix) of the Constitution as implementing the *Convention on the Rights of the Child* (CROC) or have only a more limited operation.

3. Whether the detention of a child who is an 'unlawful non-citizen' within the meaning of the Migration Act is beyond the authority conferred by the MA when that detention extends over a lengthy period or its duration is indefinite.

4. Whether the detention of a child is 'indefinite' if the child lacks capacity to make a request under s 198(1) of the MA.

Section 67ZC of the FLA provides that:

> (1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.
>
> (2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration.

In separate judgements, the High Court unanimously allowed the appeal. The majority of the court decided the appeal with reference to the first question referred by the Full Court. The majority held that s67ZC was confined in its operation to the parental responsibilities of the parties to a marriage for a child of the marriage, though for different reasons. In a separate judgement Kirby J, decided the appeal by reference to the third and fourth questions referred by the Full Court.

In a joint judgement, Gleeson CJ and McHugh J held that the Family Court's jurisdiction (in the sense of 'authority to decide') under s67ZC of the FLA, must be defined in accordance with ss75, 76 and 77

of the *Constitution*. Under those sections, the Family Court, as a federal court, may only be invested, either expressly or inferentially, with jurisdiction by federal Parliament with respect to one of the 'matters' set out in ss75 or 76 of the Constitution. Their Honours held that s67ZC standing alone does not expressly give jurisdiction to the Family Court in respect of a matter (because it does not refer to any substantive rights, privileges, duties or liabilities or the persons who can apply or be made subject to an order under that section). Hence, the valid operation of s67ZC is dependent on upon some other provision of the FLA supplying a matter to which the jurisdiction conferred by that section can attach. Their honours held that, when the FLA is read as a whole, Div 12, and in particular ss69ZH(2) and 69ZH(3) of the FLA, supply the matters to which the jurisdiction conferred by s67ZC can attach. Accordingly they held that s67ZC only confers jurisdiction on the Family Court in relation to parental responsibility for the welfare of children, (those being the 'matters' to which ss69ZH(2) and 69ZH(3) refer) and, as such, s67ZC does not enable the court to make orders binding on third parties.

In a joint judgment, Gummow, Hayne and Heydon JJ held that Div 12 and, in particular s69ZH, as a matter of statutory construction, limited the operation of s67ZC to the parental responsibilities of the parties to a marriage for the child of the marriage. Hence, they also held that s67ZC does not confer jurisdiction on the Family Court to make orders to bind third parties. In a separate judgement, Callinan J also held that, the jurisdiction conferred on the Family Court under s67ZC was limited in the manner proposed by Gummow, Hayne and Heydon JJ.

Kirby J, in a separate judgement, decided the appeal on the basis of the third and the fourth questions referred by the Full Court. Upholding the Full Court's finding that the detention of the respondent children was contrary to Australia's international obligations under Arts 9(1), 9(4) and 24 of the ICCPR and Art 37 of CROC, Kirby J considered the question upon which the appeal turned as being whether the MA could be read, 'so far as its language permitted', to ensure conformity with Australia's international obligations. In relation to that question, Kirby J concluded that, having regard to the 'intractable' language of the MA and a series of public reports tabled in parliament regarding immigration detention, it is 'beyond … doubt that the purpose of the Australian Parliament in enacting laws for the mandatory detention of aliens arriving in Australia as 'unlawful non-citizens' was to include children'. Hence, the MA could not be 'read down' to avoid any problems created by Australia's international obligations. On that basis, Kirby J allowed the appeal.

Kirby J also discussed the issue of whether the immigration detention of the respondent children was 'indefinite', stating:

> 'I do not regard it as arguable that the detention of the respondent children under the MA was permanent or indefinite. True, it lasted a long time before their release … However under the MA, the period of detention had a clear terminus. This (putting it broadly) is the voluntary election of the children (through their parents) to leave Australia or the completion of the legal proceedings brought by the parents on the children's behalf, with necessary consequences for the status of the children'.

Callinan J was the only member of the court to consider whether Pt VII of the FLA could be supported with reference to the external affairs power (the second question referred by the Full Court). In obiter comments he stated that, while 'it is possible … that some Articles of the Convention may have influenced the drafting of sections of Pt VII', the language and the parliamentary history of Pt VII 'make it clear that Parliament was *not* intending in enacting that Part to implement the Convention' (original emphasis).

***Re Alex: Hormonal Treatment for Gender Identity Dysphoria* [2004] FamCA 297**

This case involved a 13 year old child, "Alex" who, though anatomically a girl, wanted to undergo a transition to become a male. The applicant, Alex's legal guardian (a government Department), sought an order under s67ZC of the *Family Law Act* 1975 (Cth) (FLA) that the Family Court authorise hormone treatment that would begin a 'sex change process'. The respondents to the application were Alex's mother and aunt with whom Alex resided, though neither party sought to be represented or self-represented in the proceedings. Alex was appointed a Child Representative. The Child Representative sought additional orders that the applicant be authorised to apply to register a change of Alex's birth name which would reflect the name that he is currently using. The Human Rights and Equal Opportunity Commission (Commission) intervened in the proceedings.

The hearing was conducted by Nicholson CJ in an inquisitorial rather than an adversarial manner. In relation to the hearing process Nicholson CJ noted that, 'I consider that a format such as this is usually to be preferred, at least in relation to special medical procedure cases'.

The court heard evidence from Alex's aunt, Departmental caseworker, primary school principal as well as an array of expert medical witnesses. On the basis of their evidence the Court found that Alex had a 'longstanding, unwavering and present identification as a male'; that he was extremely distressed about being 'trapped in a girl's body'; that he had been very sad and miserable with his situation for a long time; and that he had had suicidal thoughts in relation to his situation.

Nicholson CJ noted that under the *parens patriae* jurisdiction which is conferred on the court by s67ZC of the FLA, the court was required to be 'firmly satisfied upon clear and convincing evidence that the proposed treatment is in Alex's best interests: see *Re Marion* (*No.2*) according to the standard in *Bringinshaw'*. In determining whether the proposed hormone treatment was in the 'best interests' of Alex, Nicholson CJ noted that he was required to have regard to the factors set out in *Re Marion* (*No.2*) as those to which the court should have regard in a special medical procedure application. He also noted that, in line with the High Court's decision in *Marion's Case*, he was required to have regard to whether Alex was competent to consent to the proposed treatment and whether the medical treatment the subject of the application was a procedure to which Alex's mother or guardian could not consent.

In relation to the issue of whether Alex was competent to consent to the proposed hormonal treatment, Nicholson CJ accepted a submission made by the Commission to the effect that the court is required to consider whether Alex 'has achieved a 'sufficient understanding and intelligence to enable him or her to understand fully what is proposed': *Gillick's Case*. In that regard Nicholson CJ found that, while having a general understanding of the proposed treatment, Alex did not have 'sufficient maturity to fully understand the grave nature and proposed effects of the treatment'. In obiter, Nicholson CJ expressed some doubts about the proposition that, in special medical procedures applications, if a child has achieved a sufficient understanding and intelligence to enable him or her to understand fully what is proposed, the Family Court has no further role in the matter:

> 'Much will depend on what it is that is proposed in each individual case. It seems to me that there is a considerable difference between a child or young person deciding to use contraceptives as in *Gillick* and a child or young person determining upon a course that will 'change' his/her sex. It is highly questionable whether a 13 year old could ever be regarded as having the capacity for the latter, and this situation may well continue until the young person reaches maturity.'

In relation to the weight that the court should place on a child's wishes in determining whether something is in the 'best interests of the child' under s68F of the FLA, Nicholson CJ commented that, 'it is necessary in each case where the wishes of a child or young person are seen to be significant, and not just medical procedure cases, to give careful

consideration to the evidence and opinions concerning the bases for such wishes and the weight they should be accorded'.

In relation to the issue of whether the hormone treatment the subject of the application was a procedure to which Alex's mother or guardian could not consent, Nicholson CJ noted that the categories of case in which Family Court's *parens patriae* jurisdiction can be properly invoked are not closed. On the basis of the evidence before him, and in particular, in view of the irreversible nature of the second stage of the proposed treatment, Nicholson CJ concluded that the proposed treatment was a procedure in respect of which court authorisation was required.

Consequently, Nicholson CJ made the orders sought by the applicant, as well as the additional orders sought by the Child Representative.

2.2 *Human Rights Act 2004* (ACT)

On 2 March 2004, the ACT Legislative Assembly passed the *Human Rights Act 2004*. The Act will come in to force on 1 July 2004. This is the first Bill of Rights enacted in Australia.

The *Human Rights Act* can be found at: http://www.legislation.act.gov.au/a/2004-5/

The explanatory memorandum can be found at: http://www.legislation.act.gov.au/es/db_8294/default.asp

Origins of the legislation

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 legislation does not implement all the recommendations contained in the Report. For example the legislation does not provide coverage of the rights contained in the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* nor does the legislation provide for a direct right of court action to enforce the rights.

Features of the Human Rights Act:

1. The 'human rights' encompassed in the legislation are civil and political rights. They are derived from the *International Covenant on Civil and Political Rights (ICCPR)* and include:

    - Recognition and equality before the law
    - Right to life (applying from the time of birth)
    - Protection from torture and cruel, inhuman or degrading treatment etc
    - Protection of the family and children
    - Privacy and reputation
    - Freedom of movement
    - Freedom of thought, conscience, religion and belief
    - Peaceful assembly and freedom of association
    - Freedom of expression
    - Taking part in public life (including right to vote)
    - Right to liberty and security of person (including the right of a person arrested or detained to be promptly brought before a judge and to be tried within a reasonable time or released)
    - Humane treatment when deprived of liberty (that is, anyone deprived of liberty must be treated with humanity and with respect for their inherent dignity, and an accused person must be segregated from convicted people except in exceptional circumstances)
    - Children in the criminal process (including the segregation of an accused child from accused adults, and the obligation to bring a child to trial as quickly as possible)
    - Fair trial
    - Rights in criminal proceedings
    - Compensation for wrongful conviction
    - Right not to be tried or punished more than once
    - No retrospective criminal laws
    - Freedom from forced work (including prohibition on slavery)
    - Rights of minorities (cultural, religious and linguistic rights)

2. The Legislative Assembly will scrutinise the human rights implications of all proposed legislation *before* it takes effect, by requiring the Attorney General to issue a compatibility statement with each Bill

presented to the Assembly. This statement must state whether in the Attorney General's opinion the Bill is consistent with human rights and if not, how it is not consistent (s 37). A standing committee is to report to the Legislative Assembly about human rights issues raised by Bills presented to the Assembly (s 38).

3. In construing a Territory law, an interpretation that is consistent with 'human rights' is as far as possible to be preferred (s 30). The Act provides guidance in undertaking this task (sections 30 and 31).

4. If, in a proceeding before the Supreme Court, the Court is satisfied that a Territory law is not consistent with a 'human right' the Court will issue a 'Declaration of Incompatibility' (s 32(2)). This declaration does not affect the rights of parties, or the validity of the subject legislation, in any way (s 32(3)). The court will not have the power to strike down the legislation. The declaration is provided to the Attorney General, who must table it before the Assembly and prepare a written response.

5. An Australian Capital Territory Human Rights Commissioner is established whose functions are:

   - to review the effect of Territory laws, including the common law, on human rights, and report in writing to the Attorney- General on the results of the review;
   - to provide education about human rights and the Human Rights Act; and
   - to advise the Attorney-General on anything relevant to the operation of the Human Rights Act.

6. The Attorney-General must review the first year of operation of the Act and report to the Legislative Assembly. This review must include consideration of whether rights under ICESCR should be included in the Act as human rights. The Attorney-General must conduct a further review after 5 years operation and again report to the Legislative Assembly (s 43).

For further materials and discussion relating to the ACT Human Rights Act have a look at the website of the Gilbert and Tobin Centre of Public Law.

http://www.gtcentre.unsw.edu.au/bills-of-rights-resources.asp

2.3 Other Legislative developments

On 11 May 2004 the Senate Legal and Constitutional Committee tabled its report into the Sex Discrimination Amendment (Teaching Profession) Bill 2004. The Government Senators on the Committee recommended that the Bill proceed, subject to it being evaluated and reviewed after two years as to its effectiveness in addressing the gender imbalance in the teaching profession. The Labour and Australian Democrat Senators on the Committee recommended that the Bill not proceed.

On March 2004 the Migration Amendment (Judicial Review) Bill 2004 was introduced into Federal Parliament. The Bill seeks to address certain aspects of the High Court's decision in relation to privative clauses in *Plaintiff S157/2002 v Minister for Immigration* (2003) 211 CLR 476. The Bill has been referred to the Senate Legal and Constitutional Committee for inquiry and report by 15 June 2004. The Commission gave evidence before the Inquiry and its submissions are available on the Commission's website.

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.

3. Developments in Australian Federal Discrimination Law

Bropho v Human Rights and Equal Opportunity Commission [2004] FCAFC 16

Bropho v Human Rights and Equal Opportunity Commission ('*Bropho*') involved a complaint of racial vilification contrary to s 18C of the *Racial Discrimination Act 1975* (Cth) made in relation to a cartoon published in the West Australian Newspaper entitled 'Alas Poor Yagan'.

The cartoon concerned the attempts by a group of Aboriginal elders to recover the remains of the Aboriginal leader Yagan, who had been killed in 1833, and whose head had been smoked and removed to England for display.

It was found at first instance by Commissioner Innes,[1] and was not at issue in the proceedings before the Federal Court, that the cartoon was in breach of s 18C as being offensive to Nyungar people specifically, and Aboriginal people generally.

However, the Commissioner had gone on to find that the cartoon (an 'artistic work') was published 'reasonably and in good faith' and was therefore not unlawful under the RDA by virtue of the exemption in s 18D(a). Relevantly, the editor had made a 'judgement call' and had decided that in the context of the public debate surrounding the issue that the cartoon was 'fair comment'. On review to the Federal Court, Nicholson J at first instance[2] upheld the decision and an appeal to the Full Court was unsuccessful (French and Carr JJ dismissing the appeal, Lee J dissenting).

French J expressed his agreement with the broad approach to the exemption in s 18D taken by both the Commission and the Court at first instance. His Honour reasoned that the prohibition on vilification in s 18C was, in fact, an exception to the general principle recognised in international instruments and the common law that people should enjoy freedom of speech and expression. Section 18D was therefore 'exemption upon exemption' and 'may be seen as defining the limits of the proscription in s 18C and not as a free speech exception to it'.[3]

French J also expressed doubt, in obiter comments, regarding the previously accepted proposition that it was for the respondent to make out an exception under s 18D.[4] This was based on his Honour's view that s 18D was not 'in substance an exemption'.[5] French J concluded by suggesting that any burden on a respondent may only be an evidentiary one.[6]

On the requirement that an act be done 'reasonably and in good faith' to fall within s 18D, Carr J expressed his agreement with the primary judge who had held that 'the focus of the inquiry is an objective consideration of all the evidence, but that the evidence of a person's state of mind may also be relevant'.[7]

French and Lee JJ, both suggested that the expression 'reasonably and in good faith' required a subjective and objective test[8] and took a substantially similar approach to this issue (although Lee J was in dissent as to the result).

Reasonableness clearly requires an objective assessment of the impugned conduct, to which questions of proportionality will be relevant. French J stated:

> There are elements of rationality and proportionality in the relevant definitions of reasonably. A thing is done 'reasonably' in one of the protected activities in par (a), (b) and (c) of s 18D if it bears a rational relationship to that activity and is not disproportionate to what is necessary to carry it out. It imports an objective judgment. In this context that means

[1] *Corunna v West Australian Newspapers Ltd* (2001) EOC 93-146.
[2] *Bropho v Human Rights and Equal Opportunity Commission* [2002] FCA 1510.
[3] [2004] FCAFC 16, [73]. The other members of the Court, Lee and Carr JJ, did not express any view on this issue.
[4] Ibid [75].
[5] Ibid [76].
[6] Ibid [77].
[7] Ibid [178].
[8] Ibid [96] (French J), [141] (Lee J).

> a judgment independent of that which the actor thinks is reasonable. It does allow the possibility that there may be more than one way of doing things 'reasonably'. The judgment required in applying the section, is whether the thing done was done 'reasonably' not whether it could have been done more reasonably or in a different way more acceptable to the court. The judgment will necessarily be informed by the normative elements of ss 18C and 18D and a recognition of the two competing values that are protected by those sections.[9]

Lee J stated that reasonableness can only be judged against the possible degree of harm that a particular act may cause. His Honour cited, with apparent approval, the decision of the NSW Administrative Decisions Tribunal in *Western Aboriginal Legal Service Ltd v Jones*[10] to the effect that the greater the impact of an act found to be otherwise in breach of s 18C, the more difficult it will be to establish that the particular act was reasonable.[11]

On the question of 'good faith', French J held that s 18D

> requires a recognition that the law condemns racial vilification of the defined kind but protects freedom of speech and expression in the areas defined in pars (a), (b) and (c) of the section. The good faith exercise of that freedom will, so far as practicable, seek to be faithful to the norms implicit in its protection and to the negative obligations implied by s 18C. It will honestly and conscientiously endeavour to have regard to and minimise the harm it will, by definition, inflict. It will not use those freedoms as a 'cover' to offend, insult, humiliate or intimidate people by reason of their race or colour or ethnic or national origin.
>
> ....
>
> ... good faith may be tested both subjectively and objectively. Want of subjective good faith, ie seeking consciously to further an ulterior purpose of racial vilification may be sufficient to forfeit the protection of s 18D. But good faith requires more than subjective honesty and legitimate purposes. It requires, under the aegis of fidelity or loyalty to the relevant principles in the Act, a conscientious approach to the task of honouring the values asserted by the Act. This may be assessed objectively.[12]

His Honour continued:

> Generally speaking the absence of subjective good faith, eg dishonesty or the knowing pursuit of an improper purpose, should be sufficient to establish want of good faith for most purposes. But it may not be necessary where objective good faith, in the sense of a conscientious approach to the relevant obligation, is required. In my opinion, having regard to the public mischief to which s 18C is directed, both subjective and objective good faith is required by s 18D in the doing of the free speech and expression activities protected by that section.[13]

Lee J adopted a similar approach:

> The question whether publication was an act done in good faith must be assessed, in part, by having regard to the subjective purpose of the publisher but overall it is an objective determination as to whether the act may be said to have been done in good faith, having due regard to the degree of harm likely to be caused and to the extent to which the act may be destructive of the object of the Act.[14]
>
> ....
>
> ... Having regard to the context provided by the Act, the requirement to act in good faith imposes a duty on a person who does an act because of race, an act reasonably likely to inflict the harm referred to in s 18C, to show that before so acting that person considered the likelihood of the occurrence of that harm and the degree of harm reasonably likely to

[9] Ibid [79].
[10] [2000] NSW ADT 102.
[11] [2004] FCAFC 16, [139].
[12] Ibid [95]-[96].
[13] Ibid [101].
[14] Ibid [141].

> result. In short the risk of harm from the act of publication must be shown to have been balanced by other considerations. The words "in good faith" as used in s 18D import a requirement that the person doing the act exercise prudence, caution and diligence, which, in the context of the Act would mean due care to avoid or minimize consequences identified by s 18C.[15]

Forbes v Australian Federal Police (Commonwealth of Australia) [2004] FCAFC 95.

In *Forbes v Australian Federal Police (Commonwealth of Australia)*, the Full Federal Court considered an appeal and cross-appeal from the decision of Driver FM.[16] The appellant's case was that the Commonwealth, through the Australian Federal Police ('AFP') had discriminated against her on the basis of her disability, namely a depressive illness. It was alleged that the AFP had discriminated against her by refusing to re-employ her at the conclusion of her fixed-term contract. It was further argued that the AFP had discriminated against her by withholding information about her medical condition from the review panel which had been convened to consider her re-employment.

Driver FM had held that the AFP had discriminated against the appellant by withholding the information from the review panel. A relevant issue for the review panel was the apparent breakdown in the relationship between the applicant and AFP. The information relating to her disability explained the breakdown in the relationship. Driver FM considered that the AFP was under an obligation to put before the review panel information concerning the applicant's illness as its failure to do so left the review panel 'under the impression that [the appellant] was simply a disgruntled employee'.[17] The AFP was found otherwise to have *not* discriminated against the appellant in its decision not to appoint her as a permanent employee, as the decision of the review panel was based on its view that the employment relationship between the appellant and the AFP had irrevocably broken down.

The appellant contended that the decision of the review panel not to reemploy her was based on her absence from work and that this absence was in turn a manifestation of her depressive illness. It was therefore argued that the decision not to reemploy her discriminated against her on the ground of her disability. The Full Court rejected this argument:

> The Magistrate found that the appellant's absence from work for a period of over two years was 'clearly important in establishing [the] breakdown' of the relationship between herself and the AFP. If the [DDA] makes it unlawful to refuse re-employment to someone because of their lengthy absence from work, where that absence is due to a disability, the appellant's submission would have force. The difficulty is that the appellant must establish that the AFP treated her less favourably, **in circumstances that are the same or are not materially different**, than it treated or would have treated a non-disabled person. The approach of the majority in [*Purvis v New South Wales* (2003) 202 ALR 133] makes it clear that the circumstances attending the treatment of the disabled person must be identified. The question is then what the alleged discriminator would have done in those circumstances if the person concerned was not disabled.
>
> Here, the appellant was not reappointed because the history of her dealings with the AFP, including her absence from work for nearly three years, showed that the employment relationship had irretrievably broken down. There is nothing to indicate that in the same circumstances, the AFP would have treated a non-disabled employee more favourably. On the contrary, the fact that the Panel did not know of the appellant's medical condition indicates very strongly that it would have refused to reemploy a non-disabled employee who had been absent from work for a long period and whose relationship

[15] Ibid [144].
[16] *Forbes v Commonwealth* [2003] FMCA 140.
[17] Ibid [28].

> with the AFP had irretrievably broken down.[18]

The Full Court also made the following obiter comments, with reference to the decision of the High Court in *Purvis v New South Wales*,[19] ('*Purvis*') in relation to the appropriate comparator when considering the failure of the AFP to put the evidence concerning the appellant's medical condition before the review panel:

> The circumstances attending the AFP's treatment of the appellant would seem to have included the AFP's genuine belief that the appellant, despite her claims to have suffered from a serious depressive illness, did not in fact have such an illness. That belief was in fact mistaken, but it explains the AFP's decision to regard the information concerning the appellant's medical condition as irrelevant to the question of her re-employment. This suggests that the appropriate comparator was an able-bodied person who claimed to be disabled, but whom the AFP genuinely believed (correctly, as it happens) had no relevant disability. If this analysis is correct, it seems that the AFP treated the appellant no less favourably than, in circumstances that were the same or were not materially different, it would have treated a non-disabled officer.[20]

The appellant also argued that the AFP had refused to act on medical reports in relation to the appellant's disability. The Full Court suggested that this submission may have proceeded on the unstated assumption that ss 5 and 15 of the DDA 'require an employer to provide different or additional services for disabled employees'.[21] The Court commented:

> If this were correct, the failure to provide a seriously depressed employee with appropriate counselling services might constitute less favourable treatment for the purposes of s 5(1). *Purvis*, however, firmly rejects such a proposition. It is true that s 5(2) provides that a disabled person's need for different accommodation or services does not constitute a material difference in judging whether the alleged discrimination has treated a disabled person less favourably than a non-disabled person. However, s 5(2) cannot be read as saying that a failure to provide different accommodation or services constitutes less favourable treatment of the disabled person for the purposes of s 5(1): *Purvis*, at 164 [218], per Gummow, Hayne and Heydon JJ; at 158 [104], per McHugh and Kirby JJ.

On the cross-appeal by the AFP, the Full Court found that his Honour had erred in finding discrimination as he had not made a finding that the decision of the AFP was 'because of' the appellant's disability. The Full Court stated:

> It is, however, one thing for the AFP to have misunderstood its responsibilities to the Panel or to the appellant (if that is what the Magistrate intended to convey). It is quite another to conclude that the AFP's actions were 'because of' the appellant's depressive illness. The Magistrate made no such finding.
>
> In *Purvis*, there was disagreement as to whether the motives of the alleged discriminator should be taken into account in determining whether that person has discriminated against another because of the latter's disability. Gummow, Hayne and Heydon JJ thought that motive was at least relevant. Gleeson CJ thought that motive was relevant and, perhaps, could be determinative. McHugh and Kirby JJ thought motive was not relevant. All agreed, however, that it is necessary to ask why the alleged discriminator took the action against the alleged victim.
>
> In the present case, therefore, it was necessary for the Magistrate to ask why the AFP had withheld information about the appellant's medical condition from the Panel and to determine whether (having regard to s 10) the reason was the appellant's depressive illness. His Honour did not undertake that task and therefore failed to address a question which the legislation required him to answer if a finding of unlawful discrimination was

[18] [2004] FCAFC 95, [80]-[81].
[19] (2003) 202 ALR 133.
[20] [2004] FCAFC 95, 76.
[21] Ibid [85].

> to be made. His decision was therefore affected by an error of law.[22]

Fetherston v Peninsula Health [2004] FCA 485

In *Fetherston v Peninsula Health*, the applicant doctor's employment was terminated following the deterioration of his eyesight and related circumstances. Heerey J identified the following 'objective features' relevant for the comparison required in assessing direct discrimination under s 5 of the DDA, noting that 'one should not "strip out" [the] circumstances which are connected with [the applicant's] disability: *Purvis* at [222], [224]':

> (a) Dr Fetherston was a senior practitioner in the ICU, a department where urgent medical and surgical skills in life-threatening circumstances are often required;
> (b) Dr Fetherston had difficulty in reading unaided charts, x-rays and handwritten materials;
> (c) There were reports of Dr Fetherston performing tracheotomies in an unorthodox manner, apparently because of his visual disability;
> (d) Medical and nursing staff expressed concern about Dr Fetherston's performance of his duties in ways apparently related to his visual problems;
> (e) In the light of all the foregoing Dr Fetherston attended an independent eye specialist at the request of his employer Peninsula Health but refused to allow the specialist to report to it.[23]

His Honour went on to consider how the respondents would have treated a person without the applicant's disability in those circumstances and held:

> The answer in my opinion is clear. Peninsula Health and any responsible health authority would have in these circumstances treated a hypothetical person without Dr Fetherston's disability in the same way. An independent expert assessment would have been sought. A refusal to allow that expert to report must have resulted in termination of employment.[24]

Heerey J also applied *Purvis* in holding that a failure to provide aids specifically requested by an employee with a visual disability did not contravene the DDA as the Act 'does not impose a legal obligation on employers, or anyone else, to provide aids for disabled persons'.[25]

QBE Travel Insurance v Bassanelli [2003] FMCA 412

The decision of Raphael FM in *Bassanelli v QBE Insurance*, was upheld on appeal by Mansfield J, sitting as a single judge, in *QBE Travel Insurance v Bassanelli*.[26]
The case concerned the denial of travel insurance to the applicant who had metastatic breast cancer. Before Raphael FM, the applicant's evidence was that she did not expect insurance for her pre-existing medical condition, but rather other potential losses such as theft, loss of luggage, other accidental injury, or injury or illness to her husband.

The Insurer had conceded that there was no actuarial or statistical data relied upon in making the decision to refuse insurance, but maintained that their conduct was 'reasonable' and therefore fell within s 46(1)

[22] [2004] FCAFC 95, [68]-[70].
[23] Ibid [86].
[24] Ibid [89]. His Honour also held that the applicant must fail because the termination was not *because of* the applicant's disability, but his refusal to allow the report of the specialist to be released to his employer: [92]-[93].
[25] Ibid [77]. His Honour also discussed, in obiter comments, whether or not there was, for the purposes of indirect discrimination under s 6 of the DDA, a 'requirement' that the applicant perform his duties (such as reading medical reports) without aids. Heerey J stated that the mere non-response to the appellant's requests for aids could not be characterised as a 'requirement or condition' within the meaning of s 6: 'That provision is concerned with some positive criterion or test or qualification or activity with which the disabled person is called on to comply' ([81]). See, however, *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393 (Dawson and Toohey JJ), 406-7 (McHugh J).
[26] [2004] FCA 396.

of the DDA which provides for an exemption where:

> (f) the discrimination:
> (i) is based upon actuarial or statistical data on which it is reasonable for the first-mentioned person to rely; and
> (ii) is reasonable having regard to the matter of the data and other relevant factors; or
> (g) in a case where no such actuarial or statistical data is available and cannot reasonably be obtained—the discrimination is reasonable having regard to any other relevant factors.

Raphael FM found that the decision of the insurer was not reasonable in all of the circumstances of the case. Mansfield J dismissed the appeal by the insurer. His Honour commented that the exemptions in ss 46(1)(f) and 46(1)(g) of the DDA are 'not simply alternatives'[27] – only one can apply in any particular case. His Honour stated:

> I consider that, on its proper construction, the exemption for which s 46(1)(g) provides is only available if there is no actuarial or statistical data available to, or reasonably obtainable by, the discriminator upon which the discriminator may reasonably form a judgment about whether to engage in the discriminatory conduct. If such data is available, then the exemption provided by s 46(1)(g) cannot be availed of. The decision made upon the basis of such data must run the gauntlet of s 46(1)(f)(ii), that is the discriminatory decision must be reasonable having regard to the matter of the data and other relevant factors. If the data (and other relevant factors) do not expose the discriminatory decision as reasonable, then there is no room for the insurer to move to s 46(1)(g) and thereby to ignore such data. If such data were not available to the insurer but were reasonably obtainable, so that its discriminatory decision might have been measured through the prism of s 46(1)(f), again there would be no room for the insurer to invoke the exemption under s 46(1)(g).
>
> Hence, if the exemption pathway provided by s 46(1)(f) ought to have been followed by the insurer, whatever the outcome of its application, the exemption pathway provided by s 46(1)(g) would not also be available. It is only if there is no actuarial or statistical data available to, or reasonably obtainable by, the insurer upon which it is reasonable for the insurer to rely, that s 46(1)(g) becomes available. The legislative intention is that the reasonableness of the discriminatory conduct be determined by reference to such data, if available or reasonably obtainable, and other relevant factors. That conclusion is consistent with the Explanatory Memorandum to the Disability Discrimination Bill 1992 (Cth) concerning the superannuation and insurance exemption.[28]

In the circumstances of the case, however, the parties had conducted the application at first instance as if the exemption provided under s 46(1)(g) of the DDA was available to the appellant insurer and Mansfield J was of the view that the respondent to the appeal was bound by that conduct.[29]

Nevertheless, Mansfield J upheld the decision of the Federal Magistrate at first instance, confirming that the onus of proof is on an insurer to qualify for an exemption under s 46 of the DDA.[30] He further held that the assessment of what is 'reasonable' is to be determined objectively in light of all relevant matters, citing with approval[31] the decisions in *Waters v Public Transport Corporation*[32] and *Secretary, Department of Foreign Affairs v Styles*.[33]

[27] Ibid [28].

[28] Ibid [33]-[34].
[29] Ibid [36].
[30] Ibid [37].
[31] Ibid [51]-[54].
[32] (1991) 173 CLR 349.
[33] (1989) 88 ALR 621.

4. Selected developments in international law

4.1 Human Rights Committee

The decisions of the Human Rights Committee handed down in the period covered by this Bulletin were not of sufficient note to warrant inclusion.

4.2 European Court of Human Rights

***Assanidze v. Georgia* (71503/01)** (April 8, 2004)

Facts

The applicant in this matter, Tengiz Assanidze, is a Georgian national who was formerly the mayor of Batumi, the capital of the Ajarian Autonomous Republic in Georgia. His conviction for illegal financial dealings was upheld by the Supreme Court of Georgia in 1995. In 1999, the President of the Georgia granted the applicant a pardon, but he was not released by local authorities. In 2000, while still in custody, he was convicted by the Ajarian High Court for kidnapping and sentenced to twelve years of imprisonment. In 2001 the Supreme Court of Georgia acquitted the applicant of this crime, but he was not released by the Ajarian authorities.

Application of the Convention to Georgia

The Court held because Georgia had ratified the Convention for the whole of its territory, the Convention also applied to the Ajarian Autonomous Republic, which was subject to the control of Georgia and had no separatist aspirations.

Article 5§1 and 6§1

The Court held unanimously that there had been a violation of Article 5§1 (right to liberty and security) regarding the applicant's detention since 2001. The complaints concerning earlier periods of detention were inadmissible, in part because they were made out of time. The Court found that as the Supreme Court had ordered the applicant's release, there was no statutory or judicial basis for his detention. In addition, the Court held by 14 to 3 votes that there had been a violation of Article 6§1 (right to a fair hearing) due to the failure of the local authorities to comply with a judgment acquitting the applicant.

Damages

In accordance with Article 41 (just satisfaction), the Court said that it was for the State to decide on and implement measures to end Georgia's violation of the applicant's rights, but it unanimously declared that the Georgia must secure the applicant's release at the earliest possible date. The Court awarded the applicant 150,000 euros for pecuniary and non-pecuniary damage and 5,000 euros for costs and expenses.

***Maestri v. Italy* (39748/98)** (April 8, 2004)

Facts

The applicant in this case, Angelo Massimo Maestri, is a judge of the *La Spezia* District Court of Italy. In 1995 the National Council of the Judiciary found that the applicant had committed a disciplinary offence by virtue of his membership of a Masonic lodge between 1981 until 1993. The Council stated that conflict between Masonic and judicial oaths, the hierarchical structure of the Freemason organization, the rejection of State justice in favour of Masonic justice and the strength of the bonds between Freemasons meant that it was contrary to the disciplinary rules for a judge to be a Freeman. The applicant's appeal to the Court of Cassation was dismissed.

Mr Maestri applied to the European Court of Human Rights asserting the sanction was a violation of his rights, including his right to freedom of assembly and association recognised in Article 11 of the *European Convention on Human Rights*.

Freedom of Assembly and Association

By eleven votes to six, the Court held that Article 11 had been violated. The issue for the Court was whether the interference with

the applicant's right to freedom of assembly and association was prescribed by law. If this were the case, the interference could not be characterised as a violation of the Convention. To be prescribed by law, the measure in question must have a basis in domestic law and be accessible and foreseeable.

The problem arose in relation to the foreseeability of the prohibition on judicial membership of the Freemasons. The Court held that between 1981 and 1990, the applicant would not have foreseen that membership of a Masonic lodge could lead to a reprimand by the Council. A directive given by the National Council of the Judiciary in 1990 only stated that members of the judiciary were prohibited from joining proscribed associations. The Court held this directive was too vague to enable the applicant to realise that his membership was contrary to judicial rules during the period subsequent to the directive. Thus the interference had not been prescribed by law and there was a violation of the Convention.

Damages

The Court awarded the applicant 10,000 euros in just satisfaction and 14,000 euros in costs.

5. Australian and International Privacy Law

5.1 Australian Privacy Law Developments

Publication of case note 3 by the Federal Privacy Commissioner

On 24 March 2004 the Federal Privacy Commissioner released case note 3 regarding the disclosure of personal information between financial institutions collected prior to the commencement of the National Privacy Principles. The Federal Privacy Commissioner publishes case notes of finalised complaints that he considers would be of interest to the public. Most cases chosen for inclusion involve new interpretation of the Privacy Act or associated legislation, illustrate systemic issues, or illustrate the application of the law to a particular industry.

In *H v Financial Institution A and B* [2004] PrivCmrA 3 the complainant alleged that there had been a disclosure of personal information (including name, address and financial details) between two financial companies that breached the Privacy Act.

As it was not clear whether the Privacy Commissioner had the power to investigate the complaint, preliminary inquiries were undertaken under section 42 of the Privacy Act to ascertain the date when the personal information in the portfolio valuation was collected. The portfolio valuation was dated 15 December 2001 and the Office of the Privacy Commissioner was satisfied that both financial institution A and B had collected the information prior to 21 December 2001.

National Privacy Principle 2 only applies to information collected after 21 December 2001 and accordingly, the disclosures between financial institutions did not come within the jurisdiction of the Privacy Commissioner. The Privacy Commissioner declined to investigate the complaint under section 41(1)(a) of the Privacy Act.

http://www.privacy.gov.au/news

5.2 International Privacy Law Developments

New Zealand

Hosking v Runting and Ors CA 101/03 [25 March 2004]

In this decision the majority of the Court of Appeal of New Zealand (comprising Gault P, Blanchard J in a joint judgment and Tipping J in a separate judgment) recognised a cause of action for breach (or invasion) of privacy by giving publicity to private and personal information. The primary remedy upon a successful claim will be an award of damages. As in breach of confidence and defamation cases, injunctive relief may be appropriate in some circumstances.

The facts of the case may be summarised as follows. The first respondent Mr Runting, a photographer, was commissioned by the second respondent, the publisher of the magazine *New Idea!* to photograph the appellants' 18 month old twins. He did so, in the street. The appellants sought to prevent publication of the photographs. They pleaded that the photographing of the children and the publication of the photographs without their consent amounted to a breach of the twins' privacy. The appeal was ultimately dismissed with costs, with the full Court finding that the law did not and could not extend to provide a remedy for the appellants in this case.

The law of civil liability in this area may be said to be in transition. Gault P and Blanchard J, in their joint judgment, analysed the developments in this area of law both within New Zealand and internationally and considered the extent to which these developments are appropriate for New Zealand and should be built on. They reviewed authorities from the United Kingdom, Australia, Canada and the United States, finding that only the United States recognised a separate tort of privacy and that the right to privacy is generally outweighed in the United States by the First Amendment right to freedom of expression.

The view of the majority was that in substance the law in New Zealand developed at the High Court level[34] is very close to the position now reached (or approached) by the English Courts, although different terminology is used. The jurisprudence of the English Courts has so far declined to recognise a free-standing tort of invasion or breach of privacy. The same can be said of Australia at superior court level. In England, however, the law will protect against the publication of private information where that is harmful and is not outweighed by public interest or freedom of expression values. This is done within the scope of the tort of wrongful disclosure of confidential information. That is, the English Courts have chosen incrementally to develop the equitable remedy of breach of confidence. It was however, the view of the majority that in so doing it has been necessary for the English Courts to strain the boundaries of that remedy to the point where the concept of confidence has become somewhat artificial. The majority found that it was preferable in New Zealand to recognise breaches of confidence and privacy as separate causes of action. That is, there should be a separate head of liability known as breach or invasion of privacy. Gault P and Blanchard J go on to state at [110]:

> Certainly, we agree…that the introduction of any high-level and wide tort of invasion of privacy should be a matter for the legislature. But that is not envisaged. Rather we are taking developments that have emerged from cases in New Zealand and in the larger British jurisdiction and recognising them as principled and an appropriate foundation on which the law may continue to develop legitimate claims to privacy.

Gault P and Blanchard J considered that the scope of a cause, or causes, of action protecting privacy should be left to incremental development by future courts. Gault P and Blanchard J did, however, (drawing from the jurisprudence of the United States) identify two fundamental requirements for a successful claim for interference with privacy:[35]

1. the existence of facts in respect of which there is a reasonable expectation of privacy; and
2. publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

Although Gault P and Blanchard J stated expressly that the cause of action will evolve through future decisions of the courts, they did provide at [119] – [128] some general guidance as to the cause of action. It is important to note, that their honours were concerned with only that part of a tort of privacy that involves wrongful publicity given

[34] *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716; *P v D* [2000] 2 NZLR 591; and *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 and *L v G* [2002] DCR 234 (albeit, not at High Court level).

[35] Tipping J's formulation is slightly different and the tort would appear to be easier to establish, see paragraphs [255]-[258].

to private lives. It was found by the majority that there should be available in cases of interference with privacy a defence enabling publication to be justified by a legitimate public concern in the information. It should be for the defendant to provide the evidence of the concern. The word "concern" was used deliberately so as to distinguish between matters of general interest or curiosity to the public, and matters which are of legitimate public concern.

Turning to the facts of this case, the majority found that the inclusion of the photographs of the twins would not publicise any fact of which there could be a reasonable expectation of privacy. The photographs do not disclose anything more than could have been observed by any member of the public on that particular day. There is a considerable line of cases in the United States establishing that generally there is no right of privacy when a person is photographed on a public street. Further, the majority were not convinced that a person of ordinary sensibilities would find the publication of these photographs highly offensive or objectionable even bearing in mind that young children were involved. The appeal was dismissed.

Keith and Anderson JJ (in separate judgments), although agreeing that the appeal failed, were of the view that a separate cause of action for giving unreasonable publicity to private facts does not exist in the common law of New Zealand. The reasons for this conclusion can be briefly summarised as follows; the central role in society of the right to freedom of expression; the array of protections of relevant privacy interests against disclosures of private information and the deliberate and specific ways in which they are in general elaborated; and the lack of an established need for the proposed cause of action. Keith J considered it to be significant that a general provision on privacy was excluded from the New Zealand Bill of Rights Act.

United Kingdom

Campbell v MGN Limited [2004] UKHL 22 (6 May 2004)

Naomi Campbell's appeal from the decision of the Court of Appeal[36] was upheld by a majority of the House of Lords (3-2) and the order of the trial judge was restored.[37] Miss Campbell claimed damages for breach of confidence and the trial judge upheld Miss Campbell's claim awarding a modest sum of 2,500 pounds.

The question in this case was whether the publicity which the respondents gave to Miss Campbell's drug addiction and to the therapy she was receiving for it in an article published in 'The Mirror' newspaper on 1 February 2001 was actionable on the ground of breach of confidence. It was accepted at trial that the Mirror was entitled to publish the fact that Miss Campbell was a drug addict and was having therapy. This was because she had publicly denied any involvement with illegal drugs and the paper was entitled to put the record straight. But, it was argued, the paper was not entitled to disclose that she was attending meetings of Narcotics Anonymous, or that she had been doing so for some time and with some frequency. Nor was it entitled to illustrate the story with covert photography of Miss Campbell in the company of other participants in the meeting.

The proceedings essentially raised questions of fact rather than any new issues of principle. The judgments of the Lords provided a useful overview of the law of breach of confidence in this area of misuse or wrongful disclosure of private information as it stands in England in light of the enactment of the *Human Rights Act* 1998. Each of the Lords accepted that in England, unlike the United States of America, there is no over arching cause of action for invasion of privacy.

Courts of equity in England have long afforded protection to the wrongful use of private information by means of the cause of action of breach of confidence. The cause of

[36] [2003] QB 633
[37] [2002] EWHC 499 (QB)

action has now shaken off the limiting constraint of the need for an initial confidential relationship. Now the law imposes a duty of confidence whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as private or confidential. The *Human Rights Act 1998* and the incorporation into domestic law of articles 8 and 10 of the *European Convention on Human Rights* have had an impact on this area of the law. Article 8(1) of the Convention protects the right to respect for private life and article 10(1) protects the right to freedom of expression. As Lord Woolf CJ said in *A v B plc* [2003] QB 195, 202:

> [Articles 8 and 10] have provided new parameters within which the court will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court or whether the restriction of freedom of expression which such protection involves cannot be justified. The court's approach to the issues…has been modified because, under section 6 of the 1998 Act, the court, as a public authority, is required not to 'act in a way which is incompatible with a Convention right'. The court is able to achieve this by absorbing the rights which articles 8 and 10 provide into the long established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of these articles.

The exercise of balancing articles 8 and 10 of the Convention may begin when the person publishing the information knows or ought to know that there is a reasonable expectation that the information in question will be kept confidential. Once the information is identified as 'private' in this way, the court must balance the claimant's interest in keeping the information private against the countervailing interest of the recipient in publishing it. Neither right takes automatic precedence over the other.

The majority of the Lords were of the view that the information about Miss Campbell's attendance at Narcotics Anonymous meetings which was revealed in the Mirror article was private or confidential. The carrying out of the balancing exercise between the parties competing Convention rights was at the centre of this case and formed the point at which opinions divided. The majority of the Lords found that Miss Campbell's right to respect for her private life outweighed the right to freedom of expression that the respondent's were asserting in this case. The minority considered that the right to freedom of expression outweighed any intrusion into Miss Campbell's private life.