# Legal Bulletin

Volume 9 May – July 2004

## Inside this issue


### 1. Introduction and forthcoming seminar details

- Upcoming Seminar - Tuesday 28 September 2004
- Federal Discrimination Law 2004 - Seminars in Canberra and Brisbane
- User Survey

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

#### 2.1 Jurisprudence

- *Applicant S v Minister for Immigration and Multicultural Affairs*
- *North Australian Aboriginal Legal Aid Service Inc v Bradley*
- *NBCY v Minister for Immigration and Multicultural and Indigenous Affairs*
- *In Re Yoren*

#### 2.2 Legislative developments

- *Anti-Terrorism Bill (No. 2) 2004 and Anti-Terrorism Bill (No.3) 2004*
- *Migration Amendment (Judicial Review) Bill 2004*
- *Age Discrimination Act 2004 (Cth)*
- *Marriage Legislation Amendment Bill 2004*
- *National Security Information (Criminal Proceedings) Bill 2004 & National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004*

### 3. Developments in Australian Federal Discrimination Law

- *Vance v State Rail Authority*
- *Kelly-Country v Beers*
- *Catholic Education Office v Clarke*

### 4. Selected Developments in International Law

#### 4.1 Human Rights Committee

- *Ahani v Canada*

#### 4.2 European Court of Human Rights

- *Leyla Sahin v Turkey*

#### 4.3 Other jurisdictions

- *Rasul v Bush*
- *A (Respondent) v. Chief Constable of West Yorkshire Police (Appellant) House of Lords*

### 5. Australian and International Privacy Law

#### 5.1 Australian Developments

- *Publication of 2004 Complaint Case Note 15 by the Federal Privacy Commissioner*
- *Publication of 2004 Complaint Case Notes 3 - 14 by the Federal Privacy Commissioner*
- *Seven Network (Operations) Limited v Media Entertainment and Arts Alliance*
- *Kalaba v Commonwealth of Australia*

#### 5.2 International Developments

- *Von Hannover v Germany*

# 1. Introduction and Forthcoming seminar details

Welcome to the July/August 2004 edition of the Legal Bulletin, covering developments in domestic and international human rights law during the period 1 May 2004-31 July 2004.

## Upcoming Seminar

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.

The next seminar will be given by Jeremy Kirk of the New South Wales Bar on Tuesday 28 September 2004 from 5-6 pm. Jeremy will discuss the High Court's decisions in *Al Kateb*, *Al Khafaji* and *Behrooz*. The decisions in those matters were handed down after the period covered by this edition of the Bulletin and will be discussed in more detail in the next edition. However, in very brief summary, all three matters involved issues regarding the constitutional validity of immigration detention without trial, along with the construction of legislation which affects fundamental rights.

Jeremy is a constitutional and commercial lawyer, who has published in the areas of constitutional law and implied constitutional rights. He appeared as junior counsel for the Human Rights and Equal Opportunity Commission, intervening, in these three cases.

**Admission is free and the venue is:**

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

**Please note:** This session is booked out. However, if you are interested in attending please contact Gina Sanna on Tel: 02 9284 9645 on the 28/9/04, as additional places may become available.

We are hoping to conduct a similar seminar in Melbourne in the near future.

## Federal Discrimination Law Seminars

The Commission is continuing its series of seminars to launch the publication *Federal Discrimination Law 2004.* forthcoming seminars will be held in

**Brisbane on 24 September 2004** and **Canberra on 29 September 2004**.

The Seminars will focus on topical issues including

- a brief overview of the new *Age Discrimination Act 2004*,
- implications for the *Disability Discrimination Act 1992* arising from the decision in *Purvis v NSW*,
- maternity leave, return to work and family responsibilities in recent cases under the *Sex Discrimination Act 1984*, and
- issues of context, comedy and free speech arising in recent 'racial vilification' cases under the *Racial Discrimination Act 1975*.

For more details please click here *Federal Discrimination Law 2004* and its up to date supplements are available online at www.humanrights.gov.au/legal/

## User Survey

The Legal section are currently undertaking a user survey to gauge how useful the resources included in the Legal Bulletin and in the Legal section of the HREOC website are for users. Your feedback will assist us greatly in this task.

To respond to the Legal Bulletin and Webpage User Survey visit:
www.humanrights.gov.au/legal/bulletins/volume_9.html#survey

**Please note:** All survey responses will be kept confidential. The information you supply will only be used for evaluation purposes and will not be passed on to any third parties.

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

## 2.1 Jurisprudence

***Applicant S v Minister for Immigration and Multicultural Affairs*** **[2004] HCA (27 May 2004)**
www.austlii.edu.au/au/cases/cth/high_ct/2004/25.html

The appellant, an Afghani national of Pashtun ethnicity, arrived in Australia by boat on 11 July 2000. He had left Afghanistan to avoid being conscripted into the military by the Taliban. On 25 July 2000 the appellant applied for a protection visa. On 5 September 2000 the Minister's delegate refused the appellant's application.

On 4 January 2001 the Refugee Review Tribunal (Tribunal) affirmed the delegate's decision, which decision was ultimately upheld by the Full Federal Court. The majority of the High Court (Callinan J dissenting in part) overturned the Full Court's decision.

Section 36(1) of the *Migration Act 1958* (Cth) creates the protection visas class of visas. Section 36(2) provides that a criterion for a protection visa is that the applicant is a:

> non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

That criterion picks up the definition of a 'refugee' in art 1A(2) of the *Refugee Convention 1951*, which relevantly provides:

> [Any person who] owing to a well founded fear of being persecuted for reasons of race, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to fear, is unwilling to avail himself of the protection of that country.

The issues before the High Court were:

1. the criteria to be applied in order to determine whether a person is a member of a 'particular social group'; and

2. whether the in the circumstances of this case, the appellant could be considered to have a 'well-founded fear of being persecuted'.

In relation to the first issue, in a joint judgement, Gleeson CJ, Gummow and Kirby JJ overturned the Full Federal Court's finding that the appellant was required to show that the particular social group of which he claimed to be a member was *perceived* by Afghan society as comprising a particular social group. Their Honours held that there is no reason why the existence of a particular social group cannot be ascertained objectively, from a 'third party perspective'. Indeed, as their Honours pointed out, in many cases that perspective is crucial:

> Communities may deny the existence of particular social groups because the common attribute shared by members of the group offends religious or cultural beliefs held by a majority of the community. Those communities do not recognise or perceive the existence of a particular social group, but it cannot be said that the particular social group does not exist.

Hence while evidence that the group was perceived by the society in question as a particular social group would be relevant factor to be considered, it is not a requirement.

In a separate judgement, McHugh J similarly held in relation to the first issue, that to qualify as a particular social group:

> it is enough that objectively that there is an identifiable group of persons with a social presence in a country, set apart from other members of society, and untied by a common characteristic, attribute, belief, interest, goal, aim or principle.

McHugh J went further saying that it would not even be necessary for the persecutor(s) to actually perceive the group as constituting a particular social group. In his view, it would be enough if the persecutor(s) single out an asylum-seeker for 'being a member of a class whose members posses a 'uniting' feature or attribute', if that group were objectively cognisable as a particular social group.

Callinan J agreed with the majority in relation to the approach required to be taken by a court in determining a particular social group.

In relation to the second issue, Gleeson CJ, Gummow and Kirby JJ, found that the conscription policy of the Taliban was not a policy of general, but arbitrary and random application. Hence the question was whether the discriminatory treatment which resulted was 'appropriate and adapted' to achieving some legitimate end – in this case, the protection of Afghanistan. Saying that, in general, that objective will be 'entirely legitimate', their Honours suggested that in this case, it may not be, the Taliban being a 'ruthless and despotic' regime. However their Honours held that even if the objective was legitimate, the ad hoc and random means by which the Taliban sought to achieve their objective was not 'appropriate and adapted' to achieving that objective.

McHugh J held that in the event that the Tribunal (on remittal) found the appellant to be a member of a particular social group, it would be open to the Tribunal to find that the:

> Taliban was not applying a law of general application but forcibly apprehending members of a particular social group in an ad hoc manner that constituted persecution by the standards of civilised society.

Callinan J dissented from the majority in relation to the second issue, finding that the general liability to give military service – whether to a *de facto* or *de jure* government, does not constitute persecution for a Convention reason.

***North Australian Aboriginal Legal Aid Service Inc v Bradley* [2004] HCA 31 (17 June 2004)**
*www.austlii.edu.au/au/cases/cth/high_ct/2004/31.html*

The respondent had been appointed as the Chief Magistrate under the *Magistrates Act* (NT) until the age of 65 years but with remuneration fixed for only the first two years of his term. The appellant challenged the validity of the appointment of the respondent as Chief Magistrate contending that, on its proper construction, the *Magistrates Act* did not authorise the appointment of a Chief Magistrate in the circumstances that existed in relation to the determination of his remuneration. In the alternative, the appellant alleged that, insofar as the *Magistrates Act* purported to authorise the appointment of the Chief Magistrate in these circumstances, it infringed the principles set out in *Kable v Director of Public Prosecutions (NSW)* ("*Kable*"). The High Court unanimously dismissed the appeal.

Section 6 of the *Magistrates Act* provides that:

> Unless and until express provision is made in relation thereto, by or under an Act, a Magistrate appointed under s 4(3) –
>
> (a) shall be paid such remuneration and allowances; and
>
> (b) holds office on such terms and conditions,
>
> as the Administrator, from time to time, determines.

In a joint judgement, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ reaffirmed that judicial impartiality and independence was 'fundamental to the Australian judicial system'. Noting that the *Magistrates Act* purported to further the fact and appearance of judicial impartiality and independence, they held that s 6, consistent with that purpose, required the Administrator to make a determination as to remuneration with initial *or* continued effect at the commencement of an appointment of a judicial officer. However the words *from time to time* in that section did not permit the Administrator to fail to exercise his or her power, if that failure would create a 'hiatus' where no determination was in operation as it would be that hiatus which would compromise judicial independence and impartiality:

> A construction which permitted such a state of affairs would place the officeholder wholly at the favour of the executive government respecting a basic attribute of judicial independence the legislation was designed to promote.

Consequently their Honours held that s 6 of the *Magistrates Act* (and the determination made by the Administrator fixing the Chief Magistrate's remuneration for an initial two year period), was not invalid by reason that it deprived the Northern Territory Magistracy of impartiality or independence in contravention of the purpose of the Act.

In a separate judgement, Gleeson CJ emphasised the fundamental importance of judicial (personal or institutional) independence and impartiality as an essential human right, though in determining whether a tribunal is impartial or independent he stated that there is no single model of judicial independence, only certain identifiable minimum conditions that must be satisfied. In relation to the construction of s 6, Gleeson CJ rejected the appellant's argument that the purpose of the Act, (to further judicial independence and impartiality), required that s 6 be narrowly construed to require the Administrator to make a determination of indefinite duration which could be altered at a later time. His Honour held that to read s 6 in that way would produce unreasonable results as the passage of time would inevitably render the terms of an indefinite determination inequitable or inappropriate. Hence, in a practical sense, the construction urged by the appellant did not leave the magistracy in better position vis-à-vis the executive:

> I am unable to accept that, in a practical sense, the determination … left the … respondent in any position of dependency or disadvantage materially different from the position that would have applied had the determination been for an indefinite time.

Stating that the question of whether the making of a determination for a fixed period compromised the independence of the judiciary was a 'concrete, practical issue, to be resolved having regard to what is said to be the other course that could and should have been adopted', his Honour therefore upheld the validity of s 6 of the *Magistrates Act*.

Disposing of the matter by reference to the construction to be given to s 6, the Court did not find it necessary to consider to the application of *Kable* to this case.

***NBCY v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 922 (16 July 2004)**
www.austlii.edu.au/au/cases/cth/federal_ct/2004/922.html

This case confirmed that fear of severe harm to family members may constitute persecution. The applicant in this case, from North Korea, was refused a protection visa on the basis that he had a right to reside in South Korea. Section 36(3) of the *Migration Act 1958* (Cth) provides that Australia is not taken to have protection

obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in another country apart from Australia. Pursuant to s 36(5) this does not apply if the person has a well founded fear they would be persecuted in that country.

The applicant claimed that his family, who still lived in North Korea, would be in great danger if he were to live in South Korea. He alleged that the media in South Korea monitors and reports the arrival of North Koreans and North Korean authorities use this information. He feared that they might starve his family or use the threat of harming his family to force him to return to North Korea where he would face imprisonment, torture and death. He claimed that this knowledge would cause him serious harm amounting to persecution.

The Refugee Review Tribunal ('RRT') accepted the applicant's evidence but found that the applicant's family members were not applicants before the Tribunal and their circumstances did not fall within the Tribunal's jurisdiction. Accordingly, the RRT dismissed the applicant's claim that he would be persecuted if he lived in South Korea. The Tribunal held that the applicant was not entitled to a protection visa as he had a right to enter South Korea and he had failed to take all possible steps to avail himself of that opportunity.

Tamberlin J held that the RRT committed a serious error of law by failing to take into account the harm to the applicant's family:

> Both in principle and in authority "persecution", in the sense of serious detriment or harm to a person, can arise from a threat to their family and those to whom that person is strongly attached by bonds of kinship, love, friendship or commitment ... severe harm to a member of an applicant's family can amount to persecution of an applicant and is clearly relevant to the question of whether an applicant can be said to be in danger of persecution.

Tamberlin J remitted the matter to the RRT on the grounds that it had fallen into jurisdictional error by failing to consider the plight of the applicant's family, which was highly relevant to the existence of harm and persecution to the applicant.

Although his Honour found it was not necessary to decide the question, Tamberlin J also expressed a view that 'all possible steps' for the purpose of s 36(3) would mean something closer to 'all reasonably practicable measures' rather than 'possible' in an absolute literal sense.

***In Re Yoren* [2004] FCA 916 (13 July 2004)**
www.austlii.edu.au/au/cases/cth/federal_ct/2004/916.html

This case was concerned with s 13(1)(b) of the *Native Title Act 1993* (Cth), which provides that an application may be made to the Federal Court to revoke or vary an approved determination of native title. The grounds on which they may be varied or revoked are set out in s 13(5) and include (a) that events have taken place since the determination was made that have caused the determination no longer to be correct; or (b) that the interests of justice require the variation or revocation of the determination.

This case was the first determination under s 13(1)(b). The High Court noted in *Western Australia v Ward* (2002) 213 CLR 1 at [32] that the section 'reflects the requirement for the continuing acknowledgement and observance of traditional laws and customs and continuing connection with the land'.

The applicant in this case, who was one of several bodies corporate holding native title, sought a variation of the native title determination. Beaumont J held that s 61(1)(b) of the Act, which allows for 'the registered native title body corporate' to apply for a variation, does not permit any single body corporate to move, on a freestanding basis, for a revision as 'it would be wrong for any one of them to proceed, independently, to apply to revise their joint determination, unless of course all of them later agree to join in the claim for revision.' As there was no evidence that the other bodies corporate wished to apply for a revision Beaumont J ordered that the application be struck out.

## 2.2 Legislative Developments

**Anti-Terrorism Bill (No. 2) 2004 and Anti-Terrorism Bill (No.3) 2004**

In June 2004, the Senate referred the provisions of the Anti-Terrorism Bill (No. 2) 2004 to the Senate Legal and Constitutional Committee for inquiry and report. After the referral of the Bill to the Senate Committee significant amendments were introduced in the House of Representatives which removed Schedules 1, 2 and 5. A new Bill, the Anti-Terrorism Bill (No. 3) 2004, containing Schedules 1, 2 and 5, was then introduced into the House of Representatives. The Senate Committee considered the Anti-Terrorism Bill (No. 2) 2004 as it stood prior to amendment. The Senate Committee reported on the provisions of the Bill on 6 August 2004.

The two bills sought to amend the Criminal Code Act 1995, the Transfer of Prisoners Act 1983, the Passports Act 1938, the Australian Security

Intelligence Organisation Act 1979; the Administrative Decisions (Judicial Review) Act 1977; and the Crimes Act 1914. The stated aim of the bills was to 'improve Australia's counter-terrorism legal framework.' The Commission made submissions to the Senate Committee in respect of certain of the proposed amendments. The most significant of the proposed amendments, from the Commission's perspective, are discussed below.

***Criminal Code Act amendments***

The Anti-Terrorism Bill (No. 2) 2004 sought to introduce a new offence into the Criminal Code Act 1995 of intentionally associating with a person who is a member, or who promotes or directs the activities, of a listed terrorist organisation in circumstances where the association provides support to the organisation. The person was required to know that the organisation was a terrorist organisation and to have intended that the support 'assist' the organisation to expand or to continue to exist. There were a number of exemptions to the offence including; if the association was with a 'close family member' and related to a matter of family or domestic concern; or if the association was for the purpose of providing certain legal advice or representation. In addition, the offence did not apply to the extent that it would infringe any constitutional doctrine of implied freedom of political communication.

In its submission to the Senate Committee the Commission expressed concern in relation to the width of the proposed offence of 'association' and the lack of precision in certain of its terms. The essence of the Commission's concern was with the width of the term 'assist' and the range of activities that may fall within it. The Commission submitted to the Senate Committee that to conform with the principle of proportionality, the term must be defined in order to identify the nature of the risk that the offence is intended to address. For example, the term could be defined by reference to specific examples, as has been done in the United States of America. Finally, the Commission submitted that its concerns in relation to proportionality were not allayed by the proposed exemptions and that the exemptions as presently drafted did not contain adequate carve outs for lawyers, journalists and family members.

A number of the Commission's concerns appeared to be accepted by the Senate Committee in the recommendations made in its report of 6 August 2004. Relevantly, in relation to the proposed offence of 'association', the Senate Committee recommended that:

- the terms 'membership', 'associates', 'support', 'assist', 'promotes', and 'family or domestic concern' contained within the offence of 'association' be defined;

- the exemptions to the offence of 'association' for religious associations and for the provision of legal advice and representation be expanded; and that the exemption for the provision of humanitarian aid be more carefully defined; and

- the operation of the proposed offence of 'association' be subject to independent review after 3 years.

***Transfer of Prisoners Act amendments***

The Anti-Terrorism Bill (No. 2) 2004 sought to introduce a new Part IV into the *Transfer of Prisoners Act 1983* to allow the Attorney-General to make orders relating to the transfer of prisoners ('security transfer orders') between States and Territories in the interests of national security. The Commission's principal concern in relation to that issue was that security transfer orders create the possibility for delay in bringing a remand prisoner to trial and accordingly, the possibility for prolonged pre-trial detention, which may contravene article 9 of the *International Covenant on Civil and Political Rights*.

The Senate Committee recommended in its report that the proposed amendments to the *Transfer of Prisoners Act 1983* not proceed until further consultation between the states and territories and the Commonwealth Government is pursued.

***Passports Act amendments***

The Anti-Terrorism Bill (No. 3) 2004 sought to amend the *Passports Act 1938* to create new offences including; making false or misleading statements; giving false or misleading information; and providing false or misleading documents in connection with an application for a foreign travel document (ss.18-20). The Bill also sought to create new offences for the improper use or possession of a foreign travel document; and possessing, making or providing false foreign travel documents (ss21-22). A defence of reasonable excuse applied to the proposed offences within ss.21 and 22 only.

In its submission to the Senate Committee the Commission expressed concern that the new offences at ss.21 and 22 of the *Passports Act 1938* potentially conflict with article 31 of the *Convention Relating to the Status of Refugees*, 1951 in so far as they apply to refugees or asylum seekers who present themselves without delay to the authorities and show good cause

for their illegal entry or presence. Article 31(1) provides that 'States shall not impose penalties, on account of their illegal entry or presence, on refugees who…enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.' The Commission acknowledged that a measure of protection was perhaps afforded to refugees by the defence of reasonable excuse, however, the Commission submitted that the term 'reasonable excuse' should be defined and it should specifically include refugees and asylum seekers. The Commission also submitted that the defence of reasonable excuse should be extended to those offences at proposed ss.18, 19 and 20 of the *Passports Act 1938*. This submission was accepted by the Senate Committee and it was recommended that the Bill be reviewed to determine whether a defence of reasonable excuse should be included in proposed ss.18, 19 and 20 of the *Passports Act 1938.*

The Bill also sought to amend the *Passports Act 1938* to create new powers to demand, confiscate and seize foreign travel documents if, inter alia; a person is the subject of an arrest warrant issued in Australia or in a foreign country; a person is prevented from travelling internationally by force of an order of an Australian or a foreign court; or a person is suspected of engaging in harmful conduct (new ss.13-15).

The Commission's principal concern in relation to these provisions was that they provide that the fact of an arrest warrant issued by a foreign court or the fact of an order of a foreign court preventing a person from travelling internationally can be accepted by the executive, without further scrutiny, as the basis for an order that a person's foreign travel documents be surrendered. The Commission submitted that, in order to conform with the principle of proportionality, some inquiry (preferably judicial) should be made into the basis for or the circumstances surrounding the relevant arrest warrant or foreign court order before such an order or warrant could be relied upon in Australia as the basis for seizing a person's travel documents. Further, the individual concerned should be allowed the opportunity to make submissions in relation to the circumstances of the arrest warrant or foreign court order before having their freedom of movement restricted by the seizure of their travel documents.

The Senate passed the Anti-Terrorism Bill (No. 2) 2004, and the Anti-Terrorism Bill (No. 3) 2004 on 13 August 2004. The Senate agreed to four amendments to the Anti-Terrorism Bill (No. 2) 2004 that give effect to three of the Senate Committee's recommendations. Relevantly, the Senate agreed to broaden the exemption to the offence of 'association' under the *Criminal Code Act 1995* for the provision of legal advice where that advice or representation is provided to meet the obligations and exercise rights under other anti-terrorism legislation. This includes, for example, legal advice concerning the ASIO warrants procedure. The amendments did not give effect to the recommendation of the Senate Committee that the terms 'membership', 'associates', 'support', 'assist', 'promotes', and 'family or domestic concern' contained within the offence of 'association' be defined. The amendments were agreed to by the House on 13 August 2004.

The Commission's submissions are available on the Commission's website at:
www.humanrights.gov.au/legal/submissions/terrorism.html

**Migration Amendment (Judicial Review) Bill 2004**

On 30 March 2004, the Senate Selection of Bills Committee referred the provisions of the Migration Amendment (Judicial Review) Bill 2004 to the Legal and Constitutional Legislation Committee for inquiry and report by 15 June 2004.

The stated aim of the Migration Amendment (Judicial Review) Bill 2004 was to 'restore the original intention' of a number of procedural requirements, notably time limits for the commencement of applications, contained in the *Migration Act 1958*. These had been rendered largely ineffective by the decision of the High Court in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 which had held that the time limits could only apply to lawful decisions where there was no excess of jurisdiction – requiring a determination by a court of the lawfulness of the decision even for applications brought 'out of time'.

The intended effect of the Bill was to impose a 28-day time limit upon applications for judicial review, with a discretion to grant an extension for a further 56 days where the court considers it to be in the interests of the administration of justice. The Bill also provided that the time limit for the High Court was to commence from the date of *deemed*, rather than *actual* notification.

The Commission made written and oral submissions to the Committee, arguing that the imposition of strict procedural requirements, such as absolute time limits (84 days under the Bill), in cases involving refugee claims creates an unacceptable risk of 'refoulement' (returning a person to a country where they face persecution) and may therefore lead to a breach of human rights.

The Commission advocated an overriding discretion for a court to allow an application to be brought out of time where the interests of justice required such an

extension of time, considering: the extent of the delay in bringing the application; the reason(s) for the delay in bringing the application; the prospects of success of the application; and any other relevant circumstance.

The Commission's submissions are available on the Commission's website at: www.humanrights.gov.au/legal/submissions/migration_amendment.htm

The Committee recommended that the Bill proceed subject to an amendment specifying that the time limit for applications to the High Court commence only upon *actual* rather than *deemed* notification of the relevant decision. This recommended change was said to take into account concerns with the Constitutional validity of the provisions in their original form.

The Migration Amendment (Judicial Review) Bill 2004 had not passed the Senate at the time Parliament was prorogued.

### *Age Discrimination Act 2004* (Cth)

The recently enacted *Age Discrimination Act 2004* (Cth) prohibits direct and indirect discrimination on the basis of age, in the areas of work, education, access to premises, the provision of goods, services and facilities, accommodation, the disposal of land, the administration of Commonwealth laws and programs and requests for information.[1] The Act also makes it an offence to, *inter alia*, publish or advertise (including in a newspaper, magazine, television or radio) with the intention of unlawfully discriminating against someone on the basis of age,[2] or victimise someone for making a complaint of age discrimination to the Human Rights and Equal Opportunity Commission (the Commission).[3]

Australia's ageing population and workforce, and the corresponding need for older workers to remain in active employment is undoubtedly the driving force behind the Act,[4] one of the objects of the Act being to 'respond to demographic change and Australia's ageing population by removing barriers to older people participating in society, particularly in the workforce, and changing negative stereotypes about older people'.[5] The Revised Explanatory Memorandum to the Act (the Explanatory Memorandum) comments that:

> The proposed new age discrimination Bill will be an integral part of a wide range of key Government policy priorities to respond to the ageing workforce and population, and the important social and economic contribution that older and younger Australians make to the community.
> …
> Age discrimination is clearly a problem for both younger and older Australians. In relation to older Australians, in particular, many recent reports have emphasised the negative consequences of age discrimination on the wellbeing of older Australians and the broader consequences for the community. There is also evidence that the ageing of Australia's population will lead to an increase in the problem of age discrimination if Government action is not taken to address this issue. Government action is needed to address the generally unfounded negative stereotypes that employers and policy makers may have about both younger and older Australians, which limit their contribution to the community and the economy.[6]
> …
> Given the ageing of Australia's population, the promotion of a mature age workforces is a priority for the Government.[7]

The Act will also protect young people from discrimination on the basis of their age.

The Act was introduced into parliament by then Attorney-General Daryl Williams in January 2003, following extensive consultations by the Attorney-General's department with a wide range of organisations. These included the Commission, business, employee, industry, financial services, health services, youth, older people and social welfare groups. The Senate Legal and Constitutional Committee inquired into the Act (on reference from the Senate), and in its report, recommended some amendments be made to the Act.[8] However none of those amendments were subsequently enacted. After much parliamentary debate the Act was enacted into law on 15 June 2004, and it commenced on 22 June 2004.

While the Act is a welcome tool for the enforcement of the human rights for those who may suffer discrimination on the basis of their age, the Commission expressed some concerns during the consultative process and to the Senate Legal and Constitutional Legislation Committee. In particular, the Commission was concerned by the breadth of the exemptions and exceptions in the Act and the fact that

[1] See Part 4, Divisions 1 – 3 of the Act.
[2] See s 50 of the Act.
[3] See s 51 of the Act.
[4] See Revised Explanatory Memorandum, *Age Discrimination Act 2004*, 5 – 10.
[5] See s 3(e) of the Act.
[6] See Revised Explanatory Memorandum, *Age Discrimination Act 2004*, 5.
[7] See Revised Explanatory Memorandum, *Age Discrimination Act 2004*, 10.
[8] See Senate Legal and Constitutional Committee, *Provisions of the Age Discrimination Bill 2003*, 2003.

establishing that discrimination has taken place is likely to be more difficult than under other federal discrimination legislation by reason of the inclusion of a 'dominant reason' test.[9]

***Marriage Legislation Amendment Bill 2004***

On 27 May 2004 the Federal Government introduced the Marriage Legislation Amendment Bill 2004 (the first Bill). The Bill sought to:

- amend the *Marriage Act 1961*(Cth) to define marriage as the union of a man and a woman to the exclusion of all others, voluntarily entered into for life; and to confirm that unions solemnised overseas between same sex couples will not be recognised as marriages in Australia; and
- amend the *Family Law Act 1975* (Cth) to prevent intercountry adoptions by same sex couples under multilateral or bilateral agreements or arrangements.

The stated aim of the Bill was to 'protect the institution of marriage' and 'reflect the Commonwealth's view that the adoption of children by same sex couples is undesirable'.[10]

The first Bill passed the House of Representatives on 17 June 2004 and was introduced into the Senate the following day. It was referred to the Senate Legal and Constitutional Legislation Committee on 23 June 2004 with the Committee scheduled to release a report by 7 October 2004. The Commission provided the Senate Committee with a written submission in respect of the human rights standards relevant to the Bill.

On 24 June 2004 the Government introduced a second Bill, the Marriage Amendment Bill 2004, which incorporated only the amendments to the Marriage Act, which the Opposition had stated it would not oppose. In the Senate later the same day, the Opposition, Independent and minor party senators refused the Government leave to give the Second Bill a first reading.

However, on 13 August 2004 the second Bill was again introduced into the Senate and passed.

The Senate Inquiry into the first Bill was to continue in respect of the adoption issue only, however it has been cancelled since the announcement of the Federal election. The Committee resolved to table a report stating that, due to the prorogation of parliament and the dissolution of the House of Representatives, the Committee has determined not to continue its examination of the first Bill.

***National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004***

These Bills sought to protect information from disclosure during a proceeding for a Commonwealth offence where the disclosure is likely to prejudice Australia's national security.

On 16 June 2004, the Senate referred the provisions of the above Bills to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 19 August 2004. The Commission made a written submission to the Senate Inquiry, raising concerns about certain provisions in the Bills, which is available at:
www.humanrights.gov.au/legal/submissions/national_security.html.

The report of the Committee's inquiry has now been tabled. The Committee concluded that the Bills should proceed, subject to the Committee's recommendations. The Committee makes a number of references to the Commission's submissions and to ICCPR rights in its report, which is available at:
www.aph.gov.au/senate/committee/legcon_ctte/index.htm

The bills had not passed either house at the time Parliament was prorogued.

## 3. Developments in Australian Federal Discrimination Law

***Vance v State Rail Authority* [2004] FMCA 240**
www.austlii.edu.au/au/cases/cth/FMCA/2004/240.html

In *Vance v State Rail Authority*, the applicant was a woman with a visual disability who complained of indirect disability discrimination in the provision of services by the respondent. The applicant had been unable to board a train because the guard allowed insufficient time to do so and closed the doors without warning while the applicant was attempting to board.
The primary argument pursued under the DDA was that the respondent required the applicant to comply with a requirement or condition defined as follows:

[9] Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Committee on the Age Discrimination Bill 2003*, 2003, available on the Commission's website at: http://www.humanrights.gov.au/legal/submissions/age_discrimination.html,.
[10] Explanatory Memorandum to the Marriage Legislation Amendment Bill 2004.

> That in order to travel on the 11.50am train on 8 August 2002 operated by the Respondent any intending passenger at Leumeah Station had to enter the train doors promptly which may close without warning.

Raphael FM found that the guard on the train simply did not notice the applicant attempting to board the train and closed the doors after a period of between 10 and 15 seconds believing that no-one was getting on. [11] His Honour also appeared to find that there was no warning that the doors were to be closed.[12] It did not follow, however, that the respondent Authority (the individual guard was not named as a party) imposed a requirement or condition consistent with that conduct.

The evidence before the Court established that the respondent had detailed procedures for guards which included a requirement that they make an announcement 'stand clear, doors closing' and ensure that all passengers are clear of the doors prior to closing them and prior to giving the signal to the driver to proceed. In these circumstances, Raphael FM asked whether it could be said that the alleged action of the guard constituted a 'requirement or condition' imposed by his employer and concluded that it could not.

His Honour considered the provisions of s 123(2) of the DDA which provides for vicarious liability of a body corporate for the actions of its employees unless the body corporate establishes that it took 'reasonable precautions and exercised due diligence to avoid the conduct'. Raphael FM was satisfied that the respondent had taken reasonable precautions and exercised due diligence to avoid the impugned conduct,[13] and concluded: 'If the respondent has no liability under s 123(2)… and if all the evidence is that the respondent itself did not impose the alleged requirement or condition, then I cannot see how there can be any liability upon it.'[14] His Honour accordingly dismissed the application under the DDA.[15]

### ***Kelly-Country v Beers*** **[2004] FMCA 532**

www.austlii.edu.au/au/cases/cth/FMCA/2004/336.html

In *Kelly-Country v Beers*, Brown FM considered the performance of a comedian who portrays a purportedly Aboriginal character 'King Billy Cokebottle' for the duration of his routine, much of which involves jokes with no specific racial element. In doing so, the respondent applies black stage make-up and an unkempt white beard and moustache as well as 'what appears to be a white or ceremonial ochre stripe across his nose and cheek bones… [and] a battered, wide brimmed hat, of a kind often associated with Australian, particularly Aboriginal people, who live in a rural or outback setting'.[16] The respondent's routine is delivered in Kriol,[17] or at least an imitation of it, with an accent common to Aboriginal people in Northern Australia.

The applicant complained that the act stereotypes Aboriginal people in both its delivery and content and holds them up to mockery and contempt, thereby breaching s 18C of the *Racial Discrimination Act 1975* ('RDA') which provides:

> It is unlawful for a person to do an act, otherwise than in private, if:
>
> (a) the act is reasonable likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people; and
> (b) the act is done because of the race, colour or national or ethnic origin of the other person or some or all of the people in the group.

Brown FM held that, when considering the material (namely, video cassettes) of a comedian which circulated throughout the country generally, the appropriate group for the purposes of the assessment required by s 18C(1) was 'ordinary Aboriginal people within Australian society'. His Honour stated that it was not appropriate to otherwise place any geographical limitation on the group.[18]

Brown FM applied a 'reasonable victim' test and noted that in doing so it is necessary to be informed by community standards and consider the context in which the communication is made, including 'the relative historical or socioeconomic situation of the group of persons to which a complainant belongs'.[19]

[11] [2004] FMCA 240 [45], [47].
[12] Ibid [44].
[13] Ibid [54].
[14] Ibid [58].
[15] His Honour did, however, find liability for negligence under the Court's accrued jurisdiction, applying the different test for vicarious liability at common law: ibid [64]. Raphael FM awarded compensation of $5,000: [71].

[16] [2004] FMCA 532, [30].
[17] An English-based Aboriginal creole spoken in Northern Australia.
[18] Ibid [100].
[19] Ibid [88].

His Honour stated:

> … a joke about a historically oppressed minority group, which is told by a member of a racially dominant majority, may objectively be more likely to lead to offence. As a result, a joke told by an Aboriginal person about other Aboriginal people may not be so likely to transgress the provisions of the RDA, because the teller of the joke itself and its subject are not in a situation of power imbalance, but are each members of the same subset of disadvantaged people…[20]

His Honour concluded, however, on the evidence that the act complained of was not unlawful:

> I accept that Mr Beers' act and tapes are vulgar and in poor taste. I also accept that Aboriginal people are a distinct minority within Australian society and so objectively more susceptible to be offended, insulted, humiliated and intimidated because of their disadvantaged status within Australian society. However, Mr Beers' act is designed to be humorous. It has no overt political context and the nature of the jokes or stories within it are intended to be divorced from reality. The act is not to be taken literally or seriously and no reasonable Aboriginal person, who was not a political activist, would take it as such.
>
> King Billy Cokebottle himself does not directly demean Aboriginal people, rather he pokes fun at all manner of people, including Aboriginal people and indeed in many of his stories, Aboriginal people have the last laugh. I do not think that an Aboriginal person, who had paid expecting to hear a ribald comedic performance, would believe that the subject of either the act itself or the recorded tapes was to demean Aboriginal people generally. [21]

His Honour also suggested that the portrayal of the character 'King Billy Cokebottle' was not an act done 'because of' race:

> I have some difficulty in reaching the conclusion that Mr Beers performs his act because of Aboriginal people any more than I could conclude that Barry Humphries assumes the character of Edna Everage because of women in Moonee Ponds… King Billy Cokebottle is a vehicle for his particular style of comedic invention.[22]

Brown FM considered the application of the exemption in s 18D(a) of the RDA which provides that it is not unlawful to do or say anything 'reasonably and in good faith' in the performance of an 'artistic work'. His Honour held that as part of remedial legislation, the exemption in s 18D should be narrowly construed:

> Essentially, those who would incite racial hatred or intolerance within Australia should not be given protection to express their abhorrent views through a wide or liberal interpretation of the exceptions contained within section 18D. A broad reading of the exemptions contained in section 18D could potentially undermine the protection afforded by the vilification provisions contained in section 18C of the RDA.[23]

There was no doubt, however, that a comedy performance fell within the term 'artistic works'. His Honour noted that the explanatory memorandum makes specific reference to 'comedy acts'.[24]

Brown FM found that the respondent had acted reasonably, taking into account the context of a comedy performance:

> In the particular context of this case, I bear in mind that Mr Beers was appearing as the character of King Billy Cokebottle, who in many ways is a grotesque caricature. As such, the character has more licence than a politician or social commentator to express views. In the context of a stand-up comedy performance, the offence implicit in much of Mr Beers' material does not appear to me to be out of proportion. I do not believe that there is a high degree of gratuitous insult, given that the comedic convention of stand-up is to give offence or make jokes at the expense of some member or members of the community. In this regard, the character does not use slang terms, which are likely to give particular offence to any particular ethnic or racial group. In my view, Mr Beers keeps his performance within the constraints and conventions of stand-up comedy and when viewed objectively, it is reasonable.[25]

His Honour further found that the respondent had acted 'in good faith', accepting his evidence that he 'personally does not intend to hold Aboriginal people up as objects of mockery or contempt' and means 'no particular spite towards Aboriginal people and, indeed, many people of indigenous background have enjoyed his performances'.[26]

[20] Ibid [92].
[21] Ibid [111]-[112].
[22] Ibid [110].
[23] Ibid [116]. Note, however, that a contrary view was taken by Nicholson J in *Bropho v Human Rights and Equal Opportunity Commission* [2002] FCA 1510, [31], and in that matter on appeal by French J: *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16, [73].
[24] [2004] FMCA 532, [121].
[25] Ibid [127].
[26] Ibid [131].

## *Catholic Education Office v Clarke* [2004] FCAFC 197

www.austlii.edu.au/au/cases/cth/FCAFC/2004/197.html

### *Background*

The appellants, the Catholic Education Office ('the CEO') and Mackillop College ('the College'), challenged the decision of Madgwick J[27] who had found that they had indirectly discriminated against Jacob Clarke, a deaf student, in the terms and conditions upon which they were prepared to enroll him in the College. While the offer of enrolment by the College included a 'model of support' which acknowledged Jacob's special needs, it did not include provision of an Auslan (Australian Sign Language) interpreter which, it was held, Jacob required to receive an education.

The Full Federal Court found there to be no error in the decision of Madgwick J and unanimously dismissed the appeal with costs.

### *Decision of Madgwick J*

The case was argued as one of 'indirect discrimination under s 6 of the *Disability Discrimination Act 1992* (Cth) (DDA), which provides:

> For the purposes of this Act, a person (discriminator) discriminates against another person (aggrieved person) on the ground of a disability of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition:
>
> (a) with which a substantially higher proportion of persons without the disability comply or are able to comply; and
> (b) which is not reasonable having regard to the circumstances of the case; and
> (c) with which the aggrieved person does not or is not able to comply.

Madgwick J had found that it was a 'requirement or condition' imposed by the College that Jacob 'participate in and receive classroom instruction without the assistance of an Auslan interpreter'. This was a requirement or condition with which Jacob could not comply and which a 'substantially higher proportion' of people without the disability were able to comply (appropriate 'base groups' for this comparison were 'students admitted to Year 7 at the College in 2000' or alternatively 'all students enrolled in the College in 2000').

Madgwick J also found that the requirement or condition was not reasonable in all of the circumstances of the case. In particular, his Honour considered Jacob's reliance on Auslan and the fact that he would not have received an effective education without an interpreter being made available. He also considered the steps taken by the College to meet Jacob's needs, the availability of Auslan interpreters and financial considerations (although financial considerations did not, in the circumstances, 'play a major part in the equation').

### The Appellants' Arguments

The appellants' main arguments to the Full Court can be summarised as follows:

- The DDA does not impose an obligation to discriminate positively in favour of a disabled person. It was therefore not unreasonable for the CEO to refuse to provide a 'model of support' for Jacob which included Auslan.
- The appellant did not require Jacob to comply with a term or condition – rather they had offered Jacob a benefit (the 'model of support') which was not available to other students.
- It was not a requirement or condition, but rather the nature of the service offered by the College, that education be received in the English language.
- As the 'model of support' was only offered to one student, Jacob, it was not possible to make the comparison required by s 6 with a group of people without the disability to determine whether they could, or could not, comply with the requirement or condition.
- His Honour erred in finding that the failure to provide for an Auslan interpreter was unreasonable, in particular in making the factual findings upon which his conclusion was based.
- In any event, the appellant's actions were protected by the exemption in s 45 of the DDA which, amongst other things, makes it not unlawful to do an act that is 'reasonably intended' to afford persons with a disability services to meet their special needs in relation to education. In essence, because the appellants' 'model of support' was 'reasonably intended' to meet Jacob's special needs, it could not then be impugned for failing to include provision for an Auslan interpreter.

[27] (2003) 202 ALR 340.

**Decision of the Full Court**

The Full Court rejected the appellant's submission in relation to 'positive discrimination'. The Full Court (Sackville and Stone JJ, with whom Tamberlin J agreed) suggested that the submission 'appears to have been inspired by certain comments made in the joint judgment of Gummow, Hayne and Heydon JJ in *Purvis.*'[28]

The Court noted that *Purvis* was not argued as a case of indirect discrimination under s 6 of the DDA and stated:

> The reasoning in the joint judgment in *Purvis* does not support the proposition that the appellants appeared to be urging, namely that the DD Act should be construed so as to preclude any requirement that an educational authority 'discriminate positively' in favour of a disabled person. The concept of 'positive discrimination' is itself of uncertain scope and does not provide a sure guide to the construction of the statutory language, in particular to s 6 of the DD Act.[29]

The Court upheld the finding of Madgwick J that the terms or conditions upon which the College was prepared to admit Jacob constituted a 'requirement or condition' for the purposes of s 6 of the DDA, namely that he participate in and receive classroom instruction without the assistance of an Auslan interpreter.[30]

The Court also upheld the approach of Madgwick J to the 'base group' in assessing whether or not a 'substantially higher proportion' of people without the disability could comply with the requirement or condition. The Court rejected the submission that it was not possible to make such a comparison 'simply because the alleged discriminator claims to have provided a benefit or service not generally available to non-disabled persons.' Once an aggrieved person established that they were required to comply with a 'requirement or condition', the Court is required to make the appropriate comparison against an appropriately defined base group.[31]

The Court upheld the findings of Madgwick J in relation to the unreasonableness of the requirement or condition and set out the established principles for determining that issue.[32]

The appellant's arguments in relation to the 'special measures' provision in s 45 of the DDA were also rejected by the Court. The 'act' rendered unlawful by the DDA was not the offer of a 'model of support' which provided benefits to Jacob, but the appellants' offer of a place subject to a term or condition that Jacob participate in and receive classroom instruction without an interpreter. This could not be said to be 'reasonably intended' to meet Jacob's special needs for the purposes of s 45.[33]

In any event, the test of whether or not something is 'reasonably intended' to achieve the objectives set out in s 45 is an objective one. Madgwick J had found that 'any adult should have known that the withdrawal of Auslan support would cause Jacob distress, confusion and frustration and that, in the absence of an Auslan interpreter, Jacob would not have received an effective education'. Sackville and Stone JJ concluded:

> Whatever the subjective intentions of the appellants' officers, it could not be said that the particular act otherwise rendered unlawful satisfied the objective standard incorporated into s 45.[34]

The Full Court also upheld the damages awarded by Madgwick J ($20,000 for general damages plus $6,000 interest), which was described by Sackville and Stone JJ as 'relatively modest'.[35]

Their Honours further commented that:

> Contrary to the claims made on behalf of the appellants, this case does not mean that educational authorities risk being penalized for endeavouring to assist disabled children. The outcome of the case depends on the particular factual findings made by the primary Judge. It also reflects the way in which the case was fought both and trial and on appeal.[36]

# 4. Selected developments in international law

## 4.1 Human Rights Committee

### *Ahani v Canada* 15 June 2004

www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol1/html/2002scr1_0072.html

The Solicitor General of Canada and the Minister of Citizenship and Immigration issued a security certificate under section 40.1 of the *Immigration Act* alleging that Mr. Ahani was a member of an

[28] [2004] FCAFC 197, [87], referring to *Purvis v New South Wales (Department of Education and Training)* (2003) 202 ALR 133.
[29] [2004] FCAFC 197, [93].
[30] Ibid [107].
[31] Ibid [113].
[32] Ibid [115].
[33] Ibid [131].
[34] Ibid [132].
[35] Ibid [134].
[36] Ibid [136].

organization which engaged in terrorism. Canada had granted refugee status to the complainant, but intelligence reports asserted that the complainant had been trained as an assassin by the Iranian Ministry of Intelligence and Security. Ahani argued that his removal would violate, *inter alia*, article 3 of the Convention against Torture and articles 9 (arbitrary detention and lack of access to court) and 13 (lawful expulsion of aliens) of the ICCPR.

**Findings of the HRC**

The HRC observed that detention on the basis of a security certification on national security grounds did not *ipso facto* result in arbitrary detention in contravention of Article 9(1). However, in the absence of a conviction for any crime, Article 9(4) further requires that the detainee have appropriate access to and frequency of judicial review of the substantive justification for his detention. In this case, the prolonged nature of the judicial proceedings – four years and ten months – violated the requirement in 9(4) that the review be 'without delay'.

The Committee further found that Canada had failed to provide Ahani with opportunity to submit reasons against the decision to remove him from the country, in violation of Article 13 ICCPR. It found that no 'compelling reasons of national security' existed to exempt Canada from this requirement of due process, and that, because Ahani alleged that he would be subjected to torture if deported, there was a violation of Article 7 (right of freedom from torture) in conjunction with Article 13.

Note that four members of the Committee entered separate opinions disagreeing with the conclusion that there was a violation of Article 9(4). This was based on the fact that Ahani's contesting the constitutionality of the security certification procedure contributed substantially to the length of the hearings and therefore to the delay.

## 4.2 European Court of Human Rights

### *Leyla Sahin v Turkey* 29 June 2004

www.associazionedeicostituzionalisti.it/cronache/giurisprudenza_comunitaria/cedu_velo/Sentenza_cedu_velo.pdf

The applicant is a Turkish national from a family of practising Muslims who considers it her religious duty to wear the Islamic headscarf. The University of Istanbul, where she was a medical student, issued a circular in February 1998 providing that students with beards or who wore the Islamic headscarf would be refused admission to lectures, courses and tutorials. From March 1998 the applicant was denied access to various lectures and examinations, as well as being refused enrolment to a course. The faculty also suspended her from university for a term for taking part in an unauthorised assembly protesting these regulations (although this was later revoked under an amnesty law).

**Complaint**

The applicant's primary complaint was brought under Article 9 of the European Convention on Human Rights (freedom of thought, conscience and religion). She alleged that the university regulation constituted an unjustified interference with her right to manifest her religion. She further argued that the prohibition on wearing the Islamic headscarf obliged students to choose between education and religion and discriminated between believers and non-believers (Art 14, Art 9). She also complained of an unjustified interference with her right to education within the meaning of Article 2 of Protocol No. 1 to the Convention.

**Findings of the Court**

The Court held unanimously that there had been no violation of Article 9. Although the university regulation constituted an interference with the applicant's right to manifest her religion (Art 9(1)), it was valid insofar as the measure primarily pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order (per Art 9(2)).

With particular reference to the Turkish context, the Court concluded that public rights and freedoms and maintenance of order were at stake because, having been used symbolically in recent years by extremist political movements who sought to impose on society their religious symbols and theocratic ideology, the headscarf had taken on political significance. In those circumstances, and having regard in particular to the margin of appreciation left to the Contracting States to take into account their specific national circumstances, the Court found that the university regulations and the measures taken to implement them were justified in principle and proportionate to the aims pursued.

The further requirement under Article 9 that interferences be 'necessary in a democratic society' was also fulfilled. The fundamental principles of secularism and equality enshrined in the Turkish Constitution allowed restrictions to be placed on the freedom to manifest religion if the restrictions were necessary to defend those principles. The Court further considered that the regulations were intended to preserve pluralism in the university.

The Court further found that no separate question arose under Articles 8 (right to respect for private and family life) or 10 (freedom of expression), Article 14 (prohibition of discrimination) or Article 2 of Protocol No. 1 (right to education).

## 4.3 Other jurisdictions

### *Rasul v Bush* (United States Supreme Court, 03-334, 28 June 2004)

http://supct.law.cornell.edu/supct/html/03-334.ZS.html

In early 2002, Rasul was captured by the United States military during the hostilities between United States and Taliban forces. The United States military transferred him to the Guantanamo Bay Naval Base, Cuba, where he remained for over two years. Upon his detention, the prisoner (through relatives) filed actions for writs of habeas corpus under the federal habeas corpus statute, 28 U.S.C. §§ 2241-2243. The fourteen petitioners in this action included Australians Mamdouh Habib and David Hicks.

The question presented was whether United States courts lack jurisdiction to consider challenges to the legality of detention of foreign nationals captured abroad in connection with hostilities and incarcerated without charge at Guantanamo Bay.

**Findings of the Court**

The government argued that the United States courts lack jurisdiction over aliens captured abroad and detained at Guantanamo Bay. They relied on *Johnsen v. Eisentrager* 339 U.S. 763 (1950) where the Supreme Court stated that 'nothing . . . in [the United States'] statutes provided prisoners, captured and detained abroad, a right to habeas review.' Both the District Court and the Court of Appeals rejected the habeas petitions, following the view in *Eisentrager*.

The detainees petitioned for certiorari and the Supreme Court reversed the decisions below. Justice Stevens found a close reading of the habeas statute sufficient to decide that the statute applies to executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction but not 'ultimate sovereignty' (since Guantanamo Bay was occupied by the USA pursuant to a lease which gives the US 'complete jurisdiction and control and within' the base for the time of the lease).

In *Braden v. 30th Judicial District Court* 410 U.S. 484, 495 (1973), the Court had concluded that a prisoner's presence within the jurisdiction was not a prerequisite of the habeas statute. Rather, jurisdiction could lie under 28 U.S.C. § 2241 'as long as the custodian can be reached by service of process.' Following this interpretation of § 2441, the Court concluded that the statute permitted the Guantanamo detainees to file their habeas petition.

The government further advanced the presumption against extraterritorial application of federal law as a reason that statutory habeas was not available to petitioners. To this contention, Justice Stevens replied that extraterritoriality 'has no application to the operation of the habeas statute with respect to persons detained within the territorial jurisdiction of the United States.' Because the United States exercised 'complete jurisdiction and control' over Guantanamo it was within the territorial jurisdiction of the United States, whether or not the US exercised sovereignty over it.

Having found that jurisdiction exists, the Supreme Court sent the case back to the District Court to consider the merits of the petitioners' claims.

### *A (Respondent) v. Chief Constable of West Yorkshire Police (Appellant)* House of Lords 6 May 2004 [2004] UKHL 21

www.parliament.the-stationery-office.co.uk/pa/ld200304/ldjudgmt/jd040506/chief-1.htm

A's application to become a constable in the West Yorkshire Police was rejected on the ground that her transgender status excluded her from conducting body searches, which was part of a constable's job description. The issue on appeal was whether this determination discriminated against A, in breach of the *Sex Discrimination Act 1975* (UK).

Section 7(2)(b) of the *Sex Discrimination Act* allows sex discrimination where sex is a genuine occupational qualification in order to preserve decency or privacy. *The Police and Criminal Evidence Act 1984* (UK) requires that suspects be searched by a police officer of the same sex. The Chief Constable argued that since A was still regarded a man by domestic law, she could not search female suspects, but, presenting as a female, could neither search male suspects.

**Findings of the Court**

The House of Lords rejected the Chief Constable's appeal. The European Community's Equal Treatment Directive 76/207/EEC of 9 February 1976 (which will prevail over domestic English law to the extent of any inconsistency) prohibits any 'discrimination whatsoever on the grounds of sex either directly or indirectly'. The prohibition is qualified where an occupation is of a nature which dictates that 'the sex of the worker constitutes a determining factor'.

In *P v S and Cornwall County Council [1996] IRLR 347*, the European Court of Justice held that discrimination arising from the gender reassignment fell within discrimination on the grounds of sex for the purposes of the Directive. In *Goodwin v UK [2002] IRLR] 664 ECHR,* that court further held that a post-operative male to female transsexual person is entitled to legal recognition as a female, and should always be considered as female in an employment context unless public policy reasons weighed against the interests of the individual claimant. The Court held that there were no such policy reasons in the present case: an ability to conduct searches was a supplementary occupational qualification and did not present a problem to which exclusion from the police force was an appropriate response. In any event, where a person is 'visually and for all practical purposes indistinguishable from non-transsexual members of that gender', no one of that gender searched by such a person 'could reasonably object to the search'. The Court considered that increased understanding of transsexuality and evolving perceptions of human dignity and freedom had 'reached a point where the margin of appreciation accorded to a state could no longer be held to legitimise the denial of formal recognition to an acquired change of gender.

# 5. Australian and International Privacy Law

## 5.1 Australian Privacy Law Developments

### *Publication of 2004 Complaint Case Note 15 by the Federal Privacy Commissioner*

**www.privacy.gov.au/act/casenotes/ccn15_04.html**

On 30 June 2004 the Federal Privacy Commissioner issued 2004 Complaint Case Note 15. *B v Credit Provider* [2004] PrivCmrA 15 concerned the listing by a credit provider of a payment default for a specified amount on the complainant's consumer credit information file.

Section 18E(1)(b)(vi)(A) of the *Privacy Act 1988* states that a credit reporting agency must not include personal information in an individual's consumer credit information file unless, amongst other things, the information is a record of credit provided by a credit provider to an individual, where a payment is at least 60 days overdue.

The complainant alleged that they had never been 60 days overdue and that they had been denied credit because of the payment default. The complainant sought removal of the payment default and compensation.

After investigation by the Privacy Commissioner it was apparent payments had been made but initially the credit provider could not establish for which account they were intended. Once the payments were identified the credit provider applied these to the complainant's credit card account. The credit provider removed the payment default since the complainant had not been 60 days overdue.

The Office put the view to the complainant that their failure to properly identify their payments contributed to the problem. The Office advised that in the circumstances it considered the removal of the default listing as an adequate response to the matter. The complainant did not pursue the issue of compensation.

### *Publication of 2004 Complaint Case Notes 3 - 14 by the Federal Privacy Commissioner*

These case notes were also issued in June 2004 and a link is provided below.
www.privacy.gov.au/act/casenotes/index.html#comdet

### *Seven Network (Operations) Limited v Media Entertainment and Arts Alliance* [2004] FCA 637 (21 May 2004)

www.austlii.edu.au/au/cases/cth/federal_ct/2004/637.html

Seven Network and the Media Entertainment and Arts Alliance (MEAA) together with the Community and Public Sector Union (CPSU) were party to the *Seven Network (Operations) Ltd Enterprise Agreement 2000*. The agreement had a nominal expiry date of 30 June 2002. MEAA and CPSU opposed the new enterprise agreement proposed by Seven. On 30 April 2003 Seven wrote to each of the employees to be covered by the agreement to advise that it would make an agreement directly with them.

MEAA, using an internal Seven telephone list that it had obtained, contracted a call centre, Connect, to survey those employees in relation to the proposed agreement.

Seven claimed that MEAA and Connect had breached the *Privacy Act 1988* in several respects and sought injunctions and orders under s 98 of the Act.

Section 98 provides that an application for an injunction may be made to the Federal Court (or Federal Magistrates Court) 'where a person has engaged, is engaging or is proposing to engage in any conduct that constituted or would constitute a contravention of this Act.'

Gyles J rejected MEAA's submission that Seven could not bring proceedings in the Court under s 98 without first making a complaint to the Privacy Commissioner. Gyles J noted that whilst *Day v Lynn* [2003] FCA 879 at [50] confirmed that there is no provision in the *Privacy Act* for a breach of Privacy Principles to be directly actionable in the court, that case (and the line of authorities it referred to) did not involve s 98 and were thus distinguishable.

The Court found that MEAA had breached National Privacy Principle (NPP) 1 (Collection of personal information) in respect of the survey information it received. However, there was no breach in respect of its 'collection' of Seven's internal phone list as it was not proved this had occurred after 21 December 2001, the date from when NPP 1 applies.

The Court found that Connect had breached NPP 1.3 (collecting personal information without taking reasonable steps to make the individual aware of the identity of the organisation etc). The court rejected Seven's claim that Connect breached IPP 2 (Use and disclosure of personal information). Nor did it accept the claim that as Connect pretended to be MEAA and did not make full disclosure as to what it was doing, there was no informed consent by the individuals polled and thus a breach of NPP 10 (Collection of sensitive information).

Having found that breaches of the NPPs had been established Gyles J held that Seven was entitled to injunctions and orders, with the form of the orders to be determined.

### ***Kalaba v Commonwealth of Australia*** **[2004] FCA 763 (8 June 2004)**

www.austlii.edu.au/au/cases/cth/federal_ct/2004/763.html

Mr Kalaba stated that he had been a prisoner of war in Hungary in 1941- 2 and that his property was destroyed by German or Hungarian forces. In 1988 he provided his details to the Department of Foreign Affairs and sought assistance to obtain compensation and a concentration camp pension from the Hungarian government. However, the Commonwealth declined to assist him as he had not been an Australian citizen at the time of his confinement. He alleged that after he brought his relationship with the Department of Foreign Affairs to an end and required no further assistance, the Commonwealth, without his consent and in breach of his right to privacy, requested the Australian Permanent Mission of the UN in Geneva to obtain through the UN High Commissioner for Human Rights records relating to his confinement.

Mr Kalaba alleged the Commonwealth breached the duty of care it owed to him to protect his privacy and that as a result of its negligence [and the negligence of Australia Post in failing to deliver certain mail] he engaged in a protest in Canberra [in which property was burnt] and was sentenced to imprisonment for 5 years. He sought damages.

In summarily dismissing the application Heerey J discussed whether there was a tort of privacy in Australia:

> . . in Australia at the moment there is no tort of privacy, although in *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* (2001) 208 CLR 199 at [132] Gummow and Hayne JJ, with whom Gaudron J at [58] agreed, left open that possibility. In a Victorian Supreme Court case, *Giller v Procopets* [2004] VSC 113 at [187] to [189], Gillard J held that the law had not developed to the point where an action for breach of privacy was recognised in Australia. Senior Judge Skoien of the District Court of Queensland was prepared to find that there is such a tort: *Grosse v Purvis* [2003] QDC 151, but I think the weight of authority at the moment is against that proposition.

Heerey J, in noting that summary dismissal will only be ordered in very clear cases, added:

> . . if this were a case where there was even a faintly arguable case that there had been an infringement of a right of privacy of a kind entertained elsewhere in the common law world, and particularly by American Courts, I would be reluctant to exercise the power of summary dismissal. . . On its face, the very worst that one could say [about the actions of the Commonwealth] was that it was a gratuitous attempt to assist the plaintiff, in the course of which an error of description [of the name of the camp] was made. That, in ordinary terms, does not involve any breach of privacy.

Heerey J concluded:

> It is plain that these criminal acts can in no way result in him recovering damage for any alleged torts committed by the defendants, even if those were available at law, which in my opinion they are not.

## 5.2 International Privacy Law Developments

### European Court of Human Rights (ECHR)

***Von Hannover v Germany*** **59320/00 (24 June 2004)**
http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=hannover&sessionid=114429&skin=hudoc-en

The applicant, Caroline von Hannover, is the eldest daughter of Prince Rainier III of Monaco.

Since the early 1990s the applicant has tried in a number of European countries to prevent the publication of photos about her private life in the tabloid press. After litigation spanning 10 years in German courts against German publishing companies proved largely unsuccessful the applicant complained to the ECHR that the decisions of those courts infringed her right to respect for her private and family life as guaranteed by Article 8 of the Convention. The applicant did not complain of an action by the State, but rather of the lack of adequate State protection of her private life and her image.

The Court had no doubt that the publication by various German magazines of photos of the applicant in her daily life fell within the scope of her private life. But it noted that protection of private life has to be balanced against the freedom of expression guaranteed by Article 10 of the Convention.

The Court stated that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. In concluded that it was clear in this case that they made no such contribution since the applicant exercises no official function and the photos and articles related exclusively to details of her private life.

It held furthermore, that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public.

It said even if such a public interest exists, as does a commercial interest of the magazines in publishing these photos and these articles, in the instant case those interests must, in the Court's view, yield to the applicant's right to the effective protection of her private life.

It held that that the criteria established by the domestic courts were not sufficient to ensure the effective protection of the applicant's private life and she should, in the circumstances of the case, have had a "legitimate expectation" of protection of her private life. The German courts had not struck a fair balance between the competing interests.

It held there had been a breach of Article 8 of the Convention in respect of 'private life'.

It reserved a decision in respect of appropriate reparation by the state under Article 41.