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NZ CENTRE FOR HUMAN RIGHTS LAW, POLICY and PRACTICE

THE UNIVERSITY OF AUCKLAND FACULTY OF LAW

Human Rights Agenda e-Bulletin

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Contents

Centre News

Public Law in Three Nations

A second colloquium of public law teachers from the law schools of Auckland, Melbourne and Witwatersrand (in Johannesburg) was held in South Africa in June.

The first colloquium had been held in Auckland in 2010. The aim was to bring the public lawyers of these three leading law schools together at regular intervals to present research work in progress and to exchange ideas.

This year's event was hosted by Wits Law School and held at the Wits University's Research Facility – a camp situated near the boundaries of the famous Kruger Game Park in South Africa. This allowed some late afternoon walks and encounters with giraffes and zebras.

The Centre's co-directors, Paul Rishworth and Kris Gledhill, together with Dean Andrew Stockley, attended the colloquium. Kris presented a paper entitled The Legitimacy of Strong Interpretive Obligations in Domestic Human Rights Statutes; Paul a paper entitled "Religious Group Autonomy: 'ministerial exceptions', and the reach of anti-discrimination law".

Papers presented at the colloquium will be published in due course.

Amnesty International NZ is reinvigorating it's Environmental Defenders Network, EDeN.

EDeN exists to protect environmental and community activists at risk and to examine the link between environmental and human rights, especially pertinent with the mammoth environmental challenges the world is now facing. EDeN is always looking for expert network members to contribute to the discussion and develop solutions for defending environmental sustainability and standards where they impact on human rights. If you would like to join EDeN's network of experts or for more information, visit their website here.

Summer Training Program on Religion and the Rule of Law in Beijing, China

Paul Rishworth was one of 10 international faculty invited to co-teach a program on Religion and the Rule of Law, in Beijing from 15 to 26 July. The program, now in its fourth year, is run under the auspices of the Beijing Foreign Studies University, Peking University and the Pu Shi Institute for Social Science.

Other foreign faculty were from Canada, the United States, South Africa and Europe. Students on the program comprised junior faculty in Chinese law schools, PhD candidates and post-doctoral fellows, Buddhist monks and a Taoist priest.

The syllabus for the course comprised international human rights law as well as comparative approaches to matters concerning freedom of religion – such as the regulation of churches, relationship between church and state, and the scope of the right to manifest religion freely in worship, observance, teaching and practice. The course is taught in English and translated, although many of the participants had English language proficiency. It was a valuable opportunity to become acquainted with issues around religious freedom in China.

Annual Criminal Law Symposium

The Centre, working with the Criminal Bar Association, held its first annual criminal law symposium on 24 July 2013.

Colin Wells, an experienced London barrister and writer, outlined some of the recent developments from the European Court of Human Rights, followed by Simon Mount of Bankside Chambers, who outlined some arguments on the potential role for human rights considerations to have an impact on sentencing decisions, a matter that will soon be considered by the Supreme Court. It is hoped that the successful launch of this initiative will lead to further symposia, and an organising committee has been established to that end, with judicial, practitioner and academic members.

Chris Mahony comments on potential western military engagement in Syria

31 August 2013

Chris Mahony was hosted on a Los Angeles Radio Show, Scholar's Circle, providing views on the legality, as well as the geopolitical context of potenial western intervention in Syria.

Centre member Alison Cleland and Dep. Director, Chris Mahony comment on child slavery.

23 October 2013

See their comments along with an accompanying story here. >>

Deputy Director, Chris Mahony publishes book chapter on potential Commision to investigate abuses during Nepal's civil war.

21 November 2013

A book to be launched at the Assembly of States Parties to the Rome Statute of the ICC in The Hague next week, "Quality Control in Fact-Finding" includes Chris's chapter on a potential Truth Commission investigating war crimes in Nepal.

Centre Director, Kris Gledhill comments on the complexities of treating mental health.

2 December 2013

Kris Gledhill's comments were provided in the November edition of Auckland's Uninews where he considered the sensitivity of intervention as well as the need to adjust New Zealand's compliance with the UN Convention of the Rights of Persons with Disabilitues. The article can be viewed on page 8 of the linked publication. (link in title)

Deputy Director, Chris Mahony comments on various TV shows on the passing of Nelson Mandela

7 December 2013

Deputy Director, Chris Mahony was hosted on a special TVNZ programme examining the life and legacy of Nelson Mandela as well as on TV3's *Firstline*, considering the socio-economic legacies of Mandela's life.

Symposium on The Bill of Rights and Religious Instruction in Schools

Should there be religion in state schools? It's a recurring controversy.

On 15th October the Centre, generously hosted by DLA Phillips Fox, presented the Symposium on Religion in Schools. While the topic has garnered attention numerous times over the years, it is of current interest due to its recent exposure in the media. The event was chaired by John Hannam, partner at DLA Phillips Fox, and the question and answer session was facilitated by former Chief Human Rights Commissioner, Rosslyn Noonan. The panel consisted of three expert speakers; Peter Harrison, Simon Greening and Paul Rishworth.

Summary of Presentations

Peter Harrison, a Councillor of the New Zealand Association of Rationalists and Humanists and founder of the Secular Education Network, discussed his concerns in regard to the transparency, or lack of, in the religion in schools programmes. He noted that the names of such programmes were often ambiguous and parents were not aware of what was being taught to their children. Additionally, children typically had to be opted out. Again, this was something that was not always clear to parents. He questioned whether children were being educated or indoctrinated. While Peter believed that children should be taught about faiths of all kinds and that there should be freedom of belief, he was uncomfortable that it was primarily Christianity being taught, and that it was being communicated as the one true faith. He noted that state education is secular and that to allow religious instruction in the school environment went against that principle.

CEO of the Churches Education Commission (CEC), Simon Greening, spoke on the changes that CEC are making in terms of their religious education programme. He outlined the functions of CEC which included training, resourcing and managing their volunteer teachers. He was aware of past problems and stated that religion in schools programmes have modernised and accepted that there are a variety of beliefs. He explained that there is great oversight of their volunteers and firm policies are in place regarding how lessons are presented. Reforms to the programme are on-going to ensure what is being taught is done sensitively, as well as being made relevant to children today. He proposed that the current legal position struck the correct balance between the right of a person to express their religious belief in a public place and the right of school students not to be discriminated against because of their belief. Simon stated that ultimately it was up to the school Board of Trustees, who are elected by their community, to decide whether there is a place for religious education in schools.

Paul Rishworth, Professor at the University of Auckland, discussed how religious education fitted in under the law, and in particular under the Bill of Rights Act 1990. He explained how religious instruction in schools is still allowed under the Education Act 1964 before going on to explore whether this was defensible/lawful. First he acknowledged some theories and approaches to the state and religion; total separation of the state and religion, and equality and neutrality on the part of the state regarding religion. Paul suggested there were three possible courses of action in regard to religion in schools – mounting a legal challenge to the law, interpreting the law in a rights-consistent manner, and applying the law in practice in a rights-consistent way.

Challenging the law on the basis that the state and religion should be completely separate may possibly result in a declaration of a breach of the Bill of Rights, but the law would not consequently be invalidated. The other two approaches focused more on the idea that the state should play a neutral role when it came to religion. Regarding the interpretation of the Education Act, the relevant section could be interpreted

as embracing all religions and therefore could be consistent with the right to freedom of religion. Finally, if the Education Act is lawful then, in its application, it must be consistent with freedom of religion. This includes having a clear ability to opt in/out and having legitimate alternatives for students who did not participate in the programme. It therefore appeared to be something that was defensible/lawful.

A question and answer session followed the presentations and many members of the audience contributed with thoughtful queries and comments. There was a significant turn-out and the event was well-received. It was particularly appreciated that each speaker had something very different to bring to the table, making for a fair and balanced discussion.

Conference on Refugee Resttlement policy compliance

On 14 December Deputy Director, Chris Mahony, led a conference analysing the refugee and asylum-seeker resettlement policies of five countries and their compliance with international human rights obligations. The conference, "Comparative Analysis of International Refugee Resettlement International Law Obligations and Policy", brought together leading academics from New Zealand, Australia, Canada, the United States and the United Kingdom.

The conference was well attended by members of the legal profession, government officials, NGOs and other interested parties.

The academics were also treated to a slice of Auckland hospitality, with a trip to the Mudbrick Winery on Waiheke Island the following day, which despite threatened rain turned out with fantastic weather and plenty of sunshine for our distinguished guests.

Conference attendees enjoy the sunshine on waiheke island

A report of the conference containing each country's findings will be produced and made available on the website.

The Bill of Rights and the Regulatory State

The Centre held a symposium on how the Bill of Rights applies in regulatory matters, such as those involving the Commerce Commission.

Professor Paul Rishworth gave an overview of the potential impact of the Bill of Rights in affecting the interpretation of statutory powers (whether they relate to matters of inquiry, search, coercion). Litigation between the Commerce Commission and Air New Zealand afforded an example: see [2011] 2 NZLR 194. He emphasised the need to be rigorous in establishing that a statutory meaning that one seeks to argue against – for BORA reasons – does in fact fail to meet the standard set by the BORA. If that cannot be done, then the BORA does not stand as a reason for preferring a different interpretation. This was the operative finding in the Air New Zealand case.

A general panel discussion then followed involving sharing of experiences by Roger Partridge, Chairman

of Bell Gully, Ian Gault of Bell Gully, Sarah Armstrong of Russell McVeagh, and Nick Flannagan of Meredith Connell. Grateful thanks to Bell Gully for its generous hosting of the event which was well attended by litigation and commercial lawyers.

The United Nations Role in OPCAT Holding Governments Accountable for Torture.

The Hon Justice Goddard delivered an annual lecture on the 6th November, discussing her role in OPCAT, holding governments accountable for torture.

The Hon Justice Goddard delivers speaks at the University of Auckland

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) is a treaty that supplements to the 1984 United Nations Convention Against Torture. It establishes an international inspection system for places of detention modeled on the system that has existed in Europe since 1987 . The prohibition of torture in Article 5 of the Universal Declaration of Human Rights is complemented by the obligation to prevent torture. Both principles are internationally recognised in the United Nations Convention Against Torture and its Optional Protocol, providing this sanction jus cogens status in international law.

The independent monitoring of places of detention is one of the most effective ways of preventing torture or cruel, inhuman or degrading treatment or punishment. The OPCAT provides a framework for regular, unannounced, preventive visits aimed at reducing risk factors and eliminating possible causes of torture

and ill-treatment at both the national and international level.

The e-bulletin aims to provide an outlet for commentary from the legal profession and academia on the practical application of human rights law, policy and practice, and also to provide alerts as to potential developments. This section includes case notes (in full), outlines of proposed legislation, an introduction to peer reviewed research working papers fostered by the Centre, and other commentary on human rights issues.

CASE NOTES

Conflicting rights in the English Court of Appeal: freedom of religion and freedom from discrimination.

Black & Morgan v Wilkinson [2013] EWCA Civ 820

Samantha Beattie

A recurring scenario in modern Western countries is the clash between liberty and equality. The battle ground is, increasingly, the Bed and Breakfasts of the nation.

A English bed and breakfast business had a policy precluding unmarried couples from staying in the same room. A gay couple's complaint that they were denied accommodation has been upheld by the Court of Appeal of England and Wales. Along with an earlier decision on similar facts, *Hall and Preddy v Bull and Bull* [2012] EWCA Civ 83, the case is now to be heard by the United Kingdom Supreme Court.

Similar scenarios have occurred in New Zealand, although not (yet) the subject of litigation. Accordingly the Supreme Court decision will be closely watched. It is but one manifestation of the interaction between anti-discrimination law and the right to freedom of religion and conscience. One of the telling factors in this struggle is the degree of intrusion that obeying discrimination law makes into the private life and conscience of the would-be discriminator. Is, for example, a B & B operator to be treated the same as a hotel chain?

Facts of *Black and Morgan*

The plaintiffs had booked a double room at the defendant's B&B and duly arrived to stay. Seeing that they were a gay couple, the defendant refused to allow them to stay. She said she had religious convictions which included a belief that sexual relations outside of marriage were wrong. The B&B was the applicant's family home and she continued to live there, providing a service to her guests as if they were family.

This case was heard at first instance in the Slough County Court in October 2012. The Recorder found in favour of the plaintiffs on the basis that the policy of refusal based on marital status amounted to direct discrimination against gay couples who (at that time) could not marry. The B&B owner appealed.

Issues on appeal

- Was the applicant's B&B a "boarding house or similar establishment" under the Equality Act (Sexual Orientation) Regulations 2007?
- Did her B&B fall within the exception (that she provided a "home-like service" to her guests)?
- Was it direct discrimination on the sexual orientation ground?
- If not, was a policy directed at unmarried couples indirectly discriminatory against gay couples?

- If indirect discrimination, could the defence of justification be established?

Decision

The Court quickly dealt with the first two issues. Lord Dyson MR held it was well-established that a B&B fell within the definition of "boarding house or similar establishment" under the Regulations. The exception within the Regulations – of providing a home-like service – could not be relied upon as it applied only to those who required a special degree of care and attention. That the applicant chose to provide such a service to her guests was immaterial.

The issue of direct discrimination was more contentious. At first instance, the Recorder followed *Preddy* in holding there was direct discrimination. A policy prohibiting unmarried couples would inevitably discriminate on the grounds of sexual orientation, since homosexual couples could never marry. Following the reasoning in *James v Eastleigh Borough Council* [1990] 2 AC 751, such a policy was a "convenient shorthand" to expressly engage a broader policy that was in itself discriminatory. Lord Dyson MR doubted this reasoning, however. He observed that all unmarried couples, regardless of sexual orientation, were discriminated against in the policy. What was material was whether a couple was married, not the reason why they were not married. He felt this clearly fitted into the scope of indirect rather than direct discrimination. It meant that homosexual couples were at a disadvantage on the grounds of their sexual orientation, albeit not explicitly (nor uniquely) targeted by the policy. However, as he could not find any way to distinguish *Preddy*, he resigned to being bound by that decision.

Given the Court was concerned with the *Preddy* reasoning, it went on to consider the issue of indirect discrimination. Such a finding brings with it the right to argue justification. The defendant argued her policy fulfilled her legitimate aim of holding and protecting a genuine religious belief. The Court noted that neither freedom of religion nor freedom from discrimination were more important than the other. Thus, to come to the answer regarding justification, they inverted the issue and asked whether the Regulations were a proportionate limitation on the applicant's religious rights. Much consideration was given to the fact that in enacting the Regulations Parliament had heavily consulted with the public, and that the matter of religion and B&Bs was addressed specifically. Given the issue was a moral and political one, the Court held that Parliament were the correct body to be deciding it. This was qualified, particularly by McCombe LJ, who stated that Parliament's choice was not formative and that secondary legislation would not always have such influence in assessing Convention rights. However, in this instance, as Parliament had struck the balance there needed to be specific facts that meant the Regulations were unfair toward the defendant. The Court noted the possibility of the Regulations having a negative economic impact on the applicant. However, as the defendant had provided no evidence that it would be commercially damaging for her to have such a restriction on her business, this was not considered further. The appeal was dismissed.

Comment

Now that same-sex marriage is possible in the United Kingdom (see the Marriage (Same Sex Couples) Act 2013), the significance of the case is perhaps diminished a little. The defendant's policy as it stands would constitute neither direct or indirect discrimination against homosexual couples. The policy would instead be solely discriminatory on the basis of marital status. The new area of contention, of course, will be B&Bs that adopt a policy against couples in same-sex marriages. That would be direct discrimination, admitting no possible defence of justification (although still amenable to the claim that it is insufficiently protective

of freedom of religion under the European Convention on Human Rights).

What of the relevance of this case in New Zealand? Section 54 of the Human Rights Act 1993 states that nothing in s 53 (the prohibition of discrimination in relation to land, housing and accommodation) shall apply to residential accommodation which is to be shared with the persons disposing of it. What precisely is meant by 'shared' may be an issue for future debate, but, given the B&B was within the confines of the defendant's home, the exception would likely have come into play in New Zealand. On the other hand, if a B&B is considered as a "service" or "facilities" under s 44 of the Act, there is no similar defence. There is then a statutory interpretation problem to solve – which of the two parts of the Act applies?

Back to the English case. Were the discrimination to be considered indirect, the Court provides little insight at to what justifications there could be for such a policy. The only justification considered at any length is that of economic hardship. The Court held that if the defendant had been able to prove that she suffered sufficient economic hardship as a result of having less bedrooms available to let, then she may be justified in having such a policy. Given the importance placed on anti-discrimination it seems unusual that loss of money, which is not a human right, could be considered enough to justify such discrimination. This is perhaps a missed opportunity as the issue of justification is of especial importance in freedom of religion cases. This is because Court's are generally unwilling to consider what manifestation specially covers, and, even when seemingly sceptical of the method of manifestation, the initial hurdle in the test is almost always satisfied.

Court of Appeal holds in-work tax credit discriminatory, but justified

Child Poverty Action Group Incorporated (CPAG) v Attorney-General [2013] NZCA 402

The Child Poverty Action Group has again been unsuccessful in its claim that the in work tax credit breaches the Human Rights Act 1993 and the Bill of Rights Act 1990. The Court of Appeal dismissed its appeal, holding that, although the eligibility criteria for the social assistance scheme appeared to discriminate, they were justified in the circumstances.

The Child Poverty Action Group ("CPAG") has again had no success in its claim that the in work tax credit breaches the Human Rights Act 1993 ("HRA") and the New Zealand Bill of Rights Act 1990 ("BORA") because it discriminates against beneficiary families by reason of "employment status". The Court of Appeal dismissed its appeal, holding that, although the eligibility criteria for the social assistance scheme were prima facie discriminatory, the discrimination was a justified limitation under s 5 of the BORA (which provides that rights in the BORA "may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society").

Background

The "Working for Families" package arose out of the social assistance reforms of the Fifth Labour Government in the early 2000s. Part of that package was the "in work tax credit", which is available to working families not already receiving social benefits. The accepted purpose of the in work tax credit is to

incentivise (relatively) low income earners to pursue and remain in work (commonly referred to as "making work pay"). As a result, two of the eligibility criteria for the tax credit are that a family is not receiving an income-based benefit (the "off-benefit rule"), and that a family is working at least 20 hours per week if a single parent and at least 30 hours per week if a couple (the "full-time earner criterion").

CPAG brought proceedings in the Human Rights Review Tribunal alleging that the off-benefit rule breached the prohibition on discrimination in s 19 of the BORA. In particular, CPAG alleged that the rule denied beneficiaries (and their families) access to the in work tax credit by reason of the prohibited ground of employment status (which, under s 21 of the Human Rights Act, includes the fact that a person is in receipt of a social security benefit).

Decisions below

The Tribunal held that the off-benefit rule resulted in prima facie discrimination, but was justified in terms of s 5.

CPAG appealed unsuccessfully to the High Court. In rejecting the appeal, the Court narrowed the pool of persons who were affected by the prima facie discrimination to the approximately 1,267 persons on benefits who meet the full-time earner criterion on the basis that only those beneficiaries were directly disadvantaged by the off-benefit rule (that rule being the only criterion denying them access to the in work tax credit) and concluded that this discrimination was justified under s 5 of the BORA.

Court of Appeal's decision

On appeal, the two questions before the Court were:

- whether the High Court correctly stated and applied the test for discrimination under s 19 of the BORA; and
- whether the High Court had correctly stated and applied the test under s 5 of the BORA.

On the first question, the Court held, and the parties accepted, that the correct test for prima facie discrimination was the two step approach set out by the Court of Appeal in *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456, namely that:

- there "is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination"; and
- the treatment, when "viewed in context, ... imposes a material disadvantage on the ... group differentiated against".

Applying that test, the Court held the off-benefit rule resulted in prima facie discrimination against all beneficiary families on the basis of employment status.

In applying the different treatment limb of the *Atkinson* test, the Court rejected the Crown's submission that the comparator exercise should take into account all the eligibility criteria for the in work tax credit (in which case the difference in treatment was said to arise from the fact the appellant group did not meet the full time earner criterion and not from their employment status). It considered that that approach would set the bar too high for establishing discrimination and would be inconsistent with the "purposive and untechnical" approach mandated by s 19. Instead, the Court agreed with the High Court and Tribunal that the appropriate comparison was "between those whose income from work is for sufficient hours to entitle them to the in-work tax credit and those excluded because of the off-benefit rule, irrespective of their full-time status." Applying that comparison, the Court held there was different treatment on the basis of employment status.

In applying the materiality limb of the *Atkinson* test, the Court disagreed with the High Court's conclusion that only the 1,267 persons who met the full time earner criterion were materially disadvantaged by the off-benefit rule. In its view, the lack of a comparable gain for all beneficiaries with children amounted to a material disadvantage.

On the question of justified limitation under s 5 of the BORA, the Court applied the test set out by Tipping J in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1, namely:

(a) does the limiting measure serve a purpose sufficiently important to justify [the limit on the right]?
(b) (i) is the limiting measure rationally connected with its purpose?
(ii) does the limiting measure impair the right ... no more than is reasonably necessary for sufficient achievement of its purpose [the "minimal impairment" limb]?
(iii) is the limit in due proportion to the importance of the objective [the "proportionality limb"]?

In the Court of Appeal it was accepted that the purpose of making work pay was a sufficiently important objective and rationally connected to its purpose. The focus of the Court's analysis was, therefore, on minimal impairment and proportionality.

However, before it considered those limbs, the Court noted that, in cases involving social policy and the allocation of scarce resources, such as the one before it, usually the decision-maker is afforded a degree of latitude or leeway. It cited Tipping J's suggestion in *Hansen* that the margin of leeway represents the area outside of the target of a bull's-eye - the size of which will vary depending on the subject-matter - and that Courts should not intervene where the measure falls within that area.

That view was, however, tempered by the Court's observations that (among other things); because any limit on a right must be demonstrably justified the burden of establishing justification falls on the Crown; Parliament has in s 5 directed the Courts to assess whether a limit is justified and the "courts cannot shy away from or shirk that task"; and the appropriate degree of leeway will depend in part on the quality of the policy process preceding the introduction of the limiting measure.

In terms of minimal impairment, the Court accepted that the off-benefit rule was a reasonably necessary means of achieving the aim of making work pay. In reaching that view, the Court considered alternative, less discriminatory measures put forward by CPAG, but concluded that the problems created by each alternative made it unsuitable.

In terms of proportionality, the Court was satisfied that the benefits of the in work tax credit in terms of incentivising people to work outweighed its adverse effects on beneficiaries. It noted, among other things, that this was a difficult analysis because the relative balance of spending on relief of poverty (i.e. social welfare) and encouraging persons into work (i.e. the in work tax credit) was a question of political judgement, decisions about where the balance lies will have flow on effects on other areas of spending, and it is more difficult to say a measure is disproportionate when the other limbs of the s 5 test are satisfied.

Comment

In considering the impact of the Court of Appeal's decision on potential future discrimination claims in respect of social policy measures, four notable points emerge.

First, the Court's emphasis on a "purposive and untechnical" approach to identifying discrimination is a signal that the Courts below should be reluctant to dispose of discrimination claims by finding there is no prima facie discrimination and should instead focus on the s 5 analysis.

Secondly, the Court's recognition that the quality of the policy process underlying a measure should affect the leeway given to the decision maker, confirms that such leeway has to, at least in part, be earned. That is, poor process should result in closer judicial scrutiny of a limiting measure even if the measure at issue involves social policy and/or is imposed by Parliament.

Thirdly, although the Court accepted that the off-benefit rule was a reasonably necessary limitation, it was prepared to consider whether any of the alternative, less rights limiting, means of achieving the "making work pay" were viable. This is significant because the bull's eye analogy in *Hansen* suggests that provided a measure is within the allowable area outside the target (i.e. is reasonably necessary), the minimal impairment limb will be satisfied. That is, the Court of Appeal was prepared to take a more "hands-on" approach to the minimal impairment limb than might have been expected.

Finally, the Court's willingness to look closely at the off-benefit rule at the minimal impairment stage was offset somewhat by its reluctance to second guess policy choices at the proportionality stage. That is, because the measure involved trading off various social policy aims and the allocation of scarce resources, the Court was reluctant to find that the off-benefit rule was a disproportionate response, particularly where the other limbs of s 5 were made out. The lesson is that, to succeed, it is likely that a challenge to social policy measures such as the off-benefit rule would need to show that one or more of the earlier limbs of the s 5 test had not been made out.

Freedom of Expression, Contempt of Court, and the law of Collateral Challenge in the Supreme Court of New Zealand

Siemer v The Solicitor-General [2013] NZSC 68

Samantha Beattie

The New Zealand Bill of Rights Act 1990 has been the occasion for the re-examination of many areas of New Zealand law. In this Supreme Court decision the issue concerned a deliberate breach of a High Court suppression order. Could he who breached the Order argue it ought never to have been made?

Mr Siemer published on the internet a High Court judgment that carried a heading prohibiting its publication in news media or on the internet, other than in a law report or law digest. Siemer was convicted of contempt of court as a result. Siemer argued he was merely exercising his right to freedom of expression under s 14 of the New Zealand Bill of Rights Act 1990. He tried to raise the defence that the order prohibiting publication was incorrectly made. The Supreme Court held by a majority held such a defence was improper. It was a collateral attack and was not permitted in the context of court orders. Further, a conviction for contempt was considered to be a reasonable and justified limitation upon Siemer's freedom of expression. Elias CJ dissented. She would have held that a non-party to proceedings in which an order is made is able to raise error of law as a defence. Such a challenge could include the argument that the non-publication order was an unreasonable restriction on freedom of expression.

Facts

Winklemann J in the High Court, had delivered a judgment making pre-trial rulings in criminal proceedings – the *"Operation 8"* case concerning the police raids in the Ureweras. The judgment contained a heading prohibiting its publication, including any commentary, summary, or description of it. Following this, the

appellant, who was not a party to the proceedings, published and commented on the judgment on his own website. He did so with knowledge of the order, and without making any application to have the order varied or withdrawn.

The lower courts

Following Siemer's publication of the judgment, the Solicitor-General brought proceedings in the High Court seeking to have him committed for contempt. The High Court found there was an inherent power to make such court orders and to breach them was contemptuous. Siemer appealed but the Court of Appeal came to the same conclusion. Siemer was then given leave to appeal again. As well the issue of the Court's ability to make such an order, the Supreme Court decided to hear argument on the additional issue of whether a collateral challenge was permissible.

Issues on appeal

The Supreme Court considered three issues, all of which took into account the impact of BORA.

- Did the judge have power to suppress publication of her judgment?
- Who has standing to apply to the court for variation or rescission of a suppression order?
- In proceedings for contempt of court based on a breach of a court order, may the defendant raise as a defence that the order should not have been made or that its terms were flawed?

Majority Judgment

Regarding the first issue, the majority found that the Court's inherent power to make non-party suppression orders had not been excluded by the statutory powers conferred by s 138 of the Criminal Justice Act 1985. They then turned to consider the impact of BORA on this inherent power. The appellant argued that continued existence of the inherent power was an unjustified limitation on freedom of expression. Alternatively, if the power existed, it must be limited in accordance with BORA. The majority affirmed that common law developments must be consistent with BORA, and went on to evaluate the appellant's arguments in light of the context that the order was temporary and designed to protect the fair trial rights of the defendants. They noted that s 25 BORA existed to protect the rights of individuals facing criminal proceedings, the administration of criminal justice, and the integrity of the courts. Section 14, the other right impacted, was not absolute. They held a suppression order could be made consistently with BORA where it sought to strike a balance between s 25 and s 14 rights. Provided a suppression order was prescribed by law, had an important objective, could be rationally connected to a purpose, and only limited s 14 to the extent reasonably necessary to protect s 25 rights, then it could be valid. However, they found it unnecessary to consider if the order was consistent with these principles as the rule against collateral challenge precluded such an analysis in the context of contempt proceedings.

The majority quickly dealt with the second issue holding that as fundamental rights were impacted by court orders, individuals affected should be able to apply to have orders varied or rescinded.

The majority ruled on the third issue that there could be no defence raised on the basis that the order should not have been made or its terms were flawed. Relating specifically to BORA, there was "no sound basis for making a general exception to the rule against collateral attack to allow such challenges based on freedom of expression." Court orders are put in place to ensure effective administration of justice. Further, they did not believe that it was an unreasonable limitation on the right. To permit such a defence would remove the deterrent effect of the sanction, create instability in court proceedings and interfere with fair

trial rights. The dismissal of the appellant's argument was further backed up by the fact that there was a process available by which he could have challenged the order.

Minority Judgment

Elias CJ in her dissent held that when a human right is limited, the Courts are obliged to consider whether the interference was necessary in the context of the particular case. She believed that it was of particular importance in this case that the appellant was not a party to the proceedings. She said "the appellant was entitled to a determination that the order was lawfully made before being committed for contempt. It would not be lawfully made if an unreasonable interference with the right to freedom of expression was not reasonably necessary to prevent the risk of prejudice to the fair trial rights of the accused."

Comment

It is of interest that the Court did not discuss the wording of the court order. The order held that publication of the judgment "in law report or law digest is permitted." Given reports and digests are available to the general public, arguably Mr Siemer's actions were the same as publishing the judgment in a report or digest. Perhaps the reasoning behind the distinction is based on the assumption that the general public are less likely to have ready access to such material, compared to those in the legal profession. If the rationale behind the order was to prevent potential jurors from being prejudiced, then legal professionals having access to the decision would be largely immaterial as those with current practicing certificates are exempt from jury service.

Should assisted suicide be criminal, and if so, should it always be prosecuted?

R (Nicklinson) v Ministry of Justice (2013) EWCA Civ 961

Samantha Beattie

Assisted suicide and other end-of-life issues are being debated around the world, with the courts increasingly being drawn into litigation. In New Zealand a private member's bill on the subject is awaiting the ballot. The Court of Appeal of England and Wales was recently asked whether ending another's life at their request (to end their suffering) might attract the criminal defence of necessity (to homicide), and if not, whether the DPP should more clearly specify when those assisting will, or will not, be prosecuted.

Summary

This English Court of Appeal case looks into the on-going debate surrounding euthanasia. Each of the three parties involved had severe permanent disabilities. Each wished to be able to end their life when the suffering got too much, but would be unable to do so without assistance. They argued that the doctrine of necessity should be available as a defence to murder in their particular cases due to Article 8(2) of the European Convention on Human Rights. They believed the blanket ban on assisted suicide and euthanasia disproportionately interfered with the right to respect private and family life. Additionally, they argued the requirement for interference to be "in accordance with the law" was breached. They claimed that the Policy as to when the Director of Public Prosecutions would prosecute those who assisted suicide or euthanized was not set out with sufficient clarity so as to make the risk of prosecution reasonably foreseeable.

The whole court dismissed the arguments relating to creating an exception to the murder charge, holding it was not the Court's place to change to change the law so dramatically. But in relation to the latter issue, the majority agreed with the appellant and found the law failed to provide sufficient clarity.

Facts

The appellants all suffered from severe and perpetual physical disabilities that required them to be in full-time care. They were competent, and aware of their position. They each had a wish to choose their time of death so that they did not have to suffer unduly and without dignity. They were unable to take their own lives without assistance. One, Martin, would require assistance to commit suicide. The other two (Nicklinson and Lamb) would require a third party to terminate their lives. All wished for a doctor to assist in the termination of their lives.

Issues

The first issue arose in relation to Lamb and Nicklinson:

Should the common law provide a defence to murder and assisted suicide in the context of euthanasia, particularly in the special circumstances relating to the appellants?

The second issue related to all appellants:

Did the legal prohibitions on those providing assistance to persons wishing to terminate their lives constitute a disproportionate interference with Article 8 of the ECHR?

The third issue was raised by Martin:

Did the DPP's Policy satisfy the requirement of Article 8(2) that interference with Article 8 must be "in accordance with the law" in that the law was clear, accessible and foreseeable?

Majority

The majority were unconvinced on the first issue. They noted that the possible reforms in the law of assisted suicide and euthanasia had recently been debated in depth by Parliament. On top of this, they outlined four reasons as to why a common law defence of necessity was untenable. First, there was no self-evident reason why values such as autonomy and dignity should give way to the right to life, and there were persuasive reasons why people might consider that it should not. Second, there was no right to commit suicide; rather it was just not a crime to kill oneself. If there was no right to kill yourself, there could be no right for others to assist you to dying. Third, as already alluded to, this was a matter for Parliament, as the "conscience of the nation" to decide. Judges would inadvertently be influenced by their own personal opinions and could not speak for the will of the nation as a whole. Fourth, they considered that any defence of assisting someone to die would have to apply to both euthanasia and assisted suicide. This was problematic in that Parliament had unequivocally stated that assisting suicide was a serious criminal offence. Given this, the Courts would be in danger of usurping Parliament were they to declare a common law defence of necessity.

Regarding the second issue (were the law's prohibitions a disproportionate interference with the right to private life in ECHR?), the Court reiterated the conclusion of other recent decisions. The blanket nature of the ban on assisted suicide was not disproportionate to the Article 8 right. Reasons for the ban included

protection of the vulnerable, and sending a message to society that life is valuable. Flexibility could be found in the ability of the DPP to use his discretion in whether or not to prosecute and to decide upon the sentence.

On the third matter (the sufficiency of the DPP's policy on prosecuting offences), the majority accepted the appellant's argument. For an interference to be "in accordance with the law" there is a requirement for foreseeability. As the Policy did not indicate how the factors would be weighed by the DPP in the case of helpers not closely or emotionally connected with the victim, the outcome for a person who provided assistance to end another person's life was unforeseeable. Given the potential gravity of the offence, it was of utmost importance that consequences could be anticipated. The Policy could be amended without crossing into Parliament's realm.

Minority

Lord Judge CJ agreed with the majority on the first two issues, but not the third. He felt that "prosecutorial guidance is in danger of expanding into a method of law reform… which is outside the proper ambit of the DPP's responsibilities." The Policy as it stood helped inform a decision made on the overall facts, not on a one-by-one tick-box approach. The reference to members of the family and close relatives had already been removed from the Policy in order to avoid distinctions between those who help the victim based on familial relationships and those who lacked such a relationship. It was also inappropriate for the Court to order the guidelines to be amended on the basis of each new situation.

Comment

It is of interest that the Court of Appeal avoided referring to the recent and factually similar Canadian decision of *Carter v Canada (Attorney General)*, 2012 BCSC 886 (currently before the BC Court of Appeal). The BC Supreme Court in this case declared the law placing a blanket ban on physician-assisted suicide to be unconstitutional and in breach of Charter rights. The Court still acknowledged Parliament's role in that it outlined the specific circumstances in which the law was in breach of human rights, and allowed for the effect of the declaration to be suspended for a year to allow Parliament to draft and consider legislation.

While the idea of Parliament representing the will of the general public is mentioned a number of times, there is no discussion of the British Medical Association's current stand on assisted dying. Bringing up the fact that the BMA are opposed to euthanasia could have provided another strong reason for the Courts being unwilling to alter the law. It would be difficult to see how a doctor in the UK would be able to assist a death when it would be against their ethical guidelines. This point is also pertinent in New Zealand where at present the New Zealand Medical Association is opposed to physician-assisted suicide and euthanasia on the grounds that it is unethical.

Bringing Discrimination Claims Against Government: Part 1 A of the Human Rights Act 1993 and the Caregivers Case

Danielle Kelly, Lecturer, Faculty of Law comments on the symposium held by the Centre at the offices of Chapman Tripp on 9 July.

In the *Family Caregivers* Case (*Ministry of Health v Atkinson* [2012] 3 NZLR 456), the Court of Appeal upheld a decision of the Human Rights Review Tribunal that a policy excluding family members from payment of

various disability support services to their children amounted to unjustified discrimination.

Frances Joychild QC and Dr Jim Farmer QC, both representing families fighting the Ministry of Health policy, gave an audience a privileged glimpse into the lives of real families behind these proceedings at an evening seminar put on by the New Zealand Centre for Human Rights Law, Policy and Practice earlier this month.

Frances Joychild brought years of experience and expertise. Her role in developing human rights law and practice was acknowledged by Dr Jim Farmer, who described himself as a newcomer to the field.

Both speakers anchored their discussion in the stories of their clients and their families, introducing the audience to their struggles around getting meaningful support and care for very vulnerable members of society. As such, the speakers showed the audience not only the importance of the case as a recent addition to a small but growing body of jurisprudence under s1A of the Human Rights Act 1993, but also the significant impact the decision and proceedings had on those involved and in similar circumstances.

However, the outcome of the case itself has been overshadowed by the subsequent response. Despite expectations of close consultation following the decision, the government instead introduced and passed the New Zealand Public Health and Disability Amendment Act (No 2) 2013 in a single day following the budget announcements. Combined with a newly announced Ministry of Health policy, the Act allows for payment of parent caregivers of disabled adults only in limited circumstances (where that disabled adult has been assessed as having very high needs) and at lower rates than non-family caregivers. Most controversially the Act completely blocked review of the Act itself, any family care policy, and anything done under the Act or policy, on the basis of specified types of discrimination.

While the Act contains specific savings for the complainants in the Atkinson case (represented by Frances Joychild QC) and Margaret Spencer (represented by Dr Jim Farmer QC), both advocates expressed disappointment in the divisiveness that this caused. The plaintiffs that became part of the *Atkinson* proceedings did so on the basis that they were representative of many families in similar situations and not just for themselves. Those who had not been named complainants in the proceedings no longer have the ability to go to the courts and claim that any policy discriminates against them.

The introduction of quite a broad ouster clause as well as the process by which it was introduced is problematic and controversial, arguably offending constitutional principles of separation of powers and undermining public faith in the government's commitment to human rights. The combined effect of the Human Rights Act 1993 and the NZ Bill of Rights Act 1990 in this case is to put the onus on government to prove that any discrimination is justified. Clearly in matters of health policy it is important to draw lines for the purpose of affordability and fiscal sustainability. However, instead of justifying discrimination on this basis, the government legislated themselves out of any responsibility to answer to the courts.

The big question left among the audience was: Where to from here? Options such as Judicial Review, bringing a complaint to the United Nations Human Rights Committee, and lobbying ahead of New Zealand's Universal Periodic Review were discussed. The opinion from the panel was that the cost of judicial review would almost certainly be prohibitive for any potential complainants: the proceedings thus far could not have been taken without the public funding of the Office of Human Rights Proceedings. As noted by an audience member, it is up to the law society and the legal profession as a whole to hold the government to account in this matter of constitutional importance.

Post script: In *Spencer v Attorney-General* [2013] NZHC 2580 Justice Winkelmann held that proceedings brought by Mrs Spencer relating to payment for care of her disabled son were not affected by orders purportedly made by the Human Rights Review Tribunal in the *Atkinson* case. There is an interesting discussion of the Tribunal's jurisdiction to have purportedly deferred the effect of its finding that the policy was unlawful, and the lack of any effect on others such as Mrs Spencer. That left the question whether there

was a Family Care plan in place such as would preclude payments for Mrs Spencer. On this point the finding was that there was no such plan. Mrs Spencer was joined as a party to the *Atkinson* proceeding which continues for the purpose of determining remedies.

NEW WORKING PAPERS

From a variety of authors on a diversity of issues, a preview of papers recently posted on the NZ Human Rights Working Paper Series at http://www.humanrights.auckland.ac.nz/uoa/research-working-papers

NZ Human Rights Working Paper no 19

Womens Rights versus Cultural Rights in Pakistan

Catalina Vercilli

Abstract: Culture has been cited by many governments to justify deprivation of women's rights and the principle of state sovereignty has been used to prevent outside reformers from intervening. Women in provincial Pakistan are notably deprived. Although international law provides for the respect of culture, the adoption of the principle of cultural change can be interpreted as an affirmation of the importance of women's rights in any culture. As gender stereotypes are embedded in patriachal societies, changes can only happen gradually as a result of educationg the population about gender equality and reforming local legislation for which non-governmental organisations' work is essential.

Introduction

Governments of patriarchal societies explain the deprivation of women's rights as a consequence of respecting their countries' cultiral beliefs and reject the interference from other states by claiming that human rights are a matter of state sovereignty. This article argues that women's rights are universal and prevail over cultural practices that neglect them. The workd of non-governmental organisations (NGOs) is essential to educate the population about how women can contribute to the economic, social and political development of the country, as well as to pressure governments for law reforms to reflect gender equality. The case of women's rights in Pakistan is presented as an example of how states and NGOs could act to promote gender equality.

Read more:
http://www.humanrights.auckland.ac.nz/webdav/site/humanrights/shared/Research/HRworkingpaper19-Pakistanwomen.pdf

NZ Human Rights Working Paper no 20

Witchcraft and Sorcery Related Killings in Melanesia: Culture, Law and Human Rights Perspectives

Miranda Forsyth

A summary of some of the key human rights related issues emerging from conference on Sorcery and Witchcraft related killings: Culture, Law and Human Rights Perspectives that was held a the Australian National University in June 2013

Abstract: One of the main issues of debate throughout the conference was best to deal with the apparently growing problem of women and men being accused of witchcraft or sorcery and then being publicly tortured, for women often in highly sexualised ways, and then killed or severely injured in PNG. The report of such incidents, especially in relation to women, has been widely publicised in both national and international media and widely condemned, particularly by international human rights groups. The conference heard from a number of Human Rights Defenders who are working at the community level in PNG to provide support for such victims, intervening where possible and providing other crucial support such as helping with obtaining medical treatment, providing counselling and seeking funds to

assist with final relocation.

Read more:
http://www.humanrights.auckland.ac.nz/webdav/site/humanrights/shared/Research/HRWorkingpaper20-Forsyth.pdf

Taking Victims' Rights Seriously

Sam Bookman

Proponents of human rights are all too often accused of giving insufficient regard to the rights of victims. Part of this perception lies in the emphasis that human rights advocates place on fair trial rights, and the need to ensure criminal defendants are treated fairly by the court process. Yet, increasingly human rights advocates are turning their attention to the rights of victims and the need to make sure that they are also protected by the criminal justice system.

The urgency of this need has once again been emphasised by the appalling revelations of the "Roastbusters" episode. The media and politicians have expressed shock at police statements that the victims of this alleged behaviour did not come forward. In highly objectionable language, the police claimed that they were simply "not brave enough". It has revealed what rape prevention advocates have known for a long time: that the spectre of the court process can be, for many victims, tantamount to a "second rape".[1] Being required to provide a detailed description of highly intimate and stigmatised activities, and having to face an alleged perpetrator in court – who in many cases may still wield significant power over the victim – are understandably traumatising experiences for many people. For this reason, it is estimated that the vast majority of sexual crimes – up to 90% – go unreported.

Without wishing to comment specifically on the "Roastbusters" episode – to do so would be to unnecessarily dredge up distressing material, and compromise possible justice outcomes – this article will examine the difficulties experienced by sexual victims in relation to the criminal justice system, and attempt to draw on some possible solutions. It is acknowledged that this article is limited in its contribution: ultimately, the best-placed voices to address this issue are the victims of such crimes, and this post is in no way intended to drown out those perspectives. Readers are encouraged to explore those contributions further.

Read the full blog post at
http://nzhumanrightsblog.com/policy/taking-victims-rights-seriously/#more-528

Do Children Have a Right to Freedom of Religion?

Alex MacKenzie

Because human rights are a fundamentally individual phenomenon, at first glance one would assume that even in the case of children, "the simple fact that they are human beings means that they have rights that dictate what others may or may not do to them".[1] While this sounds acceptable in theory, in practice it is odd to think of a child as having freedom when it comes to rights. On the one hand, it is "meaningless to speak of a baby or a very young child exercising autonomy and self-determination".[2] But on the other, freedom implies some notion of conscious control, so freedom without choice doesn't make sense. This article argues that it is fallacious to move from the premise that the conventional conception of rights does not fit children perfectly to the premise that children do not have rights. Rather, the better conclusion is that the nature and justification of children's rights differs to those of adults, and it is the job of the legal scholar to clarify this murky area of the law. It then explores the concept of religious freedom and how it applies to children in a legal context at international law

Alex is a Section Editor of the New Zealand Human Rights Blog

Read the full blog post on the NZ Human Rights Blog
at http:/http://nzhumanrightsblog.com/commentary/do-children-have-a-right-to-freedom-of-religion/

New Zealand Defence Force plans to sell arms to Colombia

One News reported that Colombia may be "at the

front of the queue" to purchase 20 underused light armoured vehicles (LAVs) from the New Zealand Defence Force.[1] The news came during John Key's historic visit to Colombia, the first ever visit by a New Zealand Prime Minister to the South American country, and amid talk of increasing trade links between the two countries.

Read the full post on the NZ Human Rights Blog at http://nzhumanrightsblog.com/overseas/new-zealand-defence-force-plan-to-sell-arms-to-colombia-should-raise-alarm-bells/#more-252

Limiting the Right to Protest within the Exclusive Economic Zone

Tracey Turner

Once upon a time, the New Zealand Government played a key role in protesting things it thought inappropriate. In the 1970s, this extended to sending two navy frigates into the middle of a nuclear test area to express concerns against French nuclear testing in the Pacific. Those days are a distant memory, with the Minister of Resources and Energy, Simon Bridges, recently introducing a Supplementary Order Paper (SOP) to amend the Crown Minerals (Permitting and Crown Land) Bill 2013. The amendment will create two new offences and corresponding penalties for people protesting against oil and gas exploration in the Exclusive Economic Zone (EEZ).

The proposals are contentious, with the likes of Sir Geoffrey Palmer, Peter Williams QC and Dame Anne Salmond issuing a joint statement that describes the amendment as "a sledgehammer designed to attack peaceful protest". Although the Government is defending the amendment – citing both economic and safety concerns – the proposals have been heavily criticised as inconsistent with international law. The proposed offences create disproportionate penalties that impinge directly upon an individual's right to freedom of expression and freedom of peaceful assembly, both affirmed under the New Zealand Bill of Rights Act 1990 ss 14 and 16 (NZBORA).

This post briefly addresses some of the procedural and substantive concerns raised by the proposals.

Read the full post on the NZ Human Rights Blog at http://nzhumanrightsblog.com/policy/limiting-the-right-to-protest-within-the-exclusive-economic-zone/

Could Richard Prosser be Criminally Liable for comments about Muslim travellers?

Sam Bookman

New Zealand First MP Richard Prosser's extraordinary column advocating the banning of Muslims from "Western" airlines is now a viral hit. The Prime Minister, Leader of the Opposition and (to an extent) his party leader have all rushed to condemn or distance themselves from his comments, while others have called for his resignation. And rightly so – the column is absurd at best and dangerously racist at worst. But could Prosser have breached the criminal law?
Read this full post on the NZ Human Rights Blog at http://nzhumanrightsblog.com/commentary/is-richard-prosser-criminally-liable/#more-235

The Public Right to Know in New Zealand

Sam Bookman

The "right to know" is a human right that is not often invoked. Yet, it is one the Law Commission ("the Commission") has emphatically endorsed in its recent proposal for changes to the Official Information Act 1982 ("the Act"). The Commission – expressly reflecting the Universal Declaration of Human Rights Art 19 and the International Covenant on Civil and Political Rights Art 19 – noted that there now exists a presumption in favour of open government, verging on a human right. Accordingly, it suggested a range of recommendations that would facilitate a more open government – many of which were rejected by the very MPs that would have been made subject to the changes.

Read this full post on the NZ Human Rights Blog at http://nzhumanrightsblog.com/policy/both-poacher-and-gamekeeper-the-public-right-to-know/#more-231