



HUMAN RIGHTS CENTRE FOR LAW, POLICY & PRACTICE

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NATIONAL UPDATE:

POLICY AND LEGISLATION

The **Crimes Amendment Bill** came into force on the 6th March. The Bill repeals certain provisions in the Crimes Act 1961 including section 71(2) which protects spouses and civil union partners in cases where they would otherwise be an accessory after the fact to an offence and section 123 which repeals the offence of blasphemous libel. The latter section attracted the most attention at the Select Committee hearings, submitters claiming that repeal would disrupt the maintenance of wholesome boundaries in the media, insulting God and undermining the Christian foundations of New Zealand. The Committee considered it highly unlikely that the repeal of the little-known provision would have any of these results. The Bill also repeals the year-and-a-day rule contained in section 162.

A Bill establishing a **Criminal Cases Review Commission** (CCRC) had its first reading in Parliament in October last year. The Bill proposes the establishment of an independent body to investigate whether wrongful conviction or sentencing has occurred in the justice system. The proposed Commission would be able to review convictions and sentences and decide whether to refer them to the Court of Appeal. The Bill was referred to the Justice Committee and submissions had to be received by the 9th January. The Committee's report is due on 31st July.

The Internal Affairs Minister, Tracey Martin, announced in February that the **Births, Deaths, Marriages, and Relationships Registration Bill** will be deferred to deal with problems caused during the Select Committee process. The Bill was introduced by the previous Government and made a number of minor changes to allow improvements to Births, Deaths and Marriage Services. The issue of self-identification in relation to trans-gender people arose due to Select Committee consideration of a petition supporting such a system. As a result the self-identification clauses were added to the Bill at

Select Committee stage, after public submissions had closed and the Bill was reported back to the house with those clauses. The Minister withdrew the Bill in order to give further consideration to the changes and how they would impact on the present law.

The Law Commission has reported back on the **Evidence Act**. The Commission concluded the Act is generally working well but some improvements are necessary and desirable and it makes 27 recommendations for reform. A number of recommendations are designed to improve the rules of evidence in sexual and family violence cases while ensuring that defendants' rights to a fair trial are preserved.

The Justice Committee has reported back on the **End of Life Choice Bill** and the Report of the Attorney-General under the New Zealand Bill of Rights Act 1990. It made certain recommendations but was unable to agree that the Bill be passed leaving it to the House to resolve the broader policy matters. To read the (lengthy) report of the Select Committee go to the parliamentary website at www.parliament.nz/en/pb/sc/reports/document/SCR_86640/end-of-life-choice-bill. The Bill is currently before Parliament.

As foreshadowed in our last bulletin the Justice Committee has also reported back on a Bill to repeal and replace the **Privacy Act 1993**. While the Bill would keep the principles-based framework of the Act, it will update the law to reflect the needs of the digital age. It will also insert a new clause (114A) to provide the Human Rights Review Tribunal with an express power to close proceedings when necessary to hear and determine an access complaint. This recommendation was considered consistent with section 27 of the New Zealand Bill of Rights Act 1990 and the right to justice. Although it is arguable that closing proceedings could restrict the right to natural justice, the Committee considered that doing so could be demonstrably justified in certain circumstances - for example, when disclosure of a document could endanger someone's safety.

The Education and Workforce Committee has reported back on the **Equal Pay Amendment Bill** noted in our last bulletin. The aim of the legislation is to improve the process for employees to raise, progress and resolve pay equity claims. It will do this by establishing a bargaining process for pay equity while still largely retaining the existing processes for equal pay and unlawful discrimination claims. While there was support for the Bill generally, it also had its critics. The Equal Employment Opportunities Commissioner was disappointed that a pay transparency mechanism had not been included in the Bill and has started a petition aimed to redress this. The petition can be accessed at www.action.hrc.co.nz/end-pay-secrecy.

An interesting private member's Bill had its first reading on 4 April. The **Rights for Victims of Insane Offenders Bill** is designed to resolve the concerns of victims of an offender who has been found not guilty by reason of insanity. The victims of such offenders arguably do not receive the same rights as the victims of an offender who is found guilty. The description of "not guilty" can leave them feeling that the court has found no crime has occurred even when the act or omission that constitutes the offence has been proven on the facts. The Bill would change the formal finding of the court providing victims with the acknowledgement that the person was proven to have acted grievously, even if they lacked the intent to be guilty of the action. The Bill will rename the verdict of 'not guilty on account of insanity' to 'the acts or omissions are proven but the defendant is not criminally responsible on account of insanity'. The revised language would acknowledge the offender did, in fact, commit the criminal act.

The ACT party has proposed a bill to protect free speech. The **Freedom to Speak Bill** would repeal two parts of the Human Rights Act on racial disharmony aimed at preventing 'abusive' or 'insulting' comment and calls for the abolition of the Human Rights Commission. The Summary Offences Act would also be amended so it is no longer a crime to behave offensively in public, and the Harmful Digital Communications Act would be changed to only apply to people under 18. As a member's Bill it will only proceed if drawn from the ballot.

INTERNATIONAL UPDATE

The sixty-third session of the [Commission on the Status of Women](#) took place at the United Nations Headquarters in New York from 11 to 22 March 2019. The priority theme was social protection systems, access to public services and sustainable infrastructure for gender equality and the empowerment of women and girls. The Minister for Women, Julie-Anne Genter, attended on New Zealand's behalf. Her statement can be read here <http://www.beehive.govt.nz/release/new-zealand's-national-statement-delivered-un>

New Zealand's examination of its compliance with the UN Convention on the Rights of Persons with Disabilities will be heard by the UN Committee on the Rights of Persons with Disabilities Committee in September / October. The Government has written a report in answer to the questions asked by the Committee following the last examination in 2018. The questions themselves can be found at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=NZL&Lang=EN. The report was sent to the UN Committee on 9 March 2019 and provides information on what the Government has done over the past four years to put the Disability Convention into action. It includes information on education employment, health, justice, transport, housing, data, accessibility and other matters and is accessible at [The Government's response to the UN Committee on the Rights of Persons with Disabilities \[DOCX, 205 KB\]](#)

The **United Nations Expert Mechanism on the Rights of Indigenous Peoples** (EMRIP) undertook a country engagement mission to New Zealand from 8 to 13 April 2019. The visit was in response to a request from the Aotearoa Independent Monitoring Mechanism on behalf of the National Iwi Chairs Forum and the New Zealand Human Rights Commission under the EMRIP's amended mandate, Human Rights Council Resolution 33/25. The purpose of the mission was to provide advice on the development of a National Plan of Action or other measure to achieve the ends of the UN Declaration on the Rights of Indigenous Peoples in New Zealand.

The government has announced that New Zealand will ratify the **International Labour Organisation's (ILO) Protocol on Forced Labour**, and supporting work by the ILO to end violence and harassment at work, at the organisation's 100th anniversary conference in Geneva in November. The protocol is a binding, treaty-level agreement which requires member countries to prevent and eliminate forced labour in their country, including modern slavery and human trafficking. It also requires that victims of these crimes are fairly and rightfully provided with protection, support and access to justice. The discussion doc published by the Government seeking comments on ratification is still available at <https://www.mbie.govt.nz/have-your-say/should-new-zealand-ratify-the-forced-labour-protocol>.

RECENT CASES

***Diane Dele Moody v Shane Chamberlain* [2019] NZEmp C 16 – right to fair terms of employment**

As a result of the *Atkinson* decision¹ the law now recognises that family members are eligible to be paid for performing the same disability support services for their family members as contracted third party carers.

Last year we noted the Court of Appeal's decision in *Chamberlain v Minister of Health* [2018] NZCA 8, a case which involved a woman, Mrs Moody, who has cared for her middle aged, severely intellectually disabled son since birth who questioned the funding policy of the Ministry of Health. Mrs Moody is only paid for 17 hours' work a week although it is, in effect, a full time job. The Court of Appeal saw the issue as whether "personal care" and "household management" (terms used in the policy

¹ *Ministry of Health v. Atkinson* [2012] NZCA 184

document) were broad enough to cover services such as safety supervision and intermittent care. It found that the phrases should not be construed narrowly and limited to specific examples of discrete tasks but interpreted in a way which advanced the purposes of home and community funding within the Public Health and Disability Act generally.² But, despite the Court's decision, Mrs Moody is still paid for only 17 hours.

Significant issues relating to the nature of employment are raised by the Ministry's policy since it operates on the premise that the funding is provided to the disabled person who can then use it to employ a care giver. In effect, this makes Mrs Moody's son her employer. The Court - and subsequently the Employment Relations Authority (ERA) - described the situation as an elaborate bureaucratic fiction since many of the disabled people in this situation are so impaired they do not have the necessary capacity to employ another person.

Mrs Moody sought a number of declarations about her employment relationship from the ERA. The ERA considered that the proceedings raised matters of that were clearly of public importance as they involved fundamental questions about the nature of the employment relationship, how it is formed and what capacity is required to be an employer or meaningfully form an employment relationship³. As the decision would impact on the Ministry's policy and how it funded care for severely disabled people, the ERA transferred the case to the Employment Court (which then had to grapple with the issue of appointment of litigation guardians for the disabled people). On April 9 the Chief Judge, Christina Inglis, granted the NZ Council of Trade Unions and the Human Rights Commission the right to intervene in the proceedings which will be heard in August, noting that a number of core issues will arise in respect of the alleged employment relationship including the capacity of a disabled person to be an employer and if, as a matter of law they cannot, then who the employer is. As such it will engage consideration of the core characteristics of an employment relationship⁴. The outcome will be awaited with interest given the complexity of the issues. For example, should she found not to be an employee of anyone, issues could arise about the lack of protections for leave, pay and such like that are provided in employment standards legislation.

***Director of Human Rights Proceedings v Slater* [2019] NZHRRT 13**

In 2012, Cameron Slater posted a series of blogs defaming Matthew Blomfield. The blogs were accompanied by personal information that Slater had obtained illegally from a backup drive of Blomfield's.

The Director of Human Rights Proceedings argued that the publications interfered with Blomfield's privacy. Slater's defence was that the publications were a 'news activity' and therefore exempt from the Privacy Act. The purpose of the exemption is to protect the free flow of information. The exemption is not solely intended to preserve mainstream news but applies to news in general, including independent bloggers. But even then the exemption is not unlimited. The privilege must be exercised responsibly. The purpose of the exemption is not to allow a news medium to use the Privacy Act where it fails to meet the standards of responsible news activity.

Because various posts had been deleted, the Tribunal only had to consider whether 12 publications were protected. It approached the matter by examining each individual post and found only one was protected under the exemption. All others were in breach. The blog not in breach involved Hell Pizza's association with a supposed 'scam' of the charity KidsCan. The Tribunal found that Slater had breached Information

² CA at [70]

³ *Moody v Chamberlain* [2018] NZERA Auckland 288 at [7]

⁴ *Moody v Chamberlain* [2019] NZEmpC 43 at [9]

Privacy Principle 11 in publishing personal information causing Blomfield humiliation, loss of dignity and injury to feeling.

The Tribunal ordered damages of \$70,000 given the harm that Slater caused; a declaration that the defendant interfered with the plaintiffs privacy; a restraining order restraining Slater from continuing or repeating the interferences with Mr Blomfield's privacy and a takedown order ordering Slater, to take down the material – although conceding that this was slightly problematic as information published on the internet is enduring, and can be likened to a 'tattoo'⁵.

The case highlights the changing nature of the news media and the strategies the common law applies to face these challenges. In relation to new media and blogging, the Tribunal makes a number of references to the Law Commission's recommendations to overhaul the Privacy Act⁶ and laments that NZ Parliament is slow to act. A significant precedent set by this case, and perhaps its overall significance is the blog by blog approach to 'news activity' involving assessment of each item and the concept of 'responsible media' as a standalone concept.

***C v L* [2019] NZHC 485 – right to freedom of movement**

Over a period of two years C had had a number of verbal confrontations with L about her dogs. He also wrote to her on a number of occasions. Some of the letters contained implied threats, or were intimidating. They also made inappropriate comments about L's young child and L herself. L responded by taking legal steps requesting C to stop and at times contacting the Police. The Police twice charged C with intimidation and served him with a trespass notice.

L then sought a restraining order under the Harassment Act 1997. An order was made in the District Court. C appealed, arguing that some acts were misidentified, the defence of lawful purpose was wrongly applied, the order itself was too long and the costs awarded too high. Having summed up the different definitions and mechanisms of the Harassment Act, Cooke J found that while the District Court may have wrongly identified some acts in making a restraining order, there were so many other qualifying acts that the outcome was the same.

Addressing the defence of lawful purpose in s 17 of the Harassment Act, Cooke J held that acts that may initially be lawful can become unlawful if performed in a way that amounted to harassment. The potentially legitimate purpose of communicating grievances with a dog owner could become unlawful because of the threatening and abusive nature of a communication. Cooke J also found that the District Court did not err in making a restraining order for 5 years given that C's conduct had escalated in seriousness and frequency over 2 years. The Judge found that because C's legal arguments at both trial and appeal lacked merit - putting L to unjustified expense in defending them - the District Court was not wrong in its costs award, awarding further costs against C.

Although the NZBORA was not part of the legal argument, Cooke J discussed its application to restraining orders under the Harassment Act because the Act can limit rights affirmed in the NZBORA and the Courts must ensure it is applied consistently with that Act. The Supreme Court's approach in *R v Hansen* was applicable to the exercise of discretionary powers that can limit rights. While making a restraining order is inconsistent with the NZBORA - particularly the right to freedom of movement - the question is whether it can be justified. In Cooke's opinion, restraining orders made under the Harassment Act meet the test for a justified limitation as such orders are only made when necessary to protect the applicant from further harassment, necessity being "particularly important in establishing a justified limit on fundamental rights".⁷ The scope and conditions of a restraining order must be limited

⁵ At [158]-[162]

⁶ At [56]. See also note above

⁷ At [15].

to what is necessary to prevent ongoing harassment. The “NZBORA is relevant not only at the interpretation phase, but also at the application phase.”⁸

This case demonstrates that even where rights and freedoms are not a live issue the Courts will still strive to ensure the requirements of the NZBORA are correctly applied. Such an approach has the benefit of establishing whether legislation is consistent with the NZBORA and, if not, whether its inconsistencies are justified limitations. While *R v Hansen* has not been applied to the Harassment Act before, this case has the potential to develop or clarify the approach to the exercise of discretionary powers in a way that is consistent with the NZBORA.

***New Zealand Police v Gary Thomas Chiles and Adrian James Leason* [2019] NZDC 3860 - right to protest**

In 2017 there was a protest against the New Zealand Defence Industry Forum outside the Wellington Westpac Stadium. Part of the protesters’ strategy was to block or slow down buses carrying delegates into the stadium. A police force was present to assist the delegates’ entry and ensure the protesters’ safety. Mr Leason was arrested while he was part of line of protesters with their arms linked in front of a gate. Mr Chiles was arrested while holding onto a gate the police were trying to open. Mr Chiles said that he was concerned about the gate being pushed outward onto sitting protesters causing risk of injury. Both Mr Leason and Chiles were charged with obstructing the public way under s 22 of the Summary Offences Act 1981. Section 22 allows a fine to be imposed on anyone who continues to obstruct a public way - without reasonable excuse - after being warned by a constable to stop. Both defendants denied hearing a warning by the police before they were arrested.

In his decision Hastings J made a number of points on human rights generally and the right to protest specifically. He begins the judgment with the statement that we are fortunate to live in New Zealand and that, had the events here happened in another country such as Tunisia or the United States, the result could have been very different going on to describe protest as a “safety valve that relieves the pressures inherent in any democracy” while also recognising that the right to protest may inconvenience others to be effective. One of the great virtues of a democracy, he said, is a shared recognition that the right to protest exists and has value, even amongst those who are inconvenienced by its exercise and those called upon to regulate its exercise.⁹

Much of the judgement focuses on the application of the NZBORA noting that meanings that are consistent with the NZBORA are preferred¹⁰ and that offences that engage the NZBORA are not to be interpreted on a case-by-case but rather given a meaning capable of future ascertainment¹¹. Restrictions on rights and freedoms will not be upheld where they are disproportionate to their purpose (i.e., more restrictive than necessary).¹² The issue in this case was whether s 22 could be given a meaning consistent with the freedoms of expression, association, movement and peaceful assembly.¹³

Drawing upon Mackenzie J’s decision in *Stanton v Police* Hastings J noted that s 22 could be given a meaning consistent with the NZBORA by interpreting the meaning of what “unreasonably impedes normal passage”. This is informed by an increasing recognition that protest itself can be part of ‘normal passage’ of a public way or, at least, a right exercisable on a public way.¹⁴ Interpreting the phrase ‘unreasonably impedes normal passage’ in a way that is consistent with the freedom of peaceful

⁸ At [20].

⁹ At [22].

¹⁰ *R v Hansen* per Elias CJ

¹¹ *Morse v Police* per Elias CJ

¹² *Supra* Elias CJ at [33]

¹³ At [34].

¹⁴ At [41]-[42].

assembly requires recognising that normal passage includes not only the ordinary meaning of passage itself but includes a range of other activities that are not unlawful. Reasonable impediments are not regulated and even unreasonable impediments will not be regulated unless they continue after a warning has been given to desist. The purpose of the provision is to facilitate police operations in a manner consistent with the freedom of assembly.¹⁵

Applying these principles, the Judge found that the defendant's acts were not unreasonable and they were not guilty of obstruction. They were exercising their right to protest, a common use of public passage. Further, the 'impediment' was not long-lasting and did not prevent the delegates' access or significantly interfere with the police's efforts to maintain the various uses of the public way. The decision recognises that obstruction of a public way is a common police tactic to arrest (or threaten to arrest) disruptive protesters and providing a NZBORA consistent interpretation of s 22 could help others charged under the section in the future. As such it forms part of a line of judgments recognising and protecting the right to protest in New Zealand.

***Nevin v Benefits Review Committee* [2019] NZSSAA 13 – the right to be free from discrimination on the ground of disability**

Mr Nevin, who has cerebral palsy, has been employed by Spreydon School in Christchurch for almost 18 years as part of the school's property team. His job involves picking up rubbish, sweeping, doing light gardening and cleaning. The school regard him as a valued employee whose presence gave students an awareness of people with disabilities and the contribution they can make to a community. For him personally, being employed allowed him to live an independent life.

Mr Nevin's employment was made possible by financial assistance from the Ministry of Education via a general operational grant. This had been in place for about 10 years. However, in 2010 the Ministry decided that such subsidies should not remain in place indefinitely as the funding was intended to encourage people with temporary disabilities to ease back into the workforce. This was to be achieved by an incremental decrease in the money allocated. For someone like Mr Nevin with a permanent disability, this meant that eventually the school would not have the necessary money to pay him even the minimum wage.

The mandating legislation is the Social Security Act 1964 (the Act). Procedural aspects are governed by the Social Security Act 2018 and subordinate legislation – the Employment and Work Readiness Assistance Programme (EWRAP). The Act provides for Parliament to appropriate funds for granting assistance under "any welfare programme established and approved by the Minister". The Chief Executive can also make guidelines under EWRAP. The guidelines are not legislation and cannot fetter the Chief Executive's discretion conferred under EWRAP. The "fade out" plan was promulgated under a provision in the guidelines.

Mr Nevin appealed to the SSAA (the Authority) claiming that his human rights were breached as the fade out plan discriminated against him as a permanently disabled person since it only provides adequate support to people with less enduring disabilities. If he did not have a permanent disability he would receive the support he needed to keep his employment. The SSAA noted that under s.21 (1)(h) of the Human Rights Act discrimination is unlawful on the grounds of disability and s.6 NZBORA requires enactments to be interpreted in accordance with the rights and freedoms in that Act including freedom from discrimination. It followed that if Mr Nevin was correct his complaint could only be supported if EWRAP could be interpreted as supporting discrimination against persons with enduring disabilities.

Despite the Ministry arguing that guidelines were not inconsistent with EWRAP, the SSAA found that on a straightforward reading, EWRAP did not mandate that Mr Nevin's support should fade out and

¹⁵ At [42].

doing so amounted to unjustified discrimination under the HRA. Mr Nevin received the support that he needed for 10 years and it was only withdrawn because of a decision to apply a policy that had the effect of excluding people with a permanent disability from appropriate and needed support. The SSAA considered that the Ministry advanced no grounds to justify “fading out” the support it had provided him with for 10 years. It was harmful to Mr Nevin’s well-being to withdraw the support and there was nothing in the Ministry’s argument weighed against this. The Authority considered both the Disability Convention and the Disability Support Network’s Employment Support Practice Guidelines and concluded that the Ministry’s practice was inconsistent with them. Further it was wrong to compare Mr Nevin’s work to that of a person without cerebral palsy. There were things that he brought to the workplace that contributed to the school community including his success in managing his life. The SSA concluded that the effect of withdrawing his support after he had established an independent life - given there were no justifying circumstances - was incompatible with his human dignity.

***Kim v Minister of Justice of New Zealand* [2019] NZCA 209 – the right to a fair trial**

Mr Kim is a citizen of the Republic of Korea. He came to New Zealand in 1989 when he was 14 and is now a permanent resident. He is the father and principal care giver of two teenaged children. Chinese authorities allege that in 2009 he killed a 20 year old woman in Shanghai. In 2011 the Peoples’ Republic of China (PRC) sought his extradition and gave an assurance that he would not be sentenced to death if he was found to have committed the offence. Mr Kim was arrested and detained in custody pending his surrender. In 2015 the Minister of Justice agreed to his extradition, claiming that the assurances given by the PRC effectively guaranteed he would be treated fairly.

Mr Kim successfully judicially reviewed the Minister’s decision arguing that were he to be returned he would be at risk of torture, extra-judicial killing or imposition of the death penalty¹⁶. He claimed he would not receive a fair trial because of systemic and fundamental flaws in the criminal justice system in the PRC. The Minister reconsidered and, again, ordered his surrender. Mr Kim also attempted to review this decision but was refused. He then appealed the refusal, claiming the Minister had failed to come to grips with how the legal system functioned in PRC and that a fair trial was not possible. He contended that the Minister should not have relied on diplomatic assurances because that undermined the standing of the international conventions and the rule of law and were inadequate to meet the concerns they purported to address. This resulted in the present case which is the first in which the PRC has sought to extradite someone from New Zealand.

The Court of Appeal described the issues as difficult. The purpose of extradition is to ensure that people who commit crimes cannot escape the consequences by fleeing the jurisdiction. On the other hand New Zealand has obligations under international law not to return a person to a jurisdiction where they will be at substantial risk of torture or they will not receive a fair trial. This is compounded by the restrictions deriving from the fundamental principles and rights in the various international covenants ratified by New Zealand and which to some extent also underlie the rights and freedoms contained in the NZBORA.

At [274] the Court noted that the case involved serious issues whether a decision to surrender Mr Kim could be made in a manner which was compliant with New Zealand’s international obligations and the difficulty that exists in obtaining assurances adequate to address the risk of torture in a country where torture is illegal yet remains widespread because of cultural and systemic features of the PRC justice system. As a result, the Court of Appeal has set down a very clear standard for extradition to the PCR. Seeking general assurances from China that do not explore every aspect of the risk to a particular individual is not enough. The level of “heightened” scrutiny required could be very difficult for the Chinese to meet. According to one commentator it may serve as a permanent bar to extradition to China. It may also be the judicial way of saving the New Zealand government the difficulty of turning China

¹⁶ *Kim v Minister of Justice* [2016] NZHC 1490, [2016] 3 NZLR 425

down¹⁷. Or, as another academic put it, the Court of Appeal regards the problems with China's criminal justice system as being so deeply rooted and inimical to our principles of justice that it might well be impossible to *ever* be satisfied that a person can receive a fair trial there. And if that is the case, a good and humane society like ours simply cannot send someone into it, no matter what they are alleged to have done¹⁸.

The case has particular resonance given the recent demonstrations in Hong Kong opposing the proposed introduction of legislation which would allow extradition to mainland China. The leader of the uprising invoked the decision almost as soon as it was made public, citing it as an indication of the problems with the justice system in the PRC.

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¹⁷Professor Neil Boister, *Asia Media Centre* 14 June 2019. See also Mike Douglas, "Case note: The extradition relationship between New Zealand and China: *Kim v Minister of Justice*" [2017] NZCrimLawRw 7; [2017] NZCLR 123

¹⁸ Andrew Geddis, *The Spinoff* June 12 2019