



# New Zealand Centre for Human Rights Law, Policy & Practice

## Auckland Law School

### University of Auckland

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### **National update: policy and legislation** (click titles for full story)

#### **Parental Leave and Employment Protection Amendment Bill**

A further Supplementary Order Paper proposed by the Opposition which would have allowed paid parental leave to be split between spouses or partners are caring for the child and taken at the same time, did not proceed but the Opposition has said that it intends to try again next year as part of the review of employment law.

#### **End of Life Choice Bill**

The Bill has been referred to the Justice Committee. Because of the contentious nature of the Bill the select committee process is likely to last for 9 months rather than the usual 6.

#### **Equal Pay legislation**

The Minister for Workplace Relations and Safety, Iain Lees-Galloway, and the Minister for Women, Julie Anne Genter, have reaffirmed the new Government's commitment to halting the *Employment (Pay Equity and Equal Pay) Bill* introduced by the previous Government.

#### **Inquiry into historic cases of abuse while in state care**

Cabinet is expected to be making decisions on the Inquiry in January, with a public announcement on its establishment in February. Once established this Inquiry will be dealing with one of the most shameful features of New Zealand's history and one all too long denied. Acknowledging the damage that has been done over many years to children, young people and vulnerable adults while in state care of one form or another, is essential to preventing abuse now and in the future.

#### **Chief Ombudsman's opinion on the use of seclusion in schools**

On 16 November 2017 Chief Ombudsman Peter Boshier released his Final Opinion on the seclusion of an autistic child at Ruru Specialist School, saying the child and his family were let down by the school and the Ministry of Education.



## International update

(click above for full story)

### ICESCR examination

- The United Nations regularly reviews New Zealand's compliance with its international human rights commitments.
- Over the next 18 months a number of reviews will deal with significant issues such as housing, poverty, education, mental and physical health, women's rights, violence, abuse, bullying and the rights of disabled people.

### Recent cases

(click titles for full story)

#### *S v Attorney-General* [2017] NZHC 2629

This case examines the right to be treated with humanity and dignity when detained

#### *Smith v Attorney-General on Behalf of the Department of Corrections* [2017] NZHC

This case examines the right to freedom of expression

#### *Janet Elsie Lowe v Director-General of Health, Ministry of Health* [2017] NZSC 115

This case examines the right to employment benefits

#### *Brown v New Zealand Basing Ltd* [2017] NZSC 139

This case examines the right not to be discriminated against in employment

#### *Quake Outcasts v the Ministry of Canterbury Earthquake Recovery & Anor.* [2017] NZCA 332

This case examines the right not to be discriminated against in claiming insurance

#### *Mark David Chisnall v the Chief Executive of the Department of Corrections* [2017] 7 NZSC 114

This case examines the right not to be arbitrarily detained or tried again for the same crime



# National update: policy and legislation

## Parental Leave and Employment Protection Amendment Bill

The *Parental Leave and Employment Protection Amendment Bill* is the first piece of legislation introduced by the new Government as part of its 100-day plan. The Bill was introduced on Parliament's first day of sitting and passed through the preliminary processes on the same day without referral to a Select Committee. The Bill - which had its third reading on 30 November - will provide increased support for working parents with new babies and young children by increasing paid parental leave to 26 weeks in 2 stages. Entitlements to parental leave payments and primary carer leave will increase to 22 weeks from 1 July 2018, with a further increase to 26 weeks from 1 July 2020. A Supplementary Order Paper also extended the number of keeping-in-touch days for employees entitled to paid parental leave in line with the extension of paid parental leave ensuring that they do not forfeit their entitlements.

## End of Life Choice Bill

David Seymour's *End of life Choice Bill* passed its first reading on 13 December 2017. The Bill would allow people with a terminal illness or irremediable medical condition to request assistance to die. The bill would require ongoing consent from the person requesting assistance and allow for withdrawal of consent at any point during the process. To be eligible for assistance certain criteria would apply. Medical practitioners who do not wish to be involved for conscience reasons will not be obliged to do so.

## Equal Pay legislation

The Minister for Workplace Relations and Safety, Iain Lees-Galloway, and the Minister for Women, Julie Anne Genter, have reaffirmed the new Government's commitment to halting the *Employment (Pay Equity and Equal Pay) Bill* introduced by the previous Government.

## Inquiry into historic cases of abuse while in state care

The new Government has committed to establishing an independent national inquiry into cases of abuse experienced by children and young people while in state care, also as part of its first 100 day plan. There have been calls for such an inquiry since the late 1970s.

Minister of Children, Tracey Martin, has prime responsibility for developing recommendations for Cabinet consideration on the mandate, scope and ways of working of



the proposed inquiry. Officials from Oranga Tamariki (Ministry of Vulnerable Children) and Crown Law are currently consulting on the Inquiry's:

- Purpose / Objectives / Goals
- Scope: children in state care (how narrowly/widely defined); age range; time period; nature of abuse
- Basis of the Inquiry – Ways of working
- Appointments.

### Chief Ombudsman's opinion on the use of seclusion in schools

On 16 November 2017 Chief Ombudsman Peter Boshier released his Final Opinion on the seclusion of an autistic child at Ruru Specialist School, saying the child and his family were let down by the school and the Ministry of Education. The school had failed to follow its own procedures, and acted unreasonably in using the room for a purpose it was unfit for. Further the record keeping was incomplete and unclear. He also criticised the Ministry of Education for failing at the time to provide schools with unambiguous and up-to-date guidance on why and how to avoid using seclusion to manage difficult behaviours. The opinion is available on the ombudsman's website at [www.ombudsman.parliament.nz](http://www.ombudsman.parliament.nz)

## International update

### ICESCR examination

The United Nations regularly reviews New Zealand's compliance with its international human rights commitments. Over the next 18 months a number of reviews will deal with significant issues such as housing, poverty, education, mental and physical health, women's rights, violence, abuse, bullying and the rights of disabled people.

Submissions must be sent to the United Nations before 15 February 2018 ahead of New Zealand's review before the Committee for Economic, Social and Cultural Rights on 22-23 March. Personal submissions or submissions made on behalf of a group or an organisation are acceptable. To find out more about making a submission and for regular updates on upcoming reviews, consultations and workshops, see [www.hrc.co.nz/your-rights/human-rights/international-reporting](http://www.hrc.co.nz/your-rights/human-rights/international-reporting). The Commission can also be contacted directly at [internationalreporting@hrc.co.nz](mailto:internationalreporting@hrc.co.nz) or on 0800 496 877.



## Recent cases

*S v Attorney-General* [2017] NZHC 2629

*the right to be treated with humanity and dignity when detained*

This case is the culmination of years of work which challenged much of the accepted understanding of how the mental health system operates and people with intellectual disability, who have committed violent offences, are treated. The approach promoted in the UN Convention on the Rights of Persons with Disability (the Disability Convention) was central to a number of the allegations made by the applicants.

The applicants - S, M and C - had been detained under the MH (CAT) Act and, in one case the ID (CCR) Act, for over a decade. All of the men have IQ's under 70, health problems, bipolar disorders, personality disorders and autism. They sought compensation for their treatment by Capital and Coast and Waitemata DHBs claiming their detention was arbitrary and their treatment amounted to torture or cruel and inhumane treatment, and as a result breached ss. 9, 22 and 23(5) of the New Zealand Bill of Rights Act 1990.

Initially the lawyer acting for the men, Tony Ellis, had sought to have the proceedings conducted without a litigation guardian (required under the HC Rules if a person is incapacitated and unable as a result to understand the court proceedings), arguing that the need for such an appointment was discriminatory as it prevented people with intellectual disabilities accessing the court as it assumed that they did not have legal capacity. In an earlier decision Ronald Young J. had dismissed the argument noting that the appointment facilitated equal access and was anticipated by the Disability Convention. Nevertheless Tony Ellis sought to re-litigate the issue before the High Court claiming that in the interim the CRPD Committee had issued a general comment on Article 12, which deals with legal capacity, stating that lacking mental capacity is not sufficient to establish lack of legal capacity. Claiming it was itself discriminatory. Ellis J refused the request, stating that the issue was *res judicata* and noting that this aspect of the general comment had already generated controversy because of its implications; at [20]. Litigation guardians were appointed for the men and a rigorous process established to ensure they understood and could contribute to the proceedings: at [28].

The lengthy judgment is divided into two parts. The first addresses the background and the second the causes of action.

### Background

The claim was originally filed in 2010 and subsequently amended on a number of occasions. The contentious period was between 2000 and 2012. As a result a number of pieces of legislation are relevant, including Part 7 of the Criminal Justice Act 1985, the MH (CAT) Act 1992, the CP (MIP) Act 2003 and the ID (CCR) Act 2003. The MH (CAT) Act 1992 is



particularly significant since it was the change in definition of mental disorder in that Act that led to many of the difficulties that have arisen in relation to the care of people with intellectual disabilities. The definition of mental disorder in the previous Mental Health Act had allowed people to be detained simply because they were intellectually disabled. Now people can only be detained if they are intellectually disabled if they also have a mental disorder. The change created a lacunae in relation to intellectually disabled people who had committed an offence and had been detained as mental health patients since any criminal proceedings under the CJA were permanently stayed<sup>1</sup>. Under the new Act that particular group had to be discharged. Clearly this was unsatisfactory and the statutory regime in Part 7 of the CJA was replaced with the ID (CCR) Act and the CP (MIP) Act. The two need to be read in tandem since the first defines intellectual impairment but does not address fitness to plead which is found in the CP (MIP) Act. The CP (MIP) Act has been criticised by disability advocates because it provides that a person can be found unfit to stand trial simply if a Court is satisfied on the balance of probabilities that he or she caused the act or omission that forms the basis of the offence with which they are charged. They may then be detained as a “special care recipient” under the ID (CCR) Act. The contentious issue is the lower standard of proof (balance of probabilities rather than beyond reasonable doubt) required to activate the Acts. Compulsory treatment can be administered under both and both have review functions and complaints mechanisms. Standards for the provision of health and disability services are promulgated by the Ministry of Health and the MH (CAT) Act and ID (CCR) Act also provide for guidelines and standards.

Eleven of the thirteen causes of action allege that ss.9 and 23(5) of the NZBORA were breached. The content of the s.9 right is described at [212] et seq. Referring to the Supreme Court’s decision in *Taunoa v Attorney-General*<sup>2</sup>, Ellis J noted that in order to breach s.9 conduct will usually involve an intention to harm or conscious and reckless indifference to causing harm as well as significant physical or mental suffering. Section 23(5) is predicated on the derivation of liberty and many cases involve the detaining authority using unnecessary force or assaulting the person detained. However the concept also includes positive duties. While *Taunoa* itself is of limited use in this area, other cases canvassed by the court suggest that the fact that people are detained means that ordinary notions of autonomy or choice are necessarily limited; detainees must nevertheless be treated with humanity and respect for their dignity and whether a policy, practice or act breaches s.23(5) will be decided by considering if it is a necessary aspect of detention and humanity and dignity are affected as a result; the boundaries of s.23(5) in a particular case reflect Parliament’s view as to a humane standard of treatment for particular groups of detainees. A breach of such standards will be indicative but not determinative of a breach of s.23(5) – the act or omission must be both unlawful and unacceptable. The detention may also give rise to positive obligations such as keeping the detainee safe from harm and the totality of conduct may amount to a breach even if individual acts or omissions do not. While the impugned treatment may be a function of the detention it may still be inhumane because of

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<sup>1</sup> If they had been special patients the original criminal charge remains “live” and proceedings could be reactivated with the result that they could be sent to prison.

<sup>2</sup> [2007] NZSC 70; [2008] 1 NZLR 429





its duration or severity; the particular vulnerability of the detainee; and the nature and extent of the impact on them. At [247] the Judge said:

*If the impugned treatment was not obviously connected with the purposes of a detainee's detention, similar question as to its inhumanity will arise. But if inhumanity is established, treatment which is not a function of the detainee's detention will be more likely to be found in breach of s.23(5) due to the absence of any countervailing state interest in maintaining safe and purposeful detention.*

### Causes of Action

i. One of the men alleged that he had been sexually violated while in detention, claiming that the DHB failed to provide him with a safe place of detention; to provide him with “preventive therapy and education” or condoms; to conduct a prompt, impartial inquiry into the alleged violation; or to provide him with legal advice or facilitate a police complaint or ACC claim. In addition he challenged the quality of a District Inspector’s inquiry. These incidents breached a significant number of his rights for which he ought compensation. The Judge found that a breach of s.23(5) was at least arguable given there was little doubt that failing to protect a vulnerable detainee from sexual assault by another detainee was capable of engaging notions of humanity and dignity: at [279]. Despite this she held that given the lapse of time (the events occurred 15 years ago) there was insufficient evidence to sustain the complaint that there had been a breach of s.23(5) and the inspection carried out by the District Inspector was thorough, timely and impartial. There was no evidence that the DHB was “recklessly indifferent” to the possibility of the man being sexually molested with the result that s.9 was breached.

ii. The next cause of action involved an allegation that the respondents breached s.23(5) by failing to provide the men with adequate rehabilitation (identifying 19 activities) in a “minimally intrusive way”, denying them the opportunity to have regular contact with their families, or access to a lawyer and the opportunity to leave the hospital without authorisation or supervision. Of the 19 activities listed a number were not pursued in a meaningful fashion and the allegation that they were not provided “in a minimally intrusive way” was conceptually problematic. The cause of action was further complicated by the fact that the nature of the rehabilitation provided to individual patients was essentially a matter of clinical judgment. There were separate allegations of breaches of the Disability Convention which the Judge considered “were not separately justiciable in this Court”.

Following close examination of the evidence, the Judge concluded that the DHBs had not failed to provide the men with appropriate rehabilitation and had made concerted attempts to help them move out of secure care and into a community setting. They had not been denied visits or telephone calls unless it was clinically justified and the denial of leave on occasions was a “rational and necessary response to the risk posed” by the individual concerned.

iii. The fifth cause of action was arguably the most contentious. It related to sexual relationships and claimed that ss.9 and 23(5) include the right to family life and respect for the applicant’s autonomy and dignity which required facilitation of sexual relationships.



The claim was broken down into a number of components - the absence of written policies; sex and relationship education; the provision of condoms; the right to masturbate and to possess pornography. In her discussion the Judge highlighted the difficulty that “the proposition that humanity and dignity requiring patients such as the applicants be permitted to form intimate relationships runs counter to what is clearly the respondent’s duty under that section, namely to take reasonable steps to ensure that the patients are safely detained”: [435]. She went on to find that there had been no breach of ss.9, 14 (freedom of expression) or s.23(5) in relation to sexual matters.

iv. The next allegation related to the use of seclusion and restraint – an issue that is of more than passing concern to a wider group of people than just the applicants. Initially the applicants argued that the use of seclusion and restraint amounted to arbitrary detention in breach of s.22 but the Judge considered that this was inappropriate and the correct focus should be on s.23(5) – and if truly egregious, s.9. A variety of situations where this might arise were outlined including the use of seclusion as punishment, for unnecessarily long periods, or without medical supervision in such a way that it amounted to assault and battery. The allegation claimed there was no detailed policy governing its use and significant flaws in whether or how guidelines were promulgated. The Judge canvassed the issues in some detail, concluding that no breach of ss.23(5) or 9 could be established. She found that seclusion and restraint was not used as punishment but in response to real and immediate risk to the safety of the patients themselves or others. Although there had been occasions when a situation could have been handled better, none of the instances documented were unlawful or unwarranted. Existing guidelines emphasised minimisation of the use of seclusion and restraint and the development of behavioural strategies to decrease their use. There was also a high level of transparency through record keeping and internal monitoring mechanisms. And while there were no guidelines relating to the IDCCR Act which also permits seclusion, this did not render its use unlawful. Overall there was no discernible legal difficulty with the Ministry’s guidelines under the MH(CAT) Act.

v. In addition to the issue of seclusion and restraint, it was alleged that S’s right to telephone calls, to write letters (or have them written for him) and visits from his advocate had been interfered with amounting to breaches of s.14 (freedom of expression) and s.17 (freedom of association). The Judge quickly dispensed with the allegation that s.17 was breached by restrictions on writing letters: at [627], and found that s.14 did not require staff to take dictation for patients who were compulsorily detained.

vii. The seventh cause of action involved the Mental Health Review Tribunal and the allegation (again relating to S) that the tribunal predetermined the outcome of any reviews he might bring. S had been reviewed in 2007 and the tribunal concluded he was mentally disordered terms of the MH(CAT) Act and that it was unlikely “in the foreseeable future” to reach a different conclusion. The Judge found herself unable to accept that this amounted to predetermining the issue. Had S wished to contest the decision he had the option of an appeal, reapplying to a differently constituted tribunal following a 6 monthly clinical review or seeking a High Court inquiry under s.84.





viii. The next cause of action related to the living conditions at Porirua Hospital. Again there were a substantial list of complaints relating to most aspects of daily life, ranging from the general condition of the Unit to lack of privacy. The men did not establish that the environment was such that it met the criteria of s.23(5) and in any event the Ombudsman (who has oversight of the unit under the OPCAT mechanism) would ensure that standards were met.

ix. The men claimed that their detention and treatment was discriminatory because they were treated differently from other offenders by reason of their intellectual disability and/or mental illness. Much of the complaint related to the CP(MIP) Act process outlined earlier in this summary. The Judge found it “highly questionable” that the applicants were treated differently from other offenders by reason of their disability as the reason for their treatment was the risk they posed to themselves and others. The discrimination claim was dismissed. The proposition that the “diversion” under the CP(MIP) Act contravened s.19 of the NZBORA was not properly argued and the men were not arbitrarily detained in terms of the NZBORA as at all times they had been detained lawfully and had adequate rights of review.

x. It was also claimed that the three men received inadequate medical care or inappropriate medication and their consent was not obtained, breaching s.11 of the NZBORA. As informed consent requires a patient to be able to process and use any information provided to reach a decision, this raises the issue of capacity. As a general principle even though a patient appears to lack capacity it is considered good medical practice to discuss with them any proposed medication within the limits of their competence. Evidence indicated that clinicians involved in caring for the men had always tried to involve them in decisions about their medication. The conditions under which compulsory treatment can be administered is found in the MH(CAT) Act. During assessment and the first month of any order treatment can be administered irrespective of the patient’s views. Thereafter an attempt must be made to explain the nature of any treatment and consent obtained but may still be administered even if it is not forthcoming. It follows that treatment explicitly authorised by law in this manner does not breach s.11.

xi. The eleventh cause of action claimed the applicants’ detention was arbitrary because they did not have access appropriate complaints procedures and the statutory review processes whereby their status was monitored was inadequate. It identified 13 ways in which this occurred, a number of which were dismissed because there was no evidence to support them. Overall, it was found that there was no substance to the claims.

xii. Finally there was the claim that even if a one single allegation did not amount to a breach of the NZBORA, the claims in total did. This claim was based on the finding in *Taunoa*<sup>3</sup> where the Courts held that in the absence of a finding that while specific incidents or conduct might not amount to a breach of the NZBORA, a breach could be found when they were considered in total. The Judge also dismissed this argument.

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<sup>3</sup> *Supra* fn 2



## Outcome

Overall the case failed, the Judge observing that throughout their time in compulsory care, the men had received “dedicated and compassionate care” and noting that while some things might have been better done the real, albeit slow, progress made by the applicants spoke for itself: at [841]. While the claims failed, the issues raised were important given the length of time that the men had been detained and New Zealand’s commitment to the Disability Convention.

*Smith v Attorney-General on Behalf of the Department of Corrections* [2017] NZHC 463

### *The right to freedom of expression*

Most people are familiar with the actions of Phillip Smith who absconded while on temporary leave from Spring Hill prison and fled to Brazil where he was apprehended a week later having been identified by a vigilant member of the public.

Smith wore a hairpiece because he was balding as a result of male pattern alopecia. While this substantially changed his appearance, there was no suggestion that it facilitated his escape. On his return to New Zealand, however, he was observed to be disoriented and unsteady on his feet, behaviour that was attributed to his having taken a drug that may have been concealed in his hairpiece. A short time later the Prison Director at Auckland Prison, Paremoremo, Thomas Sherlock, revoked the authorisation permitting Smith to wear his custom-made hairpiece but not giving reasons for his decision. Just over a week later Smith appeared by AVL before the Auckland District Court on charges arising out of his escape. The hearing attracted considerable attention from the media which made much of the change in his appearance. Following an unsuccessful meeting with departmental officials Smith complained to the Ombudsman about the decision to remove the right to wear the hairpiece. Taking all the factors into account the Ombudsman concluded that the decision to revoke approval for the hairpiece was not unreasonable.

Smith sought judicial review of the Director’s decision. He pleaded three causes of action:

- i. Breach of natural justice because the decision to revoke approval to issue the hairpiece was made without consultation and without giving reasons. It thus contravened s.27(1) NZBORA;
- ii. Breached his right to freedom of expression under s.14 NZBORA because it was manifestly unreasonable and failed to take relevant considerations into account;
- iii. Failed to treat him with humanity and respect for his inherent dignity contrary to s23(5).

By way of remedy Smith sought declarations, an order quashing the decision to revoke approval for the hairpiece and damages of \$5000 for breach of s.23(5).

Wylie J first looked at s.43(1) of the Corrections Act which sets out when a prisoner can be issued with or to keep authorised property. This allows property to be withheld if safety interests are involved. Here the Director was seeking to revoke an authorisation he had



already given. While s.43(2) allowed the director to act in such cases if he had “reasonable grounds to believe” that a state of affairs existed which authorised his action, his affidavit did not directly address those issues.

Turning to the causes of action alleged by Smith, the Judge noted that all depended to a greater or lesser extent on the assertion that s.14 applied to his right to wear a hairpiece. He reaffirmed the very broad meaning that the Court of Appeal has given s. 14 (citing *Moonen*<sup>4</sup>) and noted that it will also apply to non-verbal communication although it has limits – violent conduct is not protected, nor are publishing defamatory material or contempt of court. While there is no clear indication of what will amount to “expression” having a broad conception of the right affirmed by s.14 avoids the problem of artificially categorising expression in a way that could deny protection to whole categories of expression by virtue of their content<sup>5</sup>. The deciding factor will be whether the person claiming the protection can demonstrate that his or her activity has expressive content and should be considered on a case by case basis. In this case, the Judge found that freedom of expression was engaged because Smith was endeavouring to “present himself to others in a way with which he was comfortable”. This effectively meant that the Director should have been alive to the NZBORA implications of his actions because he was exercising a statutory power of decision. In other words he should not only have taken into account the s.14 implications of his actions but should have considered whether it amounted to a reasonable limit on Smith’s rights in terms of s.5 of the NZBORA.

The Crown argued that, in the prison context at least, the test only applies to the outcome of administrative decision-making, not the process of arriving at a particular decision. The Judge agreed to some extent, noting that while the Director was engaged in relatively low decision making, nonetheless he had a statutory obligation to ensure that the decision was made in a fair and reasonable way and where, as here, the decision involved a potential limitation of a BORA right then where the limitation could be justified was implicitly a mandatory consideration: at [84]. However, rather than the step by step analysis such as that in *Hansen*, the Director should have acknowledged Smith’s right to freedom of expression and set out – albeit briefly, but in a transparent way - why he reached the conclusion he had. At [91] the Judge said:

*The giving of reasons encourages transparency of thought, which of itself is a vital protection against a precious or arbitrary decision. The very process is likely to mean that the decision is better thought out... and that the decision maker has considered relevant matters and refused to consider irrelevant ones. The approach the decision maker has taken to any evidential issues or matters of law will be exposed. The person affected may well be more inclined to accept the decision if it is reasoned. At the very least, he or she will be better able to determine whether there is still a legitimate grievance and what the prospects of any challenge to the decision may be. A decision maker should not be able to avoid challenge by giving perfunctory reasons.*

The Judge made a declaration that Smith’s s.14 right had been abused. He also made an order in the nature of certiorari quashing the decision to revoke his right to the hairpiece,

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<sup>4</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [15]

<sup>555</sup> At [63] citing A. Butler & P. Butler *The New Zealand Bill of Rights Act – A Commentary* (2<sup>nd</sup> ed, Lexis Nexis, Wellington, 2015) at [13.7.12] and [13.7.16]



and remitting it back to the Department for the Director to consider the issue afresh but denying his request for damages.

*Janet Elsie Lowe v Director-General of Health, Ministry of Health* [2017] NZSC 115

### *The right to employment benefits*

Ms Lowe made a living providing relief for fulltime (unpaid) carers of older or disabled persons under the Carer Support Scheme. The fulltime carers submitted forms to the Ministry which, in turn, provided them with funds to pay Ms Lowe. Although the disabled or aged persons were cared for in their own homes, the scheme allowed respite care to be claimed in a variety of ways. The question for the Court was whether Ms Lowe was a “homeworker” for the purposes of s.5 of the Employment Relations Act (ERA). Section 5 defines a homeworker as a person who is engaged, employed or contracted by any other person to do work for that other person in a dwelling house. To meet the definition therefore Ms Lowe would have had to be engaged by the Ministry or DHB. If she could establish this she would be considered an employee for the purposes of s. 6(1)(b)(i) of the ERA and entitled to employment related benefits under legislation such as the Holidays Act 2003.

The decision is one of a group of cases such as *Terranova*<sup>6</sup> which address the employment conditions of an underpaid and vulnerable group of workers. By the time the matter reached the Supreme Court, the Employment Relations Authority had found she wasn’t a homeworker and the Employment Court that she was, while the Court of Appeal reversed the Authority’s decision. The Supreme Court was divided on the issue - Arnold, O’Regan and William Young JJ dismissed the appeal but Glazebrook and Elias JJ would have allowed it.

To meet the definition of a “homeworker” Ms Lowe needed to establish that she was employed or contracted by the Ministry of Health or DHB as part of its trade or business to carry out work in a dwelling house. The definition first appeared in the Labour Relations Act 1987 which was based on recommendations in a Green paper reflecting concern about the potential for exploitation of people who worked from home. It was carried forward into the Employment Contract Acts 1991 when it replaced the Labour Relations Act. The meaning has been considered by the Court of Appeal in *Cashman v Central Regional Health Authority*<sup>7</sup>- a case involving people employed by a community support service to provide services to aged or disabled persons. The court interpreted the term broadly stating that a homeworker was more than just somebody who work in their own home and included those engaged to do non-tradesman’s work. It also established that a carer who had been engaged by a public authority or its delegate to provide care to a disabled or aged person in that person’s home was engaged by the authority. While this went part of the way to establishing whether Ms Lowe was a homeworker, it did not address the main issue, namely

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<sup>6</sup> *Service and Food Workers Union Nga Ringa Tota Inc. v Terranova Homes and Care Ltd* NZEmpC 157 [2013]

<sup>7</sup> [1997] 1 NZLR 7 (CA)



whether relief carers operating under the Carer Support Scheme were “engaged” by the Ministry or DHB or if engaged to undertake work which may or may not be performed in the person’s house this was sufficient to meet the requirement of doing work in a dwelling house.

The Employment Court found that Ms Lowe was engaged as a homeworker and the term was intended to have a wider meaning than the statutory definition in s.6 (1)(a) - which stipulated that a person needed to be employed “under a contract of service”. If this was the extent of the definition there would be no need to consider whether the person fell within the status of homeworker. This conclusion was not altered by the fact that neither the Ministry nor the DHB played a role in selecting the relief carer. The Court of Appeal considered that this was a significant factor that distinguished it from the situation in *Cashman*. If Ms Lowe was engaged by anyone, it had to be by the primary carer. To say that third party funding (as here) amounted to engagement would be “to stray so far from the natural and ordinary meaning of the word ‘engage’ as to ignore it”: at [31]. As there had been no engagement, the court did not have to address the issue of whether the person was engaged to do work in a dwelling house.

In deciding whether Ms Lowe was engaged by the Ministry or DHB, Arnold and O’Regan JJ considered that how “engaged” had been used in other contexts indicated that it was a flexible, ambiguous word which was substantially affected by context: at [36], but that the meaning could not be extended by the addition of an “in substance” approach. They agreed with the Court of Appeal that the normal meaning of “engaged” contemplates involvement in the selection of the person hired and as a result the Employment Court was wrong to see *Cashman* as supporting the conclusion that relief carers were engaged by the Ministry or DHB under the Carer Support Scheme. The concept of engagement requires an event which creates a relationship between the hirer and the engaged person. The approach taken by the Employment Court had superimposed a relationship between the Ministry or DHB and the relief carer that did not fit with the facts of the case. As to whether the dwelling house requirement was satisfied, there was no express requirement under the Carer Scheme that this was necessary as a variety of different types of relief care were contemplated. Like the Court of Appeal, the Judges found that it distinctly arguable that the engagement of relief carers did not carry with it a requirement that care is provided in a dwelling house: at [74]. Accordingly, they dismissed the appeal.

William Young J agreed that the appeal should be dismissed. Although he found that there was a contractual relationship between the Ministry and respite carers, they did not provide the care for the Ministry. The reality was that (a) primary carers engaged the respite workers and (b) the Ministry subsidised the cost of doing so. He concluded “on this basis, the “trade or business” of the Ministry did not encompass the provision of respite care and the “work” carried out by the respite carers was not “for” the Ministry: at [85]

By contrast Elias CJ and Glazebrook J would have allowed the appeal. They considered that while the concept of homeworker was broader than envisaged in the original green paper, it





should not be read down simply because it would be inconvenient (being less flexible if found to be employment) or have fiscal implications. The definition was broad enough to include the employment of independent contractors and cover support care workers. They reached this conclusion by finding that Ms Lowe was did not provide support for the fulltime carer but rather the disabled person, and was part of the Ministry's business of providing services to persons in this situation to allow them to remain in the community. Interestingly, while recognising that a full time carer may have the right to choose the support carer, the disabled person was also likely to have a say in this in keeping with the Convention on the Rights of Persons with Disabilities which reflects the importance of persons with disabilities being actively involved in the decision-making process about their care - even though their choice is constrained by the options provided by the Ministry and DHBs.

*Brown v New Zealand Basing Ltd [2017] NZSC 139*  
*The right not to be discriminated against in employment*

Captain Brown and Captain Sycamore are New Zealand citizens who live in Auckland. They are pilots with Cathay Pacific Airways. New Zealand Basing Limited (NZBL) is a subsidiary of Cathay Pacific. Since 2002 the men had been employed by NZBL pursuant to a contract which provided for retirement at 55. Both had countersigned a letter providing that the law of Hong Kong applied to their conditions of service. A clause in the contract stated that the applicable law was that of Hong Kong which does not protect against discrimination on the grounds of age. The men turned 55 in 2015 and sought to rely on New Zealand law which makes it unlawful to discriminate on the ground of age, to prevent them having to retire because of their age.

We have commented on the different decisions in earlier Bulletins, most recently that of the Court of Appeal. In that case the Court had overturned the Employment Court's decision on classic conflict of laws principles finding that the NZ Employment Relations Act (ERA) applied irrespective of the contract they had signed. There was nothing in the ERA's language, the Court of Appeal said, which suggested that its provisions would apply irrespective of the parties' choice of law. Where the majority of an employee's service was performed outside the territorial limits of competing jurisdictions, then a contract reflecting the parties' agreement that the laws of the foreign jurisdiction would govern all aspects of the employment relationship, would apply.

The Supreme Court overturned the decision, reinstating that of the Employment Court. William Young and Glazebrook JJ considered the case turned on a single issue, namely whether the relevant provisions of the ERA applied to the relationship of Brown and Sycamore on one hand and NZBL on the other. They found this to be the case following an analysis of the legislative scheme as a whole, seeing the scheme as clarifying that the right to be discriminated against was not confined to conduct which occurred in the context of an employment agreement governed by New Zealand law. In reaching this conclusion they observed that ss.22, 24 and 26 of the Human Rights Act (HRA) played a significant role when read together with certain Employment Court Regulations, as they contemplated the



Employment Court having jurisdiction in cases “with a diverse range of cross-border features”: at [46]. This was inconsistent with “employer” and “employee” being subject to a territorial limitation with a definable connection with New Zealand. The Employment Court therefore had jurisdiction over the subject matter of the employment agreements between the men and NZBL.

The right not to be unjustifiably dismissed replaces the right not to be dismissed for breach of contract but the right not to be discriminated against is “not as contractual in flavour as the right not to be unjustifiably dismissed”: at [53]. The right not to be discriminated against sits alongside the right not to be sexually or racially harassed which are wrong irrespective of what an employment agreement may or may not say. The agreement merely provides the context in which the conduct occurs. At [68] the Judges said “The rights not to be sexually and racially harassed are not, in any sense, contractual and there is therefore no sensible reason for confining them to employment relationships governed by the law of New Zealand ... they are breached by any conduct which occurs within New Zealand. This being so, it would be difficult, on ordinary principles of statutory construction, to reach a different conclusion in respect of the right not to be discriminated against”. Looking more widely at the HRA a limitation based on the “proper law of the contract” of the kind contended for by NZBL was inconsistent with the scheme of the Act. It was contrary to the policy of the HRA to exclude its operation in relation to acts of discrimination which occur in New Zealand merely because the proper law of the employment agreement was not that of New Zealand. Elias CJ, O’Regan and Ellen France JJ agreed that the appeal should be allowed. While they considered that the legislative scheme protected the men against age discrimination they expressed their views somewhat differently, adopting the approach of the Human Rights Commission (which had intervened) and finding that the employment relationship was “not an ordinary contractual relationship involving attendant levels of party autonomy”: at [77]. The ERA was about building a productive employment relationship by promoting good faith, recognising a legislative requirement for good faith behaviour and acknowledging the inherent inequality or power in employment relationships and (at s.238) states that the provisions of the Act will have effect despite any provision to the contrary in any contract or agreement. Effectively, this makes the choice of law issue largely irrelevant, the Judges concluding that given the purpose of the Act and the nature of the rights involved, it would be “very odd” to construe the ERA as allowing discrimination in this context.

*Quake Outcasts v the Ministry of Canterbury Earthquake Recovery & Anor.* [2017] NZCA 332

*The right not to be discriminated against in claiming insurance*

This case involved judicial review of the Crown’s offer of reimbursement to a group of landowners in Christchurch who owned improved, uninsured properties in the Red Zone following the earthquakes in 2010 and 2011. The litany of offers by the Crown to compensate for damaged property in the aftermath of the earthquakes is now well known. The Crown initially refused to reimburse people who were uninsured including (oddly) those who owned unimproved land which was uninsurable. It later modified the decision and those with unimproved properties were offered the 2007 rateable value but the same option was not made available to people with improved, uninsured properties since it was argued that compensating



people who had not taken out insurance when they could have raised the spectre of “moral hazard” and reduced the incentive to insure in the future. This led to allegations of discrimination among those who owned land in the Red Zone<sup>8</sup>. Eventually the decision was reconsidered and in 2007 the group were offered the rateable value of their land but nothing for any improvements. The Supreme Court found that this was unlawful and called for it to be reconsidered.

The question for the Court of Appeal was whether discrimination by insurance status in the August 2015 offer was unreasonable. The Court found the Government’s decision to approve the Recovery plan and make offers pursuant to it was unreasonable and therefore unlawful. While moral hazard was relevant, it was not a major consideration. As the Supreme Court put it, it was not permissible to rely on moral hazard to justify discrimination against the owners unless the Minister considered why they were uninsured and assessed their moral responsibility for it (which he hadn’t done). Other issues that contributed to the court’s reasoning included fairness to other owners; cost to the Crown and the delay between when the earthquakes occurred and the time of the offer in 2015.

This is not the final word on the matter as it is an interim decision setting aside the earlier High Court judgment and declaring the Minister’s decision to approve the Recovery Plan under which nothing was offered for uninsured improvements, unlawful. The question of remedy remains open, the parties having been given leave to file further submissions on that issue. Nevertheless hopefully the end to the sorry saga that could have been avoided if the parties involved had acted fairly from the beginning is in sight.

*Mark David Chisnall v the Chief Executive of the Department of Corrections* [2017] 7 NZSC 114

*The right not to be arbitrarily detained or tried again for the same crime*

A person who has completed a finite sentence but still poses a very high risk of reoffending can be further detained under a Public Protection Order (PPO). To be eligible for a PPO, an individual must be 18 years or older, detained under a determinate sentence for a serious sexual or violent offence and within six months of his or her release. However, while there are sound policy reasons for the existence of the Public Safety Act (PSA), namely public protection, it does raise serious human rights issues in relation to the New Zealand Bill of Rights Act 1990 (NZBORA).

In this case the Supreme Court had to consider the conditions under which an interim supervision order (ESO) under the Parole Act could be made, the Chief Executive having – for a variety of reasons – applied too late for a PPO or ESO. An application was filed in the High Court to cover the position in the interim. Fogarty J made an interim order. Chisnall appealed unsuccessfully to the Court of Appeal. There was no dispute that the threshold for making a PPO or ESO was met. Rather, the issue centred on whether the evidence established on the balance of probabilities the matters of which the court needed to be satisfied under s.13 PSA or, in the alternative, s.107 of the Parole Act. The criteria are similar except that the Parole Act does not require a “high risk of imminent serious ...offending by the respondent”. Applications for an interim detention order or an interim supervision order must be determined on a provisional view of the evidence because until the substantive hearing of the PPO application it may not be fully tested or countered by evidence called on behalf of the respondent. While Chisnall did not oppose the making of the order he claimed that any risk he posed could be addressed by an interim supervision order with special conditions attached.

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<sup>8</sup> The real problem was the decision to create the Red Zone since it effectively rendered the land unusable.



Although the Appeal Court judges differed in their approach, all agreed that the interim detention order had been properly made.

Chisnall was granted leave to appeal to the Supreme Court. In the Supreme Court the Chief Justice observed that the scheme of the legislation requires that the conditions for making a PSA must be satisfied before an interim detention order could be made in order “to give to it the meaning commensurate with the protection of rights under the NZBORA”: at [36]. A court had to be satisfied on the balance of probabilities not only that the criteria for making a PPO had been provisionally made out but also that the risk to the public could not be met by less restrictive options. This approach is commensurate with the human rights interests affected. The omission of imminence in the Parole Act suggests that a decision to make an order does not simply involve a temporal assessment but must be linked to the likelihood of the respondent committing an offence when he or she had a suitable opportunity. To be consistent with the NZBORA “if conditions can be put in place without detention that would remove the opportunity or restrict it to an extent that there is no longer a very high risk of imminent offending ... then a PPO or an interim detention order ought not be made”: at [40]. As a result Elias CJ differed from the other members of the court as she would have suspended the interim detention order and imposed conditions to manage the risk to public safety. Less restrictive options canvassed by the Chief Justice included the possibility of treatment under the Mental Health or Intellectual Disability legislation or making an interim detention order under the PSA but suspending it on conditions. Both were dismissed as not being feasible the evidence available. Although recognising that there was no realistic alternative to detention, she would have allowed the appeal in part by varying the interim detention order to allow Chisnall to apply to the High Court for suspension of the detention order and replacement with conditions.

While the other four judges agreed with the Chief Justice that it was necessary to consider the least intrusive way of managing any risk when making an interim detention order or PPO, they did not agree that it was viable to suspend an interim detention order as an alternative to making an interim order. If the criteria for making an interim order were met, the court may make an order but to suspend it, albeit with conditions, was counter-intuitive.

For more extensive comment on the human right implications of the PSA and the making of PPOs see the Centre’s April bulletin.

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