



# 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)

#### [Criminal Records \(Expungement of Convictions for Historical Homosexual Offences\) Bill](#)

The Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill had its first reading and was referred to the Justice and Law Reform Select Committee. >>

#### [Domestic Violence Victims Protection Bill](#)

The date for submissions on the Domestic Violence Victims Protection Bill closed on 9 May and the Committee is due to report back on the 8<sup>th</sup> September. >>

#### [Three bills worth watching](#)

Three bills have had their first reading and are awaiting referral to Select Committees. These are the Employment (Pay Equity and Equal Pay) Bill, the

Sentencing (Domestic Violence) Amendment Bill and the End of Life Choice Bill. >>

#### [Report on Seclusion & Restraint](#)

In late April the Human Rights Commission released international expert Dr. Shalev's report, *Thinking outside the box – A review of seclusion and restraint practices in New Zealand*, which outlined some serious concerns about New Zealand's seclusion and restraint practices. >>

#### [New Disability Commissioner](#)

A new Disability Commissioner has been appointed to the Human Rights Commission to replace Paul Gibson, who was the first Human Rights Commissioner with a formal responsibility for disability issues. >>



## International update

(click above for full story)

- As his swansong, the outgoing Disability Commissioner, Paul Gibson, fronted a report by the Human Rights Commission and the Donald Beasley Institute on the experiences of disabled children and adults in State care. >>
- At its 35th session in June, the UN Human Rights Council formally received the Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. >>
- Also in June the UN Committee against Torture released the List of issues prior to the submission of the seventh periodic report of New Zealand on its performance under the Torture Convention New Zealand will be examined in August. >>
- In August New Zealand was examined on its performance under the Convention on the Elimination of Racial Discrimination. >>

## Recent cases

(click titles for full story)

### [State Housing Action Incorporated v Minister of Housing and Minister of Finance \[2016\] NZHC 2924](#)

This case examines the right to housing. >>

### [Attorney-General v Taylor & Ors \[2017\] NZCA 215, \[2017\] 3 NZLR 24](#)

This case examines the right to vote. >>

### [Wall v Fairfax New Zealand Ltd \[2017\] NZHRRT 17](#)

This case examines the right to freedom of expression and exciting racial disharmony. >>

### [B \(SC 60/2016\) v Waitemata District Health Board \[2017\] NZSC 88 \[14 June 2017\]](#)

This case examines the right to smoke. >>

### [Sajo Oyang Corp v Ministry for Primary Industries \[2017\] NZCA 182 \[15 May 2017\]](#)

This case examines the right to unpaid wages. >>

### [Police v B \[2017\] NZHC 526 \[24 March 2017\]](#)

This case looks into what amounts to “severe emotional distress”. >>



## National update: policy and legislation

### Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill

The **Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill** had its first reading and was referred to the Justice and Law Reform Select Committee. Submissions close on the 18<sup>th</sup> August. The Bill provides for the expungement of convictions for a historical homosexual offence if the conduct constituting the offence, if engaged in when the application for expungement was made, would not constitute an offence under the laws of New Zealand.

### Domestic Violence Victims Protection Bill

The **Domestic Violence Victims Protection Bill** which amends the Domestic Violence Act 1995, Employment Relations Act 2000, Health and Safety at Work Act 2015, Holidays Act 2003, and Human Rights Act 1993 with a view to enhancing legal protections for victims of domestic violence, was referred to the Justice and Law Reform Select Committee. The date for submissions closed on 9 May and the Committee is due to report back on the 8<sup>th</sup> September.

### Three bills worth watching

Three bills worth watching which have had their first reading and are awaiting referral to Select Committees are the **Employment (Pay Equity and Equal Pay) Bill** which aims to eliminate and prevent discrimination on the basis of sex, in remuneration and other conditions of employment and promote enduring settlement of claims relating to sex discrimination on pay equity grounds. The **Sentencing (Domestic Violence) Amendment Bill** which makes domestic violence an aggravating factor at the time of sentencing had its first reading on 29 June. Perhaps most contentious, however, is David Seymour's **End of Life Choice Bill** which gives people with a terminal illness or a grievous and irremediable medical condition the option of requesting assisted dying.

### Report on Seclusion & Restraint

In late April the Human Rights Commission released international expert Dr. Shalev's report, *Thinking outside the box – A review of seclusion and restraint practices in New Zealand*, which outlined some serious concerns about New Zealand's seclusion and restraint practices. The report suggests that seclusion and restraint may not always be used as a last resort option as



required by international human rights law. It also highlighted the over-representation of Maori in seclusion and restraint events, a small but persistent number of 'chronic' cases where solitary confinement and restraint were used for an excessive amount of time and systemic gaps, particularly in relation to care of the mentally unwell. The report is accessible at [www.seclusionandrestraint.co.nz](http://www.seclusionandrestraint.co.nz)

## New Disability Commissioner

A new Disability Commissioner has been appointed to the Human Rights Commission to replace Paul Gibson, who was the first Human Rights Commissioner with a formal responsibility for disability issues. The new Commissioner is disability advocate and former Paralympian, Paula Tesoriero. Ms Tesoriero has been General Manager, Systems and Partnerships with Statistics New Zealand since February 2016. Before that she was the General Manager of Higher Courts with the Ministry of Justice. Ms Tesoriero has served as Deputy Chair of the NZ Artificial Limb Service and a Board member of the Halberg Disability Sport Foundation. She holds an LLB, BA, and Postgraduate Diploma in Public Management qualifications.

## International update

As his swansong, the outgoing Disability Commissioner, Paul Gibson, fronted a report by the Human Rights Commission and the Donald Beasley Institute on the experiences of disabled children and adults in State care. *Institutions are places of abuse: the experiences of disabled children and adults in State care* by Brigit Mirfin-Veitch and Jenny Conder can be accessed on the Commission's website at [www.hrc.co.nz](http://www.hrc.co.nz). In June, Human Rights Specialist Erin Gough and Paul Gibson travelled to the United Nations in New York to attend the **Conference of States Parties to the Convention on the Rights of Persons with Disabilities**. The New Zealand Human Rights Commission was the only NHRI to speak and used the opportunity to promote the report and the experiences of people with Down syndrome and their families.

At its 35<sup>th</sup> session in June, the UN Human Rights Council formally received **the Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health**. The report has a special focus on mental health and the core challenges and opportunities, and calls for a shift in the present medical paradigm which has led to human rights violations in mental health settings which are often under resourced and overlooked. Consistent with the Disability Convention, the rapporteur also describes how the provision of mental health services can be improved by the application of a human rights framework. The report can be accessed at [www.reliefweb.int/sites/reliefweb.int/files/resources/G1707604.pdf](http://www.reliefweb.int/sites/reliefweb.int/files/resources/G1707604.pdf)



Also in June the UN Committee against Torture released the **List of issues prior to the submission of the seventh periodic report of New Zealand on its performance under the Torture Convention** New Zealand will be examined in August. The list includes specific information on the implementation of articles 1-16, and follow up questions from the previous reporting cycle (including the use of solitary confinement and seclusion in mental health facilities). The document is accessible at [www.ohchr.org/Treaties/CAT/.../NZL/CAT\\_C\\_NZL\\_QPR\\_7\\_24920\\_E](http://www.ohchr.org/Treaties/CAT/.../NZL/CAT_C_NZL_QPR_7_24920_E)

In August New Zealand was examined on its performance under the **Convention on the Elimination of Racial Discrimination**. A list of themes provided by the Committee in May with a view to guiding and focusing the dialogue during the examination can be found at [www.ohchr.org/layouts/treatybodyexternal](http://www.ohchr.org/layouts/treatybodyexternal) and the Concluding Observations are at [http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NZL/CERD\\_C\\_NZL\\_CO\\_21-22\\_28724\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NZL/CERD_C_NZL_CO_21-22_28724_E.pdf). CERD recommendations include:

34. The Committee recommends that the State party: (a) Immediately set up and empower an independent commission of inquiry into abuse of children and adults with disabilities in state care from 1950 until 1990, CERD/C/NZL/CO/21-22/8 with the authority to determine redress, rehabilitation and reparations for victims, including an apology from the State party; and (b) Take effective steps to reduce the number of Māori and Pasifika children in state care, including through effective and comprehensive application of the policy of "whanau first" placement for tamariki Māori

## Recent cases

### *State Housing Action Incorporated v Minister of Housing and Minister of Finance* [2016] NZHC 2924

#### *The right to housing*

In 2016 new provisions were inserted in the Housing Corporation Act 1974 conferring powers on the Minister of Finance and of Housing to enter into contracts for the purposes of one or more of the Social Housing Reform Objectives listed in s50D. In September of the same year, the Ministers agreed to sell 1124 Housing NZ corporation properties to Accessible Properties, a private provider in Tauranga. Ministers were given the Treasury Report which required them to confirm that agreement was for one or more of the social housing objectives. The Report provided details on the legislative framework and assessment of the transaction against the six objectives set out in s 50D finding that while the objectives in (a), (b), (d) and (e) were met, those in (c) and (f) were less relevant.



Simon France J noted that there was no obligation on the Ministers to have read the actual contract and they could rely on advice from officials. Regarding the issue of deficiencies, such a level of detail was irrelevant to Ministers' right to make the decision since they were not required to micromanage such schemes but could rely on officials to give effect to the policies.

As to unreasonableness, the legislation was enacted to authorise Ministers to enter into contracts with a condition that was very broadly worded. They simply had to consider whether the contract advanced any one of six objectives. The Court referred to previous authorities, highlighting the limited role that it could play in such cases but concluding that the Ministers had not acted on incorrect information and that the relevant material had been available to them. It followed there was no basis to say that the Ministers' decision under s 50E was an unreasonable exercise of statutory power and the plaintiffs' application was declined.

Simon France J concluded that policy is for the Minister, not the Courts and the plaintiffs had not had sufficient regard for the statutory scheme which contemplates the Ministers making the very decision they did.

### *Attorney-General v Taylor & Ors* [2017] NZCA 215, [2017] 3 NZLR 24

#### *The right to vote*

In 2010 Parliament passed the Electoral (Disqualification of Sentenced Prisoners) Amendment Act by a bare majority. The effect was that people imprisoned after the commencement of the legislation were disqualified from voting<sup>1</sup>. In 2015 a group of prisoners brought an action against the Attorney General, the Chief Executive of the Department of Corrections and the Electoral Commission claiming that they had been unlawfully barred from voting<sup>2</sup>. The High Court limited its intervention to two issues:

- i. whether s. 268(1)(e) of the Electoral Act required a 75 per cent majority to lawfully pass the Electoral (Disqualification of Sentenced Prisoners) Amendment Bill;
- ii. and assuming the Bill was lawful, whether it was inconsistent with provisions of the NZBORA other than s.12, particularly s.9 (right not to be subjected to torture or cruel treatment), s.19 (freedom from discrimination) and s. 23(5) (persons deprived of liberty be treated with humanity and respect for the inherent dignity of the person).

Both causes of action were dismissed, the Court finding that without elevating the NZBORA to superior law, s.268 only permitted one interpretation which meant that there was no need for a 75% majority to pass the legislation. As for discriminating against Maori (because they

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<sup>1</sup> Section 4 of the 2010 Act, amending s 80(1) of the Electoral Act. Until then prisoners were only prevented from voting if they were sentenced for a term of three years or more

<sup>2</sup> [Taylor & Ors v Attorney-General](#) [2016] NZHC 355, [2015] NZHC 355.



were over represented in the prison population) the court concluded that ... *to the extent there is disadvantage and so discrimination for Maori, it is not motivated in any way by any governmental or legislative hostility to the race or ethnicity of Maori.* There was no discrimination on the facts, and s.19 of NZBORA had not been breached.

However, arguably the most contentious issue of the case was Heath J's declaration that the effect of the 2010 Amendment was an unjustified limitation on s 12 of the NZBORA and could not be justified under s.5 of that Act<sup>3</sup>. A full bench of the Court of Appeal was asked to decide whether the higher courts had the right to make a declaration of inconsistency and, if so, the source and ambit of that power.

Appearing for the Attorney-General, Paul Rishworth argued that there were a number of reasons why a declaration was outside the court's jurisdiction. They included that:

- it had the effect of creating a new remedy and was tantamount to allowing the courts to compare the quality of laws with fundamental rights, a role that was not part of judicial power;
- such a power can only be conferred by statute;
- it did not find support in the ICCPR which requires an effective remedy (and this is not);
- because the jurisdiction to make a declaration does not exist, the courts ought to disclaim it as it could led to pointless litigation on policy matters that they were ill equipped to deal with and a waste of public resources;
- the remedy under the HRA only applies to discrimination and was intentionally specific;
- it would unlock a floodgate resulting in countless applications by people who were "disaffected with all sorts of legislation"; and
- even if such a jurisdiction existed, it is exceptional and discretionary and should not have been exercised in this context.

In response the Court said:

- the judiciary's role extends to considering whether parliamentary enactments are proper law. Legislative authority is not necessary to do this. As the Court put it: *Inconsistency between statutes is a question of interpretation, and hence of law, and lies within the province of the courts*<sup>4</sup>. The Declaratory Judgments Act 1908 does not exclude the development of the remedy at common law;
- although a declaration appears to confer no tangible remedy, nonetheless it can help a plaintiff obtain an administrative or legislative solution;
- even if the possibility of a declaration might lead to an increase in demand, the nature of the inquiry itself is not new to the courts. A decision not to intervene should not

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<sup>3</sup> *Taylor & Ors v Attorney-General of New Zealand* [2015] NZHC 1706, [2015] 3 NZLR 791 at [79]. S.12 preserves the voting rights of New Zealand citizens over 18.

<sup>4</sup> At [62]



depend on whether a remedy is available but on the jurisdiction invoked and the governmental action being scrutinised. The principle of restraint would keep judicial intervention within bounds and avoid unnecessary conflict between different branches of government<sup>5</sup>.

It followed that the right to issue a declaration of inconsistency was not unconstitutional. In the Court's opinion, the NZBORA contemplated a court identifying questions of incompatibility where necessary even if, by doing so, it amounted to an advisory opinion. This was compatible with s.5 of the NZBORA and the ICCPR requirement to fashion remedies that was part of New Zealand's international obligations. In support the Court analysed the relevant case law concluding with McGrath J's comment in *R v Hansen*<sup>6</sup> that:

*... a New Zealand Court must never shirk its responsibility to indicate, in any case where it concludes that the measure being considered is inconsistent with protected rights, that it has inquired into the possibility of there being an available rights-consistent interpretation, that none could be found, and that it has been necessary for the Court to revert to s.4 of the Bill of Rights and uphold the ordinary meaning of the statute. Normally that will be sufficiently apparent from the Court's statement of its reasoning ...*

The Court considered this was a tacit acknowledgment that there will be cases where a court could make a remedial declaration of inconsistency. The Court's position was reinforced by s.92J of the HRA and the right to make a declaration of inconsistency in relation to discrimination irrespective of provisions in the NZBORA. It went on to conclude that the higher courts have the jurisdiction to make a declaration on whether legislation is incompatible with a protected right as part of their common law function of answering questions of law.

The Court prefaced its decision with a reference to the Attorney-General's s.7 report which was made when the proposed Bill was first introduced. The report had stated unambiguously that the blanket disenfranchisement of prisoners was inconsistent with s.12 of the NZBORA and could not to be justified under s.5. It found the amendment was not rationally connected to its purpose and its effect was disproportionate. The speaker of the House of Representatives was given leave to intervene because of concern at the High Court's examination of the section 7 report arguing its use breached parliamentary privilege. However, the Court found that Heath's reference to the report did not breach parliamentary privilege. While it recognised that a court must be sensitive to parliamentary privilege, it can examine the parliamentary record where it is necessary and useful. What it must not do is question how Parliament treated the matter.

Earlier, speculating on the possibility of a positive outcome, Taylor had suggested that it would have wide ramifications because Parliament would have to think twice about passing legislation that could be struck down as inconsistent with the rights protected by the

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<sup>5</sup> At [72]

<sup>6</sup> [2007] NZSC 7, [2007] 3 NZLR 1 at [104]





NZBORA ... and he's right even though Taylor himself could not benefit from the result in this case because he was already unable to vote before the legislation was introduced. He therefore, in fact, had no standing to bring the case and his participation was only possible as part of a proceeding in which other eligible prisoners were joined. Predictably the Crown has appealed. Taylor has cross appealed his inability to benefit from the decision.

At the same time, the Court was also dealing with Taylor's appeal on the legitimacy of the amendment on the right to vote. In addition the two other prisoners (who are Maori) challenged their right to be free from discrimination on the ground of race, not subjected to degrading treatment and treated with humanity and dignity: *Ngaranoa v The Attorney- General* [2017] NZCA 351. The applicants argued that s.6 NZBORA mandated a wide and rights maximising interpretation of the relevant provision of the Electoral Act which would mean those rights were protected. The Court disagreed noting that s.6 did not "replicate the extent of protection afforded under the NZBORA but only requires a preference for a rights consistent interpretation over one that is inconsistent"<sup>7</sup>. It also considered that neither Treaty principles nor the Declaration of Independence assisted the interpretation contended for by the appellants.

In relation to the substantive matters the Court of Appeal agreed with Fogarty J that the right to vote is not entrenched. It is only the age for registration as a voter that is protected in this way. In relation to whether the legislation impacted unfairly on Maori amounting to severe treatment because it was "intentionally demoralising, erasing the right to tino rangitiratanga" and infringing their human dignity by preventing them from voting in the Maori electorates, the Court found that Ms Ngarona and Wilde's situation in this respect did not reach the necessary threshold to infringe the relevant rights. The Court devoted more time to the question of discrimination - both direct and indirect - which was said to arise because Maori are disproportionately represented in the prison population and also lose the right to choose whether to vote in a Maori electorate. It reached the same decision as Fogarty J - namely there was no discrimination - the Court finding that while the legislation affected Maori differently, it did not impose a material disadvantage on them.

### *Wall v Fairfax New Zealand Ltd* [2017] NZHRRT 17

*The right to freedom of expression and exciting racial disharmony*

In 2013 *The Marlborough Express* and *The Press* published cartoons about the introduction of a programme designed to provide free food in low decile schools. The cartoon in *The Marlborough Express* shows a group of four adults and four children heading to school dressed in school uniform. Two adults are thin and elderly and the other two are younger and obese - the woman has a cigarette hanging out of her mouth and the male's limbs are tattooed. The younger man is saying to the woman "Psst! If we can get away with this, the more cash left for booze, smoke and pokies". The characters are coloured pink but the younger adults are a

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<sup>7</sup> At [38]



darker hue. The other cartoon shows a family of two adults, five children (and a dog) around a table. Cans of beer, lotto tickets, cigarettes and a cell phone are on the table. The man is saying "Free school food is great! Eases our poverty and puts food in you kids' bellies!" Again the skin tone of the characters is pinkish.

Ms Wall is the MP for Manurewa. She complained to the Human Rights Commission that by publishing the cartoons, Fairfax (who owns the papers) breached section 61 of the Human Rights Act 1993 (HRA) by bringing the subjects into contempt and exciting racial disharmony. In her view the characters, despite their skin colour, were identifiable as Maori or Pasifika. The Commission did not pursue her complaint, having assessed the cartoons as not reaching the necessary threshold of s.61 when balanced against the right to freedom of expression. Disappointed with the Commission's decision Ms Fairfax took her case to the Human Rights Review Tribunal. The Commission intervened to explain its position on s.61<sup>8</sup>.

Section 61 has had a peripatetic history. Before the Government could ratify the International Convention on the Elimination of All Forms of Racial Discrimination it had to adopt legislation to combat incitement to racial discrimination. To meet this requirement it introduced the Race Relations Act 1971 with a section which made it a criminal offence to incite racial disharmony and allowing prosecution with the consent of the Attorney General. In practical terms the section proved difficult to implement principally because of the need to establish the necessary *mens rea*. A civil offence was therefore added to the legislation when the Human Rights Commission Act was enacted in 1977. The section was designed to allow the Race Relations Conciliator to conciliate, rather than prosecute, disputes about hate speech. It was repealed in 1989 principally because the wording had the effect of allowing the media to be prosecuted for reporting material which incited racial disharmony while leaving the perpetrators untouched. The civil offence was reintroduced when the Human Rights Act 1993 was introduced but with changed wording that provides an exception for media reporting and removes the offences of "inciting ill will" and bringing people into "ridicule". Section 61 now makes it unlawful to publish or distribute "threatening, abusive or insulting" material or use words of this nature in a public place if the effect "would be likely to excite hostility against or bring into contempt against any group of persons in or coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group". The criminal offence remains in its original form.

The situation was further complicated with the enactment of the NZBORA in 1990 - again in response to ratification of an international treaty, this time the International Covenant on Civil and Political Rights - and the protection of freedom of expression. Considered a fundamental human right because of its importance in a functioning democracy, it is generally accepted that freedom of expression can only be restricted in certain circumstances - which include inciting racial hatred - provided the limitation does not jeopardise the right itself.

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<sup>8</sup> At the time the case was heard the writer was employed by, and acted for, the Commission in these proceedings.



It was against this background that Ms Wall made her complaint, asserting that the cartoons had the effect of depicting Maori and Pasifika parents as worthless and negligent, brought them into contempt and promoted a negative stereotype. She argued that freedom of expression had no place in deciding the excitement of racial disharmony. Fairfax defended its position, arguing that s.61 did not apply to cartoons and in any event they could be justified as freedom of expression.

As the Tribunal observed any conflict needs to be resolved within the analytical framework prescribed by domestic law. The issue therefore came down to how s.61 should be interpreted and balanced against freedom of expression in the NZBORA. On doing so the Tribunal adopted the approach in *Moonen v Film and Literature Board of Review*<sup>9</sup> in which it was noted that while freedom of expression is important, it is not an absolute right. The question is where it lies on a possible continuum and when that point is overstepped.

While there is usually no problem with establishing that the material complained of meets the first limb of the section – namely, it is abusive or insulting – it is more difficult to establish the effect it is likely to have on those who read or hear it since the determining factor is whether it encourages them to act in particular way against the group that is the subject of what is said. As the Tribunal put it,

*The two-part test recognises there is no necessary connection between the use of threatening, abusive or insulting language and the likelihood of exciting hostility against or bringing into contempt the group of persons about who the language is used. The requirement of a causal link between the two parts of the test underlines the restricted ambit of the provision ... the harm at which the legislation is directed is not the expression itself, but the presumed effect on that expression on the minds of third parties.*

The Tribunal had no difficulty in finding the cartoons insulting. It drew on a recent decision of the Supreme Court of Canada, *Saskatchewan (Human Rights Commission) v Whatcott*<sup>10</sup> which had found that the prohibition against representations which exposed a class of persons to hatred or contempt was restricted to extreme manifestations of those emotions. At [202] the Tribunal said that “This filters out expression which, while repugnant and offensive did not incite the level of abhorrence, de-legitimization and rejection that risks causing discrimination or other harmful effects”. However, there is no necessary connection between the use of the language or material and whether it excites hostility or contempt. That must be determined on the facts of each case. The question is who decides this. The test is an objective one not the subjective perceptions of the publisher or the group affected. It requires considering whether the material is “likely” to have the effect contended for. “Likely” means “a real and substantial risk that the stated consequence will happen.” The Tribunal concluded that this threshold was not reached “by a substantial margin”.

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<sup>9</sup> [2000] 2 NZLR 9 (CA)

<sup>10</sup> 2013 SCC 11, [2013] 1 SCR 467



The interpretation contended for by Ms Wall would have meant that only inoffensive written matter or words could be published about Maori and Pasifika (or any other racial group for that matter) effectively reversing a long line of settled authority on the importance of freedom of expression. This is not the point of freedom of expression which is specifically intended to protect opinion that people take exception to. There is, after all, no point in protecting something that people agree with. As the Chief Justice (who was quoting American Supreme Court Justice Douglas) has observed “a function of free speech under our system is to invite dispute”.<sup>11</sup>

While the Tribunal concluded that the cartoons were unlikely to excite hostility against, or bring Maori and Pasifika into contempt, it does not mean that there is a “right to insult”. Section 61 is deliberately narrowly defined and will only apply if the two pre-conditions are satisfied. The requirements are cumulative and the test is an objective one. The tribunal formulated the following test for deciding whether there was a breach of s.61<sup>12</sup>:

*The question to be asked is whether a reasonable person, aware of the context and circumstances surrounding the publication or distribution of the written matter or the use of the words which are threatening, abusive or insulting, would conclude that such matter or words are likely to excite hostility against or bring into contempt any group of persons in New Zealand on the ground of their colour, race, or ethnic or national origins. If this objective test is not satisfied the written matter or words do not contravene s.61 of the Human Rights Act.*

### ***B (SC 60/2016) v Waitemata District Health Board [2017] NZSC 88 [14 June 2017]***

#### *The right to smoke*

Waitemata District Health Board has a smoke free policy. Anyone wishing to smoke must leave the hospital grounds. The appellant, who was a smoker, was an inpatient in the mental health unit. From time to time he was confined in the Intensive Care Unit which meant he was unable to leave the premises to smoke. He claimed the DHB’s smoke free policy was inconsistent with the Smoke Free Environments Act 1990 (SEA) and breached certain of his rights under the NZBORA. His arguments were unsuccessful at the High Court and the Court of Appeal<sup>13</sup>. He appealed to the Supreme Court. Before the Supreme Court he claimed that the DHB had an obligation to provide smoking rooms and by not doing so, his right to be treated with humanity and dignity, not be subjected to cruel or severe treatment, not to be discriminated against on the ground of disability and right to a home or private life were breached. The Supreme Court rejected his appeal.

Whether there is an obligation on the DHB to provide a dedicating smoking room turned on the interpretation of s.6 of the SEA which allows mental health institutions to provide such a room but does not mandate it. While acknowledging that in certain situations “may” can mean “must” the Court considered that this was not the case here. Since the passage of the SEA there has been a shift “from a permissive regime which envisaged the establishment of

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<sup>11</sup> *Brooker v Police* [2007] NZSC 30; [2007] 3 NZLR 91

<sup>12</sup> At [235]

<sup>13</sup> We commented on the decision of the Court of Appeal in our September 2016 e-Bulletin



smoking rooms to a more restrictive regime"<sup>14</sup>. The DHB was not acting outside its powers under the New Zealand Public Health and Disability Act 2000 in implementing the smoke free policy and arguably had an obligation to non-smokers and visitors to the hospital to provide a smoke-free environment.

The Court also found that there was nothing in the DHB's decision that was inconsistent with the rights in the NZBORA. In considering the right to be treated with humanity and dignity in s.23(5), the court endorsed the approach of the Supreme Court of British Columbia in *R v Denison*<sup>15</sup> which described smoking as "a life style choice", noting that s.23(5) did not confer "an unbounded freedom of those detained to do as they please". The DHB had treated its patients in the Unit with humanity and respect for their human dignity by offering them support to help them cease smoking.

As to whether it amounted to cruel and unusual punishment, the court agreed with the lower courts that there is a high threshold to overcome to find a breach of s.9 and the imposition of the smoking ban fell far short of it.

The appellant also alleged he was discriminated against on the ground of disability (in this case psychiatric disability) because his detention in the ICU meant that he was unable to leave the grounds to smoke. This argument also failed, the Supreme Court agreeing with the Court of Appeal that "the smoke free ban was a neutral rule with no particularised effect on psychiatric patients". He was detained in the ICU not because of his psychiatric illness but because of the danger he presented to himself or others. Further, the appellant could not rely on a claim of intra-ground discrimination (that is, discrimination among subsets within a ground) because the policy applied to everyone in the hospital, not just those with a psychiatric disability.

Finally, the appellant invoked s.28 – the provision that states that rights and freedoms not found in the NZBORA are not affected by that omission – arguing that his right to home or private life was infringed because he was unable to choose whether or not to smoke. The Court found that his liberty to smoke did not convert into an existing right. However the concept of a right to a home and private life is construed, it does not include the right to smoke in an ICU. In reaching its conclusion the court took into account a number of cases in other countries where similar bans have been imposed including the case of *McCann v The State Hospitals Board for Scotland*<sup>16</sup>. In that case, however, the ban was more extensive as it prohibited possession, searches and confiscation of tobacco products. The Court found that Mr McCann's right to privacy had been infringed because of the policy of allowing searches to implement the prohibition against possessing tobacco products. But for this, the decision would not have been contrary to Article 8. The smoking ban itself could be justified as having a legitimate purpose in protecting public health and was rationally connected to that aim. Similar cases can be found in Australia<sup>17</sup>, Canada<sup>18</sup> and the United States<sup>19</sup>. On the facts of this case the Supreme Court found that

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<sup>14</sup> *Progressive Meats Ltd v Ministry of Health* [2008] NZCA 162, [206] NZAR 633

<sup>15</sup> (1999) 70 WCB (2d) 758 (BCSC)

<sup>16</sup> [2017] UKSC 31, [2017] 1 WLR 1455

<sup>17</sup> *De Bruyn v Victorian Institute of Forensic Mental Health* [2016] VSC 111, (2016) 48 VR 647

<sup>18</sup> *Vaughan v Ontario* (2003) 115 CRR (2d) 36 (Ont SCJ)

<sup>19</sup> *Obergefell v Hodges* 135 S Ct 2584 (2015)



*...the right to a home or private life when confined for relatively short periods in the ICU of a mental health institution was too generalised because it was too removed from the sphere of personal autonomy warranting protection.<sup>20</sup>*

But even if there were a breach of the right to be treated with humanity and dignity, the Court found support in *McCann* that the smoke free policy was reasonable and proportionate and a justified limitation under s.5 of the NZBORA.

### *Sajo Oyang Corp v Ministry for Primary Industries* [2017] NZCA 182 [15 May 2017] *The Right to Unpaid Wages*

In 2011 there was a Ministerial Inquiry into Foreign Charter Vessels (FCV) operating in New Zealand waters. The Inquiry followed the sinking of a Korean-owned fishing boat and the release of research findings by three academics of conditions on the boat that amounted to forced labour and even slavery. The growing public concern about the labour conditions on such vessels, many of which were owned by foreign companies but operated under joint venture agreements with New Zealand businesses, led to changes to the conditions and legal framework under which they operated. The Centre commented at greater length on this in our September Bulletin.

The next chapter of the story unfolded when two vessels chartered by the same company were forfeited to the Crown for offences under the Fisheries Act. An attempt to recoup unpaid wages was made by 26 crew some of whom had not worked on those boats. Under the Fisheries Act a vessel forfeited to the Crown vests free of all encumbrances. The District Court found that the men did not have a case because their claim amounted to an encumbrance. This was overturned by the High Court<sup>21</sup>, Davidson J holding that entitlement to an interest extended to the crew members even though they had not worked on particular boats. He said that the Court was not justified in adopting a rigid approach where justice calls out for recognition for the plight of the crew members saying:

*This is especially so where the reasons for that plight are weighty and not of their making; indeed quite the opposite...The employer's wrongdoing would shield it from liability otherwise attaching to those vessels. The Crown would profit at the crew's expense. That result would be more than ironic, against the background of the 2002 Act and one of its purposes; namely, to widen the opportunity for the crew to seek and obtain relief.*

The Court of Appeal disagreed, considering that the Judge had adopted an overly expansive interpretation of "forfeit property" and was influenced by the fact that, but for forfeiture to the Crown, the crew would have had some redress including on vessels on which they had not worked<sup>22</sup>. He had also considered it relevant that as the men could have had a claim under the Admiralty Act prior to forfeiture, the definition extended to any vessel in the beneficial ownership of a party liable to the crew in respect of unpaid wages.

The relevant section of the Fisheries Act (which was amended in part as a result of the events in 2011) does not replace the law relating to claims in admiralty but provides relief against property forfeited. However this did not mean that the men were totally without a remedy.

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<sup>20</sup> At [132]

<sup>21</sup> *Hartono v the Ministry for Primary Industries* [2015] NZHC 3307 [18 December 2015]

<sup>22</sup> Court of Appeal at [40]



They could make a claim under the admiralty jurisdiction when the vessels were released from forfeiture and were in the beneficial ownership of the company. On 9 August, the Supreme Court granted the men leave to appeal whether they had an interest in the Oyang 75 for the purposes of s.265 of the Fisheries Act.

### *Police v B [2017] NZHC 526 [24 March 2017]*

*What amounts to “severe emotional distress”*

The respondent in this case was charged with breaching a protection order in relation to his estranged wife and causing her harm by posting a digital communication. At the District Court, Judge Doherty found that the case was made out as far as breaching the protection order but the respondent’s behaviour was not serious enough to cause the complainant serious emotional distress such that it amounted to “harm” for the purposes of the Harmful Digital Communications Act (HDC Act)<sup>23</sup>.

In the absence of any binding judicial comment, the Judge started from first principles, noting that the definition of serious emotional distress was designed to balance two competing concerns: the serious effects of calculated emotional harm, and the importance of free speech. In reaching his decision he stated that whether serious emotional distress resulted was a matter of fact and the prosecution had not provided cogent evidence of this. The Police appealed, arguing that the Judge had erred in reaching his decision on what was meant by severe emotional harm.

This is the first case to reach the High Court in relation to the offence in s.22 of the HDC Act. In reaching his decision that harm had been established, Justice Downs referred to the helpful commentary by Dr Harvey who had observed in paper for the ADLS<sup>24</sup> that:

*The Act provides a content test based on harm rather than a strict categorisation of the nature of the content. The requirement of knowledge that the message would cause harm is not present, but there is a specific intention provided that the person intended to cause harm by posting a digital communication. There has to be proof of actual harm and a mixed objective subjective test that the posting of the communication would cause harm to an ordinary reasonable person in the position of the victim (emphasis added).*

The respondent had followed the complainant and posted personal photos of her on Facebook. The complainant was shocked, describing herself as “frustrated, angry, anxious and very upset” when she learnt of it. The District Court Judge felt that more detailed specific evidence was necessary because she had not elaborated further on what these states involved. The High Court disagreed, finding he had approached the issue by focussing (wrongly) on the complainant’s feelings rather assessing the totality of the evidence including the context. Approached correctly, the evidence was capable of establishing harm as defined in the statute.

The case was remitted to the District Court to be retried. Given the increasing use of social media and the number of cases that are coming before the courts on such issues, the outcome will be awaited with interest.

Contributors: This newsletter was compiled by Sylvia Bell, Visiting Research Fellow at the New Zealand Centre for Human Rights Law, Policy & Practice; and formatted by Shirley Shen.

<sup>23</sup> *R v B* [2016] NZDC 23957

<sup>24</sup> “Prosecutions under the HDC Act” ADLS 26 August 2016