



# Redfern Legal

Redfern Legal Centre's bi-monthly e-bulletin

December 2012

Welcome to the December 2012 edition of *Redfern Legal*, bringing you legal updates and developments from our key practice areas and news of the work of Redfern Legal Centre (RLC). Please note cases cited in legal updates are not always RLC matters.

## In this edition:

- Inquiry into the partial defence of provocation (p 1)
- The Excessive Force: Tasers and police culture (p 3)
- Better protection for boarders and lodgers (p 3)
- Tread carefully: Social media and the workplace (p 4)
- Credit and debt case study: International roaming charges (p 5)
- Exposure Draft Human Rights and Anti-Discrimination Bill 2012 released (p 6)
- International Student Advice Service: One year on (p 7)
- The Justice Awards 2012 (p 2)

## LEGAL UPDATES

### Domestic violence

#### *Inquiry into the partial defence of provocation*

The Legislative Council is currently conducting an inquiry into the partial defence of provocation. RLC's Sydney Women's Domestic Violence Court Advocacy Service (Sydney WDVACS) made a submission and gave evidence to the inquiry, recommending that the partial defence of provocation be abolished and the law of self-defence be reformed to reflect community standards and adequately address the social context of women who kill violent partners.

The **Parliamentary Inquiry** was prompted by community outrage over the death of Manpreet Kaur, who was killed by her husband Chamanjot Singh. Ms Kaur died after her husband slashed her throat eight times with a box cutter. A jury accepted that Singh was provoked into killing his wife after she told him she was leaving him, and had (according to the offender) verbally abused him.

More recently a Sydney man, Dragi Maglovski (who killed his wife of 28 years when she told him she wanted a divorce) has been found guilty of murder when a jury rejected his claim that he acted under provocation.

### RLC media

#### RLC on police taser use

In November, RLC Police Powers Solicitor, David Porter, spoke to AM's Will Ockenden about police taser use. "What has come out of the Curti inquest is that we have police officers who are too quick to use force in general. So we see the less experienced officers being predominantly responsible for the use of tasers. More experienced officers don't need to use tasers because they find other options," said Mr Porter.

For the full story, see ABC News: [Police Taser Training Questioned](#) and ABC News: [Police Urged to Make Taser Training Harder](#).

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#### RLC on the right to silence

RLC Police Powers Solicitor, David Porter, told Alternative Media Group that the right to remain silent is a key protection individuals have against the resources of the state. "This [new] legislation makes an uneven playing field even less even", he said. "To take away the right to silence means that the accused person is forced to assist the prosecution in their own conviction."

For the full story, see [Presumption of Innocence at Risk](#).

### RLC community legal education

This month, RLC held the final session in our community education series, "Helping the Helpers: Supporting Community Workers." This series has been very successful and enabled RLC to connect with community workers from all over Sydney. Watch this space for upcoming community education events.

## NSW Police Force “Yellow Card” scheme review

The NSW Police Force (NSWPF) and Women NSW have commissioned Urbis Consultants to do an evaluation of the Yellow Card scheme, sometimes referred to as the DVPASS (Domestic Violence Pro Active Support Service). The purpose of the police Yellow Card is to provide early support for victims of domestic violence, especially during the period between police intervention and the first court mention. The service aims to:

- Decrease the possibility of victims falling through the net after police intervention;
- Increase the knowledge of and access to services that alleviate the impact of domestic violence; and
- Provide victims with relevant and appropriate information about breaking the cycle of violence.

RLC’s Yellow Card Project was implemented after the 2005 closure of Redfern Local Court and the resultant decrease in the number of Redfern victims attending the Downing Centre Local Court in the city. Since the introduction of the Yellow Card Project at RLC, more than 2,000 women have been supported in finding appropriate services and ways forward out of domestic violence.



## Legal Aid NSW Sexual Assault Communications Privilege Service

Sexual assault counsellors and health professionals should be aware of the Sexual Assault Communications Privilege Service (SACPS), which operates at Legal Aid NSW. SACPS is a victims’ legal service that helps protect the privacy of counselling notes and other confidential therapeutic records in criminal proceedings involving sexual offences. The service provides legal advice and representation to victims of sexual assault who want to prevent or restrict the disclosure of sensitive sexual assault communications in court. The service also provides education and training to the legal profession, police, sexual assault counsellors, medical records staff and other health professionals who want to promote awareness of the privilege.

Client referrals and enquiries can be made to [sacps@legalaid.nsw.gov.au](mailto:sacps@legalaid.nsw.gov.au).

## Women’s Family Law Support Service

The Women’s Family Law Support Service runs out of the Sydney Family Law Registry. It is a joint project between the Sydney Family Law Registry and the NSW Women’s Refuge Movement. The Support Service provides non-legal support, information and referrals for women who are separating from their partners. The service has a focus on women and children separating from a partner and father who is abusive or violent, but does not exclude other women from using this service.

The service operates on Monday, Tuesday and Wednesday between 9am and 1pm. They can be contacted on (02) 9217 7389 or at [wflss@bigpond.com](http://wflss@bigpond.com).

## Community

### Justice Awards 2012

Redfern Legal Centre was pleased to be nominated for several awards for this year’s Justice Awards, run by the Law and Justice Foundation.

RLC Principal Solicitor, Elizabeth Morley, was nominated for the Justice Medal; RLC’s collaborative project with Clayton Utz, the “Unfair Dismissal Scheme,” was nominated for the Community Legal Centres NSW Award; and RLC volunteer, Penny Broekhuizen, was nominated for the Law and Justice Volunteer Award.

RLC would like to congratulate the winners of these awards, respectively: Theodora Ahillas, Principal, Dust/Diseases, Maurice Blackburn; Kingsford Legal Centre and Freehills Foundation; and Elizabeth Gilmore who has volunteered at Penrith Court for 11 years.



Nominee, Penny Broekhuizen and her nominator, Natalie Bradshaw

## RLC staffing updates

Welcome back to RLC Chief Executive Officer, Joanna Shulman, who has this month returned from maternity leave.

Jacqui Swinburne, who has been Acting CEO for the last 12 months, is our new Employment Solicitor and Chief Operations Officer.

Finally, last month we bade farewell to our Employment Solicitor, Megan Cameron, as she went on maternity leave. Megan gave birth to a baby boy, Daniel Cameron Ferris.

## Police and government accountability

### The Excessive Force: Tasers and police culture

On 23 October, the NSW Ombudsman released a report into the NSWPF taser usage. On 14 November, the NSW State Coroner released her findings in the inquest into the death of Roberto Laudisio Curti. Both were critical of the interpretation of the concept of "reasonable necessary force" by the NSWPF.



Curti's case, and several others reviewed, involved police officers tasing a person in handcuffs. Curti was tasered seven times in less than one minute, while handcuffed. The senior officers who reviewed these incidents did not reprimand the misconduct.

Another matter, run by the Aboriginal Legal Service, involves the tasing of a 14-year-old boy. The conduct of the officer involved reveals itself in his threat, "If you fucking swear once more, I'm going to fucking light you up again!" That officer's actions were approved of by a police complaint review.

The State Coroner referred to NSWPF as having "an un-governed pack mentality, like the schoolboys in *Lord of the Flies*."

### Bail Amendment (Enforcement Conditions) Bill

The State Government has introduced the *Bail Amendment (Enforcement Conditions) Bill* (the Bill), which will overturn *Lawson v Dunlevy*, one of the most important Supreme Court decisions on bail in the past decade.

*Lawson v Dunlevy* reaffirmed the principles of bail, being the administration of justice, the presumption of innocence, and the safety of the community.

The Bill provides additional measures for the policing of people on bail. For more information, read the full [Bill](#).

## Housing and tenancy

### Better protection for boarders and lodgers

On 23 October 2012, NSW Parliament passed the *Boarding*

*Houses Act 2012*. The Act will provide greater protection for boarders and lodgers in premises with five or more beds. Boarders and lodgers will now be covered by an occupancy agreement, which outlines their basic rights and responsibilities.

The main issues raised by boarders and lodgers who seek advice from RLC's Inner Sydney Tenants' Advice and Advocacy Service (ISTAAS) are bond disputes, immediate evictions and uncollected goods.

After submissions by RLC and other services, the Bill was amended to allow residents to take bond disputes to the Consumer, Trader and Tenancy Tribunal (CTTT). RLC also recommended that there be a minimum period of seven days notice for termination notices. Unfortunately the Act only provides that residents be given "reasonable" notice of termination.

Occupancy agreements only cover boarders and lodgers in premises with five or more beds and sub-tenants without written agreements are now excluded from the *Residential Tenancies Act 2010* (NSW), s 10. This means that many people who live in share housing are in legal limbo, facing costly court action if there is a dispute. ISTAAS recommends that s 10 of the *Residential Tenancies Act 2010* be amended to protect those tenants who live in shared premises with less than five beds and do not have written tenancy agreements. Read RLC's [submission](#) in response to the draft *Boarding Houses Bill 2012*.

### Housing NSW Repairs Campaign update

In October, ISTAAS invited Housing NSW tenants to a celebration for International Tenants Day 2012. Tenants enjoyed morning tea, received an update about the Housing NSW Repairs Campaign, and previewed the campaign website "Get It Fixed". There was discussion of how tenants can be involved in the campaign and which issues they would like the campaign to address.

Jamie Parker, MP for Balmain, attended the celebration and noted that lack of repairs in Housing NSW homes is the most common concern for people who attend his electoral office.

Since the campaign began and ISTAAS and other services have actively been encouraging Housing NSW tenants to seek resolution of their legal issues through the Consumer, Trader and Tenancy Tribunal, applications by social housing tenants have increased by 312% from last financial year. This is a significant achievement by the campaign and the tenants who have asserted their rights. Unfortunately, Housing NSW often does not comply with Tribunal orders.

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## Housing and Administrative Law Clinic

ISTAAS and the University of New South Wales conducted a Housing and Administrative Law Clinic in second semester this year. Students attended lectures in administrative and housing law at RLC and undertook casework under the supervision of ISTAAS.

Students conducted client interviews, engaged in casework, undertook legal research, advocated on behalf of tenants to landlords, wrote appeals to Housing NSW and the Housing Appeals Committee and attended hearings at the CTTT. One student conducted a conciliation at the CTTT and went on to represent the client at the full hearing. Students also gained experience in making applications for client records under the *Government Information (Public Access) Act 2009*.

The clinic was a great success and will continue in 2013.

## Employment

### Tread carefully: Social media and the workplace

#### *Linfox Australia Pty Ltd v Stutsel [2012] FWA 7097*

Use of social media by employees to make negative comments about their workplace or colleagues is becoming a significant problem for employers and employees alike. This is demonstrated in the recent decision *Linfox Australia v Stutsel*, an appeal of an original decision made by Fair Work Australia (FWA).

#### *The case at first instance*

Mr Stutsel was an employee of Linfox, having worked as a truck driver for about 12 years. In mid-2011, Linfox terminated Mr Stutsel's employment on the basis that he engaged in serious misconduct by posting derogatory, offensive and discriminatory remarks about two of his managers on Facebook.

Following his termination, Mr Stutsel made an unfair dismissal claim at FWA. In deciding whether Linfox had unfairly dismissed Mr Stutsel, FWA had to consider whether there was a valid reason for Mr Stutsel's dismissal, whether the dismissal was "harsh, unjust or unreasonable", and (if a finding of unfair dismissal was made) what type of remedy Mr Stutsel was entitled to.



image by [marco pako](#) (Employment)

FWA made three main findings. First, FWA found that, in posting the controversial comments on Facebook, Mr Stutsel had not engaged in serious misconduct. Thereby, there was no valid reason for terminating Mr Stutsel's employment.

In arriving at this conclusion, FWA considered that:

- In posting the comments, Mr Stutsel was expressing his private views in a forum that was not intended to be public, taking into account his belief that his privacy settings were such that his comments were not public;
- Whilst Mr Stutsel's comments were in poor taste, they were not racially derogatory;
- The Facebook conversation on Mr Stutsel's page appeared more

## RLC events and projects

### Tenancy Conference

RLC's ISTAAS attended the annual Tenancy Advice and Advocacy Program (TAAP) conference in Ballina. Advocates attended workshops on drafting re-hearing applications, coal seam gas mining and tenancy in NSW, and no-grounds evictions and Land Councils – the Koori perspective.

Experienced tenant advocates conducted a mock CTTT hearing, including examinations in chief and cross-examinations. The Network discussed the new *Boarding Houses Act 2012*, and its implications for case work and community education.

Penny Carr, Coordinator of the Tenants Union in Queensland, spoke about the Queensland government de-funding 22 tenancy services. Similarly to NSW, Queensland tenancy services are 50% funded by the interest on tenants' bond money. The federal government has provided emergency funding for Queensland services until June 2013. It is uncertain whether tenants in Queensland will have access to any free advice services after this date.

ISTAAS Advocate **Tom McDonald** (pictured below) won the 2012 TAAPSTAR People's Choice Award for Best performance in a conciliation, negotiation, or behind-the-scenes machination.



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like a “conversation in a pub or café, although conducted in an electronic format”;

- Although there were comments on his Facebook page of a sexual nature about Mr Stutsel’s female manager, the comments were made by other individuals and not by Mr Stutsel;
- Mr Stutsel’s comments were an attempt at humour and did not contain a credible threat to the manager’s wellbeing; and
- The company did not have a policy on the use of social media by employees.

Secondly, FWA found that Linfox’s dismissal of Mr Stutsel was harsh, unjust and unreasonable, on the basis that Linfox treated Mr Stutsel differently compared with other employees who had made offensive comments on Mr Stutsel’s Facebook page. Linfox did not take any action against these other employees who were equally implicated in the Facebook conversation.

Thirdly, FWA found that the reinstatement of Mr Stutsel would be a practicable and appropriate remedy, primarily on the basis that FWA believed the employee/employer relationship could be re-established provided that there was goodwill on both sides. FWA deemed it appropriate for Mr Stutsel to be compensated for loss of wages from the date of termination until the date of his reinstatement.

#### *The case on appeal*

Linfox appealed FWA’s decision on the basis that FWA made errors of fact when determining that:

- There was not a valid reason to terminate Mr Stutsel’s employment;
- The dismissal was harsh, unjust or unreasonable; and
- Reinstating and compensating Mr Stutsel was appropriate.

The Full Bench upheld the first instance decision on all bases. In doing so, the full bench considered the fact that:

- Mr Stutsel was a long-term employee with a satisfactory track record;
- Mr Stutsel believed that his Facebook page was on maximum privacy settings and he never intended his comments to be communicated to the manager concerned;
- The conduct in question took place outside of the workplace and outside working hours;
- Some of the comments complained about were not made by Mr Stutsel, but by others commenting on Mr Stutsel’s page;
- The company did not take action against the other employees who were equally involved in the Facebook conversation; and
- Mr Stutsel was fully aware that his comments were foolish and regretted the entire situation.

#### *Lessons for employees*

Despite the fact that FWA found in favour of the employee in this case, the Full Bench made a number of points that should serve as words of caution to all employees who use social media, namely that:

- “Employees should exercise considerable care in using networking sites in making comments or conducting conversations about their managers and fellow employees”; and
- Whilst Mr Stutsel’s ignorance as to how Facebook worked was taken into account in this case, this factor is likely to be given less weight in future cases, especially as the understanding of the implications of using social media improves in the community and as more employers implement social media/networking policies.

## **Credit, debt and consumer complaints**

### **Case study: International roaming charges**

Jacinta (not her real name) had very limited English skills. At the start of 2011, Jacinta entered a contract with a telecommunications company (telco) for a “\$29 cap” plan covering mobile and broadband services and a handset. At the time she signed up, Jacinta had not read nor understood the terms of the contract. Over the course of the contract, Jacinta did not use the phone heavily, typically paying just \$22 a month on her plan.



image by [phossil](#)

At the start of this year, Jacinta went on a trip to China for just under a month with her son. Upon returning to Australia, she was shocked when she received a mobile phone bill for \$2,591.76.

Jacinta learned that the enormous fee comprised charges for international roaming, a feature that Jacinta never knew she had on her phone and did not personally use on her China trip.

Jacinta also did not receive any notifications on her phone when she was approaching her “cap” or when she had exceeded the “cap”.

Jacinta received a letter of demand from the provider’s debt collectors, demanding she pay, or further action would be taken against her. Jacinta was incapable of paying off the charges. Jacinta was a single mother who relied entirely on the pension to support her and her family.

RLC assisted Jacinta to file an online complaint with the Telecommunications Industry Ombudsman (TIO) and by negotiating directly with the telco. RLC argued that the provider fully waive the charges on the basis that:

- Jacinta was unable to read or understand the contract she entered into;

- She was not aware that her phone had a global roaming function, nor of the cost of such a function;
- Jacinta was not financially in a position to pay off the charges and relied entirely on a pension of just \$300 a week; and
- The charges were, in any event, inaccurate as her son stated that he only used the phone four times.

Following a number of rounds of negotiation, RLC was successful in coming to a settlement that Jacinta was happy with. The telco waived all the international roaming charges and Jacinta was required to pay a final fee of \$59, being the final payment for her handset and one month's mobile and broadband usage. Further, the case was not referred to credit rating reference agencies, which Jacinta had been worried about.

**RLC Tip:** On 1 September 2012, the Australian Communications and Media Authority launched its revised *Telecommunications Consumer Protections Code (Code)*, which includes a number of mandatory measures telco providers must comply with. Arguably, these measures would have assisted Jacinta had they been in place at the time. Some of the important changes that should directly benefit consumers include the fact that:

- All key product features and pricing information must be given before a sale or a contract is entered into so that consumers understand the plan and can compare different offers before they sign up;
- Telcos can only use the term "cap" for new plans if it is a true cap that cannot be exceeded;
- Telcos must send consumers a usage notification when 50%, 85% and 100% of the allowance of a mobile or broadband plan has been used;
- Cost and usage for previous bills for plans with included value for calls and data will be displayed on each bill and any charges that exceed spend limits or included value limits must be displayed; and
- Consumers will be able to track their complaint and be given a timeframe for resolution and a unique reference number for each issue. Telcos must acknowledge all complaints within two working days and resolve them within 15 working days from the day the telco receives the complaint (or as soon as practicable).

As the various measures of the Code will gradually take effect over the coming months, it will be interesting to see how the telcos change their processes to comply. Watch this space.

## Discrimination and human rights

### Exposure draft Human Rights and Anti-Discrimination Bill 2012 released

The federal government recently released for comment the exposure draft *Human Rights and Anti-Discrimination Bill 2012*. The Bill consolidates the five existing Commonwealth anti-discrimination Acts into one comprehensive Act, and also makes some significant changes to the current system.

RLC welcomes the following improvements:

- Discrimination on the grounds of sexual orientation and gender identity will be prohibited on the federal level for the first time;
- Discrimination on the basis of protected attributes is now unlawful in any area of public life;
- There will now be an enforceable remedy for unlawful discrimination in employment on the basis of industrial history, religion, political opinion and social origin, nationality or citizenship and medical history (not criminal record);
- In the complaints process there will be a shifting burden of proof, ensuring the party is in the best position to know the facts (such as the reason for particular conduct) is required to show them; and
- Each party to a court dispute will bear its own costs, ensuring greater access to justice, and ensuring courts have discretion to award costs in the interests of justice.

Some of the other changes include:

- A new defence of "justifiable" conduct, done "in good faith for a legitimate aim, in a manner proportionate to that aim";
- An enhanced ability for the Australian Human Rights Commission to dismiss "unmeritorious" complaints;
- New voluntary business assistance measures to help businesses understand and meet their obligations;
- Voluntary certification of compliance codes, temporary exemptions and special measure determinations will be available for businesses, which would constitute a complete defence against a discrimination complaint; and
- Many existing exceptions (including those for religious organisations) will be retained. However, no provider of aged care services with Commonwealth funding can discriminate, including religious organisations.

The Bill has been referred to the Senate Standing Committee on Legal and Constitutional Affairs. Submissions are due on 21 December 2012, and the Committee has a reporting date of 18 February 2013. RLC will be working with other community legal centres to make a submission.



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## International Student Advice Service: One year on

In October 2011, RLC launched an advice service for international students studying at universities and colleges throughout New South Wales. This expanded our existing services for international students offered by our solicitors at the University of Sydney Post Graduate Students Association (SUPRA) and Sydney Institute of TAFE.

Stories about the mistreatment of international students in Australia are common in the media, with accounts of racism and violence, overcrowded share accommodation, and poor quality private colleges receiving publicity in recent years.

Whether because of unfamiliarity with the local legal system, language difficulties or fears about the immigration consequences of making complaints, international students face heightened barriers to accessing legal information and advice. RLC identified a need for free legal advice services for international students, particularly those at private colleges.

The RLC Wednesday night International Student Advice Service is run with the assistance of volunteer solicitors, tenant advocates and law students. We also have a pro bono partnership with international migration firm Frago-men so that a registered migration agent is also available to advise students on problems related to their student visas.

A large number of students seek assistance with issues about accommodation and the return of rental bonds. Students who enter into informal relationships with landlords or head-tenants often have difficulty claiming their bonds back, especially when their departure from the country is imminent.

Another common area of advice is the treatment of international students in part-time employment. Employers can intimidate international students into accepting unlawful conditions, hours and rates of pay by threatening to dismiss them or report them to immigration authorities if they refuse.

Other common problems experienced by international students are:

- Discrimination and sexual harassment;
- Complaints about education providers and their agents;
- Scams (flights, accommodation, international money transfers);
- Motor accidents and fines; and
- Domestic violence.

RLC is working on an evaluation of the effectiveness of the International Student Advice Service with pro bono assistance from social researcher Erol Di Guisto.

## Case study: Housing scams

Fan is an international student from China who came to Australia to study English. On a Chinese language website she found an advertisement for a room for rent in a suburban house. When she inspected the room she found that six other students lived in the house, as some larger rooms had been partitioned into smaller rooms.

Fan was asked to sign an agreement in English that she could not read, and the landlord refused to give her a copy of the agreement. When Fan's mother contacted the landlord to request that Fan be given a copy of the agreement, she was told that there was a fee of \$300 to get a copy of the agreement.

After Fan moved in she found there were many house rules that she found oppressive. For example, the students were not allowed to use the kitchen, and were forced to wash their clothes together in the one load of washing at specific times of the week.

After a short period at the house Fan gave the landlord four weeks notice that she was moving out. When she left the landlord refused to return her bond. RLC advised Fan that she was not a tenant covered by the *Residential Tenancies Act*. However, as the landlord appeared to be in the business of letting rooms to students she could make an application to the General Division of the CTTT to recover her bond. RLC helped Fan complete the CTTT application form, and she successfully recovered her bond.

The free, confidential service runs each Wednesday evening from 6:30 pm. Face-to-face and telephone appointments can be booked by calling Redfern Legal Centre on (02) 9698 7645. Free interpreters can be provided.

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