

Juveniles v The State

A NEW DIRECTION

for class action

By MARY ROSE LIVERANI

IN LATE NOVEMBER 1991, a fiery debate raged in the Australian Parliament during the second reading of amendments to the *Federal Court of Australia Act 1976* (FCA Act). The new legislation was designed to make better provision for representative proceedings. Enacted in 1992, it was inserted into the FCA Act as Part IVA, a term now enjoying wide currency in class action circles.

Victoria slipped Part IVA with minor alterations into its own *Supreme Court Act 1986* and the two jurisdictions dominated class action proceedings for almost two decades. That primacy is unlikely to continue since the unveiling of NSW's latest class action amendments in March 2011. These incorporate all the acceptable parts of Part IVA plus improvements likely to make NSW first choice in future for class action proceedings.

The 1991 debate was narrowly focused and unabashedly ideological. Peter Costello and Senator Peter Durack, speaking for the Liberal Opposition saw group proceedings, especially those founded on an 'opt out' provision, as outcomes of lobbying by the "organised consumer movement" notoriously hostile to big business.

Costello, himself a lawyer, cited arguments and comments from the Business Council of Australia and from representatives of the large

legal corporations, supporting his thesis that 'entrepreneurial' lawyers would exploit the new procedures to make large fortunes for themselves, adding that "any lawyer who has a client who has a claim would be mad not to issue the claim on behalf of the class that the client falls into".

"The matter is particularly knotty, having involved three government agencies: NSW Police and the departments of Juvenile Justice and Corrective Services."

While Michael Duffy, the Attorney-General, noted mildly that the reforms were a significant part of the government's equity and access policies, Peter Duncan, also with the ALP Government, spoke of "redressing the balance between the people who are wealthy and powerful and those who are less wealthy and powerful – the poor, the ordinary people of this country", averring that in the past "it has been almost impossible for the man in the street to sue huge corporations – those that put unsafe products on the Australian market" and "are involved in unsafe work practices". Peter Staples declared that "the Opposition are terrified of any legislation that would protect the consumer in a way that does not protect the people who are out there making mistakes".

In fact, most class actions subsequent to the 1992 amend-

ments have made claims against corporate misbehaviour. According to Ben Slade, principal lawyer of Maurice Blackburn, a plaintiff law firm which claims the largest class actions practice in Australia, his firm acts for "victims of serious corporate misconduct such as price-fixing, share

Court Liaison Committee.

On the list of Mr Slade's projects, which largely speak of investors, faulty medical products and cartels, is one that would have been far from the minds of both reformers and conservatives participating in the second reading of the *Federal Court of Australia Amendment Bill 1991* – a class action against the state of NSW, conducted jointly by Maurice Blackburn and the Public Interest Advocacy Centre (PIAC) and claiming compensation for the "false imprisonment of children in that state".

This class action has nothing to do with the business sector but belongs to the area of human rights, false imprisonment being a form of wrongful detainment that can range from taking someone hostage and removing them to another place or grabbing a shoplifter and forcing them to remain till the police are called to detaining a casual passer-by during a riot.

Musa Konneh v The State

According to the literature, courts do not appear to be easily persuaded by claims of false imprisonment, but this did not stop PIAC and Maurice Blackburn commencing a class action, *Musa Konneh v The State of NSW*, on behalf of an 18-year-old youth representing a group of other young people who it is claimed have been detained in similar circumstances to Mr Konneh. The matter is particularly knotty, having involved three government agencies: NSW

Mary Rose Liverani is a freelance writer and former Senior Writer for the Law Society Journal.

Police and the departments of Juvenile Justice and Corrective Services.

The story is that two police officers checking a train for fare evaders found a youth without a ticket and carrying a licence in someone else's name. He refused to give his address and eventually the police charged him with goods in custody and released him on bail, to continue until he faced the court. Bail conditions

turned up several nights later and arrested the youth for breach of bail.

In response to his informing them that the magistrate had dismissed all charges and the bail associated with them, they told him they were acting on their own police records which showed he had breached his bail conditions. They "touched" him, entered his bedroom without consent, manacled his hands

by legal agencies working with young people. While he originally encountered the police on 28 July 2010, PIAC, Legal Aid NSW and the Public Interest Law Clearing House NSW (PILCH) had five years earlier launched the Children in Detention Advocacy Project (CIDnAP) which aimed to challenge the unlawful and unnecessary detention of young people in the criminal justice system. Advocates had

man, drawing attention to the continued unlawful detention of young people by the NSW police.

LSJ attempted unsuccessfully to explore the hi-tech glitch scenario, which has currency in explaining why it is difficult to achieve an instant or at least fast link between the police system and JusticeLink, but candour is conspicuously absent in the matter. Information on policy is impacted, characterising a massive inequality of power between interested parties.

But patient application over six years by an extended network of legal officers has generated an impressive data bank that makes a convincing argument of systemic unlawful detainment of children by NSW police. Causation may be indeterminate, but the facts are not. And the numbers involved seem likely to grow. PIAC and Maurice Blackburn have now set up a phone hotline for any young person living in NSW who has been arrested or detained by a police officer for breach of a bail condition where the bail condition was not current at the time the person was arrested and

the alleged breach of bail was related to offences being heard in the Children's Court.

The 'opt out' class action is seeking not only a remedy and compensation for victims but aggravated and exemplary damages, the costs of which added to the substantial costs accruing to those false imprisonments already carried out will bring no joy to the bunkered NSW Treasury.

Despite the acclaimed improvements in NSW civil procedure rules this class action has already met its first setback: an amended Statement of Claim was ordered on 7 October by Justice Hoeben.

Ben Slade, veteran of many combats with corporate giants responds to the judge's decision with equanimity. "It will delay things a bit, but I should think we will be able to achieve the required amendments and move on quite easily." □



One of the youths at the centre of a class action being pursued over false imprisonment is Musa Konneh (centre) seen here at a press conference with Vavaa Mawuli, Senior Solicitor with the Public Interest Advocacy Centre and Ben Slade of Maurice Blackburn Lawyers.

PHOTO: DOMINIC O'GRADY/PIAC

required the youth to attend the station three times a week. He complied for the first week but not the second, was picked up by the police for breaching bail and brought before a magistrate of the Children's Court. The magistrate dismissed the charges and the bail breaches were nullified.

Theoretically, police records, by whatever means common sense suggests, should have been promptly updated and the matter dropped. Instead, the police

behind his back, placed him in a police van where he bounced around, unable to support himself, took him to a police station where he was searched, and then transported him to a court cell complex under the control of Corrective Services NSW. There he was strip-searched and retained till the next afternoon when the court confirmed his release.

The humiliation and suffering experienced in this way by a teenager who knows objectively that the police are behaving unlawfully is unlikely to encourage him to respect the law, especially when he discovers that some scores of other young people have been similarly treated over the preceding six years, in the face of petitions to the authorities to resolve the situation.

That Musa Konneh's false imprisonment could be systemic had earlier been noted

been alarmed by "the high incidence of children and young people arrested and detained in relation to outdated warrants or bail conditions, as a result of administrative problems in the transfer of information between NSW Police and the courts".

Since CIDnAP offers free legal advice and representation to children and young people who may be able to claim false imprisonment by various authorities, its members have succeeded in assembling a body of cases sufficiently similar to warrant a class action. The stories are in fact so similar, anyone reading them might conclude that the police are following procedures to the letter.

Numerous letters from CIDnAP have gone to the Police Commissioner, the Attorney-General's office and ultimately to the Ombuds-