Human Rights Law Centre

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OPINION: STRONG PAROLE SYSTEMS IMPROVE COMMUNITY SAFETY

A stronger, better resourced and human rights compliant parole board would better for community safety, writes the HRLC's Executive Director Hugh de Kretser and Professor Arie Freiberg for the Herald Sun.

NEWS: HARSH ASYLUM SEEKER POLICIES CENTRAL TO ELECTION CAMPAIGNS

Asylum seeker policies are set to dominate federal election debate once again with PM Rudd vowing that asylum seekers arriving by boat will never be resettled in Australia.

CASE NOTES: NSW V KABLE

High Court finds orders in excess of jurisdiction are valid until set aside

HRLC POLICY & CASE WORK:

The HRLC has welcomed Tasmania's move to decriminalise abortion - the only publicly funded health service that is currently criminalised, and encourages other Australian states to adopt versions of the safe 'access zones' included in the proposed laws.

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OPINION

Strong parole system will benefit community

Strengthening Victoria's parole system would strengthen community safety. Ninety-eight per cent of offenders will eventually be released from prison and about 5500 prisoners are released into the Victorian community every year.

It's better to release prisoners gradually with monitoring and conditions than simply letting them go unsupervised. That is what parole is all about. It allows offenders to be released from prison under supervision by community corrections officers with conditions such as curfews, reporting and travel restrictions. It is about protecting community safety by reducing the risk that someone will reoffend.

Some people object to parole because they think it involves "early" release from prison. But when a judge hands down a sentence they normally specify a range – a minimum and a maximum term.

An offender can't be released on parole until they have served the minimum prison sentence set by the court. Release before the end of maximum prison term is not automatic. The parole board decides when an offender is released and on what conditions. But when the maximum term expires, unless they are covered by the serious sex offender legislation, that person must be released, supervised or not.

Without parole, offenders would be released into the community without any supervision or conditions. That would undermine our safety.

Some form of supervised release has been operating since European settlement. When Victoria's first parole legislation was introduced in 1955 by then Liberal Deputy Premier Arthur Rylah, he said the reforms came "from a realisation that the protection of the community can best be achieved by the ultimate rehabilitation of the criminal".

In other words, the ultimate aim of parole is not to provide a benefit to offenders. It is about protecting community safety by reducing the risk that someone will offend again. Parole cannot eliminate the risk of someone reoffending, but the best evidence is that it reduces those risks.

But it is critical that the parole board makes the right decisions about when to grant parole and when parole should be cancelled.

There have been serious failures by the board, by community corrections and by police. The consequences have been horrific – offenders whose parole should have been cancelled, have remained in the community and gone on to commit serious crimes. The answer to these failures is not to abandon parole but to strengthen it.

The Victorian Government is already making changes to improve parole. But it could do more. The Adult and Youth Parole Boards are the only government agencies that are not required to comply with Victoria's Human Rights Charter.

The charter requires government agencies to protect life and the liberty and security of people. It also requires fair decision making.

The exemption for the parole boards should be scrapped. Making parole comply with human rights standards would reduce the risk of bad decisions that undermine safety.

It would also make parole more transparent and accountable to the community, including victims of crime who feel that their voices are not being heard adequately.

The parole boards also are inadequately resourced. In 2011-12, the Adult Parole Board heard more than 10,000 cases over 187 meeting days – on average 54 cases per day, meaning only a few minutes on average can be allocated per case. That increases the risk of mistakes.

The ultimate responsibility for crimes lies with the offender. But there is plenty of evidence about what governments and communities can do to reduce crime and prevent murders, rapes and violent assaults.

For years the Adult Parole Board has highlighted inadequate resourcing of housing, mental health and drug and alcohol treatment. Their calls have largely been ignored.

Serious failures have rightly put the spotlight on Victoria's parole system. To protect community safety, we need to strengthen parole to avoid future mistakes.

Hugh de Kretser *is executive director of the Human Rights Law Centre and* ***Arie Freiberg*** *is an Emeritus Professor, Monash University (and contributed to this article in a personal capacity).*

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NEWS IN BRIEF

Human rights adrift in election campaign asylum seeker policy debate

Prior to calling the federal election, Prime Minister Kevin Rudd unveiled a harsh new policy that seeks to ensure asylum seekers arriving in Australia by boat will never be settled here. The plan has attracted serious criticisms, with the United Nations High Commissioner for Refugees issuing a scathing assessment and the Australian Human Rights Commission saying it likely breaches international human rights law. The plan will cost $1.1 billion over four years, while foreign aid budget has been slashed by almost $1 billion. In response, the Opposition released its plans to put a three-star commander in charge of a military-led border protection campaign to address what Tony Abbott describes as a national emergency.

Concerns remain about conditions at Manus Island detention centre

The week following the Government's PNG announcement, SBS's Dateline aired an interview with a former OHS manager at the Manus Island detention centre who made allegations of repeated instances of rape and sexual abuse and said "In Australia, the facility couldn't even serve as a dog kennel. The owners would be jailed." On a subsequent visit to the Manus detention centre, Immigration Minister Tony Burke described the conditions as "infinitely better" than he had expected. Previously a UNHRC reported that every asylum seeker detained on Manus was displaying signs of anxiety and depression.

Indigenous justice 'needs intervention'

Law Council of Australia and Australian Bar Association president Michael Colbran has called on the federal government to intervene and stem the rising rate of indigenous incarceration. The proportion of indigenous people in jail has doubled in the last 20 years.

10 year plan for Indigenous health

The Australian Government has released a plan after a long consultation process with Indigenous communities and health experts to address racism in the health system and empower Aboriginal people to get healthy. The Coalition has attacked the 10-year Indigenous health plan as nothing more than "business as usual" from the government.

Doubts over mandatory alcohol rehab laws in NT

Under the Northern Territory's mandatory alcohol rehab laws anyone who's taken into protective custody for drunkenness three times in two months is assessed for 'alcohol rehabilitation' raising numerous health and legal concerns.

'Bare' case welcomed as landmark for public interest litigation

A young man, represented by Youthlaw and pro bono lawyers, has won an important public interest costs decision in an appeal against a decision in the Supreme Court relating to independent police investigations. The Victorian Court of Appeal made a protective costs order limiting the amount of costs that can be awarded against him if he loses.

Welcome steps to up mental health training for NSW Police

Every front-line police officer across NSW will receive specialised mental health training in a new course.

Racism in the ranks faces scrutiny

Community legal centres will advise a Victoria Police inquiry that racial profiling by members of the police force is endemic. Victoria police will also reopen an internal investigation into a raid that allegedly resulted in several African-born people being racially abused, punched and subdued with capsicum spray.

Landmark ruling in hormone treatment case

Families and doctors won't need to ask the permission of a judge if a child with a gender identity disorder wants medications to prevent the onset of puberty following a landmark ruling in a hormone treatment case.

Role of Pine Gap in US drone strikes revealed

Central Australia's Pine Gap spy base has played a key role in the United States' controversial drone strikes involving the "targeted killing" of al-Qaeda and Taliban chiefs, sparking concerns of Australia's potential culpability in the deaths of thousands of civilians.

Pope makes conciliatory remarks towards homosexuals

Although expressing concerns about the 'gay lobby', Pope Francis has reached out to gay and lesbian people declaring that it is not his place to judge them and they should be "treated with respect, compassion and sensitivity, without discrimination. Meanwhile, efforts to condemn Russia's anti 'gay propaganda' laws, have attracted celebrity endorsement in the lead up to the 2014 Winter Olympics.

HRLC POLICY WORK AND CASE WORK

Tasmanian abortion reform: Decriminalisation is central to the realisation of women's human rights

Tasmania's move to decriminalise abortion has been welcomed by the Human Rights Law Centre in a submission to a Parliamentary Committee reviewing the proposed laws.

The HRLC's Director of Advocacy and Campaigns, Rachel Ball, said abortion is currently the only publicly funded health service that is criminalised.

"Criminalisation creates uncertainty and barriers to accessing important services. It undermines women's right to non-discrimination, health and privacy. We welcome these overdue reforms and encourage other states to take note," said Ms Ball

Praising the proposed reforms, Ms Ball said all Australian states should adopt versions of the safe 'access zones' for protests included in the Reproductive Health (Access to Terminations) Bill 2013.

"Women should be able to access health services without the fear of having to put up with harassment, abuse and other intimidating behaviour. Having specified access zones like the ones proposed in Tasmania, and already in effect in other countries such as Canada, will help ensure women and staff can feel safe accessing and delivering services," said Ms Ball.

Whilst welcoming the creation of access zones, the HRLC submission suggests the exact scope of the zones should be tweaked to avoid any unnecessary limitation of freedom of expression or assembly.

"Access zones are consistent with international human rights law when they are tailored to achieve legitimate aims such as protecting the rights of women and also manage to balance this with not excessively limiting other rights such as freedom of expression and assembly," said Ms Ball.

The HRLC submission cites access zones in Canada that currently only apply up to 50 metres from clinics and argues this is a proportionate and tailored responds to protect the privacy, safety and dignity of female patients as well as staff. The HRLC also suggests the severity of the proposed fines for non-compliance should be reconsidered by the Tasmanian parliamentary committee.

Despite submitting these suggested improvements to the committee, Ms Ball said the proposed laws should be passed as soon as possible.

"There is some room for improvement in this Bill, but overall it is overwhelming positive and I encourage all Tasmanian parliamentarians to embrace these landmark reforms," said Ms Ball.

A copy of the HRLC submission can be found online here.

New discrimination protections for LGBTI people welcomed, but wholesale reform still required to fix outdated system

Long overdue legal protections for lesbian, gay, bisexual, transgender and intersex (LGBTI) people that came into effect on 1 August, have been welcomed by leading human rights organisations and LGBTI community groups, but also highlight the need for systemic reform to Australia's out-dated discrimination laws.

The *Sex Discrimination (Sexual Orientation, Gender Identity and Intersex Status) Amendment Act 2013* (Cth) is now in force and adds the new grounds of 'sexual orientation', 'gender identity' 'intersex status' and 'marital and relationship status' to existing federal discrimination laws. This means that LGBTI Australians who have been discriminated against on the basis of these attributes may take a complaint of discrimination to the Australian Human Rights Commission and the courts.

The HRLC's Director of Advocacy, Anna Brown, welcomed the commencement of the laws as an historic advance for the rights of LGBTI people.

"These laws finally deliver legal protections from discrimination at a national level, filling important gaps in protection and setting a new national standard for the protection of transgender, intersex and gender diverse people," Ms Brown said.

However, Ms Brown said despite the new areas of coverage, more fundamental reform was needed.

"While there are many people that will benefit immediately, such as employees of federal departments and agencies and people accessing services such as Medicare and Centrelink, unfortunately these new protections have been welded onto an outdated system," said Ms Brown.

The *Sex Discrimination (Sexual Orientation, Gender Identity & Intersex Status) Amendment Act 2013* was introduced after the Government shelved a more ambitious project to consolidate federal anti-discrimination legislation earlier this year. The Government's draft *Human Rights and Anti-Discrimination Bill 2012* consolidated five federal anti-discrimination laws and was the subject of a Senate committee inquiry. The HRAD Bill is yet to be released by the Government in its final form.

"The update and modernisation of our anti-discrimination laws is long overdue and would have benefited businesses and individuals alike," said Ms Brown.

"We're talking about five different laws passed over decades, the oldest of which is now close to 40 years old," added Ms Brown.

The Attorney-General Mark Dreyfus has committed to continuing the Government's project of consolidating the five federal anti-discrimination laws if re-elected.

"We welcome the Federal Government's commitment to continue with its project to consolidate and update its federal anti-discrimination laws to relieve users of this complex, costly and inefficient system," said Ms Brown.

However, the HRLC is concerned at suggestions by the Attorney-General that further consultation is required before the amended HRAD Bill could be released.

"The Government already indicated that it would fix the controversial 'offence' clause that caused significant confusion and concern during the consultation on the exposure draft Bill. With this amendment, the Bill is ready to be introduced. These reforms have been the subject of significant discussion and consultation, including no less than three public inquiries, since 2007. We need action," said Ms Brown.

The Attorney-General also announced a temporary measure to exempt those acting under State laws from breaching the new federal law. This temporary exemption will last for 12 months to allow time for State and Territory Governments to request permanent exemptions for particular laws. As part of this discussion the Attorney General Mark Dreyfus indicated he will work with States and Territories towards nationally consistent recognition of sex and gender, including in birth certificates.

"It is important that thee laws provide a new national standard to protect LGBTI people from unfair treatment and harm and this means identifying and amending outdated State and Territory laws," said Ms Brown.

The HRLC welcomed the move towards reform of State and Territory laws on recognition of sex.

"We hope that in the coming year State and Territory governments will consult with transgender and intersex people and bring their birth certificate laws into line with best practice, reflected in new federal guidelines, ensuring they are treated with dignity and respect," added Ms Brown.

More information about the *Sex Discrimination (Sexual Orientation, Gender Identity and Intersex Status) Amendment Act 2013* (Cth) is available on the Australian Human Rights Commission website.

Aboriginal and Torres Strait Islander Languages in the Australian Curriculum

The HRLC has welcomed the development of a draft *Framework for Aboriginal Languages and Torres Strait Islander Languages* in Australia's national curriculum, which has been developed by the Australian Curriculum Assessment and Reporting Authority.

"Given the strong links language has with culture and identity, it is essential that Aboriginal and Torres Strait Islander languages are preserved and promoted through inclusion in Australia's national curriculum," said the HRLC's Ben Schokman.

The HRLC's submission to ACARA identifies Australia's international human rights obligations relating to the preservation and promotion of Aboriginal and Torres Strait Islander languages, including:

- the right to culture;
- the right to education;
- children's rights, including the best interests of the child, right to life, survival and development, and right to culture; and
- the right to equality and non-discrimination.

The submission also identifies concerns about Australia's failure to preserve and promote Aboriginal and Torres Strait Islander languages that have been expressed by a number of respected UN bodies in recent years, including the Committee on Economic, Social and Cultural Rights, Committee on the Elimination of Racial Discrimination and Special Rapporteur on Indigenous Rights.

The HRLC makes a number of recommendations to ensure that the Framework and its implementation is consistent with Australia's international human rights obligations.

A copy of the HRLC's submission is available here.

A copy of the draft Framework is available here.

Monitoring of Places of Detention in the Northern Territory

Proposed legislation in the Northern Territory which will enable independent experts to visit places of detention will play an important role in preventing ill-treatment. In a submission to the NT Government, the HRLC has welcomed the draft legislation but recommended a number of changes to ensure full compliance with Australia's international obligations.

"The independent monitoring and oversight of places of detention is essential to promote humane treatment in all places of detention," says the HRLC's Ben Schokman.

"This is not only in the interests of all people deprived of their liberty but also in the interests of the broader community."

The Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) (National Uniform Legislation) Bill 2013 seeks to implement part of the obligations contained in the *Optional Protocol on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, which was signed by Australia on 19 May 2009. The object of the Bill is to facilitate visits by the UN Subcommittee on the Prevention of Torture to all places of detention in the Northern Territory.

The HRLC's submission focuses on ensuring unfettered access to all places of detention and access to documents and information, as well ensuring that the language of the Bill is clear and drafted in a way that will achieve the purpose of the Optional Protocol.

A copy of the HRLC's submission is available here.

Further information on the Optional Protocol to the Convention Against Torture (OPCAT) is available here.

PNG deal carries huge human rights risks

The Australian Government's policy to send all asylum seekers to Papua New Guinea breaches international law and will condemn thousands of people to significant suffering.

On the afternoon the policy was announced, the Human Rights Law Centre's Daniel Webb, made various media appearances to highlight various problems with the policy.

In a statement prepared for the media, Mr Webb said:

"This isn't a regional solution, it's a hasty deal that carries huge human rights risks. Prime Minister Rudd said countries shouldn't 'pass the parcel' but this is exactly what Australia is doing. This isn't shouldering our fair share of our refugee obligations, it's outsourcing them to another country without Australia's wealth, stability or security.

The announcement will broaden the scope of a cruel and ineffective policy. Under the new policy, no refugee arriving by boat will be resettled in Australia.

Just last week, the UNHCR confirmed that every single person transferred to Manus is showing signs of mental illness and that their indefinite detention violates international law. Now we will be transferring thousands more into these conditions in as little as two weeks.

This announcement carries grave risks of serious and sustained human rights violations. Australia, with all its resources, has shown itself incapable of humanely processing asylum seekers within reasonable timeframes. So we have every reason to doubt that PNG, with its challenges, will be able to do so. We simply don't believe there will be adequate support and safeguards for the large numbers of asylum seekers PNG will be required to process and settle.

Despite many attempts, we've never had an offshore processing system that is lawful or humane. This arrangement is offshore processing on a much larger scale with far greater risks. Over the last year Australia has been unable to develop humane and appropriate services for the 145 detainees currently held at the Manus Island facility. It is defies belief that safe and appropriate accommodation will somehow now be created for the thousands expected to arrive.

For many refugees, normal pathways don't exist and the only choice is get on a boat or languish indefinitely in a camp overseas. This arrangement does little or nothing to address this situation and punishes those who arrive by boat.

The same sense of compassion and humanity evident when asylum seekers drown at sea must inform the way we treat those who survive. Deaths at sea are tragic, but violating the human rights of survivors is not an effective, lawful or humane policy response.

There will be huge financial costs associated with this policy which could be far better spent on a true regional processing solution with structured and assisted resettlement of vulnerable people."

AUSTRALIAN HUMAN RIGHTS CASE NOTES

Right not to have home or privacy unlawfully or arbitrarily interfered with is not part of tribunal jurisdiction in eviction proceedings

Commissioner for Social Housing in the ACT & Massey (Residential Tenancies) [2013] ACAT 41 (4 June 2013)

Summary

The ACT Civil and Administrative Tribunal (ACAT) has held that, when determining an application for termination of a public housing tenancy, ACAT's jurisdiction to consider the human rights compliance of the public landlord is limited to ACAT's exercise of discretion under the *Residential Tenancies Act* 1997 (ACT) (RT Act).

With reference to the decision of the Victorian Supreme Court of Appeal in *Director of Housing v Sudi* [2011] VSCA 266 (Sudi), ACAT found that its consideration of whether the Commissioner for Social Housing in the ACT (Commissioner) had given proper consideration to human rights and acted compatibly with human rights under the *Human Rights Act* 2005 (ACT) (HRA) in bringing the eviction proceedings would amount to "collateral review" of the Commissioner's decisions. With the efficiency of the Tribunal in mind, Member Daniel found that ACAT does not have jurisdiction to undertake such a review. Any challenge to the decisions of the Commissioner under the HRA must be made to the Supreme Court.

Facts

Ms Massey and her son had lived in the public housing property under a tenancy agreement with the Commissioner since May 2010. She had previously lived in another public housing property, but had to leave after being charged with a murder in the local area. While on bail, Ms Massey and her son lived with Ms Massey's mother in "cramped and difficult conditions" for about one year before being transferred to their current property.

Ms Massey was convicted of the murder in May 2011 and sentenced to 16 years' imprisonment with a non-parole period of 10 years. As a result, she was incarcerated and her son moved in with his grandmother.

In December 2011, the Commissioner served Ms Massey with a "26 week no cause notice" i.e. a termination notice, which required Ms Massey to vacate the property by 12 June 2012. On 26 October 2012, the Commissioner applied to ACAT seeking a termination and possession order (under section 47 of the RT Act).

Ms Massey applied for leave to appeal the murder conviction to the High Court and this application is due to be heard in August 2013. If leave is granted, Ms Massey intended to apply for bail and hoped to reside in the property with her son during this time.

ACAT held that it was not appropriate to adjourn the proceedings pending the outcome of the application to the High Court and proceeded to hear and determine the eviction application.

Decision

ACAT granted a termination and possession order.

Rights engaged

The Commissioner accepted that the following rights were engaged by its decision to apply for Ms Massey and her son to be evicted:

- The protection of families and children (under section 11 of the HRA); and
- The right not to have their privacy, family, home or correspondence interfered with unlawfully or arbitrarily (under section 12 of the HRA).

The Commissioner disputed that they had failed to give proper consideration to these rights or that the application for a termination and possession order was incompatible with these rights.

ACAT accepted that the right to privacy and home was engaged, but was not satisfied that Ms Massey and her son's rights under section 11 were engaged (although the reasons for this were not identified).

Human rights obligations of public housing authorities

Section 40B of the HRA provides that it is unlawful for a public authority to act in a way that is incompatible with a human right under the HRA or, in making a decision, to fail to give proper consideration to a relevant human right.

Section 40C(2) of the HRA provides that, if a person claims that a public authority has acted in contravention of section 40B (i.e. has acted incompatibly with human rights or failed to give proper consideration to human rights) the person may:

- start a proceeding in the Supreme Court against the public authority; or
- rely on the person's rights under [the HRA] *in other legal proceedings* (emphasis added).

It was accepted that the Commissioner is a public authority and therefore has obligations under section 40B of the HRA. ACAT also accepted that eviction proceedings in ACAT under the RT Act were 'legal proceedings' for the purposes of section 40C(2)(b) of the HRA and that the tenant can therefore (to some extent) rely on her rights in RT Act proceedings.

Human rights considerations in eviction proceedings

ACAT considered whether the Commissioner's compliance with the HRA should be addressed in eviction proceedings and, if so, how.

The Welfare Rights and Legal Centre argued on behalf of Ms Massey that if, after considering the human rights compliance of the Commissioner, ACAT found unlawfulness under section 40B of the HRA, ACAT might decline to exercise its discretion to make a termination and possession order. Further, this review of the Commissioner's decisions and actions was intended by the wording of section 40C(2)(b) of the HRA.

ACAT, however, found that the consideration of the human rights compliance of the Commissioner leading up to the commencement of eviction proceedings would amount to

"collateral review" and section 40C(2)(b) does not confer "some sort of HRA review jurisdiction upon the Tribunal".

ACAT went on to find that even if there was a finding that a decision of the Commissioner (for example, to issue a Notice to Vacate or apply for a possession order) was "unlawful" because of non-compliance with the HRA, this does not mean it is of no legal effect; administrative decisions and actions are of legal effect until set aside or declared to be of no legal effect by a court of competent jurisdiction. According to ACAT, section 40C(2)(b) is not intended to impliedly vest ACAT with power to declare decisions undertaken contrary to section 40B of the HRA to be of no legal effect. Without such a declaratory power "there would be no utility to the ACAT embarking on a review of the lawfulness of pre-litigation decisions by a public authority coming before it".

ACAT reiterated that, if a tenant wants the lawfulness of a decision of the Commissioner to be considered under the HRA, the eviction proceedings may be stayed while these questions are determined by the Supreme Court. This does not amount to ACAT "closing its eyes to unlawfulness" because "there is no unlawfulness until a competent body has determined that to be so".

Discretion when making possession orders

Section 47 of the RT Act provides that, on application by a lessor, ACAT *may* make a termination and possession order if satisfied that (1) a ground for termination exists; (2) a Notice to Vacate based on that ground has been served on the tenant; and (3) the tenant has not vacated the premises by the required date. ACAT held that evidence showing that making a possession order would be contrary to the tenant's rights under the HRA could be taken into account in exercising discretion as to whether or not to make the order. ACAT distinguished this from engaging in a review of the Commissioner's decisions and actions.

Member Daniel noted that even if a decision of the Commissioner pre-litigation had been made without due regard to relevant rights, "it is by no means clear that a proper consideration of those rights at the relevant time could or would have resulted in a different decision or these proceedings not being brought". ACAT noted that as there was no finding by the Supreme Court in relation to the validity of the Commissioner's decisions relating to Ms Massey, there was nothing that ACAT could take into account in deciding whether or not to exercise the discretion to make the possession order.

Member Daniel considered the difficult circumstances of Ms Massey and her son, including the risk of homelessness and separation if Ms Massey was released on bail. She weighed this against the Commissioner's evidence that there are over 3200 applicants for public housing on the waiting list in the ACT, with 291 on the priority waiting list and noted that the property had effectively been empty for two years.

Member Daniel was not satisfied on the evidence that the making of the order for termination and possession would amount to an unlawful or arbitrary interference with the rights of Ms Massey or her son.

Commentary

The HRA is a very similar instrument to the Victorian Charter and the laws regulating residential tenancies in the ACT and Victoria are also analogous in many ways. A key difference is that the RT Act gives ACAT discretion when deciding whether or not to make a possession order, whereas that the *Residential Tenancies Act* 1997 (Vic) (RTA) requires that VCAT *must* make an order if certain requirements regarding notice are met.

It has been suggested that section 39 of the Victorian Charter should be amended in line with section 40C(2)(b) of the HRA to clarify that legal proceedings can be commenced on the basis of Charter non-compliance (currently the Charter does not create an independent cause of action).

However, the decision in Sudi highlighted that even if such an amendment was made, unless VCAT is conferred with jurisdiction to consider the Charter compliance of a public housing authority by the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) or the RTA, such consideration is likely to constitute impermissible collateral review. The decision in *Massey* follows this reasoning, such that it is unlikely that an amendment to section 39 of the Charter alone would be sufficient to address the jurisdictional limitations of VCAT when deciding applications for possession made by public landlords.

The importance of VCAT's jurisdiction to consider human rights compliance when determining applications for possession orders is significant. While tenants ostensibly have the option of seeking review of a public landlord's decision in the Supreme Court, in reality, the complexity of this process, the potential adverse cost consequences and the limited capacity of legal services to assist with such actions, make it highly unlikely that this option will be pursued. Tellingly, since Sudi almost two years ago not a single Charter-tenancy case has proceeded to determination by the Supreme Court of Victoria. This is remarkable given that vulnerable and disadvantaged tenants are being evicted on a daily basis. In our experience, human rights issues often arise but capacity, client circumstances or landlord unwillingness to proceed to a final court hearing often mean that these matters don't make it to court.

VCAT is an accessible, affordable forum that makes decisions about whether or not disadvantaged tenants will be evicted from public housing. While the "legislated imperative of efficiency" is undeniably important, the risk of arbitrary evictions from public housing is significantly greater if VCAT is not empowered to contemplate the human rights obligations of public housing providers in eviction proceedings.

The decision is available at: http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/act/ACAT/2013/41.html?stem=0&synonyms=0&query="Human%20Rights%20Act

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High Court finds orders in excess of jurisdiction are valid until set aside

State of NSW v Kable [2013] HCA 26 (5 June 2013)

Summary

The High Court has found that the State had detained Mr Kable with lawful authority, notwithstanding that the source of that lawful authority was subsequently struck down on constitutional grounds. As a result Mr Kable had no remedy in tort for unlawful detention, despite his detention subsequently being held to be unlawful.

Facts

This case concerns the appeal of a decision of the Court of Appeal of New South Wales, in which the respondent, Mr Gregory Wayne Kable, successfully obtained damages against the appellant, the State of New South Wales, and the interveners, for false imprisonment: see *Kable v New South Wales* (2012) 293 ALR 719.

This litigation arises out of the earlier decision of the High Court in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable No 1)*. Upon application by the Director of Public

Prosecutions (DPP), Justice Levine made an order pursuant to section 9 of the *Community Protection Act 1994* (NSW) that the respondent be detained in custody for six months. The Act allowed for such orders to be made by the court in circumstances where a person is more likely than not to commit a serious act of violence and it is appropriate, for the protection of a particular person or persons or the community generally, that the person be held in custody. The Court of Appeal dismissed the respondent's appeal of the order authorising his detention: see *Kable v Director of Public Prosecutions* (1995) 36 NSWLR 374 (*Kable No 1)*. Mr Kable appealed to the High Court. The High Court allowed the appeal and ordered that the application by the DPP be dismissed.

This decision had important constitutional ramifications. The majority of the High Court found that the Act was constitutionally invalid because it required the Supreme Court to exercise judicial power in its capacity as a court, but to perform a task that was executive in nature, which was inconsistent with its constitutional integrity.

Before the matter reached the High Court, the six months' detention period expired and the respondent was released; this meant the order was not set aside until after the full period of detention had occurred. The respondent brought proceedings seeking damages for collateral abuse of process, malicious prosecution and false imprisonment. The primary question before the court was whether the appellant had authority to hold the respondent in detention at the time of detention, given that the Act was subsequently found to be invalid.

The primary judge dismissed the grounds relating to collateral abuse of process and malicious prosecution. Further, the primary judge rejected the argument that the order was a nullity and held that the order made by Justice Levine was valid until it was set aside: see *Kable v New South Wales* (2010) 203 A Crim R 66.

The New South Wales Court of Appeal agreed with the primary judge on the grounds of collateral abuse of process and malicious prosecution. However, the Court of Appeal allowed the appeal in part, finding that the existence of the order of Justice Levine could not defeat the respondent's claim for false imprisonment. President Allsop, with whom Justices Campbell and Meagher and Chief Justice at Common Law McClellan agreed, found that the order was not judicial in character because the court was acting, effectively, in an executive function, and so the order "had no force or effect because, as an executive act, it took its force only from the statute which is and was always unconstitutional and of no effect." In a separate opinion, Justice Basten found that the order did not constitute a judicial order, that the detention order was made in the exercise of federal jurisdiction to uphold an invalid State law, and was therefore an "invalid non-judicial order."

Arguments on appeal

The State appealed, supported by the interveners (Attorneys-General of the Commonwealth, Queensland, Victoria and Western Australia). Those parties argued that the Supreme Court was a superior court of record and the order was effective until it was set aside, meaning that the order provided lawful authority for the respondent's detention.

In opposition, the respondent submitted that if the Supreme Court had not made a judicial order, the rule giving effect to the order until it was set aside was not engaged. The order was "void ab initio" or "annulled ab initio" and either way, the order did not provide authority for the respondent's detention.

Decision

A majority of the High Court (Chief Justice French, Justices Hayne, Crennan, Kiefel, Bell and Keane) allowed the appeal. Justice Gageler, in a separate opinion, agreed with the conclusions and orders of the majority, with similar reasoning.

The Findings in Kable No 1

The High Court was of the view that the Court of Appeal misconstrued the decision in *Kable No 1.* The High Court clarified that the majority in *Kable No 1* held the Act invalid on the basis that:

> [It] required the Supreme Court to exercise judicial power and act institutionally as a court, but to perform a task that was inconsistent with the maintenance (which Ch III of the Constitution requires) of the Supreme Court's institutional integrity.

The High Court highlighted that in *Kable No 1* there was no doubt that the Supreme Court was exercising federal jurisdiction (to the extent that those proceedings arose under and involved the interpretation of the Constitution), and the Court of Appeal was exercising the Court's appellate jurisdiction. The majority also observed that the High Court in *Kable No 1* set aside the order of Justice Levine, as distinct from quashing or declaring the order invalid.

Void or voidable?

The majority, noting the difficulties with this terminology, found that to the extent which the orders of a superior court are valid until set aside, there is little point in attempting to classify those orders as "void" or "voidable".

Nature of the order

The High Court found that the order made by Justice Levine was the result of a determination of the rights of the respondent, and both authorised and required a fixed term of detention. The factors leading to its characterisation as a judicial order included the inter partes hearing; the application of the rules of evidence (with some exceptions), the examination of witnesses and the making of submissions, and the enforcement and appeal of the court order made. The majority emphasised that the exercise of the judicial power refers to the "*final* quelling of controversies according to law" whereas the exercise of executive power involves decisions "*subject* to law." The order was not a "step in the administrative process", rather, it was a judicial order.

The effect of the order

The majority found that the following propositions do not pose any "logical conundrum":

- all courts in Australia have the authority to decide their own jurisdiction, but not the finality of their decisions, which are subject to review; and
- orders made by a superior court of record are valid until set aside, even if those orders are made in excess of jurisdiction.

The problem with the appellant's submission is that orders and decisions of the courts could not have "immediate effect" – placing the Executive in the unsatisfactory position of either disobeying the order of the court, or incurring tortious liability in relation to the person whose rights and liabilities were affected by the order. Justice Levine's order therefore allowed, until it was set aside, for the legitimate detention of the respondent.

Justice Gageler elaborated on the majority's reasoning, opining that the capacity of a superior court to determine its own jurisdiction is consistent with having the power to determine the validity of a statute that purports to confer jurisdiction on that court, because the making of a final judicial order ordinarily requires the resolution of the question of jurisdiction as between the parties.

Orders

The appeal was allowed, and the orders of the Court of Appeal were set aside and substituted with orders that the appeal to that court be dismissed with costs. The appellant was ordered to pay the respondent's costs of both the application for special leave and the appeal to the High Court.

Commentary

The High Court's decision confirms that the orders of superior courts are valid and lawful until they are set aside.

Consequently people who have been detained under superior court orders which are later found to be unlawful do not have a remedy in tort.

The decision is available here: http://www.austlii.edu.au/au/cases/cth/HCA/2013/26.html

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INTERNATIONAL HUMAN RIGHTS CASE NOTES

Failure to protect against domestic violence amounts to gender-based discrimination and torture under European Convention

Eremia v Republic of Moldova [2013] ECHR, *Application no. 3564/11* (28 May 2013)

Summary

The Republic of Moldova's failure to adequately protect a woman and her two daughters from her husband's violent attacks amounted to a breach of the European Convention on Human Rights. The European Court of Human Rights found Moldova's inaction amounted to a violation of articles 3 (Torture and inhuman treatment), 8 (Private Life) and 14 (Discrimination).

The case is an important development in the ways in which human rights can be used to tackle systemic issues of gender-based violence and gender discrimination.

Facts

Mrs Lilia Eremia, (applicant) and her two daughters, Doina and Mariana Eremia (daughters) had been victims of domestic violence at the hands of the applicant's husband since the late 1990s. In August 2010 the applicant began reporting the various assaults to the police. On the first occasion the husband was fined a total of 12.40 Euros. It was only after the fifth reported assault, some of which took place in front of the applicant's daughters, and on the applicant's own initiative and request, that a protection order was made. The protection order was never enforced by social services and the husband breached the order on multiple occasions, even coming back to live at the house without permission. Each incident was reported to police and forwarded to the prosecutor's office, without any real response.

The applicant had also filed for divorce but was told there was a six month waiting period for couples to allow for possible reconciliation. Her request that this waiting period be waived was refused.

In January 2011 the police pressured the applicant to drop her criminal complaint. The police alleged her husband would lose his job if he was convicted and the daughters' education would be impacted. The prosecutor eventually decided not to initiate a criminal investigation. The next

day the husband returned home, assaulted the applicant and threatened to kill her if she did not drop the complaints.

The applicant was eventually invited to meet with social workers who advised her to reconcile with her husband since she was "neither the first nor the last woman to be beaten by her husband".

In April 2011 the husband admitted at the Office of the Prosecutor that he had physically and psychologically abused his wife and daughters. The husband concluded a plea bargain and asked to be conditionally released from criminal liability. The prosecutor, despite finding substantive evidence of the abuse, held the offence was a "less serious offence", that the husband had three minors to support, was respected in the community and did not represent a danger to society. The prosecutor then suspended the investigation. The applicant appealed against this decision unsuccessfully, the senior prosecutor holding that suspending the investigation would afford better protection to the applicants.

Law

Moldovan laws protect against family violence, mandating community service or time in prison with the length of time depending on the severity of the violence. A release from criminal liability is only available for less serious offences and where the perpetrator does not represent a danger to society.

The Court reviewed the case under the Convention, in particular:

> Article 3(Torture and inhuman treatment): No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
>
> Article 8 (Private and family Life): Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> Article 3 in conjunction with article 14 (Discrimination): The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex…

Decision

In contrast to previous similar cases, Moldova actually had legislation in place to protect against domestic violence and punish offenders. However, the Court found that the failure to effectively implement such legislation amounted to a breach of the State's obligations under the European Convention. It was noted that, given the repeated assaults on the applicant and the blatant disregard of the protection order it was unclear how the prosecutor could conclude the husband was "not a danger to society". The suspension of the criminal investigation effectively shielded the husband from liability, rather than deterring him from further violence.

The Court held that the assaults, as well as the fear of further ill-treatment, caused the applicant to experience suffering and anxiety amounting to inhuman treatment within the meaning of article 3. Traditionally focused on treatment by public authorities, the Court reiterated that article 3 also requires that authorities conduct effective investigations into alleged ill-treatment even if such treatment is inflicted by private individuals.

The failure to take adequate measures to protect the daughters, traumatised as a result of witnessing their father's assaults on the applicant, was held to be a breach of the obligations regarding respect for private life under article 8.

Finally, the failure of the judicial system and other government agencies to provide an adequate response to serious domestic violence amounted to gender discrimination under article 14 in

conjunction with article 3. The Court remarked that the violence was gender-based and accepted evidence that domestic violence impacted disproportionately and differently upon women. Such violence demands a response which treats it as a form of gender-based discrimination; failure to do so will mean a failure to effectively prevent further abuse. According to the court, the combination of factors, such as failure to investigate, pressure to drop complaint, urging the applicant to reconcile and so on "clearly demonstrates that the authorities' actions … amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards the first applicant as a woman."

The Court also took into account the findings of the UN Special Rapporteur on violence against women to come to the conclusion that it was clear the authorities in Moldova did not appreciate the seriousness and extent of the problem of domestic violence in Moldova and its discriminatory effect on women.

Commentary

Previously, complaints regarding domestic violence have been made primarily under article 8 and respect for private life. In finding that domestic violence also engages both articles 3 and 14 of the European Convention the Court is not only recognising domestic violence as a public and State issue, but developing the jurisprudence to better confront systemic sexism and gender based discrimination.

The *Eremia* case is the latest milestone in using the Convention and human rights to battle institutional inequality and sexism. The decision confirms that domestic violence can amount to inhuman and degrading punishment, bringing domestic violence firmly out of the private sphere and making it a public and State issue. It has also brought the Convention further towards an ability to counter systemic inequality. Article 14 has not always been seen as capable of dealing with discrimination that doesn't amount to formal inequality. However, the court accepted evidence that domestic violence affects men and women differently and that the State must recognise the fact that domestic violence is a gender discrimination concern.

The decision has also set a higher threshold for what is considered adequate action against violence against women. While in previous cases the State had not reacted at all to claims of domestic violence, including failure to implement adequate legislation, here the State had actually put in place laws to protect Mrs Eremia and her daughters. However, the Court found the steps and implementation had not been effective. It was not only this failure, but also the fact that the authorities did not fully appreciate the seriousness and extent of the problem of domestic violence in Moldova and its discriminatory effect on women, that was held to amount to a violation of the Convention.

This decision is available online at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119968

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Irreducible life sentence breaches article 3 of the European Convention

Vinter v United Kingdom [2013] ECHR, *Applications nos. 66069/09, 130/10 and 3896/10* (9 July 2013)

Summary

The Grand Chamber of the European Court of Human Rights has held that the imposition of an irreducible sentence of life imprisonment will breach article 3 of the European Convention on Human Rights.

Facts

The issue before the court was whether the imposition in the United Kingdom of life sentences without the possibility of parole breached article 3 of the Convention. Article 3 provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment of punishment".

In England and Wales, the mandatory sentence for murder is life imprisonment. The trial judge must set a minimum term of imprisonment, after which the prisoner may apply to the Parole Board for release on licence. However, if the crime is exceptionally serious, the trial judge may make a "whole life order" pursuant to which the prisoner will *never* be released on parole. In such cases, the Secretary of State has a statutory discretion to release the prisoner if satisfied that "exceptional circumstances" exist which justify the prisoner's release on compassionate grounds. The Secretary of State's written policy is to exercise the discretion to release a prisoner only where the prisoner is terminally ill or seriously incapacitated.

The applicants in *Vinter* were three British nationals who had been given whole life sentences (either under the current law set out above or pursuant to certain transitional provisions) for committing murders which were considered to be especially heinous. The applicants submitted that their whole life orders, which afforded them no possibility of release except at the discretion of the Secretary of State in narrowly defined circumstances, breached article 3.

Decision

At first instance, the Fourth Section of the Court in a 4:3 decision found in favour of the United Kingdom on the basis that an irreducible life sentence (whether mandatory or discretionary) will only breach article 3 if the applicant's continued imprisonment can no longer be justified on any legitimate penological grounds. According to the majority at first instance, because imprisonment will almost always be justified at the time of the sentence of imprisonment being imposed, any breach of article 3 will not occur until some time after sentencing and, indeed, may never occur (if the prisoner's imprisonment continues to be justified for the whole of the prisoner's life). By contrast, the minority found that an irreducible life sentence will *always* breach article 3 and that, accordingly, a breach will occur when the sentence is imposed.

On appeal the Grand Chamber, by a majority of 16:1, agreed with the minority at first instance. The Grand Chamber found that article 3 of the Convention prohibits all irreducible life sentences and that, accordingly, a prisoner must have at least some possibility of being released. The Grand Chamber held that a prisoner's circumstances may change such that continued imprisonment is no longer justified, that a prisoner who is subject to an irreducible life sentence may not be able to atone for his or her crimes, and that it is incompatible with human dignity to deprive a person of their liberty "without at least providing him with the chance to someday regain that freedom". In a separate concurring judgment, Judge Power-Forde found that article 3 encompasses "the right to hope", finding that "[t]hose who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change".

Having found that article 3 prohibits irreducible life sentences, the Grand Chamber found that the sentences imposed upon the applicants were in fact irreducible. The Grand Chamber noted that the relevant question is whether the prisoner has "any prospect of release" and that the imprisonment will be considered irreducible if, either at law or in fact, the sentence cannot be reduced. On the basis that different nations may legitimately seek to comply with their obligations under the Convention in different ways (the so-called "margin of appreciation"), the court found that article 3 does not require any particular form of review of life sentences (for example, review by a parole board). Nevertheless, the Court found that the discretionary review by the Secretary

of State on “highly restrictive conditions” did not create a sufficient prospect of release to avoid a breach of article 3. In this regard, it is useful to compare the case with *Kafkaris v Cyprus* [GC], no. 21906/04 in which the Grand Chamber found that, although there was no provision for granting parole for any prisoners in Cypriot prisons (including those serving life sentences), the applicant's life sentence was not irreducible because the President of the Republic of Cyprus had a discretion (which had previously been exercised in other cases) to remit, suspend or commute any sentence or to order a prisoner's conditional release.

The question of whether the applicants should actually have been released was not at issue before the Grand Chamber, and so the finding that there was a violation of article 3 did not mean there was a prospect of their imminent release. That would turn on a separate question as to whether there were any grounds for their continued incarceration (e.g. dangerousness) in their individual cases.

Commentary

It remains to be seen how the United Kingdom will respond to the Grand Chamber's decision in *Vinter*. In the meantime, the decision's potential relevance in Australia is a subject worthy of consideration.

Legislation in every state and territory in Australia permits (or, in certain circumstances, requires) courts to impose a sentence of life imprisonment without parole. The Grand Chamber's decision will be of particular relevance in Victoria and the Australian Capital Territory given that Victoria’s Charter of Human Rights and the *Human Rights Act 2004* (ACT) each contain a provision in relevantly identical terms to article 3 of the Convention.

With respect to sentences of life imprisonment without parole in Victoria, the Victorian Court of Appeal noted in *R v Coulston* [1997] 2 VR 446 at 462 that “dreadful crimes … may require dreadful punishments” and that, accordingly, sentences of life imprisonment without parole should not be regarded as only appropriate in very rare cases. As at 2012, twelve prisoners in Victoria were serving sentences of life imprisonment without parole.

Regardless of the possible jurisprudential effect in Australia of the Grand Chamber's decision in *Vinter*, the decision is a reminder of the important balance in sentencing between, on one hand, ensuring the safety of the public and effectively deterring crime and, on the other hand, ensuring that prisoners are treated with a degree of dignity, are afforded an opportunity to rehabilitate and are not entirely bereft of hope.

This decision is available online at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122664

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Russian denial of prisoner voting rights violates European Convention

Anchugov and Gladkov v Russia [2013] ECHR, *Application Nos 11157/04 and 15162/05* (4 July 2013)

Summary

The European Court of Human Rights unanimously held that the Russian Federation’s laws denying prisoners the right to vote violated article 3 of Protocol 1 (right to free elections) of the European Convention on Human Rights.

The case involved two prisoners who argued that their incarceration and consequent disenfranchisement, under article 32 § 3 of the Russian Constitution, violated their right to vote in

various parliamentary elections. Despite the severity of the offences for which the applicants had been incarcerated, the Court found that the applicants had been denied their right to vote at the parliamentary elections and article 32 § 3 breached the Convention as it imposed a blanket ban on the right of the prisoners to vote and failed to account for the length of the sentence or the gravity of the offence committed.

Facts

The first applicant, Mr Sergey Borisovich Anchugov, a Russian national, was convicted of murder, theft and fraud in 1998 and sentenced to death. The second applicant, Mr Valdimir Mikhaylovich Gladkov, also a Russian national, was convicted of murder, aggravated robbery, participation in an organised criminal group and resistance to police officers in 1998 and sentenced to death. The applicants appealed their sentences in 1999 and 2000 respectively, and their respective sentences were reduced from death to 15 years' imprisonment.

Following incarceration, Mr Anchugov and Mr Gladkov were excluded from voting in parliamentary and presidential elections under article 32 § 3 of the Russian Constitution.

Mr Anchugov and Mr Gladkov, on various occasions, unsuccessfully challenged article 32 § 3 of the Constitution before the Russian Constitutional Court. In 2004, Mr Gladkov applied to the European Court of Human Rights, with the application being dispatched in 2005. Mr Gladkov was released on parole in April 2008, while Mr Anchugov remained in prison.

Decision on the violation of article 3 of Protocol No. 1 to the Convention

Mr Anchugov and Mr Gladkov, relying on article 3 of Protocol No. 1 of the Convention, argued that their disenfranchisement had violated their right to vote in various elections held between 2000 and 2008. Further the applicants argued that their disenfranchisement violated their right to express an opinion under article 10 (freedom of expression) of the Convention and was discriminatory, due to their status as prisoners, under article 14 (prohibition of discrimination) of the Convention.

Relying on *Hirst v the United Kingdom (No 2)* [GC] no 74025/01, the applicants argued that the deprivation of the right to vote on prisoners in detention, regardless of the severity of their offences was a breach of the Convention. The Russian Government argued that *Hirst* was distinguishable, as a suspension on prisoners' voting rights was enshrined in the Constitution, rather than legislation (as was the case in *Hirst*). The Court accepted that the rationale for the applicant's constitutional disenfranchisement was directed at instilling a sense of civic responsibility and respect for the rule of law. However, the Court did not accept that the restrictions placed on the applicants were proportional to these aims. The Court found that:

> when disenfranchisement affects a group of people generally, automatically and indiscriminately, based solely on the fact that they are serving a prison sentence, irrespective of the length of the sentence and irrespective of the gravity of their offence and their individual circumstances, it is not compatible with article 3 of Protocol No 1 (*Scoppola (No 3)*, {GC} no 126/05 § 96).

The Russian Government further submitted that the Constitution, as the highest ranking legal instrument in Russia, took precedence over all other laws, including international treaties that Russia was a party to. Referring to article 27 of the Vienna Convention on the Law of Treaties, the Court found that a State may not invoke provisions of its internal law as justification for failing to comply with a treaty. As Russia had acceded to the Convention, in the absence of reservations, Russia must ensure that the people of Russia enjoy the rights and freedoms protected in the Convention.

Commentary

The Court's decision establishes that a blanket dismissal of the rights enshrined in the Convention will lead to a violation of article 3 of Protocol No. 1 of the Convention. Restrictions on prisoner voting rights can be imposed, however they need to take into consideration the seriousness of the offence. In Australia, prisoners serving more than a three year sentence are suspended from voting pursuant to the *Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Act 2011* (Cth). There are other instruments in Australia, however, that guarantee the right to vote, such as section 18(2)(a) of Victoria's Charter of Human Rights which provides that every eligible person is entitled to the right and opportunity to vote.

In 2006 the High Court decision of *Roach v Electoral Commissioner and Another* [2007] HCA 43 confirmed the validity of legislation imposing suspension on the voting rights of prisoners serving a sentence of more than three years. However, the High Court in *Roach* struck down proposed amendments under the *Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Act 2006* (Cth) which sought to disenfranchise every person serving a prison sentence.

The High Court noted that the Constitution provides for a system of representative government which, at its heart, consists of the people of Australia voting in elections. The High Court held that the amendments operated to disqualify prisoners from voting, without regard to the culpability of the offender.

In July 2013 the Coalition announced that, if elected in the upcoming federal election, it intends to amend legislation to suspend the voting rights for prisoners serving a custodial sentence of more than one year. Although the High Court rejected the previous similar amendments, it is unclear whether the High Court will accept a more restrictive legislative provision that does not amount to an absolute ban.

This decision is available online at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122260

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Smoke-free hospital policy upheld by the New Zealand High Court

B v Waitemata District Health Board [2013] NZHC 1702 (8 July 2013)

Summary

Three applicants challenged a Waitemata District Health Board policy to prohibit smoking in its hospitals and surrounding grounds (Policy). The applicants argued that the Policy was inconsistent with the Board's controlling legislation and the *New Zealand Bill of Rights Act 1990* (Bill of Rights).

The New Zealand High Court dismissed the applicants' claims, finding that the Board was lawfully exercising its powers consistent with its statutory framework. His Honour Justice Asher found no rights were limited by the Policy; however, he concluded that even if there were, these limitations would be justified in accordance with the Bill of Rights.

Facts

The Policy required the Board to ensure that employees, patients and members of the public were protected from tobacco smoke. It also charged the Board with responsibility for encouraging and supporting patients and staff to cease smoking. In accordance with the Policy, all staff, patients and visitors were required to leave the hospital and surrounding grounds to smoke.

This case was a consolidation of three different proceedings. Two of the applicants had been psychiatric inpatients at North Shore Hospital in Auckland which is run by the Board. The third applicant was a former psychiatric nurse at Waitakere Hospital, also operated by the Board.

The applicants sought judicial review of the Policy on three grounds. The applicants argued the Policy was illegal, pleading a failure to preserve dedicated smoking rooms with ventilation, a breach of the obligation to provide a safe working environment and a failure to take into account relevant considerations. The applicants also argued the policy was irrational and its implementation a breach of natural justice (including an alleged failure by the Board to take into account legitimate expectations).

The applicants further argued that the Policy breached rights protected under the Bill of Rights to be free from discrimination, to not be subjected to torture or cruel treatment and the rights of detainees to be treated with humanity and respect for the inherent dignity of the person. The applicants also relied on the International Covenant on Civil and Political Rights and the European Convention on Human Rights to claim a breach of the right to respect for private life.

Decision

Justice Asher found that the Board, in accordance with its controlling legislation, was entitled to implement a non-smoking policy to protect patients, staff and visitors from smoke and to promote the cessation of smoking. His Honour held that in deciding on the Policy the Board did not fail to consider relevant considerations or consider irrelevant matters. Justice Asher further found that there was no irrationality, breach of duty to consult or breach of legitimate expectations.

His Honour found that there was no discrimination on the ground of psychiatric illness in breach of the Bill of Rights. His Honour noted that the restraint applied equally to all patients, staff and visitors and was not on the basis of psychiatric illness or acute illness. Rather, his Honour found that the Policy effectively prohibited smoking on the basis of particular features of the applicants' condition (for example being a danger to themselves or others), or employment situation, that led to their detention or presence on the premises, and consequent inability to leave the hospital property to smoke.

His Honour found that an addiction to nicotine is not a disability and therefore that it was not necessary to determine whether the Policy discriminated on this ground. His Honour also concluded that there were no breaches of the other human rights argued by the applicants. However, his Honour found that even if there had been breaches of the applicants' rights, the Policy would be a justified limitation on these; the ban is rationally connected with the purpose of reducing smoking and protecting people from smoke inhalation, is proportionate, and does no more than is necessary to achieve its purpose.

Commentary

It is illegal in Victoria to smoke in enclosed workplaces (*Tobacco Act 1987* (Vic)). There are exemptions to this law for areas in approved mental health services. However, many Victorian hospitals do not allow smoking within a defined perimeter of the hospital and most have smoke-free zones that include outdoor areas such as internal courtyards. In addition to these policies the Victorian Chief Psychiatrist has developed a guideline promoting smoke-free public mental health inpatient and residential units (issued May 2012).

Similar to this case, there is scope to argue that smoke-free policies in Victorian psychiatric inpatient units contravene the rights of patients to humane treatment when deprived of liberty and to protection from torture and cruel, inhuman or degrading treatment, contrary to the Victorian Charter (ss 10 and 20). It is arguable that nicotine deprivation and its associated effects,

particularly for psychiatric inpatients in secure extended care units, could be sufficiently severe to constitute physical and mental suffering contrary to these rights. It is also arguable that smoke-free policies contravene the rights of involuntary patients to recognition and equality before the law, contrary to section 8 of Victoria's Charter of Human Rights. However, any challenge on these grounds would need to overcome the proportionality test in section 7(2) of the Charter which allows rights to be subject to reasonable limitations. Although unsuccessful in this New Zealand case, there is scope in the Victorian context to argue that there are less restrictive means reasonably available to achieve the purposes of encouraging smoking cessation and protecting patients, staff and passers-by from the effects of smoke inhalation.

There is also scope to argue that implementing smoke-free policies in Victorian psychiatric inpatient units constitutes unlawful discrimination in breach of the Victorian *Equal Opportunity Act 2010* (EO Act). Case law in other jurisdictions has entertained the idea that drug dependence falls within the definition of disability for the purposes of equal opportunity legislation. In this context it would be open to decision-makers to find that nicotine addiction would also fall within this category. However, any challenge under the EO Act would need to overcome issues of causation as well as an exception permitting discrimination if it is reasonably necessary to protect the health or safety of any person (including the person discriminated against) or of the public generally (EO Act s 86).

The decision is available at: http://www.nzlii.org/nz/cases/NZHC/2013/1702.html

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State responsibility under European Convention extends to soldiers serving overseas

Smith v The Ministry of Defence [2013] UKSC 41 (19 June 2013)

Summary

The UK Supreme Court has held that British servicemen who died during service in Iraq were within the jurisdiction of the UK for the purposes of article 1 of the European Convention on Human Rights. Claims that the UK breached article 2 of the Convention by failing to implement a framework for protecting the lives of those servicemen were therefore not struck out by the Court. The Court, instead, required further facts to be examined and saved a determination on the issue for a later date.

Facts

These proceedings stem from the deaths of British servicemen in Iraq. There were three sets of claims examined. This case note focusses upon the second set of claims ("the Snatch Land Rover claims"), which arose from the detonation of improvised explosive devices killing two soldiers travelling in Snatch Land Rovers. It was claimed that the Ministry of Defence breached an implied positive obligation in article 2 of the Convention to take preventative measures to protect the life of soldiers patrolling in Snatch Land Rovers. The other claims were based in negligence at common law.

The Court was asked to determine whether the servicemen were within the UK's jurisdiction as required by article 1 of the Convention and, if so, whether article 2 imposed positive obligations on the UK to prevent deaths of its own soldiers in overseas military operations.

Decision

Lord Hope (with whom Lord Walker, Lady Hale and Lord Kerr agreed) provided the leading judgment. In relation to whether the servicemen were within the UK's jurisdiction, Lord Hope cited *Bankovic v Belgium* (2001) 11 BHRC 435, which held that the reach of the Convention is inhibited by territorial limits which preclude extraterritorial jurisdiction, save in exceptional circumstances. Lord Hope considered that military service abroad was such an "exceptional circumstance" which justified extraterritorial jurisdiction.

In making this determination, Lord Hope referred to *R (Al-Skeini) v Secretary of State for Defence* [2008] AC 153. He noted that it was not directly applicable to the present circumstances as the casualties in *Al-Skeini* were Iraqi citizens as opposed to British servicemen. Nevertheless, he extracted from the case a general principle that extra-territorial jurisdiction can exist whenever a state has effective authority and control over an individual. Also, Lord Mance in *Al-Skeini* said that "An occupying state cannot have jurisdiction over local inhabitants without already having jurisdiction over its own armed forces". Since it was clear that the UK had jurisdiction over local Iraqi inhabitants, Lord Hope held that the UK must have jurisdiction over servicemen within their military forces. Therefore, the British servicemen were deemed to be within UK jurisdiction at the time of their deaths and the Convention consequently applied.

In examining whether article 2 imposed positive obligations on the UK, Lord Hope looked for guidance from the European Court of Human Rights. After analysis of the relevant jurisprudence, Lord Hope concluded the following:

> The guidance which I would draw from the Court's jurisprudence in this area is that the court must avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations in situations of armed conflict which are unrealistic or disproportionate. But it must give effect to those obligations where it would be reasonable to expect the individual to be afforded the protection of the article. It will be easy to find that allegations are beyond the reach of article 2 if the decisions that were or ought to have been taken about training, procurement or the conduct of operations were at a high level of command and closely linked to the exercise of political judgment and issues of policy.

Lord Hope noted that the circumstances of the Snatch Land Rover claims did not fit neatly into the categories established by the guiding authorities. The Court deemed that more facts were necessary in order to make an accurate determination. In light of this uncertainty, the Court considered its overarching objective is to try and achieve "a fair balance … between the competing interests of the individual and of the community as a whole". The Court considered it unfair to apply too exacting a standard. As a result, the majority held that the claims ought not to be struck out and for the decision on liability to be deferred until after the trial, when further facts may be examined.

In the minority, Lord Mance (with whom Lord Wilson agreed) contended that this was a question for the European Court of Human Rights and, without any signal from them, the Court should not be extending or introducing principles which do not have basis in common law. Hence, Lord Mance would have struck out the claims.

Editor's note

The case is the latest in a line of authorities confirming that a state's human rights obligations do not end at its territorial borders. The decision confirms the principle that a state can have extra-territorial responsibility in respect of matters that are within its effective authority and control.

The decision is available online at: http://www.bailii.org/uk/cases/UKSC/2013/41.html

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US Supreme Court finds exclusion of same-sex marriage unconstitutional

United States v Windsor, No. 12-307 (US Supreme Court, 26 June 2013)

Summary

The Supreme Court of the United States has found the *Defense of Marriage Act* (DOMA), which defined "marriage" and "spouse" as excluding same-sex partners, unconstitutional. The Court held DOMA to be a deprivation of the equal liberty of persons, which is protected by the Fifth Amendment to the United States Constitution.

Facts

Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship. In 2007 they travelled to Ontario, Canada, where they were lawfully married. New York has since legislated to recognise same sex marriages. After Spyer's death in 2009, Windsor was barred by DOMA from claiming the estate tax exemption for surviving spouses.

Section 3 of DOMA amended the Dictionary Act in Title 1, §5 of the United States Code to provide a definition of "marriage" and "spouse" for the purposes of all federal statutes. "Marriage", it stated, "means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

Windsor paid the taxes and commenced action in the United States District Court for the Southern District of New York after she was denied a refund. She contended that DOMA violated the guarantee of equal protection, as applied through the "due process" clause of the Fifth Amendment ("nor shall any person … be deprived of life, liberty, or property, without due process of law").

While the refund suit was pending the Attorney-General announced that, while §3 of DOMA would still be enforced, its constitutionality would no longer be defended by the executive. The Bipartisan Legal Advisory Group of the House of Representatives then voted to intervene to defend DOMA. This unusual aspect of the procedural history was a point of contention in the Supreme Court.

The District Court held that §3 of DOMA was unconstitutional and ordered the Treasury to refund the tax with interest. That decision was affirmed by the Court of Appeals for the Second Circuit. The Supreme Court granted *certiorari* after the government failed to provide Windsor with her refund and continued to enforce §3 of DOMA.

Decision

The Supreme Court had two questions to decide: first, whether the parties had standing, and second, whether DOMA was constitutional. The majority (Justice Kennedy, joined by Justices Ginsburg, Breyer, Sotomayor and Kagan) held that the parties had standing and that DOMA was unconstitutional. Justice Scalia, joined by Justice Thomas and Chief Justice Roberts in part, dissented on both points; Justice Alito, joined in part by Justice Thomas, wrote a separate dissenting opinion.

Standing

The essence of the controversy regarding standing was stated by Justice Scalia:

> the plaintiff and the Government agree entirely on what should happen in this lawsuit. They agree that the court below got it right; and they agreed in the court below that the court below that one got it right as well. What, then, are we *doing* here?

For the majority, the fact that the judgment below ordered the government to pay money that it would not otherwise disburse was key. There was still an injury to the Treasury if the payment was made (or to Windsor if it was not), no matter the executive's views of DOMA's constitutionality.

The majority was also satisfied that prudential concerns arising from the executive's position – namely whether the case would be properly argued – had been overcome. The Bipartisan Legal Advisory Group, defending DOMA's constitutionality, presented a sufficiently "sharp adversarial argument".

Justice Alito agreed with the majority here, but on slightly different grounds.

Justice Scalia (Justice Thomas agreeing, Chief Justice Roberts agreeing on this point) disagreed vehemently with the majority as to standing. He described the majority's decision to hear the case as "jaw-dropping" and criticised its "exalted conception of the role of this institution in America".

Constitutionality of DOMA

In addressing DOMA's constitutionality, the majority first established that the definition and regulation of marriage had long been treated as within the authority of the states. New York's decision to legalise same sex marriage and give a certain class of persons the right to marry, conferring upon those persons a "dignity" and status, was therefore a proper exercise of its sovereign authority. However, the Court considered that DOMA sought to "injure the very class New York seeks to protect" – its principal purpose was to impose inequality, and its necessary effect was to "demean those persons who are in a lawful same-sex marriage". Unable to identify a legitimate purpose which could overcome that purpose and effect, the majority held DOMA to be unconstitutional.

Justice Scalia described the majority's judgment as "rootless and shifting" and criticised it for ascribing DOMA a purpose without comprehensively discussing the arguments put forward by the statute's defenders. More fundamentally, though, his Honour thought the Court simply should not have heard the case. "It is one thing for a society to elect change", he wrote; "it is another for a court of law to impose change". Justice Alito (Justice Thomas agreeing on this point) and Chief Justice Roberts filed separate dissenting opinions, displaying similar misgivings about the appropriateness of the Court hearing the case and criticising the majority's reasoning.

Commentary

Needless to say, this case and its outcome were extremely controversial. It has been heralded as a milestone in US jurisprudence, and was welcomed by same-sex marriage campaigners worldwide.

Its potential impact in Australia, though, is difficult to gauge. The Australian Constitution contains no express guarantee of due process analogous to the Fifth Amendment, and while sub-section 8(3) of Victoria's Charter of Human Rights promises "the equal protection of the law without discrimination", that is evidently in different terms to the US due process guarantee. In Australia, then, it will perhaps be in the political realm, rather than jurisprudentially, that the case will prove most influential.

This decision is available online at: http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf

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UK Supreme Court upholds legislative limitations on the right to a fair trial

Bank Mellat v Her Majesty's Treasury (No 1) [2013] UKSC 38 (19 June 2013)

Summary

A narrow majority of the UK Supreme Court has ruled that it is entitled to consider "closed materials", being materials only available to one party to a proceeding, in certain cases arising under the *Counter-Terrorism Act 2008* (Act). The court, in coming to its decision, sought to balance the principles of open justice and a person's right to a fair trial with considerations of national security.

Facts

The Act empowers the state to take steps to prevent money laundering, terrorist financing and the proliferation of nuclear weapons. Specifically, it empowers the Treasury to direct financial institutions not to engage in transactions or dealings with specified others, in circumstances where it has a reasonable belief that money laundering or the financing of terrorist or nuclear weapons programs has occurred. The underlying rationale of the Act is the protection of national security.

On 9 October 2009, the Treasury issued a directive that all members of the UK's financial sector cease dealing with Bank Mellat, an Iranian bank with substantial operations in the UK and other countries. This directive "effectively shut down the United Kingdom operations of the Bank and its subsidiary, and is said to have damaged the Bank's reputation and goodwill both in this country and abroad".

The issues

The Bank applied to the High Court to have the directive set aside. The government argued that it had highly sensitive and confidential evidence in support of the directive which ought not be disclosed to the Bank or others. The trial judge agreed to engage the closed procedures specifically provided for under the Act.

The two-day trial before the High Court was partly open and partly closed. During the closed part of the hearing, the Bank's interests were represented by "special advocates" who had been given clearance to access the sensitive material, but were not permitted to disclose it or seek instructions from the Bank in relation to that material. At the conclusion of the hearing, the trial judge issued two judgments, one open and one closed. Ultimately, the trial judge confirmed that the Bank had facilitated Iran's nuclear weapons program and, thus, upheld the directive.

The Bank then appealed to the Court of Appeal. That appeal was held largely by way of an ordinary open hearing, although there was a short closed hearing at which the Court of Appeal considered the trial judge's closed judgment. The Court of Appeal declined to grant the appeal and the directive was upheld.

The Bank then appealed to the Supreme Court. One of the key issues before the Supreme Court was the question of whether it was entitled to conduct its own closed procedure and consider the closed judgment of the trial judge. This question was a complex one because, unlike the High Court and the Court of Appeal, the Act made no specific provisions for closed hearings in the Supreme Court, which was still in the process of being established when the Act was enacted. Hence, the source of the legislative power to establish closed procedures – if it existed at all – was unclear.

Decision

Majority decision

A five-member majority found that the Supreme Court *did* have the power to adopt the closed procedures. This power, according to the majority, was derived from legislation and was not an inherent power.

The majority distinguished the present case from the landmark decision in *Al Rawi v Security Service* [2012] 1 AC 531, in which the Court had previously held it had no inherent power to create closed processes. In *Al Rawi*, Lord Dyson had said:

> …the right to be confronted by one's accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that.

The majority endorsed the rationale in *Al Rawi* and emphasised the fundamental importance of the principles of open justice and the right to a fair trial. In this case, however, the majority said Parliament had abrogated the right to a fair trial through the provisions of the Act, which translated to the Supreme Court notwithstanding that the Act did not make specific reference to the Supreme Court.

The majority overcame this lacuna by relying on the rules of the Supreme Court which, in essence, require that court to deliver justice in appeals from lower courts. In other words, in order to properly hear appeals and deliver justice, the Supreme Court must be able to adopt the same processes relating to closed materials as lawfully adopted in the courts below.

The majority clearly had misgivings about the closed processes generally, and issued guidance about the steps that parties and courts ought to take to address proportionality and limit the abrogation of rights as much as practical.

Minority decisions

Three members of the Supreme Court issued dissenting judgments, including Lord Kerr and Lord Reed who found that the rights to open justice and a fair trial prevailed in the absence of any express provisions in the Act enabling the Supreme Court to conduct closed processes.

Lord Dyson also dissented, finding that although the Supreme Court had the power to adopt a closed material procedure, "the power should only be exercised where it has been convincingly demonstrated that it is necessary to do so in the interests of justice." He argued that the threshold was not met in this case, because the closed judgment added nothing to the Supreme Court's ultimate conclusions in the appeal.

Commentary

The right to a fair trial, which encompasses a person's right to know the case against them and properly test that case, has been the subject of a number of international human rights decisions.

This right has also been the subject of legislative limitations in Australia, where refugees who are given negative security assessments by ASIO may be detained indefinitely without being informed of the evidence that ASIO has against them, or the opportunity to test that evidence. Refer to Madeline Forster's case note on ZZ v Secretary of State for the Home Department *[2013] EUECJ C-300/11* from a previous edition of this bulletin for a further discussion of these issues.

The decision is available online at: http://www.bailii.org/uk/cases/UKSC/2013/38.html

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European Court of Human Rights finds Lithuanian conjugal visit laws for persons on remand discriminatory

Varnas v Luthania, [2013] ECHR, *Application no 42615/06* (9 July 2013)

Summary

The European Court of Human Rights held that Lithuanian laws concerning the rights of persons on remand to receive conjugal visits were discriminatory when compared to the same right of convicted persons serving a custodial sentence. The Court therefore found a violation of article 14 (prohibition on discrimination), in conjunction with article 8 (right to family life), of the European Convention of Human Rights.

Facts

In March 2004, the Applicant was arrested on suspicion of belonging to a criminal association and placed on remand during the pre-trial investigation, where he remained for over two years. In June 2006 the Applicant was convicted and sentenced to 12 years' imprisonment (reduced to six years on appeal) and in September of the same year he was transferred to a correctional facility to commence serving his sentence. In June 2007, a second criminal investigation was brought against the Applicant and he was again placed on remand, this time until February 2008. In October 2009 he was sentenced to five years imprisonment in relation to the second set of criminal charges.

During the periods of time the Applicant was held on remand, he was not permitted to receive conjugal visits from his wife, despite repeated requests. In comparison, convicted persons serving a custodial sentence were permitted to receive conjugal visits.

The Applicant brought three main complaints before the Court:

- The length of his pre-trial detention was excessive and disproportionate, and thus in violation of article 5 of the Convention (right to liberty and security of person);
- His inability to receive conjugal visits while on remand violated article 8 of the Convention along, and in conjunction with article 14; and
- The deplorable conditions of his pre-trial detention at the remand prison violated the Convention.

The Court held that only the second complaint was admissible. In relation to the remaining claims, the Court held that the Applicant had either failed to exhaust domestic remedies, or that they were unfounded. For this reason, only the arguments relating to the second complaint will be dealt with further.

Submissions

The Applicant argued that his inability to receive conjugal visits from his wife while on remand caused him mental and physical suffering so severe it amounted to torture. The inability to maintain a social and physical connection with his wife also violated article 8 of the Convention (right to family life) as is "denied [him] the possibility of having children and risked breaking up his marriage and the loss of family happiness."

Moreover, the Applicant argued that denying persons on remand conjugal visits, but not persons serving a custodial sentence, meant a person whose guilt had not yet been established by a court faced harsher restrictions than someone already convicted. He argued this amounted to punishment without conviction and was contrary to the presumption of innocence.

Lithuania argued that pre-trial detention necessarily entails restriction of the accused person's private and family life. However, it argued that denying persons on remand conjugal visits did not violate the Convention because this interference with the prisoner's Convention rights was "prescribed by law". Moreover, there was a legitimate aim for distinguishing between persons on remand and convicted persons: the stricter restrictions for persons on remand are necessary to ensure the person does not obstruct the pre-trial investigation, abscond or commit further crimes.

Decision

The Court noted that article 14 (prohibition on discrimination) does not exist independently, but only has effect in relation to other Convention rights. Since the Applicant's claim fell within the ambit of article 8, article 14 was applicable in this case, regardless of whether it found a violation of the Applicant's article 8 rights.

The Court also noted that "for an issue to arise under article 14, there must be a difference in treatment of persons in analogous, or relevantly similar, situations". It held that the situation of a person on remand was sufficiently similar to that of a convicted prisoner.

Taking into consideration that it generally allows Member States some discretion as to how they interpret Convention rights (through the "Margin of Appreciation Doctrine") in relation to prisoners and penal policy, the Court held that the difference in treatment in this case was discriminatory because it was not justified in the circumstances. The Court held that the legitimate aim of ensuring the integrity of a criminal investigation could be attained through less oppressive means, such as not applying the prohibition on conjugal visits to all persons on remand as a blanket rule. The Lithuanian government was not entitled to rely solely on legal norms for justification without reference as to why such restrictions might be necessary in each individual case. The circumstances of the Applicant's case did not justify a complete prohibition of conjugal visits. While recognising the severity of the charges against the Applicant, his wife was neither a co-accused nor a witness. Consequently, the Court found Lithuania in violation of article 14 in conjunction with article 8 of the Convention.

Having found this breach, the Court did not deem it necessary to consider whether there had been a violation of article 8 alone.

Commentary

The decision in *Varnas* raises some interesting questions in a Victorian context about the right of a prisoner to conjugal visitation. Although in different terms, Victoria's Charter of Human Rights requires that people enjoy their human rights without discrimination (section 8) and requires protection of the family unit (section 17).

As it stands, Victoria allows conjugal visits, but only to eligible prisoners. Only prisoners in minimum and medium level security prisons are eligible. Such a two-tiered system may raise human rights questions similar to those in *Varnas*. However, it may be argued that the two-tiered conjugal visitation system in Victoria is serving a more legitimate purpose than that in *Varnas* as the differential treatment is directly tied to a prisoner's security classification.

The decision is available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122173

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Exclusion of pregnant students from schools undermines fundamental rights

Head of Department, Department of Education, Free State Province v Welkom High School and Another Case (CCT 103/12) [2013] ZACC 25 (10 July 2013)

Summary

The Constitutional Court of South Africa has ruled that school pregnancy policies that allow the automatic exclusion of pregnant students, violate students' constitutional rights to equality and a basic education and were not in the best interests of the students. The Court ordered that the policies be reviewed.

Facts

In 2008 and 2009 respectively, the governing bodies of Welkom High School and Harmony High School adopted pregnancy policies which provided for the automatic exclusion from school of any student who fell pregnant. In October 2009, a 16-year-old student in grade 10 at Harmony High School fell pregnant and was instructed that she would not be readmitted to school for the remainder of 2010. The following year, a grade 9 student at Welkom High School also fell pregnant, and was instructed to leave school pursuant to the school's pregnancy policy.

Following requests from the students' families for assistance in having the students' cases reviewed, the Head of the Department of Education of the Free State Province ('HOD') issued instructions to the principals of the schools to readmit the students who had been excluded in accordance with the pregnancy policies. The schools approached the High Court for interdictory relief, arguing that the HOD did not have the power to issue instructions to the principals requiring them to disregard the schools' policies.

The High Court held that the HOD did not have the legal authority to act as it did. This decision was upheld on appeal, with the Supreme Court of Appeal adding that because the content of the pregnancy policies had not been challenged in the proceedings, it was not necessary to consider the constitutionality of them. The HOD appealed to the Constitutional Court.

The case primarily dealt with the proper exercise of public power by organs of the state and the steps that must be taken by the Executive in order to protect fundamental rights. In addition, the Court took it upon itself to evaluate the human rights implications of the pregnancy policies, as the constitutional rights to education, human dignity, privacy, bodily and psychological integrity, and equal protection and benefit of the law, as well as the prohibition against unfair discrimination were all implicated by the pregnancy policies.

Pending the decisions of the Courts, the two students were readmitted to their schools.

Decision

Justice Khampepe delivered the leading judgment (with Moseneke DCJ and Justice Van der Westhuizen concurring) and began by considering whether the Schools Act authorised public school governing bodies to adopt pregnancy policies. Justice Khampepe concluded that the governance responsibilities placed on school governing bodies, and their authority to adopt codes of conduct, empowered them to adopt pregnancy policies. However, she found that this power was limited by the Schools Act and the Constitution, and did not extend to adopting pregnancy policies that have exclusionary effects: "[n]o governing body may adopt and enforce a policy that undermines, amongst others, the fundamental rights of pregnant learners to freedom from unfair discrimination and to receive an education".

Having made this finding, Justice Khampepe went on to determine what course of action the HOD was empowered to take. Justice Khampepe found that when faced with a school policy that offends the Constitution and the Schools Act, an HOD is obliged to engage in a consultative process with the governing body and, if there are reasonable grounds, take over the performance of the governance or policy formulation function in order to give effect to the relevant constitutional rights and the objectives of the Schools Act. Additionally, the HOD, as an organ of the state, has obligations under section 7(2) of the Constitution to respect, protect, promote and fulfill the rights as enshrined in the Constitution.

Justice Khampepe found that the schools' governing bodies were empowered to adopt pregnancy policies and that in addressing his concerns regarding the policies, the HOD was obliged to act in accordance with the Schools Act, which he did not. The HOD therefore acted unlawfully in issuing instructions to the principals that they readmit the pregnant students, contrary to their schools' pregnancy policies. Justice Khampepe held that the HOD's obligations under section 7(2) of the Constitution did not affect this finding, as the obligation to protect must be discharged in accordance with the rule of law. Therefore, while the HOD was obliged to protect the rights of pregnant students to freedom from unfair discrimination and a basic education, he was obliged to do so lawfully.

Justice Khampepe then considered the unconstitutionality of the pregnancy policies. She found that the policies were discriminatory as they differentiate between students on the basis of pregnancy, which is disallowed under section 9(3) of the Constitution. The policies also limit pregnant students' fundamental right to education, as protected by section 29 of the Constitution, by requiring students to repeat up to a year of schooling. The requirement that students report to the school authority when they believe they are pregnant violates their rights to human dignity (section 10), privacy (section 14), and bodily and psychological integrity (section 12(2)). This is further compounded by the obligation placed on other students to report to the school authority when they suspect a student is pregnant. Finally, Justice Khampepe considered that the inflexible nature of the policies, which require the automatic exclusion of pregnant students, violates section 28(2) of the Constitution, which provides that a child's best interests are of paramount importance in every matter concerning a child.

In light of these findings, Justice Khampepe ordered that the appeal be dismissed and that the schools' governing bodies review their pregnancy policies in light of the judgment and furnish the Court with a copy of the revised policies. Further, the Court ordered that the parties engage meaningfully with each other to give effect to the revised policies. Justice Froneman and Skweyiya agreed with these orders.

In contrast to the majority's findings on the exercise of public power, Justice Zondo found that the governing bodies did not have the power to make the pregnancy polices as they were inconsistent with provisions of the Schools Act and the Constitution. As such, he found that the HOD not only had the power to act as he did in instructing the principals not to carry out or implement the pregnancy policies which were in breach of the Schools Act and the Constitution, he was obliged to do so.

Commentary

Article 28 of the *United Nations Convention on the Rights of the Child* recognises the right of the child to education. However, unlike the South African *Bill of Rights*, neither the Australian Constitution nor Victoria's Charter on Human Rights contains a specific right to education. Nevertheless, the Charter provides that every person has the right to enjoy their human rights without discrimination (section 8(2)) and that every child has the right to such protection as is in

their best interests and is needed by them by reason of being a child (section 17(2)). Therefore, as in the present case, a policy which discriminated against pregnant students and was implemented inflexibly and not in the best interests of the pregnant child, would likely raise significant issues under Australia's international human rights law obligations and under the Victorian Charter.

In Victoria, additional protection is provided by the *Equal Opportunity Act* (2010) as well as Victorian Department of Education's 'Student Pregnancy and Parenting School Policy', which stipulates that students who are pregnant or parenting have the right to continue schooling. Freedom is granted to schools and principals in making local decisions about how pregnant students can be supported to continue their schooling, but the policy guards against the exclusion of pregnant students by reason of their pregnancy.

The Federal *Sex Discrimination Act 1984* (Cth) also protects against discrimination on the basis of pregnancy in the provision of goods and services, including education, although private religious schools do have an exemption under this legislation.

The decision is available at: *http://41.208.61.234/uhtbin/cgisirsi/20130715092443/SIRSI/0/520/J-CCT103-12*

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INTERNATIONAL HUMAN RIGHTS DEVELOPMENTS

UN launches LGBT awareness campaign: Free and Equal

The office of the High Commissioner for Human Rights launched a new public information campaign to raise awareness of homophobic and transphobic violence and discrimination and to promote respect for the rights of LGBT people. The campaign will focus on the need for legal reforms and public education.

The campaign was launched by Archbishop Desmond Tutu and Justice Edwin Cameron, alongside the High Commissioner Navi Pillay on Friday 26 July 2013. "The Universal Declaration of Human Rights promises a world in which everyone is born free and equal in dignity and rights – no exceptions, no-one left behind," said High Commissioner Pillay. "Yet it's still a hollow promise for many millions of LGBT people forced to confront hatred, intolerance, violence and discrimination on a daily basis."

Consensual adult same-sex activity is still a crime in over 70 countries and is punishable by death in five. In many countries where legal protections exist, homophobic and transphobic violence can still be a daily reality for many.

The campaign has also released a series of new fact sheets. The fact sheets deal with:

- criminalisation;
- equality and non-discrimination;
- homophobic and transphobic violence;
- LGBT rights in international law; and
- FAQs on sexual orientation and gender identity.

The campaign website can be accessed here: https://www.unfe.org/en

A piece by Justice Cameron on the campaign can be found here: http://ohrh.law.ox.ac.uk/?p=2371

The fact sheets can be found here: https://www.unfe.org/en/fact-sheets.

Two steps forward, one step back for LGBTI rights

In the lead-up to Prime Minister Rudd's announcement of the government's disastrous Papua New Guinea refugee 'solution', an event took place that understandably escaped much public attention.

Hours before the harsh new asylum seeker policy was unveiled, Foreign Minister Bob Carr convened a roundtable of community representatives to discuss Australia's "international agenda" on lesbian, gay, bisexual, transgender and intersex rights.

To his credit, as well as bringing us up to speed with the government's work in the area, Carr also wanted to hear from non-government organisations about what the government could do better.

True to form, the NGOs in question got together in advance of the meeting and prepared over 20 actions under six themes for the Minister to consider.

Making LGBTI rights a part of Australia's foreign policy was at the top of this list and we were pleased that shortly after the meeting the Minister issued a commitment that LGBTI rights was now part of Australia's 'core' foreign policy.

By doing this, the government sent a clear message to its diplomats across the globe that they should start to consider how to incorporate LGBTI rights in their work.

For while marriage equality occupies much public debate in Australia, in other countries being lesbian, gay, bisexual, transgender or intersex can mean persecution, abuse, imprisonment and even death.

This means that Carr's commitment has potential to have a real impact. It can help bring human rights atrocities under the spotlight. It can drive the government to support intersex babies in Africa who are dumped in rubbish tips because of their physical differences. It can improve our efforts to help countries still fighting an HIV/AIDS endemic or help promote LGBTI health issues on the ground.

Despite the negative views on homosexuality in much of the Pacific region, various cultures celebrate and respect a range of identities that we might call transgender. Supporting these minorities to attain the fullest possible health and well-being is an important goal that Australia can support.

In multilateral forums, Australia is well-positioned to encourage our Asia Pacific neighbours to progress the rights of LGBTI people. One such way is via the UN's Universal Periodical Review, where countries' human rights records are reviewed. In last year's reviews, two Pacific region countries committed to decriminalising homosexuality within the next three years. Unfortunately, while Nauru was among these, PNG is yet to commit to such action.

And it's on this front that Carr's comments are severely undermined by the 'PNG solution'.

Under the new policy, no asylum seekers 'arriving by boat' will be settled in Australia. Instead they will be processed and resettled in PNG – a country whose criminal code punishes "unnatural offences", including homosexual sex. So people who have escaped places like Iran, where homosexuals risk public execution, will be resettled in PNG where they may face up to 14 years in prison for the same 'crime'. They will be trapped in a horrible Catch 22, where in seeking protection they will have to explain that they are fleeing persecution because of their sexuality, but by doing so they will potentially be admitting to a 'crime' in PNG.

Putting people at risk of harm in this way clearly violates Australia's obligations under international law.

While it is true that there have been no known prosecutions under Papua New Guinea's anti-gay laws in recent years, the existence of such laws creates an unsafe environment for gay refugees. Indeed, gay people from PNG have sought asylum in Australia due to the persecution they face because of their sexuality.

Australia has a moral duty, and an obligation under international law, to make every effort to facilitate resettlement of such refugees in a country that does not criminalise homosexuality.

If it were not for this ruthless policy, Carr's announcement could have represented an important and historic step towards helping LGBTI people across the globe.

However, we will work with the Minister and his department to continue Australia's active involvement in the international push for LGBTI rights and ensure this commitment translates into the improved realisation of human rights on the ground.

Anna Brown *is the Director of Advocacy and Strategic Litigation at the Human Rights Law Centre.*

This article was first published on Gay News Network.

UN reviews Indonesia's implementation of ICCPR

On July 10 and 11 the UN Human Rights Committee reviewed Indonesia's implementation of the International Covenant on Civil and Political Rights.

The Committee highlighted the ongoing violence in Papua and deplored the excessive use of force by the Indonesian security forces. Since there is no effective mechanism available to hold military members accountable, the Committee sees re-occurrences of such violations as likely until Indonesia takes measures to develop effective complaint procedures. The Committee referred to the high number of extrajudicial killings that have occurred in Papua over the last 2 years and deplored the use of violence in dispersing peaceful protests in Papua.

Reports of human rights abuses in the provinces of Papua and West Papua continue to pose challenges to the Australia-Indonesia relationship. The HRLC has previously raised concerns about support Australia has provided to Indonesia's elite anti-terrorism unit, Detachment 88, which has been accused of various human rights abuses.

The International Coalition of Papua recently published a report called Human Rights in West Papua 2013 which covers events from October 2011 to March 2013.

Source: International Coalition for Papua

NATIONAL HUMAN RIGHTS DEVELOPMENTS

Appointment of Race Commissioner

The Australian Human Rights Commission President, Professor Gillian Triggs, has welcomed the appointment of Dr Tim Soutphommasane as Australia's Race Discrimination Commissioner.

Dr Soutphommasane is a Postdoctoral Fellow at the Institute for Democracy and Human Rights at the University of Sydney. He is of Chinese and Lao extraction, and a first-generation Australian.

Dr Soutphommasane has written extensively on race and politics, as a commentator for newspapers including *The Australian*, *The Sydney Morning Herald*, and *The Age*; and as the author of books such as *Don't Go Back To Where You Came From: Why Multiculturalism Works* (New South Books, 2012).

He is a board member of the National Australia Day Council, a member of the Australian Multicultural Council and a fellow of Per Capita and St James Ethics Centre.

“Dr Soutphommasane is an influential thinker, writer and broadcaster who has substantially contributed to national discussions about diversity and national identity,” Professor Triggs said.

“Dr Soutphommasane will play a critical role at the Australian Human Rights Commission as the Race Discrimination Commissioner.

“His skills and experience will help build communities where people of all cultures and backgrounds feel safe, respected and included.”

Source: Australian Human Rights Commission.

National Foundation to Prevent Violence Against Women and their Children

In July, the Commonwealth Minister for the Status of Women, the Hon Julie Collins MP, and the Victorian Minister for Community Services, the Hon Mary Wooldridge MP, launched a new organisation, the Foundation to Prevent Violence Against Women and their Children. The Foundation has been set up to raise awareness and engage the community to prevent violence against women and their children. Natasha Stott Despoja AM has been appointed as Chair of the Foundation.

“Think of an Australia where women, girls and boys live without the threat or fear of abuse and violence, of any kind, whether in their homes or in other places.

Think of living in a country in which we all speak up about these issues and as a community say we do not and cannot accept violence in the lives of anyone.

This is what the Foundation to Prevent Violence Against Women and their Children is about.

I am proud to be leading this new national organisation as we progress the important business of raising awareness across the community and engaging individuals, groups and organisations to take action to prevent violence against women and children”, said Ms Stott Despoja AM.

Source: Foundation to Prevent Violence Against Women and their Children

Election of new co-chair for National Congress

The National Congress of Australia's First Peoples, Australia’s peak Aboriginal body, has elected a new leadership team. The editor of the *Koori Mail*, Kirstie Parker, has become the new female co-chair of the organisation replacing Jody Broun. The National Congress also re-elected male co-chair Les Malezer.

Law Reform Commission to review Native Title Act

The Attorney-General, the Hon Mark Dreyfus MP, has announced a new inquiry for the Australian Law Reform Commission – a review of the *Native Title Act 1993* (Cth).

“The Native Title Act turns twenty this year. The time has come to consider how to improve native title law and encourage faster, simpler resolution of native title claims for all parties,” Mr Dreyfus said.

"We must make sure that the law helps to unlock the economic potential of native title for Indigenous Australians. The draft terms of reference focus on proving connection to land and waters and authorisation, the laws which establish who can negotiate in particular circumstances. These are complex issues, which need detailed analysis and broad community consensus," Mr Dreyfus said.

Minister for Indigenous Affairs, Jenny Macklin said the Government would consult widely on the terms of reference and was open to adding new key issues to the Inquiry. "We want to hear from Indigenous peoples, representative bodies, farmers, miners, pastoralists and environmental groups about the issues they want considered by the Australian Law Reform Commission," Ms Macklin said.

Minister for Resources, Energy and Tourism, Gary Gray also welcomed the inquiry. "I would encourage all stakeholders, particularly those in the minerals and tourism industry, to have their views heard and make a submission to the Australian Law Reform Commission," Minister Gray said."

Source: Australian Law Reform Commission.

Law Reform Commission to review legal barriers for people with disability

Attorney-General Mark Dreyfus QC has asked the Australian Law Reform Commission to inquire into how to reduce legal barriers to people with disabilities.

"I want to make sure that existing Commonwealth laws and legal frameworks do not create barriers to people with disability exercising their rights and legal capacity," Mr Dreyfus said. "Most of us take for granted the independent decisions we make about our lives. People with disability deserve the same opportunity. This inquiry is about maximising choice and autonomy for Australians with disability."

Minister for Disability Reform Jenny Macklin said that people with disability are entitled to the dignity that comes from being able to make choices over their own lives. "Ensuring that people with disability have access to the same rights and opportunities as Australians without disability is a hallmark of a just society," Ms Macklin said. "As we celebrate the twentieth anniversary of the Disability Discrimination Act, it is fitting that we consider whether our laws are adequately supporting people with disability. The announcement of this inquiry coincides with the upcoming launch of DisabilityCare Australia, the national disability insurance scheme, a significant reform that will transform the way people with disability are supported and put choice and control in the hands of people with disability."

Source: Australian Law Reform Commission.

STATE-BASED HUMAN RIGHTS DEVELOPMENTS

Farewell to Acting Commissioner Karen Toohey

The Victorian Equal Opportunity and Human Rights Commission has farewelled Karen Toohey, after two years as Acting Commissioner. Karen first joined the Commission as its inaugural Chief Executive Officer in 2010.

Karen led the Commission's work on a broad range of significant projects and reports, including such as the relinquishment of children with a disability into state care, discrimination in the private

rental market, reporting racism, and gender and sexual diversity on the sporting field. Karen also oversaw the introduction and implementation of the *Equal Opportunity Act 2010* (Vic), and, importantly, has ensured that the Commission has effectively utilised its new functions and powers since the Act came into force in 2011. The Commission has redeveloped its website, and made its services more accessible, including streamlining the complaint process and handling more inquiries and complaints from the public than ever before.

Karen was farewelled by the Victorian human rights community in a function held at the Commission's offices in Carlton in July. Staff, government representatives and community leaders alike spoke of her capacity for innovation and strategic thinking to achieve practical outcomes and positive change. Her leadership, drive and appetite for tackling challenging and significant human rights issues will certainly be missed.

A permanent appointment is expected to be made shortly. Chris Humphreys, a senior public servant from the Department of Justice with significant expertise in equal opportunity and human rights, will be filling the role in the meantime.

New Commissioner for Aboriginal children in Victoria

The Victorian Government has appointed Australia's first Aboriginal Children's Commissioner. The newly-appointed Commissioner for Aboriginal Children and Young People, Andrew Jackomos, will focus on reducing the high number of Aboriginal children who are in the justice system or who are at risk of abuse.

Mr Jackomos will oversee a five year plan for Aboriginal children in out-of-home care. He will provide advice to government and service providers about policies and practices that promote the safety and well-being of Aboriginal children.

Mr Jackomos has a long history of advocating for the rights of Aboriginal people and has extensive experience working in Aboriginal affairs and administration.

He was instrumental in developing and implementing the Victorian Aboriginal Justice Agreement and the Koori Court system, and is the director of the Koori Justice Unit.

The Australian Human Rights Commission's Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, described the appointment as a positive and significant development.

"Many Aboriginal and Torres Strait Islander families continue to experience trauma because of past actions by government and non-government agencies.

"A dedicated Aboriginal Children's Commissioner will help reduce the number of Aboriginal and Torres Strait Islander children who are trapped in the justice system," Mr Gooda.

The National Children's Commissioner, Megan Mitchell, also welcomed Mr Jackomos' appointment.

"The creation of this position provides the opportunity to focus on assisting families and communities to keep their children safe in culturally appropriate ways," Ms Mitchell said.

Source: Australian Human Rights Commission

HRLC MEDIA COVERAGE

The HRLC has featured in the following media coverage since the last edition of *Rights Agenda*:

- Hugh de Kretser and Arie Freiberg, Strong parole system will benefit community, *Herald Sun*, 30 July 2013
- Jane Lee, Australia likely to pay asylum seekers' Nauru legal costs, *The Age*, 30 July 2013
- Joel Magarey, Psychiatric oversight demanded, *The Australian*, 29 July 2013
- Louise Milligan, Victims' families question Victoria's parole system, *ABC's 7.30*, 29 July 2013
- Anna Brown, Two steps forward, one step back for LGBTI rights, *Gay News Network*, 30 July 2013
- Louise Milligan, Murder victims' families demand reform of Victoria's parole system, *ABC News online*, 29 July 2013
- Susie O'Brien, An inquiry will hear young African men are assaulted and taunted by police, *Herald Sun*, 26 July 2013
- Jared Lynch and Dan Oakes, Parole board under fire scorns government on lack of support, *The Age,* 25 July 2013
- Bianca Hall, Queries over PNG deal costings, *The Age*, 21 July 2013
- Annie Guest, Controversy over Queensland juvenile reforms, *ABC Radio – PM*, 19 July 2013
- Santilla Chingaipe, Call for Refugee Convention support, *SBS World News Australia Radio*, 18 July 2013
- Oliver Laughland, All Manus Island detainees show signs of anxiety and depression, report says, *The Guardian*, 12 July 2013
- Thea Cowie, Rudd & Abbott back Indigenous referendum plan, *SBS News* 10 July 2013

SEMINARS & EVENTS

People's Hearing into Racism and Policing

17 & 18 August, Melbourne

If you have experienced racial or religious profiling by police, or if your family, group or community have been impacted by racially discriminatory policing this is your chance to tell your story. The Flemington Kensington Community Legal Centre's People's Hearing is a safe and supportive opportunity to ensure community voices are heard. For more information see: http://www.imarayouth.org/peoples-hearing/

Human Rights vs Restrictive Practices forum

30 August, Brisbane

People with intellectual or cognitive disability who have challenging behaviour may be subjected to restrictive practices in Queensland – physical, mechanical, chemical restraint, containment and seclusion. Queensland Advocacy Incorporated and co-sponsor Anti-Discrimination Commission Qld invite you to a forum to explore alternatives to restrictive practices for people with disability in Queensland. See here for more information.

International Commission of Jurists (Victoria) and the Centre for Comparative Constitutional Studies Joint Conference on Human Rights

11–12 October 2013, Melbourne

The International Commission of Jurists Victorian Branch and the Centre for Comparative Constitutional Studies present a joint conference: "Human Rights and Democracy: Past Their Use By Dates?" The purpose of this conference is to provide a forum for the discussion on the state of human rights and democracy in Australia. Paper topics include federal anti-discrimination laws, constitutional recognition of indigenous peoples and the statutory human rights framework.

The Conference will be opened by keynote speaker Paris Aristotle AM (Director of the Victorian Foundation for Survivors of Torture Inc. (VFST) and Executive Member of the Forum of Australian Services). Other speakers include: Mark Leibler AC, Dr Mark McMillan, Professor Cheryl Saunders AO, The Hon Ron Merkel QC, Professor Spencer Zifcak, The Hon Justice Debbie Mortimer, Emeritus Professor GillianTriggs and Dr Helen Durham.

See here for the program.

Practicing law in the public interest

December 2013, Melbourne

La Trobe University is running Human Rights and Comparative Disability Law – LAW5HCD with Professor Marcia Rioux at La Trobe's city campus. In this subject students examine recent developments in international and comparative disability law and issues arising in a range or areas such as mental health; education; employment; housing and health. For further details contact Lee Ann Basser via l.basser@latrobe.edu.au.

HUMAN RIGHTS JOBS

Flemington & Kensington Community Legal Centre

The Flemington and Kensington Community Legal Centre is seeking a Generalist Solicitor to undertake casework focusing on consumer, debts, motor vehicle accidents, infringements, criminal law, social security, tenancy, complaints and wills. It's also seeking a Police Accountability Solicitor to undertake strategic, public interest litigation, legal casework, research, negotiation, general advocacy and representation and work towards clear human rights & police accountability outcomes.

Refugee & Immigration Legal Centre

The Refugee & Immigration Legal Centre (RILC) – a leading non-profit organisation specialising in refugee and immigration law, policy and education – seeks a highly effective and efficient solicitor to co-ordinate its Taskforce Unit. The role involves the coordination and supervision of the Unit's legal work, provision of legal casework as well as contributing to policy, law reform and advocacy projects. For further details and position description, please contact Sarah on 9413 0103 or sarah@rilc.org.au. Applications must address the selection criteria outlined in the position description and be received by 5pm on Wednesday 14 August 2013.

Australian Human Rights Commission

The Australian Human Rights Commission is seeking an Executive and Research Assistant to the Race Discrimination Commissioner.

RESOURCE

Commentary on the International Covenant on Civil and Political Rights

The third edition of "The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary" by Professor Sarah Joseph and Melissa Castan has been released. The book analyses 40 years of jurisprudence from the Human Rights Committee.

OPINION

Legality, rights and statutory interpretation

By Justice Steven Rares

The movie mogul, Samuel Goldwyn is reputed to have said: "A verbal contract is not worth the paper it's written on". Many of the fundamental precepts that we take for granted as our legal rights in Australia's democratic system derive from the common law. They are not enshrined in the Commonwealth Constitution or in any statute. They have the same fragility as Goldwyn's verbal contract.

Every society must have laws or rules that regulate its citizens' rights, responsibilities and obligations. Laws also define powers of the society's institutions of government. However, laws do not exist in any community in a vacuum, divorced from the critical context of established the norms. Our nation, and its concept of the rule of law, has evolved from our early European settlers' British foundations and most of the attributes of their legal system.

The original convict ancestry of many of our non-indigenous early settlers may explain the lackadaisical attitude Australians have towards their rights and the institutions of government. It is significant that there is little national celebration or recognition of our federal Constitution or the basic elements of the separation of powers that it enshrines. More importantly, the Australian public has no real appreciation of the lack of any constitutional protection of their rights. Remarkably, Australia is the only western common law democracy without a Bill of Rights.

In our common law there is a general prophylactic presumption applied by the Courts when interpreting legislation. The Courts presume that legislative provisions will be construed as effecting no more than is strictly required by clear words or as a matter of necessary implication in respect of "important common law rights", such as:

- the right to personal liberty;
- trial by jury;
- taking property without compensation;
- procedural fairness;

Of course, the enforceability, nature and extent of common law rights are all vulnerable to the reality and degree of independence of the judiciary, the statutory construction it places on the Constitution and legislation, and to Parliamentary modification.

The principal means by which liberty can be eroded today in Australia is by a law enacted by the Parliament or by its delegated legislative power or by a State or Territory law. The Constitution confers specific legislative powers on the Parliament, generally divided into subject matters. Many of those powers are found in section 51. The Parliament has a plenary power to make a law operating upon or effecting one of those subject matters or fulfilling one of those descriptions.

In Australia very few rights are enshrined expressly in the Constitution, unlike the position in the United States. We have the religion clause in section 116 and the prohibition against laws in one State discriminating against citizens resident in another State in section 117. The High Court has also identified implications and assumptions in the Constitution that are sources of legal rights, such as the implied constitutional freedom of political communication.

I do not consider that the Victorian or Australian Capital Territory approach to statutory recognition of human rights in a charter with provisions for a declaration of incompatibility between charter rights and an overriding statute is the most desirable solution for our country to follow. They are legislative attempts to give some definition to the principle of legality. But, they suffer from the same weaknesses as the common law presumptions do: statutes can displace them and they do not withdraw legislative or executive power. Only a constitutional provision has that effect.

Two criticisms of the Victorian Charter may be made at once. First, the Court cannot find the impugned law invalid. To the contrary, where incompatibility exists, that law remains valid and overrides the Charter rights. Secondly¸ the Court can only make a declaration that has no legal effect except to draw the incompatibility to the attention of the Attorney-General.

One reaction to the suggestion that Australia should have a Constitutional Bill of Rights is that it would give too much power to the judiciary. But, as in any constitutional democracy, the boundaries for any separations of powers among the three arms of government are drawn themselves by a democratic process. At the moment, the only checks or balances on the relatively plenary legislative power of the Parliament under chapter I of the Constitution comprise limited constitutional implications, the important political need for legislatures to justify their actions to their electorates and common law principles of statutory interpretation.

Creating an entrenched Bill of Rights gives no substantive new power to the judiciary. Rather, the decision to reflect important societal values in a Constitutional instrument involves the electorate removing or withdrawing power from not just the legislative and executive branches, but also from the judicial one as well. The right, for example, to due process limits judicial power too.

Of course, Courts must determine the legal validity of any legislative or executive conduct in light of any relevant provision in a Bill of Rights. Our legal system currently allows every court in this

country, from a local court magistrate to the High Court, when exercising federal jurisdiction, to declare a law made by any parliament or under delegated legislation or any executive conduct to be constitutionally invalid. When, particularly, the High Court makes a decision of that character, the Court can become involved in political controversy. But, that is simply a proper and necessary outcome of the third arm of government performing its role of determining the boundaries in which the other two arms of government may or may not operate, or the limits of judicial power. That use of judicial power is itself an essential governmental function in a society operating under the rule of law. And, when the Courts exercise their powers under chapter III of the Constitution, they must justify that exercise in proceedings that occur transparently in open court and in reasons for the judgment in which the Court decides and pronounces the law.

If citizens are to have rights worth having, they can only be guaranteed either by constitutional entrenchment through a democratic referendum, or by the Parliament scrutinising legislation and the Courts continuing to apply the principle of legality.

Steven Rares *is judge of the Federal Court of Australia and an additional judge of the Supreme Court of the Australian Capital Territory.*

This is an edited extract from a paper presented at the 2013 AGS Administrative Law Conference, Canberra, 20-21 June 2013. The full paper can be accessed at: http://www.fedcourt.gov.au/publications/judges-speeches/justice-rares/rares-j-20130620

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The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

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