Human Rights Law Centre

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RIGHTS AGENDA

Monthly Bulletin of the Human Rights Law Centre

OPINION: AUSTRALIA'S CORE MISSION IN AFGHANISTAN MUST BE TO PROMOTE AND PROTEXT HUMAN RIGHTS

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IF I WERE ATTORNEY-GENERAL…

A lawyer practising in the area of human rights and social justice, **Elizabeth O'Shea,** believes peace and justice are inseparable concepts that should underpin any legal system devoted to fairness and equality.

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Special Human Rights Week Offer!

Double your human rights impact!

To celebrate Human Rights Week, our partners at Blake Dawson, DLA Piper and Mallesons Stephen Jaques have generously agreed to match your tax deductible donations to the Human Rights Law Centre from 5 to 10 December 2011.

The promotion and protection of human rights is at a critical juncture in Australia. With no recurrent funding beyond 2012, the work of the HRLC is also at a critical juncture. We need your support to continue and expand our high-impact human rights work.

To double your money, double your human rights impact and support the HRLC, click here.

OPINION

Australia's core mission in Afghanistan must be to promote and protect human rights

Next week, delegates from 90 countries will gather in Bonn to discuss the transfer of security responsibilities in Afghanistan to the national government by 2014. It will be ten years since the international community last gathered in Bonn to agree a framework for rebuilding this shattered, war-torn state.

As such, it's a good time to reflect on what we've set out to achieve in Afghanistan over the past decade, both as a nation and as an international community.

At Bonn 2001, the international community expressed its determination to promote national reconciliation, lasting peace and respect for human rights in Afghanistan. Four years later, at a conference titled 'Building on Success', we renewed our commitment to build a "secure, prosperous, and democratic nation", with "good governance and human rights protection for all under the rule of law." We pledged to support the Afghan government to reduce hunger, poverty and unemployment. We agreed that national security and law enforcement agencies would adopt measures to prevent arbitrary arrest, detention and torture; and that the Afghan Independent Human Rights Commission (AIHRC) would be supported to monitor, investigate, protect and promote human rights. We said that we'd support the Government to implement the *Action Plan on Peace, Justice and Reconciliation,* aimed at promoting accountability for past human rights violations and war crimes. We committed to building a nationally respected, professional army and police force. And we said we'd strengthen the role of women in governance institutions.

Today in Afghanistan, these sound like lofty ideals.

Afghanistan today is one of the worst places in the world to be either a child or a mother. One in 11 women die during childbirth. With more than half of all Afghan girls marrying before their 16th birthday, many of the mothers dying in childbirth are themselves children. One in nine children die before their first birthday and one in five die before the age of five. More than 4 million children lack access to education, most of them girls.

The *Action Plan on Peace, Justice and Reconciliation* has been all but forgotten, and suspected war criminals dominate the political elite. President Karzai has described justice as a 'luxury', not to be pursued at the expense of peace. But you can't have one without the other, and now in Afghanistan we have neither.

Women are poorly represented in peace negotiations, with just nine women in the 70 member High Peace Council. Moreover, recent statements both by the Afghan Government and the international community suggest that the once-strong commitment to women's rights may be waning. As one Kabul-based embassy official explained, "we can't impose [women's rights] as a pre-negotiation red line because that will be counter-productive in getting to talks. Women's issues are important but they are not our top priority." Constitutional guarantees of gender equality already appear flimsy. In 2009, the government passed a law allowing men to deny their wives basic sustenance if they refused to submit to sexual intercourse.

The Afghan police are regarded as corrupt, abusive and incompetent, and a recent inquiry found evidence of widespread torture in Afghan detention facilities. The AIHRC has a critical role to play in holding the national security forces to account, but last year was so short of funds that it went several months without paying its staff.

In light of all this, the easiest option for Australia would be to cut our losses and leave state building to the Afghans. After all, state building was never really our objective, and the agreement between Karzai and the US to have combat troops out of the country by 2014 would have been a reasonable excuse for Australia to disengage.

Fortunately, we haven't taken this option. Prime Minister Gillard has promised that we'll remain in Afghanistan for another decade, at least. The commitment is impressive; the stated objectives, less so. Gillard said that we were staying the course firstly to make sure that Afghanistan never again becomes a safe-haven for terrorists, and secondly, to honour our alliance commitment to the US.

However, with ten years of engagement behind us and at least ten to go, we can and must do better than this. For starters, we need to shift the rhetoric and put the rights of the Afghan people at the heart of the post-transition strategy. So that when we talk about our objectives, we talk not about terrorist safe-havens or about allegiance to the US, but about providing a safe and secure environment where children go to school, women participate in political processes and state institutions are trusted and credible.

And then in the lead up to Bonn, we need to start thinking about what we can do for the Afghan people. We could ensure, for example, that the AIHRC always has enough money to pay its staff; and that relevant staff within the Ministry of Interior receive specialised training in investigating allegations of abuse. We could urge the Afghan Government to embrace the concept of external oversight of police, and promote understanding that ultimately this strengthens the credibility of the state. We could help to re-invigorate the *National Action Plan for Peace, Justice and Reconciliation*, such as by supporting vetting procedures for senior civil servants. We could seriously improve the quality of police training, as well as the institutional support that we provide for the Ministry of Interior. We could invest more in female teachers and health-workers. Finally, we could use our influence to ensure that any political settlement explicitly guarantees the rights of women and children.

With nearly $4 billion invested in Afghanistan, let us aim for something more than denying safe-haven for terrorists and sticking by the US alliance. Let us instead recommit to the promise we made in 2001 to create a stable and prosperous Afghanistan, with good governance and human rights protection for all under the rule of law.

Rebecca Barber *is a Humanitarian Policy and Advocacy Advisor at Save the Children*

NEWS IN BRIEF

Parliament adopts modest but critical protections for human rights

Legislation requiring the Federal Parliament to consider international human rights obligations when making new laws has passed through parliament. The *Human Rights (Parliamentary Scrutiny) Act 2011* and the *Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Act 2011* were warmly welcomed by the Human Rights Law Centre.

Coroner recommends changes following death of Tyler Cassidy

Delivering findings in relation to the death of 15 year-old Tyler Cassidy, who was shot by police in 2008, the Coroner has said Victoria Police urgently needs to focus its training on recognising and managing vulnerable young people.

The Age echoed the call for urgent reform of police training, while the HRLC said the Coroner's recommendation that an independent person with a law degree should be present as an observer when the officers involved in similar incidents are interviewed by other police was only a partial answer to the problem of police investigating police.

Government announces shift in asylum seeker processing regime

The Federal Government will start using bridging visas to process asylum seekers in the community as part of a new onshore processing plan. The changes see a return to a uniform asylum-seeker processing regime for boat and plane arrivals. Asylum seekers on bridging visas will be given work rights and healthcare access but no Centrelink benefits. The plan was welcomed by refugee and human rights advocates, including UN High Commissioner for Human Rights Navi Pillay.

Charges dropped against children in Australian prisons on people smuggling charges

Australian Federal Police have dropped charges against at least 33 Indonesian children held in Australian adult prisons after a West Australian District Court ruled that wrist x-rays, previously used to establish prisoners' age, are unreliable. Up to 100 people claiming to be children remain in Australian prisons. The detention of children in adult prisons is in breach of the UN Convention on the Rights of the Child claims Greens Senator Hanson-Young.

… Meanwhile, the Human Rights Commission will inquire into underage detainees

The Australian Human Rights Commission has announced that it will inquire into the detention of suspected people smugglers who might be underage and the Greens propose to introduce legislation that will require the government to prove a person is over 18 before placing them in adult detention facilities and prisons.

Calls for closer scrutiny of situation in West Papua

In a joint letter to Foreign Minister Kevin Rudd, the HRLC and Human Rights Watch have called for Australian monitors to be allowed into West Papua amid fears of another violent crackdown on

pro-independence rallies marking the 50th anniversary of the first raising of the West Papuan 'Morning Star' flag.

Slavery and human trafficking on law reform agenda

The Federal Government has sought public comment on draft legislation to broaden the crime of slavery and people trafficking. The bill would create new offences such as forced labour and forced marriage, and would make it a crime for anyone to harbour a victim of trafficking or slavery.

PM to support conscience vote on marriage equality

Prime Minister Julia Gillard said she would allow Labor Party MPs a conscience vote on gay marriage. However, the Prime Minister herself will not vote in favour of reform, despite a recent poll indicating that most voters support gay marriage and a conscience vote is almost certain to defeat any move to change the current marriage laws. Senator Penny Wong was among those who have spoken out against the proposed conscience vote.

'Stronger futures' for Indigenous Australians

The Federal Government has introduced its 'Stronger Futures' legislation, aimed at tackling the systemic disadvantage of Aboriginal and Torres Strait Islanders people. The bills were introduced into federal parliament amid criticism from the Northern Territory opposition that it 'stamps all over' Territory rights. Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda welcomed the legislation as a possible "long term solution" to the problems of chronic disadvantage.

'Milestone' as more women to enter PNG's parliament

Papua New Guinea passed a bill that will set minimum quotas for women in its parliament. The bill will reportedly reserve 22 of the total 109 parliamentary seats for women.

INTERNATIONAL HUMAN RIGHTS DEVELOPMENTS

Strengthening the UN Human Rights Treaty Bodies – Report on Dublin II

A process aimed at strengthening the UN treaty bodies, which was initiated by the UN High Commissioner for Human Rights in 2009, culminated in a meeting in Dublin, Ireland on 10-11 November. This followed two years of consultations, organised by different stake-holders, including meetings of NGOs that were convened in Seoul and Pretoria.

In Dublin, representatives from nine UN treaty bodies met to agree and sign up to an outcome document that is based on many of the proposals that have emerged from the stake-holder consultations, in addition to written papers that have been submitted and which are available at: http://www2.ohchr.org/English/bodies/HRTD/index.htm.

Other participants in Dublin included Ms Kyung-wha Kang, Deputy High Commissioner for Human Rights, representatives from four NGOs and three national human rights institutions, and a participant from a consultation of academics. These participants are expected to endorse the outcome document.

Many recommendations that have come from NGOs are reflected in the final text. For example, the assertion that *"strengthening the treaty body system must result in strengthening the capacity of rights-holders to enjoy their human rights"* was a recurring theme of NGO discussions and contributions. The document also captures the emerging good practice of some committees in making their procedures much more accessible and impactful. It encourages the treaty bodies to consider further means of doing so, such as holding in-country reviews of states reports and creating a reporting calendar for advance scheduling of reviews and deadlines.

There are also some more far-reaching recommendations. For example, to improve the membership of the treaty bodies, the outcome document suggests that states hold open and transparent national selection processes to nominate their independent experts. In line with recent international treaties, the final text also suggests that in future membership terms should be limited to a maximum of two full terms.

Another recommendation calls for consideration to be given to alternatives to traditional reporting methods, such as *in situ* (that is, in country) reviews that could be simultaneously undertaken by one or more committees, on the basis of reports which are written in light of priority concerns identified by the treaty bodies.

While not a radical piece, the Dublin outcome text reflects many of the difficulties facing NGOs and other stake-holders in engaging with treaty body processes, as well as (many cost-neutral) steps to overcome these challenges. Yet, we can expect resistance from some states in supporting the recommendations. This is in part due to their reluctance to provide additional resources – the provision of which will be key to more ambitious proposals. There is also push-back from some states on the evolution of the treaty bodies, with some questioning the legitimacy of treaty bodies to undertake core functions like developing general comments.

States will have the opportunity to express their views during two further consultations in coming months. Then the High Commission for Human Rights will prepare a report for the General Assembly to be held in 2012. Consequently any final NGO contributions should be made by mid-February.

Tania Baldwin-Pask *works in the International Advocacy Program with Amnesty International (International Secretariat)*

UN Human Rights Committee adopts new procedure to review human rights record of non-reporting states

The UN Human Rights Committee held its 103rd session from 17 October to 4 November 2011. States reports from Iran, Jamaica, Kuwait and Norway were reviewed and the Concluding Observations are now available at www.ohchr.org.

In addition to these four countries, specific attention should be given to the review of Malawi that was done in the absence of a state report. The initial report from Malawi had been due since March 1995. As provided for by the Committee's Rules of Procedure, the review was held in a closed meeting and the provisional Concluding Observations will remain confidential until October 2012, pending the receipt of comments by the State.

This is, however, the last time that the Human Rights Committee will review non-reporting States in closed session. In the October session, a very important step was taken by the Committee, by deciding to amend rule 70 of its Rules of Procedure. This will allow the Committee to review non-reporting States in public session. In addition, the Concluding Observations will no longer be confidential, but instead will be released at the end of the session.

This is a major improvement in the work of the Human Rights Committee. It will ensure that all States are treated equally and reviewed under the same procedure. States that are not cooperating with the Human Rights Committee will non-longer benefit from the confidential procedure. It will also make the entire process more transparent and accessible to civil society and individuals of these countries.

Consequently, as from March 2012, the review of non-reporting States will be held in public session and will be web casted live. The next non-reporting States on the Committee's agenda include Mozambique and Cape Verde, in March 2012 and Ivory Coast in October 2012. This will be a unique opportunity for NGOs to engage with the Committee and assess the implementation of the ICCPR at the national level.

To learn more about this new development, watch Mr. Rajsoomer Lallah, Committee member and for an interview in Spanish, watch Mr. Fabian Salvioli, Committee member.

Patrick Mutzenburg *is Director of the Centre for Civil and Political Rights in Geneva*

NATIONAL HUMAN RIGHTS DEVELOPMENTS

Federal Parliament passes significant human rights legislation that will benefit all Australians

The passage of important legislation which requires the Federal Parliament to consider international human rights obligations when passing new laws has been warmly welcomed by the Human Rights Law Centre.

"The Federal Parliament has today taken a critical step in respecting and promoting human rights," said Ben Schokman, the HRLC's Director of International Human Rights Advocacy.

The new laws, passed by the Federal Parliament on 25 November, will provide a modest but critical contribution to the legislative and institutional protection of human rights, and will play an important role in human rights education and acculturation.

"Although it falls short of enshrining human rights in a national charter or bill of rights, this is an important step in the right direction. It will ensure the Federal Parliament will be more accountable and transparent about the human rights impacts of new legislation," Mr Schokman said.

"These important new laws will benefit all Australians, but particularly groups such as the homeless, elderly persons, people with disability and Aboriginal and Torres Strait Islander peoples, all of whom were identified by the National Human Rights Consultation Committee as particularly vulnerable to breaches of their human rights," Mr Schokman said.

The Human Rights (Parliamentary Scrutiny) Act 2011 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Act 2011 comprise key elements of the Federal Government's "Human Rights Framework", which gives effect to some of the key recommendations of the 2009 National Human Rights Consultation. The new laws:

- require that each new Bill introduced into Federal Parliament is accompanied by a Statement of Compatibility of the proposed law's compliance with the seven core international human rights treaties to which Australia is party; and
- establish a new Parliamentary Joint Committee on Human Rights to provide greater scrutiny of legislation for compliance with Australia's international human rights obligations.

The HRLC congratulates the Attorney General, the Hon Robert McClelland MP, for his leadership in seeing these laws through parliament.

Human Rights Commission announces inquiry into detention of Indonesian children

The Australian Human Rights Commission has announced it will hold an inquiry into the treatment of suspected people smugglers who claim to be children.

“I have been concerned for some time that errors may have been made in the processes used to determine the age of these individuals,” Commission President Catherine Branson QC said.

“These errors may have resulted in children being detained for long periods of time in immigration detention and in adult prisons.

“The individuals of immediate concern are Indonesian nationals who have worked as crew on boats bringing asylum seekers to Australia and who have subsequently been investigated for people smuggling offences,” Ms Branson said.

Ms Branson said Australia has a range of human rights obligations in relation to unaccompanied children who arrive in Australia. She says she holds concerns for at least 20 individuals currently detained in adult prisons who say they are children.

“Australia has a responsibility to ensure that unaccompanied children who arrive in Australia are provided with special protection and assistance due to their vulnerability,” Ms Branson said. “Australia is also obliged to ensure that children deprived of their liberty are separated from adults in detention or prison.”

The Commission’s inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children is expected to run until mid-2012.

Information about the inquiry can be found at
www.humanrights.gov.au/ageassessment/index.html

Source: Australian Human Rights Commission

Bridging visas promote humane treatment of people seeking protection

The Australian Human Rights Commission has welcomed the announcement that bridging visas will be granted to a group of asylum seekers who arrived in Australia by boat while their refugee claims are finalised. Ms Branson welcomed the government's decision to make greater use of community-based alternatives such as bridging visas and community detention.

"The Commission has said for some time that asylum seekers who arrive by boat should be treated the same way as those who arrive by plane, and that they should be given bridging visas instead of being held in detention for long periods," Commission President Catherine Branson QC said.

Ms Branson said bridging visas are a more effective, humane and cheaper alternative to the current approach of holding thousands of asylum seekers and refugees in remote immigration detention facilities around Australia for long periods of time. She emphasised that implementing a single system for determining asylum seekers’ refugee status promotes a fairer, more efficient and more cost-effective system.

However, Ms Branson said she was disappointed that the government was retaining the excision regime, meaning that asylum seekers that arrived by boat would only be granted access to the onshore processing system at the discretion of the Minister of the day.

Legal team recognised for outstanding pro bono human rights advocacy for refugees

The Human Rights Law Centre very warmly congratulates the legal team comprising the Refugee and Immigration Legal Centre, Allens Arthur Robinson, Debbie Mortimer SC and Richard Niall SC on being shortlisted as a finalist for the prestigious Australian Human Rights Law Award. The team has already been recognised for its work through the 2011 Tim McCoy Award and a Law Institute of Victoria President's Award. The HRLC is proud to have nominated the team for each of these awards.

The legal team acted pro bono in two landmark High Court cases which have upheld human rights and the rule of law. Individually, each member of the team has also advised and acted pro bono in a significant number of other cases to promote and protect human rights.

In *Plaintiff M61 v The Commonwealth & Ors* (2010), the team acted on behalf of two Sri Lankan asylum seekers who arrived by boat at Christmas Island and sought to claim refugee status. In a unanimous decision, the High Court held that, despite the status of Christmas Island as an 'excised offshore place', the men were entitled to the full protection of Australian law and to procedural fairness.

In *Plaintiff M70 v Minister for Immigration and Citizenship* (2011), the team acted for two asylum seekers, including one 16 year old child, scheduled to be deported from Christmas Island to Malaysia for the processing of their refugee claims. In a 6-1 decision, the High Court held that under the Migration Act, the government could not send asylum seekers for processing to a third country unless that country satisfied certain criteria.

In both these landmark cases, the legal team acted pro bono and ensured not only that each of these plaintiffs would have their claims for refugee status determined in Australia under Australian law, but that the fundamental tenets of access to justice, procedural fairness, executive accountability and the rule of law were protected and preserved.

The HRLC also very warmly congratulates David Manne (Executive Director of the Refugee and Immigration Legal Centre) and Ron Merkel QC on being shortlisted for the prestigious Human Rights Medal. The HRLC is proud to have nominated both finalists for this award.

UN expert on trafficking in persons concludes first fact-finding mission to Australia

The United Nations Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, has concluded her country visit to Australia. Ms Ezeilo conducted her official visit from 17 to 30 November to examine the situation of trafficked individuals and anti-trafficking measures in the country.

Ms Ezeilo is an independent expert mandated by the UN Human Rights Council to advocate for the prevention of trafficking in persons in all its forms and to encourage measures to uphold and protect the human rights of victims.

In her preliminary report released on 30 November 2011, Ms Ezeilo said that "Australia has demonstrated strong leadership in combating trafficking in persons regionally and domestically, however it needs to devote greater attention to the rights and needs of victims."

Ms Ezeilo highlighted the need to improve support services, including accommodation, legal assistance and counselling services, to suspected victims of trafficking and de-link government support from participation in criminal justice processes. She also praised the recent release of an

exposure Bill to expand the definition of trafficking to better address labour exploitation and forced marriage.

During Ms Ezilo's country mission, the Human Rights Law Centre provided a briefing paper on the application of people smuggling laws to persons who may have been trafficked. The briefing paper makes the point that where a person has been recruited by means of deception for the purpose of exploitation – as may be the case for many of those charged with people smuggling offences – they meet the definition of a trafficked person under the Protocol and should be provided with adequate assistance and protection, not criminalised and subjected to lengthy jail terms in Australian prisons.

On this topic, Ms Ezilo expressed her concern about "the possibility of trafficked persons including children being arrested, detained for long periods and deported for breach of migration regulations without proper identification especially given the strong migration control policy of Australian government."

A full report of the Special Rapporteur's mission will be submitted to the UN Human Rights Council in June 2012.

Discrimination Commissioner takes RailCorp to court

The Public Interest Advocacy Centre (PIAC) is representing Mr Graeme Innes AM who is suing RailCorp for disability discrimination. He alleges that RailCorp has failed to consistently provide audible announcements on trains, in breach of the *Disability Discrimination Act 1992*.

Mr Innes, the Disability Discrimination Commissioner, commenced these proceedings in the Federal Magistrates Court.

Since 2007, RailCorp has been required under the *Disability Standards for Accessible Public Transport 2002* to ensure that audible station announcements are made on all trains.

Mr Innes, who has been blind since birth, has already lodged 36 complaints with the Australian Human Rights Commission regarding failures by RailCorp to have audible announcements on trains. Attempts by Mr Innes to resolve his complaints with RailCorp through the Commission have failed.

Mr Innes explains: "For a person who is blind or has low vision, such as myself, the major problem with catching trains is knowing what station you have reached."

"Missing the right stop means getting off at an unfamiliar station. Locating the right platform to catch a train back to the intended station is not just inconvenient - it can sometimes be extremely stressful, and is usually quite time-consuming."

"This is a major failure by RailCorp," PIAC CEO Edward Santow said. "The fact that Mr Innes has made 36 separate complaints in seven months suggests the problem is systemic and ongoing."

Graeme Innes says: "I am just asking RailCorp to treat me and other blind people in the same way as all other passengers – tell us where we are."

Source: Public Interest Advocacy Centre

Government response to parliamentary report on Indigenous youth in the criminal justice system

On 24 November 2011, the Federal Government tabled its response to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs Report, entitled *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System*. The Attorney-General, Robert

McClelland, announced that the Government had accepted the 40 recommendations made by the report, albeit some in part or in principle. The Attorney-General emphasised that a number of the recommendations have already been actioned by the Government, including providing $490 million over three years to foster support for Aboriginal and Torres Strait Islander families, improving child wellbeing and developing stronger community bonds. In addition, the Government has ordered the construction of two boarding facilities (one in Garrthalala in East Arnhem and the other in Wadeye in the Northern Territory). The boarding facilities have the stated purpose of "improving educational engagement and completion in remote communities".

Other courses of action currently underway include the development of a strategy to prevent suicide in Aboriginal and Torres Strait Islander communities, fostering partnerships with State and Territory Governments to guarantee that police benefit culturally relevant training, and evaluating the existing Indigenous justice programs to establish best practice guidelines under the National Indigenous Law and Justice Framework.

In response to the Report, the Attorney-General expressed concern at statistics which continue to highlight the overrepresentation of young Aboriginal and Torres Strait Islander people in juvenile detention facilities. Such high levels of incarceration remain at unacceptably high levels, despite the recommendations of the Royal Commission into Aboriginal Deaths in Custody over 20 years ago. Many of the Royal Commission's 1991 recommendations have still not been implemented.

Richard Collins *is undertaking an internship with the Human Rights Law Centre*

Survey on discrimination against victims/survivors of domestic and family violence

The Federation of Community Legal Centres (Victoria) is contributing to a submission to the Commonwealth Attorney-General's Department, on the consolidation of Commonwealth anti-discrimination laws (submissions due 1 February 2012).

At present, it is not unlawful to discriminate against someone on the basis that they are a victim/survivor of domestic/family violence. The Federation will submit that domestic/family violence victim/survivor status should be added to the existing list of attributes upon which it is unlawful to discriminate.

To strengthen the Federation's submission, they are seeking examples and case studies where victims/survivors may have been discriminated against on this basis. Their definition of domestic/family violence is broad, as in the *Family Violence Protection Act 2008*. Relevant areas of discrimination include renting a house, buying goods or services, applying for or being dismissed from a job, and education. The Federation is interested in examples where the person was discriminated against on the basis of being a current victim or survivor, or on the basis of past victimisation.

If you have one or more examples to contribute, please fill out the online form here.

This is an opportunity to provide evidence to the federal Government to influence law reform on an important issue of justice. If you have any examples, please respond by 19 December.

Police support for national protection under domestic and family violence orders

In early November 2011, State and Territory Policy Ministers entered an agreement to support a new nationally coordinated scheme for domestic and family violence orders. As it stands, people

who have a domestic and family violence order are required to register in each new jurisdiction they enter to maintain protection.

Attorney-General Robert McClelland and Minister for Home Affairs and Justice Brendan O'Connor supported this move to increase coordination and ensure that domestic and family violence orders are automatically recognised when people travel across State and Territory borders. The nationalisation of domestic and family violence orders implements a commitment under the National Plan to Reduce Violence against Women and their Children 2010-2022.

The Standing Council on Law and Justice are currently considering the draft legislation.

Federal Government announces 'Stronger Futures' legislation for Aboriginal communities in the Northern Territory

On 23 November 2011, the Minister for Indigenous Affairs Jenny Macklin introduced the *Stronger Futures in the Northern Territory Bill 2011* to replace the 2007 Northern Territory Emergency Response.

The 10 year plan under Stronger Futures focuses on three key measures affecting Aboriginal people in the Northern Territory.

First, alcohol-related measures (such as 'alcohol protected areas', alcohol management plans, alcohol restrictions and increased penalties for 'grog running') aimed to reduce alcohol abuse and alcohol-related harm.

Second, land reform measures to facilitate voluntary long term leasing for both individual and business property rights and interests, with the aim of promoting secure land tenure for economic development on Aboriginal land.

Third, food security measures through the community stores licensing system to regulate Aboriginal communities' access to food, drink and grocery items.

The *Social Security Legislation Amendment Bill 2011* complements Stronger Futures to implement the income management aspects of the proposals. Under alcohol management measures, social security benefits paid to Aboriginal people can be deducted under income management regimes if they do not abide by alcohol management plans. Under the School Enrolment and Attendance Measures (SEAM), parents' income support payments are tied to their child's school attendance.

The response to Stronger Futures has been mixed. The Federal Government and Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda support the measures' potential impact for social change, while a number of NGOs such as ACOSS and the Aboriginal Peak Organisations of the Northern Territory have called on the Government to focus on cooperation and scrap the discriminatory aspects of the measures. There is contention about the best way to implement long-term, financially sustainable measures which engage local communities to manage their own affairs. At this stage, it is unclear whether Stronger Futures will achieve its goal of supporting Aboriginal people in the Northern Territory to live "strong, independent lives where communities, families and children are safe and healthy."

***Lee Carnie** is a volunteer with the Human Rights Law Centre*

STATE-BASED HUMAN RIGHTS DEVELOPMENTS

Police shooting: Coroner's findings highlight urgent need for reform of police training on use of force

Victoria Police must take a new approach to handling confrontation with people in crisis, the Human Rights Law Centre has said, following the 23 November release of the findings of the coronial inquest into the 2008 police shooting of Melbourne teenager Tyler Cassidy.

The Human Rights Law Centre's Director of Advocacy and Strategic Litigation, Anna Brown, said it is important to keep in mind that the police shooting of Tyler Cassidy was not a one off.

"More people are shot dead by police in Victoria than in any other state. Unless the Victoria Police force fundamentally change the way they deal with people in crisis, history will continue to repeat itself," Ms Brown said. "We welcome the Coroner's call for 'urgent' reform of police training to 'safely manage vulnerable youth and people in crisis'," said Ms Brown.

As well as structural reform, Ms Brown said a cultural shift was required within Victoria Police, which on average uses force every 2.5 hours.

"Only 73 seconds elapsed between the police first approaching Tyler and him being shot dead. In this short time, Tyler was sprayed with capsicum foam twice, took a phone call and was shot 10 times. Tyler may have been highly agitated and distressed, but police protocols and training should provide officers with the ability to safely deal with a wide range of circumstances without resorting to lethal force," Ms Brown said.

The HRLC considers that Victorian law and the Victoria Police Manual need to be amended to make it clearer that force is only lawful as a last resort and when strictly necessary.

"Situations do arise where police may need to use force, but it should only be used with the utmost restraint and in a manner which minimizes damages and injury. Force should only be used to safeguard life and property, not for behavioural or compliance purposes," Ms Brown said.

The Coroner's findings also highlight the inadequacy of current systems for the investigation of police related deaths, which involve police investigating police. However, Ms Brown said that the Coroner's recommendation that an "institutionally independent legally trained person" be available to observe the interviewing of police officers implicated in deaths is only a partial answer.

"Human rights law and international best practice require that such investigations be conducted by a body that is fully independent of police. An independent investigative body would not only reduce the risk of collusion or corruption, but increase public trust and confidence in police processes," said Ms Brown.

"If the Victorian Government is serious about transparency and accountability, we need to ensure that these principles are upheld when Victorian citizens are injured or killed by Victoria Police."

AUSTRALIAN HUMAN RIGHTS CASE NOTES

Victorian Court of Appeal considers Charter post-*Momcilovic*

WK v The Queen [2011] VSCA 345 (30 November 2011)

Summary

In a recent appeal from an interlocutory decision of the County Court, the Victorian Court of Appeal held, by a majority of 2:1, that s 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) is applicable to the interpretation of the *Surveillance Devices Act 1999* (Vic). Only His Honour Nettle JA considered the implications of the recent High Court decision in *Momcilovic v The Queen* [2011] HCA 34. However, all three judges agreed that the trial judge in this case:

- erred in holding that a recording of a private conversation between the defendant (WK) and his alleged victim (DTY) was prohibited under the Surveillance Devices Act, but
- was correct in admitting a transcript of the recording into evidence, regardless of the privacy issues involved.

Facts

WK is alleged to have attempted to procure sex from DTY by threat or intimidation. Crucial to the prosecution case was a recording of a conversation between WK and DTY, made on a tape recorder provided to DTY by the police. WK appealed the trial judge's decision to admit a transcript of the tape recording into evidence, arguing that it was not authorised by the Surveillance Devices Act and should have been excluded under the *Evidence Act 2008* (Vic). Section 6 of the Surveillance Devices Act prohibits the use of a listening device to record a private conversation between two other people without their consent. The trial judge actually issued an interlocutory ruling that the recording was made unlawfully, but, after weighing this fact against its probative value, refused to exclude it.

Given the implications of this provision for human rights, the Court of Appeal (by majority) considered its interpretation must be subject to s32(1) of the Charter, which requires that statutory provisions be interpreted consistently with human rights "so far as it is possible to do so consistently with their purpose."

Decision

The Court of Appeal comprised Maxwell P, Nettle and Harper JJA. Maxwell P began by noting that Victoria Police have to date considered that s 6 of the Surveillance Devices Act does not prevent them from supplying equipment to others to record their own private conversations (as opposed to police recording them directly). This approach, His Honour noted, was vindicated in the case of *R v Bandulla* [2001] VSCA 202 (a pre-Charter case).

WK contended that a broader interpretation of the "use" of a listening device should include indirect use (through an agent) of such a device to obtain evidence, since the practice had implications for the right to privacy under s 13 of the Charter. If police were free to make recordings of private conversations without "judicial or regulatory supervision," WK argued, arbitrary interferences with privacy in contravention of s 13 would be the result.

Maxwell P responded that such an interpretation would effectively criminalise accepted police practices, which would amount to an amendment of the legislation rather than a mere reinterpretation. This, he noted, would exceed the Court's powers as discussed in *Momcilovic v The Queen* [2010] VSCA 50 (subsequently [2011] HCA 34). His Honour pointed out

that s 6(2)(c) of the Surveillance Devices Act specifically exempts law enforcement officers who record a private conversation with the consent of only one party – reinforcing the view that the legislation was not intended to criminalise this aspect of police procedure. In any event, His Honour found no breach of WK's right to privacy, and concluded that the trial judge was correct to admit this evidence, which is of "very significant probative value."

Nettle JA agree with Maxwell P that the evidence should have been admitted, but on a slightly different basis. His Honour observed that:

> the judgments in *Momcilovic v The Queen* do not yield a single or majority view as to what is meant by interpreting a statutory provision in a way that is compatible with human rights within the meaning of s 32 of the Charter. As it appears to me, French CJ and Crennan and Kiefel JJ took a view of s 32 which is similar to that adopted by this court in *Momcilovic*; Gummow, Hayne and Bell JJ took a broader view of s 32, which attributes greater significance and utility to s 7; and Heydon J concluded that s 32 is invalid. Assuming that s 32 is not invalid, one is left with a choice between the other two approaches.

Nettle JA said the trial judge had adopted the approach advocated by French CJ and Crennan and Kiefel JJ – effectively he considered s 6 as though there were a conflicting (unqualified) right to privacy in the common law. If he had instead followed the Gummow/Hayne/Bell JJ approach, he would have treated the right to privacy as subject to s 7 of the Charter (the general limitation provision). Choice of this latter approach, according to Nettle JA, might have resulted in a different conclusion because the right to privacy would be subject to "such reasonable limits as can be demonstrable justified in a free and democratic society…."

Nevertheless, Nettle JA ultimately concluded that neither approach would render the police conduct unlawful in this particular case, because the purpose of the Surveillance Devices Act, as reflected in s 11, clearly allow for limitations on the right to privacy for law enforcement purposes. Even if the recording had contravened the Act, His Honour held, the trial judge should still have admitted it under the Evidence Act rules concerning unfair admissions and improperly/unlawfully obtained evidence (ss 90 and 138).

Harper JA found that the applicant had, in the circumstances, "no possible right to privacy" because "an offender who is caught in the act cannot require that the direct evidence of those who saw or heard the commission of the crime be excluded on the basis that otherwise some right he or she has to his or her privacy will be infringed." His Honour therefore found s 32 of the Charter to be irrelevant and agreed that the appeal should be dismissed.

As Nettle JA noted, the Charter's first major test in the High Court (*Momcilovic v The Queen*) did not result in clear authority on how lower courts should approach their interpretive duties under ss 7 and 32. As such, the question of whether human rights-consistent interpretations of legislation under s 32 are to be considered in light of the general limitations in s 7 remains open.

The Court of Appeal's decision can be found online at:
http://www.austlii.edu.au/au/cases/vic/VSCA/2011/345.html

Adam Fletcher *is Manager of the Accountability Project at the Castan Centre for Human Rights Law and a volunteer with the Human Rights Law Centre*

Principles of access to justice and open justice may require state funded video link to enable asylum seeker to participate in proceedings

Minister for Immigration and Citizenship v MZYLE [2011] FCA 1210 (25 October 2011)

Summary

The Federal Court held that an asylum seeker is entitled to be present at the proceedings via video link at the expense of the Minister to ensure access to justice and open justice and due to the potential for the proceedings to immediately and significantly affect the rights of the respondent.

Facts

MZYLE (the Respondent) is a Sri Lankan asylum seeker who arrived at Christmas Island in February 2010 but is currently detained in Darwin by the Department of Immigration and Citizenship. His application for refugee status was refused. He obtained pro bono legal assistance through Victoria Legal Aid, who lodged a successful appeal in the Federal Magistrate's Court against the original recommendation to reject his application. It is from this decision which the Minister appealed.

The Respondent sought to require the Minister to pay for the cost of a video link so that he could observe and/or participate in the Melbourne hearing from Darwin.

Decision

Justice North held in favour of the respondent for two main reasons.

First, North J noted the ability to observe proceedings is central to the principles of access to justice and openness in justice. Despite arguments to the contrary by the Minister, this is so regardless of whether the Respondent is represented by counsel, whether such attendance is 'necessary' for the purpose of the hearing or whether they can 'understand' the proceedings. North J noted this is so because "the ability to see for themselves that the legal system has taken their case seriously lies at the heart of requirements of free access to the law and open justice."

Secondly, in North J's opinion, the request to witness the proceedings is a reasonable one, particularly given the propensity of the proceedings to have "immediate and direct personal consequences for an asylum seeker".

North J offered two further, subsidiary reasons in support of his decision. First, the respondent was located in Darwin due to a decision of the Department of Immigration and Citizenship. Secondly, he analogised the public law nature of the proceedings with that of the criminal jurisdiction. Victorian law entitles defendants in criminal appeals to be present in the Court on hearing of appeals; by extension, this rule also applies to public law proceedings.

The cost of providing the requested video link was also briefly discussed, with North J noting that there were currently 256 cases involving asylum seekers pending. North J found that the financial burden to the Department, if a one hour video link costs $712 and all represented litigants are entitled to such a link, could not be considered "overly substantial".

Implications

North J suggests that there are two questions which must be answered when determining whether the Department should be required to secure the attendance (at least in the virtual sense) of an asylum seeker respondent:

- Is it reasonable for the respondent to want to be present?

- Who is responsible for the geographic distance between the respondent and place proceedings are to be heard?

Despite taking the path to participation least burdensome to the Department by seeking a funded video link instead of personal presence, the high-level arguments of North J leave open the possibility of requiring the Department to cover the cost of transporting a respondent to enable observation or participation in proceedings.

Perhaps most importantly, North J's decision recognises that the principles of openness, fairness and access – foundations of our legal system – are intended to protect from the overzealous exercise of power by the State. Failing to provide for the observation of that exercise of power by those who will be affected undermines the foundations of system itself.

The decision can be found online at http://www.austlii.edu.au/au/cases/cth/FCA/2011/1210.html.

Liz Austin *is a volunteer lawyer at the Human Rights Law Centre*

INTERNATIONAL HUMAN RIGHTS CASE NOTES

Treatment and conditions of detention for women must be gender-sensitive, says CEDAW

Inga Abramova v Belarus, Communication No. 23/2009, UN Doc. CEDAW/C/49/D/20/2008 (2011)

Summary

The Committee on the Elimination of Discrimination against Women has found that Belarus' treatment of a woman detained under administrative arrest violated articles 2(a)-2(b), 2(e)-2(f), 3 and 5(a) of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), read in conjunction with article 1 and the Committee's General Recommendation No. 19 on violence against women.

Facts

The District Court of Belarus found Inga Abramova guilty of "minor hooliganism" for hanging ribbons and posters calling for participation in the "European March," and ordered her to serve five days administrative arrest. Abramova claimed that a male staff member subjected her to a body search, touched her inappropriately, and threatened to strip her naked. She further claimed that she was detained in an underground cell in a facility staffed entirely by men. According to Abramova, the facility housed persons detained on criminal charges as well as those under administrative arrest. Among other things, Abramova also claimed that: she was only fed twice a day; the heating system was turned off, despite almost freezing temperatures; there was inadequate light and ventilation; other prisoners and male staff could watch her use the toilet; and she was subjected to frequent humiliating comments.

Following unsuccessful attempts to obtain redress at the domestic level, Abramova submitted a communication to the Committee in which she alleged violations of articles 2(a)-2(b), 2(e)-2(f), 3 and 5(a) of CEDAW, read in conjunction with article 1. In a further submission to the Committee, the author reiterated that her communication was concerned primarily with the discrimination she experienced as a woman detained at the aforementioned facility, rather than the conditions of detention *per se*.

Decision

The Committee found that Belarus' treatment of Inga Abramova constituted discrimination and sexual harassment, in violation of articles 2(a)-2(b), 2(e)-2(f), 3 and 5(a) of CEDAW, read in conjunction with article 1 and the Committee's General Recommendation No 19. In reaching its determination, the Committee also took into account rule 53 of the Standard Minimum Rules for Treatment of Prisoners and the UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders.

In reaching its views, the Committee reiterated that failure of detention facilities to adopt a gender-sensitive approach to the specific needs of women prisoners constitutes discrimination, within the meaning of article 1 of CEDAW. Recalling rule 53 of the Standard Minimum Rules, which is consistent with the definition of discrimination against women in article 1 of CEDAW, the Committee explained that:

- In an institution for both men and women, the part of the institution set aside for women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution.
- No male member of staff shall enter the part of the institution set aside for women unless accompanied by a woman officer.
- Women prisoners should be attended and supervised only by women officers.

The Committee further reiterated that sexual harassment is a form of gender-based violence against women that is prohibited under CEDAW.

In its recommendations, the Committee called on Belarus to provide appropriate reparation, including compensation, to Abramova. In addition, it recommended that Belarus take measures to, *inter alia*: protect the dignity, privacy and physical and psychological safety of women detainees; ensure access to gender-specific health care for women detainees; and provide safeguards to protect women detainees from all forms of abuse, including gender-specific abuse.

Relevance to the Victorian Charter

The Victorian Charter makes no express reference to the obligations of public authorities with respect to women prisoners. However, several Charter rights, when interpreted together, impose obligations on public authorities to adopt measures to address the specific needs of women prisoners and protect them against discrimination and harassment. These include the rights to non-discrimination and equality (s 8), freedom from torture and cruel, inhuman or degrading treatment (s 10), freedom from arbitrary interference in private life (s 13), and the right to humane treatment when deprived of liberty (s 22).

The decision is available at: http://www2.ohchr.org/english/law/docs/CEDAW-C-49-D-23-2009.pdf

Simone Cusack *is Senior Policy & Research Officer in the Australian Human Rights Commission's Sex and Age Discrimination Unit*

Sterilisation of woman amounted to breach of respect for private life and prohibition against inhuman or degrading treatment

V.C. v Slovakia [2011] ECHR 1888 (8 November 2011)

Summary

In this case, the European Court of Human Rights held that the sterilisation of a woman in circumstances where "consent" to the procedure was obtained during the late stages of labour violated her right to private life and the prohibition against torture and ill-treatment.

Facts

The applicant, VC, is of Roma ethnic origin, living in North-East Slovakia. Born in 1980, VC finished compulsory schooling in sixth grade and at the time of the case, was unemployed. She speaks the Roma language and a local dialect in her day-to-day activities.

In August 2000, VC gave birth to her second child by Caesarean section at the public Prešov Hospital. During the procedure, the hospital sterilised VC by severing and sealing her fallopian tubes to prevent future fertilisation.

According to the hospital, VC had consented to the procedure after having been informed of the medical risks associated with a subsequent pregnancy. VC's signature was evident on the consent form (albeit shaky and with her surname split), and the medical records stated that "Patient requests sterilisation" at 10.30 am. The medical records also include "Patient is of Roma origin".

According to VC however, the hospital's account is not an accurate and complete statement of events.

VC arrived at Prešov Hospital in labour shortly before 8 am. Previously, her eldest child had been born by Caesarean section due to the small size of her pelvis. This, and post-operative complications from her first pregnancy, led to the medical decision to deliver this child also by Caesarean section. VC submitted that after several hours of being in labour and pain, the Prešov Hospital medical personnel asked her whether she wanted to have more children. VC responded that she did, but was told that if she had another child, either her or the baby would die. According to VC, she began to cry, and convinced that her next pregnancy would be fatal, she responded "do what you want to do". She was then asked to sign the medical record that stated that she had requested sterilisation. VC did not understand the term 'sterilisation', and, being in the last stage of labour, her recognition and cognitive abilities were influenced by labour and pain.

At 11.30 am, VC was put under anaesthetic and the delivery was completed by Caesarean section. The two doctors involved in the delivery then performed a tubal ligation on VC. She awoke from the anaesthetic at 12.20 am.

After the birth, VC alleges that she was put in a hospital room solely for women of Roma ethnic origin, and was prevented from using the same bathrooms as women not of Roma origin.

Since the sterilisation, VC has suffered from serious medical and psychological after effects, including a phantom pregnancy. As a result of her sterilisation, VC has also been ostracised from the Roma community, separating, and ultimately divorcing, from her husband due to her inability to have further children.

Decision

The Court found that Slovakia had breached VC's right to freedom from torture or inhuman or degrading treatment or punishment under article 3 of the European Convention, which "enshrines one of the most fundamental values of democratic society" (at [100]). In addition, the Court found that Slovakia had breached VC's right to private and family life under article 8 of the Convention.

VC also submitted that her rights to marry and found a family under article 12, to an effective remedy under article 13, and to freedom from discrimination on the base of race and sex under article 14 of the Convention had been breached. The Court however found that it was not necessary to separately determine whether the facts of the case gave rise to breaches of articles 12 and 14, and that there was no breach of article 13 when taken into consideration with the other breaches.

The Court's approach to each of these submissions are discussed in turn below.

Article 3

Article 3 of the Convention contains the right to freedom from torture or inhuman or degrading treatment or punishment. In order to engage the operation of this article, the ill-treatment must be of a minimum level of severity, determined by consideration of the circumstances of the case.

The Court referred to precedent which has established that the treatment of a person by a State engages article 3 where it results in bodily harm of a certain degree of severity. Medical necessity is however a logical exception to the operation of article 3 under these circumstances, but must be proven and still follow procedural guarantees and protections. In particular, given the "very essence of the Convention is respect for human dignity [and] freedom", free, full and informed consent is fundamental to any medical procedures, even where necessary (excluding certain emergency situations).

The Court found that sterilisation resulted in bodily harm to VC of a sufficient severity to engage operation of article 3. In particular, the Court held that:

> sterilisation constitutes a major interference with a person's reproductive health status. As it concerns one of the essential bodily functions of human beings, it bears on manifold aspects of the individual's personal integrity including his or her physical and mental well-being and emotional, spiritual and family life. It may be legitimately performed at the request of the person concerned, for example as a method of contraception, or for therapeutic purposes where the medical necessity has been convincingly established.

VC began her legal action after the release of the report 'Body and Soul: Forced and Coercive Sterilisation and Other Assaults on Roma Reproductive Freedom in Slovakia" which informed VC that a tubal ligation was not a life-saving surgery, and that full and informed consent was required to perform the procedure.

The Court addressed the difficulties faced by courts when assessing the application of the law to cases of medical necessity, stating (at [110]) that "it is not the Court's role to review the assessment by medical doctors of the state of health of the applicant's reproductive organs". Having referred to a series of international reports on human rights and sterilisation, the Court continued: "however, it is relevant to note that sterilisation is not generally considered as a life-saving surgery … as there was no emergency involving imminent risk of irreparable damage to the applicant's life or health, and since the applicant was a mentally competent adult patient, her informed consent was a prerequisite to the procedure, even assuming that it was a 'necessity' from a medical point of view."

The Court found that the approach taken by the doctors at Prešov Hospital was incompatible with VC's human rights; in particular, "such a threat was not imminent as it was likely to materialise only in the event of a future pregnancy and it could also have been prevented by means of alternative, less intrusive methods".

The Court concluded that there was no indication that there was any unique medical necessity to perform the sterilisation. Regardless of a medical necessity, in the absence of an emergency situation, the Court found that VC had not given free, full and informed consent to her sterilisation as required by international standards under the Convention on Human Rights and Biomedicine, the WHO Declaration on the Promotion of Patients' Rights in Europe, and CEDAW General Recommendation No. 24.

The Court also made a statement with respect to "paternalistic" decision making by treating medical practitioners, stating that "the applicant's informed consent could not be dispensed with on the basis of an assumption on the part of the hospital staff that she would act in an

irresponsible manner with regard to her health in the future" (at [113]). While this statement is made in respect of the facts of this case, it provides a useful summary of principle regarding determinations in the "best interests of the patient" by doctors.

Article 8

It was not disputed between the parties that the sterilisation affected VC's reproductive health status, and had repercussions for her private and family life. VC submitted that Slovakia had failed in its positive obligation under article 8 to ensure that her private life was not interfered with by not securing the rights guaranteed under article 8 in the Slovakian legal system. In particular, Slovakia was under a positive obligation to ensure that the reproductive health of women of Roma origin was protected through legal safeguards (at [145]).

Documents were tended before the Court that included concerns from the Council of Europe Commissioner of Human Rights that the Roma population of eastern Slovakia was at particular risk of improper sterilisations. These documents included recommendations that more adequate safeguards be developed to protect Roma women from inappropriate sterilisations and discrimination. The identification of VC's ethnic origin in her medical reports, and testimony from the treating doctors that stated that VC's case was "the same as in other similar cases", was deemed by the Court to demonstrate the medical staff's negative opinion of Roma patients, rather than the basis of implementing more specialised care.

Whilst Slovakia had taken steps to amend its healthcare legislation to ensure fully informed consent was obtained in sterilisation procedures, these amendments were subsequent to the facts of VC's case. The Court found that VC's case in fact demonstrated that the laws at that time were not sufficient. As a result, the absence of the relevant legal safeguards to protect the reproductive health of VC as a Roma woman resulted in a failure by Slovakia to comply with its positive obligation to secure protections to enable her to enjoy her right to respect for private and family life.

Article 12

Similar to article 14 below, the Court found that it was not necessary to determine article 12 separately in light of findings under article 8 of the Convention. Article 12 expresses the right to marry and found a family. VC submitted that her right to found a family was breached by the sterilisation. The Court found that the sterilisation did have a serious impact on her family life, however as this was considered and found for under examination of article 8, the Court held that it was absolved from separately determining a breach under article 12.

Article 13

VC submitted that she was not provided with an effective remedy in respect of her complaints relating to articles 3, 8 and 12 of the Convention. Article 13 provides that where an individual's rights under the Convention have been violated, they shall have an effective remedy from the State. The Court found no breach of this article as VC had had two opportunities for her case to be reviewed at the domestic level. The Court reiterated that an "effective" remedy need not be a "successful" one (at [165-166]).

Article 14

Article 14 prevents discrimination against a person on the basis of, inter alia, race and gender. VC submitted to the Court that her ethnic origin had played a decisive role in the Prešov Hospital medical personnel's decision to sterilise her. Referencing the Convention on the Elimination of all forms of Discrimination Against Women, VC also submitted that the differentiation of level of

medical care between men and women in the health services was a breach of the prohibition of discrimination on the grounds of sex, and the sterilisation performed on her without her informed consent amounted to a form of violence against women. The Court found that there was not sufficiently strong evidence to prove VC's submissions under this article, but rather than find no breach, the Court found that it was more appropriate to deal with these matters as part of the failure of the State to perform its obligations in respect of article 8.

It was under this article 14 that the dissenting judge, Mijovic J, differed from the majority. Mijovic J held that a breach of article 14 should have been considered separately, and having done so, found that article 14 had indeed been breached by Slovakia. Mijovic J found that the "special attention" granted to VC as a Roma woman was to sterilise her, and in a short, but sharp, dissenting judgement on article 14, held that this case demonstrated the "relics of a long-standing attitude towards the Roma minority in Slovakia" which "represents the strongest form of discrimination".

The case is available at: http://www.bailii.org/eu/cases/ECHR/2011/1888.html

Alexandra Phelan *is a lawyer with the Mallesons Stephen Jaques Human Rights Law Group*

Supreme Court of British Columbia refuses to admit evidence obtained in breach of Charter rights

R v Nakamura, 2011 BCSC 1443 (26 October 2011)

Summary

This case concerns a *voir dire* ruling made by the Supreme Court of British Columbia to exclude from the proceedings an incriminating statement made by one of the two accused on the basis that the accused was not advised upon being detained of the right to counsel. Pursuant to s 10(b) of the *Canadian Charter of Rights and Freedoms,* everyone has a guaranteed right upon on arrest or detention *'*to retain and instruct counsel without delay and to be informed of that right*'.* Section 24(2) of the Charter provides for the exclusion of impugned evidence if admission of the evidence would bring the administration of justice into disrepute.

Facts

The two accused were charged with aggravated assault and assault with intent to steal. Both gave statements to police which were the subject of the application. The accused Vincent was initially taken to the police station simply for questioning and was informed that he could leave at any time. However, following an aggressive interrogation during which the interviewing officer threatened to go to Vincent's home with a warrant for arrest, Vincent confessed, implicating the other accused, Nakamura. Vincent was read his Charter rights just prior to having his statement taken.

The accused Nakamura was an Asian male whose second language was English. Upon his arrest, and then again just prior to having his statement taken, Nakamura was advised of his right to counsel and was asked whether he understood this right. He was further advised that he had the right to a reasonable opportunity to contact counsel.

Decision

The Court confirmed that the onus is on the accused to establish a Charter breach on a balance of probabilities. The burden of proving certain contested issues, however, shifts to the Crown. For

example, once the accused shows that his or her right to counsel was infringed, it is for the Crown to establish that the accused would not have conducted him or herself differently.

The test for valid waiver of the right to counsel is whether the person waiving the right actually knows what he or she is giving up. Where special circumstances exist that would reasonably alert the officer informing the accused of this right that there may be a language comprehension difficulty, the police office must take further steps to ensure a detainee understands their Charter rights.

In respect of the Nakamura statement, it was found that, despite Nakamura's language difficulties, the circumstances showed that he was "sufficiently proficient" in English to be able to grant a valid waiver of his right to counsel.

In respect of the Vincent statement, it was held that Vincent's right to counsel accrued upon him being psychologically detained. According to Romilly J, the power imbalance between the police officer who took the statement and the "unsophisticated, short, slightly built 19 year old…was huge". Moreover, even when the police officer did advise Vincent of his rights, it was done with an "almost indecent hast" and without Vincent being given any time to consider whether he wished to contact counsel. There had been no valid waiver, and therefore Vincent's statement was obtained in breach of the Charter. Consequently, it was necessary for the Court to consider whether the evidence should be excluded under s 24(2).

On this issue, the Court reaffirmed the approach taken in *Grant v Harrison* 2009 SCC 34, which involves three lines of inquiry into: (i) the seriousness of the Charter-infringing state conduct; (ii) the impact of the Charter violation on the Charter-protected interests of the accused; and (iii) society's interest in an adjudication on the merits. In balancing these three lines of inquiry, the Court determined that admitting the illegally obtained evidence would bring the administration of justice into disrepute. Vincent's statement was thus excluded.

Relevance to Victorian Charter

This case raises important questions concerning the need to preserve the rights of the detained individual while maintaining the integrity of the administration of justice. The public must have confidence that vulnerable citizens are being advised of their rights by state authorities. To admit evidence where proper cautions have not been given would be to undermine the public's confidence in state authorities and the legal system in the long term.

Application for exclusion of impugned evidence can be made under current law, and unlawfulness arising from breach of the Victorian Charter may be used as a ground in the cause of action.

The Victorian Charter guarantees some protections for accused persons. The minimum rights guaranteed in circumstances of detention and arrest are dealt with separately in ss 21 and 25 respectively. Relevantly, a person charged with a criminal offence is entitled to have adequate time to prepare his or her defence and to communicate with a lawyer or adviser chosen by him or her. If the accused is unrepresented, he or she has the right to be told of the right, if eligible, to legal aid under the *Legal Aid Act 1978* (Vic). A detained person does not have the right to retain counsel immediately. The Victorian Charter would arguably be strengthened by the inclusion of the right upon detention to retain and instruct counsel with delay and, importantly, the right to be clearly informed of this right.

This decision can be found online at:
http://canlii.ca/en/bc/bcsc/doc/2011/2011bcsc1443/2011bcsc1443.html

Isabel Waters *is a lawyer with the Mallesons Stephen Jaques Human Rights Law Group*

Failure to protect woman effectively against domestic violence violated Convention on Elimination of Discrimination against Women

V.K. v. Bulgaria, UN Doc CEDAW/C/49/D/20/2008 (17 August 2011)

Summary

The Committee on the Elimination of Discrimination against Women has found that Bulgaria's failure to protect V.K. effectively against domestic violence amounted to violations of articles 2(c)-2(f) of the *Convention on the Elimination of All Forms of Discrimination against Women*, read in conjunction with article 1, and article 5(a), read in conjunction with article 16(1) and General Recommendation No 19 on violence.

Facts

V.K. claimed that her husband, F.K., subjected her to domestic violence, initially psychological, emotional and economic abuse and later physical violence. Following continued abuse, V.K. filed an application for protective measures and financial maintenance with the Warsaw District Court but the proceedings remained unresolved. During this time, the abuse continued and included an attempt to strangle V.K. F.K. subsequently initiated divorce proceedings against his wife and claimed custody of both their children. Police were called on multiple occasions in response to F.K.'s abusive behaviour. V.K. succeeded in obtaining an order for immediate protection under the Bulgarian *Law on Protection against Domestic Violence*. However, domestic courts refused to grant V.K. a permanent protection order on the basis that there was no imminent threat to the life or health of V.K. and her children because they had not been subjected to domestic violence in the month prior to applying for the order.

Following unsuccessful attempts to obtain redress at the domestic level, V.K. submitted a communication to the Committee in which she alleged violations of articles 2 (state obligations), 5 (wrongful gender stereotyping) and 16 (equality in marriage and family relations) of CEDAW, read in conjunction with article 1 (definition of discrimination).

Decision

Freedom from gender-based violence against women

In its views, the Committee reiterated that gender-based violence is a form of discrimination against women that States Parties to CEDAW are required to address. It further reiterated that States Parties have a due diligence obligation to prevent, investigate, punish and remedy acts of violence committed by private actors.

The Committee noted that Bulgaria had adopted the *Law on Protection against Domestic Violence*, but had failed to implement it in practice so as to afford V.K. and other women effective protection against domestic violence. In condemning this failure, the Committee explained that "the political will that is expressed in such specific legislation must be supported by all State actors, including the courts, who are bound by the obligations of the State party."

The Bulgarian courts' refusal to issue a permanent protection order against V.K.'s husband was central to the Committee's finding that the State Party had violated article 2 of CEDAW. According to the Committee, the refusal was based on the assumption that there was no imminent threat to the life or health of V.K. and her children because they had not been subjected to domestic violence in the month prior to applying for the order. The Committee noted, however, that CEDAW "does not require a direct and immediate threat to the life or health of the victim. Such violence is not limited to acts that inflict physical harm, but also covers acts that inflict mental or sexual harm or suffering, threats of any such acts, coercion and other deprivations of

liberty." The Committee noted further that, while applications under the *Law on Protection against Domestic Violence* for an immediate protection order require "a direct, immediate or impending threat to the life or health of the aggrieved person", no such threat is required to issue a permanent protection order. According to the Committee, Bulgaria's courts had "applied an overly restrictive definition of domestic violence that was not warranted by the Law and was inconsistent with the obligations of the State party under article 2 (c) and 2 (d) [of] the Convention…." The Committee explained that

> both courts focused exclusively on the issue of direct and immediate threat to the life or health of the author and on her physical integrity while neglecting her emotional and psychological suffering. Moreover, both courts unnecessarily deprived themselves of an opportunity to take cognizance of the past history of domestic violence….The courts also applied a very high standard of proof by requiring that the act of domestic violence must be proven beyond reasonable doubt, thereby placing the burden of proof entirely on the author, and concluded that no specific act of domestic violence had been made out on the basis of the collected evidence. The Committee observes that such a standard of proof is excessively high and not in line with the Convention, nor with current anti-discrimination standards which ease the burden of proof of the victim in civil proceedings relating to domestic violence complaints.

The Committee also concluded that the unavailability of domestic violence shelters in Bulgaria amount to a violation of articles 2(c) and 2(e) of CEDAW.

Freedom from wrongful gender stereotyping

In its views, the Committee reiterated the links between wrongful gender stereotyping and the freedom from gender-based violence against women as well as the right to a fair trial. Affirming its findings in *Karen Tayag Vertido v The Philippines*, the Committee noted that States Parties can be held accountable under CEDAW for judicial decisions that are based on gender stereotypes, rather than law and fact. "Stereotyping," the Committee said, "affects women's right to a fair trial and the judiciary must be careful not to create inflexible standards based on preconceived notions of what constitutes domestic or gender-based violence."

Considering the facts, the Committee found that the refusal to grant a permanent protection order was based on gender stereotypes related to domestic violence. It found further that the divorce proceedings had been influenced by gender stereotypes related to the roles and behaviour expected of men and women within marriage and family relations. According to the Committee, reliance on these gender stereotypes amounted to discrimination and also resulted in the re-victimization of V.K, in violation of articles 2(d) and 2(f) of CEDAW as well as article 5(a), read in conjunction with article 16(1) and the Committee's General Recommendation No 19 on violence against women.

Relevance to the Victorian Charter

In Australia, one in three women over the age of 15 years has experienced gender-based violence in their lifetime. Over 40 per cent of these women, around 1.2 million women, have experienced that violence at the hands of a current or former partner. Whilst domestic violence cannot be eliminated through law alone, it is an essential component of any response to this human rights violation.

The *Victorian Charter* provides a key tool in the struggle against gender-based violence, even though it does not include express protections against this human rights abuse. Several of its rights are relevant to domestic violence, including rights to non-discrimination and equality (s 8),

the right to life (s 9), and the freedom from torture and cruel, inhuman or degrading treatment (s10). It is important that these rights are interpreted in a way that provides women with meaningful protection against gender-based violence.

The decision is available at: http://www2.ohchr.org/english/law/docs/CEDAW-C-49-D-20-2008.pdf

Simone Cusack *is Senior Policy & Research Officer in the Australian Human Rights Commission's Sex and Age Discrimination Unit*

Systemic overcrowding in prisons may amount to inhuman and degrading treatment

Mandic and Jovic v Slovenia [2011] ECHR Application Nos. 5774/10 and 5985/10 (20 October 2011)

Summary

In this case, the European Court of Human Rights confirmed that inadequate physical conditions of detention in prison, in particular insufficient personal space for prisoners resulting from systemic overcrowding, can amount to inhuman and degrading treatment in breach of article 3 of the European Convention of Human Rights. If a prison does not meet certain minimum standards, the threshold of severity necessary to amount to a breach of article 3 may be crossed even in the absence of a positive intention to humiliate or debase prisoners.

Facts

Mr Mandic, a Slovenian national, and Mr Jovic, a Serbian national (the applicants), were detained in the remand section of Ljubljana Prison in Slovenia for approximately seven months in 2009-2010 pending trial. They occupied a cell measuring 16.28 square metres together with four other inmates. The cell had no artificial ventilation, though it did have four windows which the prisoners were free to open and close. The average daily temperature in the second half of July and August of 2009 was approximately 28 degrees celcius.

The cell was equipped with a sanitary annex, separated by floor-to-ceiling walls and a door with a functioning artificial ventilation system. Partitioned showers were available for daily use on the same floor as the cell.

The cells were locked throughout the day in both the remand and the closed section of the prison and the applicants were only able to leave their cell for scheduled activities (such as visits or exercising) for an average of 2.5 hours per day. They were able to use the outside yard, which was on average used by no less than 30 prisoners at a time, for two hours a day and also had access to a recreation room for a couple of hours a week.

The occupancy of the Ljubljana Prison twice exceeded its official capacity of 128 prisoners during the period of the applicants' detention, with 261 and 245 prisoners held in 2009 and 2010 respectively. The effects of overcrowding at this prison on inmates, particularly in summer, had previously given rise to the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment recommending that efforts be made to reduce cell occupancy to a maximum of four prisoners per 18 square metre cell and subsequently criticising the lack of progress on this front. The Slovenian Human Rights Ombudsman had also expressed concern about the overcrowding and noted in a 2007 report that "the living conditions, as observed by us during the summer, were inhuman".

The applicants complained that the conditions of their detention amounted to a violation of articles 3 and 8, and that they had no effective remedy for these violations as required by article 13. In particular, they complained of severe overcrowding, inadequate ventilation, poor sanitary

conditions, excessive restrictions on out-of-cell time, high temperatures in the cell, inadequate health care and psychological assistance and exposure to violence from other inmates due to insufficient security.

Decision

Article 3

The Court noted that "severe lack of space in a prison cell" was a significant factor in determining whether detention conditions were degrading within the meaning of article 3. It observed that the applicants had been held in a cell for several months in which the personal space available to each of them was 2.7 square metres (and even less when furniture was taken into account), holding that "this state of affairs in itself raised an issue under Article 3".

The Court considered that the applicants' situation was exacerbated by confinement to their cell day and night, save for two hours of daily exercise in the outside yard and an additional two hours per week in the recreation room. The Court took further note of the applicants' complaints regarding the high temperatures in the cells, as substantiated by reports by the Slovenian Human Rights Ombudsman. The Court accepted that the sanitary conditions may have been affected by the fact that the facilities were overcrowded, but did not find on the basis of the material before it that the cleanliness of the relevant areas of the prison was inadequate.

Significantly, in the absence of any indication that there was a positive intention to humiliate or debase the applicants, the Court ultimately concluded that:

> …having regard to the fact that for the most part of their detention they had less than 3 square metres of personal space inside their cell for almost the entire day and night, the Court considers that the distress and hardship endured by the applicants exceeded the unavoidable level of suffering inherent in detention and went beyond the threshold of severity under Article 3 and therefore amounted to degrading treatment.

This followed from the principle articulated at paragraph [72] of the judgment that:

> …although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3.

Article 8

The applicants relied on restrictions on visits and telephone calls to support a claim that there was a violation of the right to private life protected by Article 8. The Court rejected this claim as manifestly ill-founded as these restrictions were provided for in the relevant legislation, and were not unreasonable restrictions to "uphold the prison regime". Furthermore, there was no evidence or concrete information submitted to indicate the applicants were unable to use the facilities in accordance with the law.

Article 13

The applicants complained that, owing to the systemic nature of the inadequate prison conditions, they did not have any effective remedy at their disposal as regards their complaints under articles 3 and 8.

The Slovenian Government asserted that there were several remedies to which the applicants could have resorted. The Court found that none of these could be regarded as constituting an effective remedy. The transfer of a remand prisoner to another prison or the transfer of a convicted prisoner under criminal legislation, for example, were inadequate because they could only have been requested by the prison governor. Moreover, the authorities were aware of the

overcrowding and presumably would have ordered the applicants' transfer if it was possible to do so. The Court also found that the other remedies proposed by the Government – namely, the institution of civil proceedings to obtain compensation, a petition to the Human Rights Ombudsman or an appeal to the Constitutional Court – were not sufficiently certain remedies in respect of inadequate prison conditions to be considered effective remedies.

Relief

Slovenia was ordered to pay the applicants 8,000 euros each in respect of non-pecuniary damage and 2,000 euros jointly in respect of costs and expenses. Further, the Court underlined the need for the Slovenian government to take steps to reduce the number of prisoners in the prison in order to prevent future violations of article 3 even though it could not conclude there was a structural problem consisting of a practice incompatible with the Convention nationwide in Slovenia.

Relevance to the Victorian Charter

Section 10 of the Charter provides protection from torture and cruel, inhuman or degrading treatment on similar terms to article 3 of the Convention. Furthermore, s 22(1) of the Charter provides that "all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person". This decision may usefully inform the interpretation of these provisions of the Charter. The reiteration in this case that the State has positive obligations to ensure that certain minimum standards are met in detention facilities is significant in light of public authorities being caught under the Charter. This is particularly interesting in the context of the partial privatisation of the prison system in Victoria.

Rebecca James *is a lawyer and Pro Bono Coordinator with Allens Arthur Robinson*

Proceeds of crime and the presumption of innocence

Gale & Anor v Serious Organised Crime Agency [2011] UKSC 49 (26 October 2011)

Summary

Approximately £2 million worth of property was confiscated from the appellants, on the basis that it was the fruit of drug trafficking, money laundering and tax evasion.

Under Article 6(2) of the European Convention on Human Rights, the United Kingdom Supreme Court held that the appellants' criminal conduct was to be proved on the balance of probabilities, and not beyond reasonable doubt. It was held that the proceedings were civil in nature and did not share a procedural link with previous criminal proceedings brought against one of the appellants in Portugal and Spain.

Facts

The *Proceeds of Crime Act 2002* (UK) provides for confiscation of assets if the court is satisfied on the balance of probabilities (the civil standard of proof) that the assets were obtained by unlawful conduct.

At first instance, the British Serious Organised Crime Agency ("SOCA") obtained an order against the appellants for confiscation of property to the value of £2 million. SOCA satisfied the primary judge that the property was the proceeds of drug trafficking, money laundering and tax evasion in various countries.

On appeal to the Supreme Court of the United Kingdom, the appellants relied on the fact that David Gale had been acquitted of drug trafficking in Portugal, and criminal proceedings against him had been discontinued in Spain. They argued that unlawful conduct had to be proved beyond

reasonable doubt (the criminal standard of proof), otherwise the proceedings violated article 6(2) of the European Convention on Human Rights. Article 6(2) provides: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

Decision

The Supreme Court unanimously dismissed the appeal.

Lord Phillips examined previous decisions of the European Court of Human Rights on article 6(2). Although his Lordship found it difficult to identify a unifying principle underlying the cases, he concluded firstly that the existence of a "procedural connection" between the previous criminal trial and the subsequent civil proceedings was relevant. If such a connection existed, the criminal conduct would have to be proved beyond reasonable doubt for the civil claim to succeed. His Lordship held that there was no procedural link between the Portuguese trial and the current proceedings. Further, the British court was permitted to consider evidence that formed the basis of the Portuguese charges.

An alternative route to violation of article 6(2) was if public authorities (for instance, the court) suggested that an acquitted defendant might nonetheless have been guilty. His Lordship could identify no such suggestion on the facts.

The other justices broadly agreed with Lord Phillips. In concluding that no procedural link existed, Lord Dyson remarked that the Act provides for free-standing proceedings that can be brought whether or not there has been a criminal trial.

Relevance to the Victorian Charter

Section 25(1) of the Victorian Charter contains similar wording to article 6(2): "A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law."

In *Momcilovic v The Queen* (2011) 280 ALR 221; [2011] HCA 34, at paragraph 52 French CJ tentatively indicated that s 25(1) may extend to "prejudicial pre-trial statements and proceedings for the award of costs or compensation for detention on remand following discontinuance of criminal proceedings or acquittal". However, this comment was in passing, as *Momcilovic* concerned the principle that the prosecution bears the burden of proof in criminal proceedings.

The principles discussed in *Gale* appear relevant to various types of civil claims, such as a compensation claim by the defendant for being remanded in custody; disciplinary proceedings against the defendant by a professional body or employer; and damages claims by victims.

However, the utility of the case itself may be limited. The justices found the prior ECHR cases confusing and difficult to interpret. Much ambiguity surrounds the requirement of "procedural connection", and the efforts of Lord Phillips in particular to flesh out a unifying principle were limited by the facts in issue. If there ever was a case where two proceedings lacked a procedural connection, this was it – the previous criminal trial and subsequent civil proceedings took place in different jurisdictions. Accordingly, the justices rightly suggested that it would be desirable for the Grand Chamber of the ECHR to clarify and rationalise "this whole confusing area".

The decision can be found online at: www.bailii.org/uk/cases/UKSC/2011/49.html

***Sylvester Urban** is a lawyer with the Mallesons Stephen Jaques Human Rights Law Group*

Detention of person with mental illness was arbitrary and unlawful

Sessay, R (on the application of) v South London & Maudsley NHS Foundation Trust & Anor [2011] EWHC 2617 (QB) (13 October 2011)

Summary

The High Court of England and Wales considered the circumstances in which the compulsory admission to hospital of non-compliant incapacitated patients under the *Mental Health Act 1983* (MHA) may constitute a deprivation of liberty in contravention of article 5 the European Convention of Human Rights (ECHR).

The Court found that the procedures provided for detention by the MHA to be comprehensive. It held that Ms Sessay's detention for 13 hours in contravention of the procedure provided by the MHA constituted a deprivation of liberty in contravention of article 5 of the ECHR.

Facts

The claimant, Sawida Sessay, was taken by police officers to the Maudsley Hospital and detained for 13 hours pending the making of an application to admit her compulsorily under s 2 of the Act. Section 2 of the MHA provides for the compulsory admission and detention of a patient to hospital for assessment (or assessment followed by treatment) for up to 28 days.

The police officers entered the claimant's home following receipt of a complaint that Ms Sessay had not been caring properly for her child. They formed the view that the claimant was mentally disordered, were concerned for her welfare and that of her child and considered it was in Ms Sessay's best interests that she be taken to hospital to be assessed.

The officers considered that Ms Sessay could be detained under s 135 of the MHA, which provides for the detention in a place of safety for up to 72 hours of a person believed to be suffering from a mental disorder but unable to care for themselves. However, they were unable to exercise that power due to the lack or a warrant and the absence of approved practitioners. They therefore relied on s 5 of the *Mental Capacity Act 2005* (MCA), which provides power to, and procedures for, detaining a patient for up to six hours pending the making of an application under s 2 of the MHA where there is a risk that they will leave the hospital before the application is completed.

However, Ms Sessay was detained for 13 hours before the application for her admission under s 2 of the MHA was completed. She claimed that her treatment amounted to unlawful detention and/or deprivation of liberty in breach of article 5 of the ECHR. She further sought a declaration that the general practice and policy of the South London & Maudsley NHS Foundation Trust of holding persons awaiting assessment for admission for up to eight hours is unlawful.

Decision

The Court held that the MHA provides comprehensively for the compulsory admission to hospital of non-compliant incapacitated patients, that the common law principle of necessity does not apply in this context and that the claimant's detention was consequently unlawful. It found that this unlawful detention constituted a breach of her rights under article 5 of the EHCR. However, the Court did not consider that the Trust's policy of holding persons for up to 8 hours to be unlawful.

Was the detention unlawful?

The Court did not accept the submission that a lacuna existed in the MHA which could only be filled by the common law doctrine of necessity. It considered that the MHA provides comprehensively for such admission for the following reasons:

- the MHA provides a procedure for compulsory hospital admissions;
- Parliament has expressly provided for the situation where the application is one of urgent necessity;
- the Code of Practice provides guidance in relation to emergency applications;

- the Trust has provided its own policy regarding potential time delays;
- where a patient evidences an intention to leave before an application for admission is completed, hospital staff may contact the police who have the power to detain under s 136 of the MHA; and
- the House of Lords has held that the statutory powers of detention conferred on hospital authorities are exhaustive and that any common law power of detention which the authority might otherwise have possessed have been impliedly removed.

The Court noted that the European Court of Human Rights has held that a claimant was deprived of his liberty in breach of article 5(4) of the ECHR in circumstances in which the doctor had used the common law doctrine of necessity rather than statutory powers to detain, which did not meet the requirement in article 5(1)(e) that detention be carried out in accordance with the procedure prescribed by law.

Did the unlawful detention constitute a deprivation of liberty in breach of article 5?

The Court observed that, in considering the operation of article 5 of the ECHR, the starting point must be the specific situation of the claimant and account must be taken of a wide range of factors. These include the type, duration, effects and manner of implementation of the deprivation of liberty.

It considered the principles relating to lawfulness and protection against arbitrary detention, noting:

- lawfulness requires conformity with procedural and substantive aspects of domestic law;
- the relevant law must meet the standard of lawfulness set by the Convention which requires that the law be sufficiently precise to allow the citizen to foresee to a reasonable degree the consequences which may follow a particular action; and
- it must be established that the detention conformed with the essential objective of article 5(1), being to prevent the arbitrary deprivation of liberty.

The Court further observed that authorities suggest that a deprivation of liberty, to breach article 5, must be for more than a negligible length of time and that there is room for a pragmatic approach to be taken which takes full account of the circumstances.

The Court found that the claimant was detained under s 5 of the MCA, which does not confer on police officers the powers to remove persons to hospital which are provided by ss 135 and 136 of the MHA, and that the defendant failed to establish lawful justification for the detention.

Although the Court considered that a detention at common law will not necessarily constitute a deprivation of liberty for the purposes of article 5, it found that it did so in this case. The Court held that no justification for the deprivation of liberty was provided by the fact that Hospital staff considered that power existed to detain Ms Sessay under s 136 of the MHA (although this power was not exercised), and that some of the delays in processing her application for admission had not been adequately explained.

The Court finally found that, although a deprivation of liberty occurred in respect of Ms Sessay's detention, the Trust's policy that persons be held for up to eight hours is not unlawful, and that there was no evidence that the hospital was unable to process applications in a timely manner when the case is one of urgent necessity. This finding of the Court suggests the adoption of a pragmatic approach, in circumstances where the statutory procedures provide for a maximum six hour detention.

Relevance to the Victorian Charter

The right to liberty and security of the person is protected by the Victorian Charter of Human Rights and Responsibilities. Section 21 relevantly provides:

- Every person has the right to liberty and security.
- A person must not be subject to arbitrary arrest or detention.
- A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.

Section 21(7) further provides that any person deprived of liberty is entitled to apply for a declaration or order regarding the lawfulness of his or her arrest or detention.

The consideration by the High Court of Ms Sessay's detention provides useful guidance in respect of the approach which may be taken by Victorian courts to the application of s 21 of the Charter. It suggests that, where statutory procedures for lawful detention are comprehensively provided, courts may be willing to take a pragmatic approach, but reluctant to consider any significant departure from such procedures to be lawful.

The decision can be found online at http://www.bailii.org/ew/cases/EWHC/QB/2011/2617.html.

Catie Shavin *is a lawyer at Allens Arthur Robinson.*

States have margin of appreciation to regulate access to reproductive health care

S.H. & Others v Austria [2011] ECHR 1879 (3 November 2011)

Summary

The Grand Chamber of the European Court of Human Rights has found that Austrian legislation which prevents couples from conceiving a child with in vitro fertilization using donated ova or sperm does not breach the European Convention on Human Rights.

This decision reverses an earlier finding that Austria's *Artificial Procreation Act* breached the applicants' rights to private and family life (article 8) and non- discrimination (article 14) under the Convention.

The decision focuses on state parties' discretion when it comes to balance competing rights and interests, referred to as the "margin of appreciation". Taking into account all the circumstances, the Court granted Austria a wide margin of appreciation in this instance.

Facts

The applicants were two married, heterosexual couples who, for biological reasons, were unable to conceive naturally. Both couples required access to IVF treatment. Additionally, the first and second applicants needed access to donated sperm, while the second and third applicants needed donated ova. Both couples were prohibited by the Act from accessing the particular treatment they sought.

Relevantly, there is no universal agreement among member states about where to draw the line in this complex and sensitive area of the law. Regulation of reproductive treatments varies from country to country. In Austria, sperm donation is permitted for the purposes of artificial insemination only, but not IVF. Many other European countries that allow sperm donation do not distinguish between its use in artificial insemination and IVF treatment. Italy, Lithuania and Turkey prohibit sperm donation altogether. Croatia, Germany, Norway and Switzerland, meanwhile, permit sperm donation but prohibit ova donation.

Germany and Italy intervened in these proceedings in support of Austria's position.

Discussion

The applicants claimed that Austria's restrictions on IVF interfered with their rights to procreate and found a family without discrimination.

The applicants also argued that decisions about reproduction "concerned the most intimate sphere of their private life and therefore the legislature should show particular restraint in regulating these matters". They submitted, therefore, that Austria's "margin of appreciation" should be narrowly conceived.

The Austrian government conceded that article 8 of the Convention was relevant in the circumstances in the case. In other words, it agreed that "the private life aspect within the meaning of Article 8.1 of the Convention also covered the desire of couples or life companions to have children as on of the essential forms of expression of their personality as human beings".

While acknowledging that the Act limited the applicant's rights, Austria submitted that the limitation was lawful, legitimate and necessary, bearing in mind the competing rights and interests at stake and the particular sensitivities surrounding reproductive treatments.

Specifically, Austria raised concerns about expanding access to IVF on the bases that:

- egg donation might lead to the "exploitation and humiliation" of women, particularly economically disadvantaged women by creating a marketplace for ova;
- it wanted to avoid circumstances where a child could claim to have two biological mothers (the egg donor and the woman who carried the embryo), and
- broadening access to IVF may open the gateway to lead to selective reproduction and raised "essential questions regarding the health of children…general ethics and moral values of society".

The applicants also argued that many of these concerns relied on by Austria could be overcome by enacting supplementary legislation, such as laws prohibiting the buying or selling of ova (which already exist in Austria) and laws clarifying maternity. Further, the applicants said the Act was "illogical and inconsistent" because it permitted IVF and the use of sperm donors, but prohibited medical treatment which involved combining the two.

Decision

The decision focuses on the issue of Austria's margin of appreciation. In other words, was the limitation on the applicant's human rights a legitimate exercise of Austria's discretion to balance competing rights and interests? The majority said the key issue was whether "in striking the balance at the point at which it did, the Austrian legislature exceeded the margin of appreciation afforded to it under the Article," and not whether Austria might have reached a different (arguably fairer) solution.

On the one hand, the majority said that where a particularly important aspect of an individual's existence or identity is at stake – as in this case – the margin allowed to the country will normally be restricted.

On the other hand, the majority said where there is no consensus among member states of the Council of Europe about the relative importance of the interests at stake, or the best means of protecting those interests, the margin afforded to each country will be wider, particularly if the case raises sensitive moral or ethical issues. Although the majority referred to an "emerging consensus" among European countries in favour of IVF using donated sperm or ova, it found that it did not significantly narrow Austria's discretion, as the "emerging consensus" was not yet based on settled or long-standing principles.

Ultimately, the Court accepted that Austria's conduct did not exceed its margin of appreciation, bearing in mind that the complexities and sensitivities of the issues. Therefore, the Court held that Austria had not breached the Convention.

In concluding, the majority noted the rapid change and dynamism in this area of the law, which leaves the door open to the potential for a different decision in the future.

The case can be found online at: http://www.bailii.org/eu/cases/ECHR/2011/1878.html

Emma Purdue *is on secondment to the Human Rights Law Centre from Lander & Rogers*

HRLC POLICY WORK AND CASE WORK

Retrospective Deterring People Smuggling Act violates human rights and the rule of law

The *Deterring People Smuggling Act 2011* was passed on 25 November 2011.

The Act amends the people smuggling offences in the *Migration Act 1958*. People smuggling offences are established *inter alia* where a person brings people to Australia who have no lawful right to come. The Act retrospectively defines "no lawful right to come to Australia" to mean no lawful right *under domestic law*. This is notwithstanding that a person may have a clear and lawful right under international law to come to Australia.

In essence, the Act toughens an already draconian regime which threatens to see hundreds of impoverished Indonesian fishermen and boys jailed for a minimum of 3 years. This regime violates human rights, threatens the rule of law, costs taxpayers tens of millions of dollars in legal fees and detention costs and is likely to have no impact on people smuggling.

The HRLC's submission to the Senate Legal and Constitutional Affairs Committee focused on the human rights implications of the Act, identifying the following concerns:

- the Act contravenes the prohibition on retrospective criminal laws contained in article 15 of the *International Covenant on Civil and Political and Political Rights*, Australian common law and Government guidelines;
- the mandatory sentence of 5 years with a 3 year non-parole period that flows from the offence of aggravated people smuggling contravenes the prohibition on arbitrary detention (article 9 of the ICCPR) and the right to a fair trial (article 14 of the ICCPR); and
- the Act violates Australia's obligation to act in 'good faith' by seeking to indirectly avoid its obligations under the Convention Relating to the Status of Refugees.

The Senate Committee acknowledged these concerns, citing the HRLC submission and oral evidence extensively, but nevertheless recommended that the Act be passed. The Committee did, however, recommend that the Government review the operation of the people smuggling offences in the *Migration Act 1958* to ensure that these offences continue to effectively deter people smuggling.

Australia's export credit agency must be reformed to better protect human rights in developing countries

The Human Rights Law Centre has made a submission to the Productivity Commission calling for reform of Australia's Export Finance and Insurance Corporation (EFIC) to better promote and protect human rights.

EFIC is the Australian Government provider of export credits, insurance, reinsurance, and other financial services that support Australian exports and overseas investments.

Like most export credit agencies globally, EFIC assists exporters and private providers of insurance and finance products in circumstances where the private sector is unwilling or unable to provide support.

The role of ECAs has expanded considerably due to globalisation and the exponential growth of global markets. In particular, ECAs play a significant role as providers of finance in the developing world. ECAs may offer loans to developing countries on the condition that they buy the exports of the lending country, or they may provide guarantees or insurance for the loans made by commercial banks or exporters to developing countries.

Given the importance of ECAs in the global economy and their role in supporting corporate activity in developing countries, ECAs are in a unique position to promote human rights compliance in projects seeking ECA support. However, EFIC and other ECAs have a poor history of incorporating human rights compliance mechanisms into their operations. As a result, EFIC and other ECAs have facilitated corporate activity that has been associated with significant adverse human rights impacts.

For example, ECA-backed projects have been associated with forced displacement of local populations, poor conditions of work, suppression of peaceful protests and the rights to freedom of expression and association, exposure to environmental contaminants and the destruction of cultural sites.

The HRLC submission considers EFIC's international human rights obligations and concludes that EFIC's current policies and operations do not comply with its obligation to protect human rights as established under the framework set out by the UN Special Representative on Business and Human Rights, Professor John Ruggie.

The HRLC recommends that EFIC's policies should:

- require that EFIC undertake adequate human rights due diligence;
- require due diligence by EFIC's client companies; and
- state that EFIC will not support activities that are likely to cause or contribute to human rights abuses.

The implementation of these policies, in conjunction with appropriate transparency requirements and grievance mechanisms, would be a significant step towards the implementation of EFIC's international human rights obligations.

Landmark legal challenge to uphold the right to peaceful protest for Occupy Melbourne

The HRLC is part of a legal team led by Ron Merkel QC taking action on behalf of the Occupy Melbourne protesters in a landmark case on the right to free expression and peaceful protest. The right to protest is a fundamental right under the Australian Constitution and also afforded protection under the Victorian Charter of Rights and Responsibilities. The case focuses on protesters' rights, but has broad ramifications for representative democracy and the right of all

Australians to gather in groups, to express their views and to participate in the democratic process.

The decisions and actions taken by Melbourne Lord Mayor Robert Doyle and Victoria Police to forcibly evict peaceful demonstrators from City Square raise serious questions about the infringement of fundamental civil and political rights and use of force by Victoria Police. However, the focus of this case, which has been commenced in the Federal Court, is preserving the ability of the Occupy Melbourne demonstrators to continue to exercise their right to protest by maintaining a peaceful presence in public parks in Melbourne.

Since their forcible eviction from City Square on 21 October, Occupy Melbourne has moved to other public parks in the City of Melbourne to continue their protest. While we have not seen the same display of force and violence by the authorities that occurred on 21 October, the Council and Victoria Police have maintained a regular presence at the protest site, issuing numerous 'Notices to Comply' to protesters in relation to their possessions (everything from cardboard boxes, cooking utensils and cardboard signs to folding tables and marquees), confiscating the property of protesters and, on a number of occasions, arresting protesters on the grounds that they were obstructing council workers carrying out their duties under the Local Law. The Council is relying on provisions of the Activities Local Law 2009 which prohibit advertising signs or camping without a permit granted by the Council.

The Federal Court proceeding challenges the enforcement action taken by the Council and Victoria Police against the protesters on a number of bases, including that such action is in breach of the implied freedoms of political communication and association contained in the Australian Constitution and the right to peaceful assembly and freedom of expression under the Victorian Charter. Significantly, as public authorities under the Charter, the Council and Victoria Police have a legal responsibility to act compatibly and give proper consideration to human rights. International human rights law is clear that there should not be any limitations on these rights unless those limitations are reasonable, proportionate and necessary. The onus will be on the Council and Victoria Police to demonstrate that their actions were proportionate in the circumstances. The Court will also be asked to consider whether certain provisions of the Local Law are invalid to the extent that they operate in a way which is an impermissible burden upon or incompatible with these rights.

This is not an isolated incident. Occupy protesters are being arrested and 'moved on' from public spaces across the world. The legal team here is seeking to protect the rights to free expression and assembly for the protesters in Melbourne. Members of the Occupy movement and human rights supporter across the globe will be watching this case closely as it will serve as an international precedent for similar actions in foreign jurisdictions.

The Human Rights Law Centre is working with Fitzroy Legal Service on this matter and is assisted by the pro bono support of Allens Arthur Robinson together with Ron Merkel QC, Mark Moshinsky SC, Nick Wood and Emrys Nekvapil of Counsel.

If any lawyers or law students wish to volunteer to assist the Occupy Melbourne Legal Support team, a group of volunteer lawyers assisting the protesters with a range of legal issues, please contact occupymelbournelegal@gmail.com.

HRLC publishes Briefing Paper on Australia for UN Special Rapporteur on Trafficking in Persons

The UN Special Rapporteur on Trafficking in Persons, especially in women and children undertook a country mission to Australia in November.

In preparation for that mission, and at the request of the UN Office of the High Commissioner for Human Rights, the Human Rights Law Centre and Anti-Slavery Australia prepared a major Briefing Paper to the Special Rapporteur. Mallesons Stephen Jaques provided substantial pro bono research assistance in preparing the paper.

The Briefing Paper provides an overview of trafficking in persons in Australia, including:

- the main forms and manifestations of human trafficking;
- existing or planned laws, policies and plans of action to address trafficking in persons;
- existing or planned bilateral or multilateral agreements to address trafficking;
- support services for victims of trafficking; and
- priorities for reform.

In the view of both the HRLC and Anti-Slavery Australia, the most effective way to address human trafficking and severe exploitation is to "incorporate a human-rights based approach into measures taken to prevent and end trafficking in persons and to protect, assist and provide access to adequate redress to victims, including the possibility of obtaining compensation from the perpetrators".

Australia must take a principled stand on the protection of human rights in Papua

The HRLC – together with leading human rights organisation Human Rights Watch – has lobbied the Australian government to take a leadership role in promoting and protecting human rights in the Indonesian province of Papua.

"Australia must unequivocally support the human rights of all persons to freedom of expression, association and assembly," said Tom Clarke from the Human Rights Law Centre. "It is not in Australia's strategic interest to have a festering human rights problem on our doorstep."

1 December 2011 marked the 50-year anniversary of the first raising of the "Morning Star" flag, a symbol of the independence movement in Papua.

In the lead-up to the anniversary, the HRLC and Human Rights Watch sent a joint letter to Foreign Minister Kevin Rudd. The letter called on the Australian Government to:

- urge the Indonesian Government to ensure full and free media access to Papua and deploy Australian embassy staff to monitor and observe independence day events;
- reiterate Australia's unequivocal support for the rights to freedom of expression, assembly and association, in accordance with the *International Covenant on Civil and Political Rights*;
- call for an immediate, full and impartial investigation into the deaths and injuries, and allegations of excessive use of force by the authorities at the Third Papuan People's Congress on 19 October 2011; and
- urge Indonesia to release all political prisoners detained in Papua, including Filep Karma who Amnesty International reports was imprisoned for his part in a flag raising ceremony.

The letter generated media coverage and The Australian published an HRLC opinion piece calling on Kevin Rudd and the Australian Government to take a principled and public stand for

basic human and democratic rights in our region. The Government has not yet responded to the letter.

"The default policy of successive Australian Governments has seemingly been to politely look the other way while human rights abuses occurred on our doorstep. This approach desperately needs rethinking. The problem of violence and repression in West Papua needs to be acknowledged and addressed," Mr Clarke said.

Inquest Findings Highlight Urgent Need for Reform to Police Use of Force

On 23 November 2011, the Coroner handed down her findings in the inquest into the 2008 Police shooting death of 15-year-old Tyler Cassidy. The findings highlight the urgent need for better training and investigation of police use of force, and reflect a number of submissions made by the HRLC.

The HRLC intervened to provide the Coroner with assistance on the relevance of the Victorian Charter and made discrete submissions on the human rights issues raised in the proceedings. The HRLC was assisted on a pro bono basis by Allens Arthur Robinson, together with Brian Walters SC and Sam Ure of Counsel.

The findings canvassed many factual and legal issues relevant to the circumstances of Tyler's death. Significantly, the Coroner found that the police members acted within the "limits of their training" and that due to Tyler's mental state a finding of suicide was not able to be made. The Coroner made a total of eight recommendations, many of which dealt with the issues raised by HLRC.

It was pleasing to see a number of HRLC submissions related to training reflected in the Coroner's recommendations. Specifically, recommendations for specific training to equip members to safely and effectively manage vulnerable youth and, similarly, to safely manage people in crisis or possibly intent on bringing about their own deaths at the hands of police. A further recommendation was made to reintroduce some form of assessment following training. Over-reliance on weapons to resolve incidents was another issue raised in HRLC's submissions which was reflected in a recommendation that Victoria Police develop a structure to ensure adherence to the 10 operational safety principles in order to prevent over-reliance on operational equipment.

Also welcome was the Coroner's recommendation that Victoria Police arrange for a suitable welfare person to attend and assist the family at the scene and thereafter. This reflected a HRLC submission that policies and procedures be developed and implemented to ensure that next-of-kin are dealt with in a sensitive and appropriate manner.

The findings also highlighted the inadequacy of Victoria's systems for the investigation of police related deaths, which currently involve police investigating police. The Coroner recognised that concerns of perception and bias arise when police are interviewed by their fellow officers following an incident and recommended that an "institutionally independent legally trained person" be available to observe the interviewing of police officers implicated in deaths. However, this recommendation was only a first step to addressing the structural problems presented by the current model of investigation, and an imperfect step at that. Ensuring that interviews are video or audio recorded within 24 hours of the incident would more adequately allay perceptions regarding collusion and bias.

The HRLC's submissions advocated for the establishment of a body hierarchically, practically and institutionally independent of the Victoria Police to conduct primary investigations into deaths associated with police conduct. Such reforms would reduce the risk of collusion or corruption and

increase public trust and confidence in police processes. While the Coroner appeared to accept that there were a number of deficiencies in the investigation into Tyler's death and, in some cases, made recommendations as to rectifying procedures for future investigations, ultimately she did not make a finding that these matters impaired the adequacy or independence of the investigation. Disappointingly, the Coroner found it unnecessary to engage in an analysis of the legal arguments presented on the question of the adequacy of the current model of investigation, but instead referred to the conclusions and minor suggestions for improvement that have flowed from a recent Office of Police Integrity review. In addition, the Coroner has committed to developing a set of Coronial Guidelines for coronial investigations into police related deaths. Such a step is a welcome enhancement to aspects of the current process but does not address the structural issues relating to the conduct and oversight of the primary investigation into police related deaths.

The HRLC will continue to advocate for the need to overhaul Victoria's model for investigation of police related deaths. Given the Victorian Government was elected on a platform of integrity, transparency and accountability, it is important to ensure that these principles are upheld when Victorian citizens are injured or killed by Victorian Police.

A copy of the Human Rights Law Centre's recent report, "Upholding Our Rights: Towards Best Practice in Police Use of force" can be found online here: http://www.hrlc.org.au/content/police-use-of-force-reform-needed-to-uphold-the-right/

HRLC outlines further issues for Australia to include in report to UN Committee against Torture

On 3 November 2011, the HRLC made a submission to the Australian Government outlining the issues of torture and ill-treatment that Australia should address in its forthcoming periodic report to the UN Committee against Torture, in addition to those already identified by the Committee in the List of Issues Prior to Reporting. The submission identifies five key issues which were not addressed in the LOIPR, but which the HRLC considers engage Australia's legal responsibilities in relation to torture and ill-treatment, being:

- criminalisation and prevention of torture;
- non-refoulement and bilateral and regional arrangements to address people smuggling;
- treatment of prisoners and conditions of detention;
- involuntary psychiatric treatment; and
- violence against women.

HRLC MEDIA COVERAGE

The Centre has featured in the following media coverage since the last Bulletin:

- Tom Clarke, 'Time for Rudd to take a stand for basic rights in West Papua', *The Australian*, 1 December 2011
- Phil Lynch, 'Detention conditions: degrading, intolerable and inhumane', *ABC The Drum*, 30 November 2011
- Karlis Salna, 'Papuan leader's welfare causes concern', *The Age* (AAP), 30 November 2011

- Geraldine Coutts, 'Calls for Australian government to send embassy staff to Papua', *ABC Radio Australia*, 29 November 2011
- Liz Cush, 'West Papuans to raise morning star flag for independence', *The Wire,* 29 November 2011
- Karlis Salna, 'Exodus in Paupa amid fears of crackdown', *Sydney Morning Herald* (AAP), 27 November 2011
- Farah Farouque, 'Police training review urged', *The Age*, 24 November 2011
- Steve Lillebuen, 'Vic police training change after death', *9 News*, 23 November 2011
- Irene Scott, 'Meet the 'people smuggler'', *Triple J, ABC Radio* , 22 November 2011
- Anna Gordon, 'Protesters call for a referendum on independence for West Papua', *The Wire*, 16 November 2011
- Liz Hobday, 'Occupy Melbourne challenges eviction in court', *AM (ABC Radio)*, 9 November 2011

SEMINARS & EVENTS

Human Rights Watch's Elaine Pearson in discussion with Dateline's Mark Davis

Public Seminar: Human Rights in Asia – Situations of Concern

Join the Deputy Director of Human Rights Watch's Asia Division, **Elaine Pearson**, and SBS's Dateline presenter, **Mark Davis**, for updates and discussion about situations of concern in Asia including human rights abuses in West Papua and Burma, religious freedom in Indonesia, extrajudicial killings in the Philippines and accountability for war crimes in Sri Lanka. The discussion will also consider what Australia can and should do in the region to better promote and protect human rights.

Date: **12.45pm to 2.00pm on Wednesday, 7 December 2011**
Venue: Maddocks, Level 6, 140 William Street, Melbourne
Cost: $20 / $15 (concession) (includes lunch)
RSVP: By 2 December 2011 (Download Booking Form Here)

About Elaine Pearson
Elaine Pearson supervises HRW's research, reporting, monitoring, documentation and advocacy on human rights issues across Asia, especially South East Asia. She has previously worked for the International Labour Organization, the UN Development Fund for Women, and led the first trafficking program at Anti-Slavery International in London. Pearson is a frequent media commentator, writing for the Guardian, the Wall Street Journal and The Age.

About Mark Davis
Mark Davis is a presenter of SBS's Dateline and one of Australia's leading video journalists. His work has been recognised with five Walkley Awards, including the prestigious Gold Walkley for 'Blood Money', a Dateline report on the funding of pro-Indonesian militias in East Timor. His groundbreaking work in recent years has included reporting on the trial of David Hicks, securing the first interviews with the Bail Nine, and gaining unprecedented access to WikiLeaks founder Julian Assange.

This event is being co-hosted by the Human Rights Law Centre and Human Rights Watch.

Human Rights Oration 2011: The big picture

Tuesday 13 December, 12.30–1.30pm, Zinc, Federation Square, Melbourne

The Victorian Equal Opportunity and Human Rights Commission is pleased to invite you to this year's Human Rights Oration. Keynote speaker, Bernard Salt, is best known for his media commentary on the business implications of demographic and social change. He will blend humour and substance to paint the big picture: *How will demographic change shape our community, and what have human rights got to do with it?*

This is a free and accessible public event, but registrations are required.

RSVP by Wednesday 7 December to (03) 9032 3448 or rsvp@veohrc.vic.gov.au.

Visit humanrightscommission.vic.gov.au/oration for more details.

International conference on human rights in places of detention

Implementing Human Rights in Closed Environments

20-21 February 2012, Monash University Law Chambers, Melbourne

Where liberty is restricted in closed environments, such as prisons, police cells, immigration detention, and closed psychiatric and disability settings, the potential for human rights abuses is high. The management of such environments requires a delicate balance between the rights of individuals, and the safety and security of others in the closed environment and the broader community.

This conference will bring together eminent international and national speakers to examine how human rights are implemented and monitored in closed environments. It will provide an analysis of the comparative experiences of practical implementation of human rights in closed environments, as well as canvas current approaches to the national implementation of the Optional Protocol to the Convention Against Torture, and the role of regulatory frameworks more broadly in facilitating human rights implementation.

Further information is available here.

HUMAN RIGHTS JOBS

Amnesty International – Researcher, Pacific Islands

Amnesty is looking for a Researcher to join their Southeast Asia team to focus primarily on the Pacific Islands. You'll take the lead responsibility for initiating strategy and a programme of human rights research and action by providing country expertise, research skills and sound political judgement.

FOREIGN CORRESPONDENT

UN Committee against Torture interprets right to redress and reviews States compliance with the Convention against Torture

The November 2011 session of the Committee has been a mixed experience. The Committee has made its best efforts to implement its mandate while States have often played a spoiler role, either due to outright hostility or lack of preparation for engagement with the Committee. During the November session, I was actively involved in country reviews of Germany and Sri Lanka; live webcasting of the session; and the further development of a draft General Comment on article 14 of the Convention Against Torture interpreting the right to redress for torture victims.

The periodic review of Sri Lanka was a much anticipated event and saw a high level of NGO participation seeking to ensure that Committee members were adequately informed about the current situation on the ground. Due to the security situation for human rights defenders in Sri Lanka it is often difficult to get well documented torture cases brought to the attention of the Committee. In a rather innovative initiative, Freedom From Torture, a UK based torture rehabilitation centre, submitted a report analysing trauma documented in medico-legal reports on Sri Lankan asylum seekers in the UK. This information was well received by the Committee members who appreciated the high level of detail and the fact that such documentation is much more difficult for the State delegation to reject as slander.

In order to make this and other country reviews available to stakeholders who are not present in Geneva, a group of Geneva based NGOs jointly produced live webcasts of the periodic reviews of five countries. This gave an opportunity for all stakeholders to follow the discussions between Committee and State delegation and can, among other things, be used for better media campaigning and holding State representatives accountable for what they say during the hearings.

One of the most anticipated elements of the November session was the ongoing development of a General Comment on article 14 of the Convention. The General Comment focuses on the right to redress, which encompasses the right to an effective remedy and reparations for torture victims. The text has a strong victim-centered approach and includes a number of innovative elements. Among these are early determination of victim status and the responsibility for non-perpetrator States hosting torture victims to provide them with access to an effective remedy and reparations. This would to allow for rehabilitation and other reparations to commence before the conclusion of criminal proceedings and ensure effective access to redress for refugees and asylum seekers. Unfortunately, most States who participated in the oral hearing on the draft text took an, at best, conservative approach to interpretation of article 14. Many States advanced some variation of not accepting any obligations for the host States to provide redress. Australia, like many other States, expressed the opinion that providing redress to victims present in Australia but who were tortured by other States goes beyond the scope of article 14. It rather saw this as something that was recommendable for States to do and the Australian delegate highlighted that Australia was implementing initiatives to this effect. While this remains a controversial issue, it was unfortunate that no States were well prepared enough or willing to engage in a discussion of this concept, which is still not settled in academic and other analysis of the Convention.

The Committee is expected to submit a new draft for written comments later this year and will seek to adopt the text during its May 2012 session. During this session it will also review the

following countries: Albania, Armenia, Canada, Cuba, Czech Republic, Mexico, Russian Federation, Rwanda and possibly Greece.

Asger Kjaerum *is Head of the Geneva Office of the International Rehabilitation Council for Torture Victims*

IF I WERE ATTORNEY-GENERAL…

Respect for human rights and the rule of law is essential for a "just and secure society"

Elizabeth O'Shea

If I were Commonwealth Attorney-General, I would set my sights on achieving the stated goal of the Attorney General's Department, namely achieving a just and secure society. Unfortunately, we are currently falling well short of this objective. At the most basic level, it requires a universal commitment to the rule of law. Carrying out this task politically involves a combination of listening and leadership.

Human rights are increasing the language through which justice is expressed. We have listened to the Australian population and they support a Charter of Human Rights. The National Human Rights Consultation found that there is a range of opinions but vast sections of society support the introduction of such legislation. This is a mandate to introduce a Charter and it would be a significant step towards building a society that is committed to fairness and equality.

As the only Western jurisdiction without a Charter, Australia is becoming legally isolated. Our statutory interpretation and jurisprudence in respect of human rights, press freedom and administrative law is quickly becoming marginalised. It is hard to criticise human rights abuses abroad when we do not even recognise their existence domestically. Once we have this framework, it will assist us to understand the pursuit of social justice in objective terms and not be subject to the whim of political debate.

As Attorney-General, I would apply a rights-based approach and lead the charge to end mandatory detention. The policy has been widely condemned as costly and inhumane, as well as in breach of our international obligations. Malcolm Fraser put forward a reasonable proposal here that should become bipartisan policy immediately. The over-politicisation of this issue has debased public debate in this country and earned us a reputation as mean spirited and legally backward. It is a persistent cause of shame that will only be resolved with political leadership using a legal framework of respect for human rights and international law.

I would also seek to repeal the legislation in respect of people smuggling, which suffers from the same political short sightedness (and attenuating lack of utility) as the policy of mandatory detention. I would also ensure that all Indonesian children held under this legislation are released, which should have already happened under the current government's policy. I would appoint a Children's Commissioner to ensure children have an advocate for them who is independent of the Minister for Immigration and Citizenship.

If I were Attorney-General I would set to work at fixing the problem we currently face with the two dozen or so refugees who are the subject of adverse security assessments from ASIO. I represented two of them earlier this year. They have been accepted as refugees and therefore cannot return to their country of origin, but have adversely assessed by ASIO and therefore

cannot be given a visa. As such, they face the very real prospect of indefinite immigration detention.

This is a very serious issue for our system of law. Common law systems have traditionally respected personal liberty and do not permit it to be taken away without a clear and justified basis. But currently, a person seeking asylum, as is their right under international law, can be subject to indeterminate detention authorised by an executive arm of government without any avenues to review the merits of that decision.

I would give the courts greater powers to review these decisions, including, as a start, allowing the person the subject of the assessment to see it. These people could also be released from detention and be subject to monitoring as required whilst the assessment remains.

Such a problem raises the broader question of the role of the national security state in our legal system. In the decade since 9/11, the interests of the amorphous concept of national security have trumped civil liberties and transparency in government. This is an imbalance that must be corrected. The revelations by Wikileaks in many ways reveal the deficiencies of our current information protection laws. We were told that Cablegate would be devastating for international relations. Instead, we see that greater transparency in government has fostered debate about the quality of our democracy. Yet none of this information would have been available to the press or an individual; it would have been protected in the name of national security.

An independent and robust fourth estate is essential to a democratic society. Wikileaks has contributed to this in a fundamental way and deserves legal protection just like any publishing. We need stronger protections for whistleblowers and better access for journalists to government material.

As an Australian abroad, Julian Assange deserves full consular assistance. I would seek undertakings from Sweden that it does not intend to hand Assange over to US authorities via temporary surrender and would do my best to protect his civil liberties in my dealings with the US. Any prosecution of Assange on the basis of his publishing activities would be roundly condemned by me as an obvious and direct attack on a free press. Amongst other things, I would have profound concerns about the ability of Assange to receive a fair trial in the US.

The US, of course, has form in denying controversial prisoners a fair trial and the Australian government also has form in failing to do anything about it when it involves an Australian citizen. David Hicks was coerced into making a guilty plea under threat of torture in Guantanamo in legal forum that was improperly constituted. Torture has no place in a society that respects the rule of law. I would set up an inquiry into Australian involvement in the incarceration and treatment of Hicks and advocate for his conviction to be quashed by the US government. It should be government policy to never let anything like that happen to an Australian citizen ever again.

Some of these reforms may require political effort, but at least they are all mercifully low cost. As Rob Hulls has said, the role of AG is fantastic because “you don't need a stack of money to make a difference.” But one thing that does require proper funding is legal aid. For our justice system to work, everyone must have access to legal representation. In our society, legal issues can have a very profound affect on people’s lives, particularly those struggling in poverty and battling with debt collectors, discrimination and housing issues. We need good laws, but we also need access to justice.

The Federal legal aid budget was slashed and burned under Howard in 1997 and it has never recovered. We are now well behind in global standards and eligibility for legal aid comes in below the poverty line in many states. It is not just morally troubling; it is also economically foolish as

modelling has shown that properly funded legal aid agencies provide savings to other areas of the economy that outweighs the extra cost up to nearly three times over.

Recently, we have seen the first increase in federal funding for legal aid since 1997. But there is still a long way to go. Adverse costs protection for public interest litigants would also promote litigation to create policy and legal change.

These are only the first, but most urgent steps I would take towards a just and secure society. Peace and justice are kindred, inseparable concepts that nurture the better angels of our nature. To achieve this, the central pursuit of the Attorney General should be to build a legal system that is devoted to fairness and equality, both in theory and in practice.

Elizabeth O'Shea *is a lawyer practising in the area of human rights and social justice. She has previously worked the International Labour Organisation in Geneva and in Louisiana, USA with a capital defence office representing indigent prisoners on death row. You can follow her on Twitter @Lizzie_OShea*

The Human Rights Law Centre would like to thank everyone who contributed to the production of this Bulletin.

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.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible and gratefully received.

Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne, Vic, 3000, Australia
www.hrlc.org.au
www.twitter.com/rightsagenda
ABN: 31 117 719 267

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