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Rights Agenda

Monthly Bulletin of the Human Rights Law Centre

HRLC Case Work

The High Court ruled on 28 January that the Government's detention of 157 asylum seekers for nearly a month on board a customs vessel at sea was legal under Australian domestic law.

Human Rights News

Sector leaders have called for a bipartisan commitment to permanently end the policy of mandatory and indefinite detention of asylum seeker children and families following the release of the Australian Human Rights Commission inquiry report.

Casenotes

Summaries of various human rights related decisions from Australian and international courts.

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ASYLUM SEEKERS

High Court finds that detention at sea of 157 Tamil asylum seekers was not a breach of Australian domestic law

The High Court ruled on 28 January that the Government's detention of 157 asylum seekers for nearly a month on board a customs vessel at sea was legal under Australian domestic law.

While it was a very close 4:3 decision and a disappointing outcome, the case the Human Rights Law Centre helped run with Shine Lawyers and a team of barristers led by Ron Merkel QC was important for three key reasons.

First, it brought vital scrutiny and transparency to the Government's secretive actions at sea. It took this case for the Government to break its silence and confirm that these 157 people were in its custody. As one of the asylum seekers, a young mother, said, "if it wasn't for this case, no one would have even known we existed."

Second, the case helped to ensure that the 157 asylum seekers will have their refugee claims processed, instead of being sent back with no questions asked.

Third, the case established that there are important limits to the government's powers to intercept and return asylum seekers at sea. While those limits weren't breached in the attempted return to India in this case, they will be relevant in future attempts to return asylum seekers directly to Sri Lanka, or to place them on orange lifeboats off the coast of Indonesia or elsewhere.

The HRLC's Executive Director, Hugh de Kretser, said the decision highlights the widening gap between Australia's international human rights obligations and its domestic laws and practices.

"Incommunicado detention and attempts to return asylum seekers with assessing why they are fleeing are clear violations of our international obligations," said Mr de Kretser. "Unfortunately, this decision confirms that our domestic law allows the Government to breach our international obligations."

Following the judgement, the UNHCR, which intervened in the case, issued a statement expressing its "deep concern" at the Government's actions at sea. The statement confirmed that Australian laws "do not change Australia's international obligations." The statement reminded Australia of the simple but important obligation at the core of the Refugee Convention – to never return people to harm – and of the fact that Australia can't dodge that obligation by acting beyond its borders.

Fleeing persecution

The lead plaintiff in the case, who for legal and safety reasons can only be identified as CPCF, is a Sri Lankan Tamil who fled to India with his wife and children after receiving death threats due to his involvement in politics.

"In Sri Lanka we lived a very terrible life. Authorities came to my house and beat me. They threatened to shoot me just for standing up for my political beliefs," CPCF said.

After fleeing to India, which is not a signatory to the Refugee Convention, CPCF said his family were unable to obtain legal status, work or access schooling.

"In India we had no status. We couldn't register with the authorities because we had no legal right to be in that country. It was like we were hiding. We couldn't stay," he explained.

So CPCF made a decision so many others in desperate situations have made before: he got on a boat, seeking “an ordinary life, somewhere safe” for him and his family. There were 157 Tamil asylum seekers on the boat, including 50 children as young as one.

In late June, the asylum seekers told refugee groups in Australia via satellite phone they were nearing Christmas Island, but were experiencing severe engine trouble. Then suddenly, all contact ceased.

Government secrecy

With relatives fearing for the safety of those on board, the Australian Government repeatedly refused to confirm what happened to the boat. In an absurdly evasive press conference the then Migration Minister, Scott Morrison, simply brushed aside questions refusing to comment on ‘on-water maters’. The Minister told journalists, “I am not confirming any of these matters. This should come as no surprise to you. This has been our practice now for the entire period of this operation. This is another day at the office for Operation Sovereign Borders.”

It was only when legal action was brought in Australia’s High Court on 7 July that the Government finally broke its secrecy to confirm the asylum seekers had been intercepted and were detained somewhere at sea. The Government still refused to confirm where they were or where they were headed.

“If it hadn’t been for this case, the Australian public may never have found out what the Government was doing in their name,” said Mr de Kretser.

Attempted return, no questions asked

The asylum seekers were intercepted on 29 June within sight of Christmas Island. Initially relieved and grateful to have been rescued, they soon realized they were not being taken to land. Instead, they were detained for a month at sea while the Government tried, and failed, to return them to India.

During the entire time at sea, none of the 157 members of the group were asked why they left Sri Lanka, why they left India or whether or not they had safety fears if they were returned to Sri Lanka or India. They were not told where they were being taken or for how long they would be detained. They were not provided with any opportunity to say anything about where they were being taken.

The group spoke Tamil. The crew on board the Ocean Protector did not use professional Tamil interpreters to communicate with the group and relied on three members of the group who spoke a little English to communicate with the entire group.

After the High Court case commenced, lawyers from the Human Rights Law Centre were able to speak to a small number of the group on board the vessel via a phone link using professional interpreters.

Detention conditions and lifeboat plan

CPCF described the detention as “very difficult”. “There were women and children on the boat. There was even a pregnant woman. There were people who were sick and people who had heart problems. We all suffered a lot.”

“I was locked in a room with 80 people. I was kept apart from my wife and children and was very worried about them,” he said.

The asylum seekers spent at least 22 hours a day locked in windowless rooms, for the most part never knowing where they were or where they were going.

Then, after around two weeks, 9 adults and 2 children were removed from the rest of the group. The adults were taken to a number of orange lifeboats and told that they would have to navigate their own way in them to India with each lifeboat carrying 50 to 60 of their fellow asylum seekers.

None of the adults had experience in navigating a boat. Despite not speaking English well, they were instructed how to use them in English. When they refused to take responsibility for the safety of the others in the lifeboat, they were told they had no choice but to obey.

For reasons that still haven't been made public, the Australian Government then abandoned the lifeboat plan. In the meantime, the Immigration Minister flew to Delhi but failed to secure India's agreement to accept the return of the Sri Lankan asylum seekers.

The high seas detention finally ended when CPCF and others aboard the boat were brought back across the Indian Ocean on 27 July to the Australian territory of Cocos Islands and flown from there to the remote Curtin Immigration Detention Centre on the Australian mainland. With the legal team urgently requesting permission to visit them, they were secretively taken with no warning to Australia's detention centre on Nauru in an overnight flight.

High Court hearing

On an interim basis, on 7 July the High Court ordered the Government not to return the asylum seekers to Sri Lanka. The government subsequently undertook not to hand them over into the custody of any foreign government without notice.

When the asylum seekers were finally brought to Australia and then Nauru, the focus of case turned to challenging the legality of the month long detention at sea.

The case considered whether the decision to detain CPCF and take CPCF to India needed to be made through a fair process which properly considered his personal circumstances; whether CPCF could legally be detained for the purpose of taking him to India despite there being no agreement in place with India to take him there; and whether the power to detain him and take him to some other place was limited by Australia's obligations under international law to not directly or indirectly return people to risks of serious harm.

Changing the goalposts

When the High Court hearing concluded and judges retired to consider their decisions, the Government set about securing legislative changes to weaken any limits on future turn-backs that might be established by the case.

The Government's *Migration and Maritime Powers Amendment Act* removed any obligation under domestic law for the Government to consider or comply with international human rights rules and principles of natural justice when conducting boat turn-backs.

Limits on powers

While the High Court ultimately found the detention of CPCF was lawful, the decision established important limits on the Government's powers to intercept and return asylum seekers.

The court found that the government couldn't detain people for an "aimless and indefinite" or a "futile or entirely speculative" voyage.

More importantly, the court set limits through its interpretation of section 74 of the *Maritime Powers Act* which states that a maritime officer must not "place or keep a person in a place" unless satisfied on reasonable grounds that "it is safe for the person to be in that place."

The Government argued in the case for a narrow interpretation of section 74 arguing that it had the power to return CPCF directly to Sri Lanka without asking about risks to his safety.

A majority of the court however found that section 74 required that the maritime officer who disembarks someone in a place (which could be a country or potentially a lifeboat in the ocean) must be satisfied on reasonable grounds that it is safe to do so. The court specifically referred to risks of persecution as being relevant in assessing safety – which would require some reasonable assessment of individual circumstances before returning asylum seekers directly to the country they are fleeing.

Section 74 wasn't amended by the *Migration and Maritime Powers Amendment Act* so these limits are still operative.

The future for the asylum seekers

Most of the 157 continue to languish in detention in Nauru in conditions described by the United Nations Refugee Agency as inhumane, unsafe and unfit for children. They have not been given a timeframe for their processing and remain unsure as to if and where they will eventually be resettled.

"We are here in very bad conditions. We are still being put through hardship", said CPCF.

The HRLC will continue to explore legal avenues to challenge Australia's punitive asylum seeker policies. The HRLC will also continue to develop and present more humane and less costly options for providing protection to refugees in our region in ways that do not breach Australia's international obligations.

Mr de Kretser said MPs must consider more humane and less costly options for providing protection to refugees.

"Instead of using cruel and secretive measures to stop refugees arriving on boats, the Government should focus on addressing why they get on them in the first place. Providing safe and viable pathways to protection within our region will address the reasons why refugees get on boats. This is where our focus should be," said Mr de Kretser.

As for his hopes for the future, CPCF said "Our lives are in the hands of Australia and its leaders. We still hope they will give us a secure future. I just want to live an ordinary life with my family in safety."

CHILDREN IN DETENTION

Damning evidence of serious child harm in detention

12 February 2015

Sector leaders have called for a bipartisan commitment to permanently end the policy of mandatory and indefinite detention of asylum seeker children and families following the release of the Australian Human Rights Commission inquiry report.

Save the Children's Director of Policy & Public Affairs, Mat Tinkler, said, "As the child protection agency that supports children on Nauru we know from first-hand experience that prolonged, mandatory detention causes serious harm to children. While considerable efforts are made to minimise that harm, the only way to guarantee the rights and wellbeing of asylum seeker children on Nauru is for the Australian government to immediately end the practice of mandatory detention."

"The findings of the Australian Human Rights Commission report confirm what is already known globally: detention is a dangerous place for children and can cause life-long harm. You can't keep children safe in detention," said UNICEF Australia's Chief Technical Adviser, Amy Lamoin.

The report states that prolonged detention causes acute distress and a rapid decline in mental health and well-being. From 2013-2014, 128 children engaged in self-harm and 105 children were assessed as being at serious risk of suicide or self-harm. The report identifies a direct correlation between the time spent in detention and rates of mental illness.

Human Rights Law Centre's Director of Legal Advocacy, Daniel Webb, said, "Australia's mandatory and indefinite detention of children is one of the most punitive policy approaches in the world. It's harmful. It's a breach of international law. It must end."

Sector leaders recognize that Minister Dutton's recent steps to rapidly move children from immigration detention into the community on mainland Australia is a distinctly positive step. "We consider the rapid movement of children out of detention as acknowledgement, by the Minister, of the serious harm that the Government's policy has caused," said Child Rights International Chair, Alastair Nicholson.

"The Australian Human Rights Commission report proves that the Australian Government has failed in its duty of care to asylum seeker children," said Mr Nicholson. "It provides clear evidence to both parties that the current approach causes immeasurable harm that cannot be justified."

Plan International Australia Deputy CEO, Susanne Legena, said, "We remain seriously concerned about the children who are still in detention and those who will be affected by this policy in the future, if it were to continue.

We again call for a new approach based on shared regional responsibility so that we can avoid repeating the same mistakes at an enormous cost to children."

DEATHS IN CUSTODY

Still no answers for the family of Julieka Dhu

3 February 2015

Almost six months since Julieka Dhu's tragic death in police custody, her family still have no answers as to how she died.

While the Western Australian Government has committed to holding a coronial inquest to look into the death, they have left the family in limbo as to when.

The Human Rights Law Centre's Senior Lawyer, Ruth Barson, said not knowing how Ms Dhu died, or when there will be any answers, is causing the family great stress.

"Christmas was a very difficult time for Ms Dhu's family, made harder by the fact that they still don't have any answers. It's cruel to leave the family guessing. The Western Australian Government needs to improve its communication with Ms Dhu's family and it should provide an expected date for when the coronial inquest will likely be held," said Ms Barson.

Carol Roe, grand-mother of Ms Dhu, said that Ms Dhu would have turned 23 on Boxing Day. Her family spent the day by her grave.

"We need answers. Why is it taking so long? My great grand-daughter often asks me what happened to Julieka, and I don't know what to say. We need the truth and we need justice. She

died too young. We need to know why and we need to stop something like this happening ever again," said Ms Roe.

Ms Barson said that while providing answers to the grieving family through a timely coronial inquest should be the number one priority, the Western Australian Government should also tell the public what the Government is doing to address the fact that Western Australia has the highest Aboriginal imprisonment rate in the country.

"Aboriginal people are locked up at 18 times the rate of non-Aboriginal people and comprise 40% of the prisoner population. When it comes to the broader public policy concerns raised by Ms Dhu's death in custody, the Government should explain how they plan to reduce WA's epidemic Aboriginal over-imprisonment rates, and what they are doing to stop more deaths in custody," said Ms Barson.

Ms Dhu was placed in South Headland police custody due to unpaid fines. The Western Australian Aboriginal Legal Aid Service's Chief Executive Officer, Dennis Eggington, said that locking people up for unpaid fines is a false solution and contributes to Aboriginal women being the fastest growing prisoner demographic in Australia.

"You only have to look at the situation of Ms Dhu to see that locking people up for unpaid fines is an unmitigated disaster. A better approach would be to increase the options for community service orders so that there is a practical way to keep people out of prison. The last thing the Government should be doing is exacerbating the spiraling cycle of disadvantage by locking up more and more Aboriginal people," said Mr Eggington.

Mr Eggington also said that there are compelling policy reasons in support of a timely coronial inquest.

"The coronial inquest is the best chance the family has of understanding why Ms Dhu, a seemingly healthy 22 year old woman, died after spending three days in police custody. But equally, it also provides an opportunity for the Government to learn from what went wrong, and to make changes to ensure a tragedy like this doesn't happen again," said Mr Eggington.

ARMED DRONES

Australia's drones ambitions must be tempered with far greater transparency and safeguards

6 February 2015

If Australia wants to pursue its own military drone program, far greater levels of transparency and rigorous safeguards are absolutely essential, the Human Rights Law Centre will tell the Senate's Foreign Affairs, Defence and Trade Committee during its inquiry into Australia's potential purchase of its own drones.

The HRLC's Director of Advocacy and Research, Emily Howie, said given Australia's current role in the USA's covert and deadly drone program, the public should be wary of any ambitions the Australian Government has to have its own armed drones.

"There are credible reports that Australia is already intimately involved in the covert US drone strikes through the joint military facility at Pine Gap near Alice Springs. These drone strikes have been shrouded in secrecy and significant numbers of civilians have been killed. Our Government

hasn't even been willing to come clean about its role in the US drone program, so the prospect of it pursuing its own drones program is deeply troubling," said Ms Howie.

Although it's understandable that Australia would want to capitalise on some of the opportunities that drone technologies present, such as surveillance, Ms Howie said the use of weaponised drones open up a Pandora's box of legal and ethical considerations.

"Because drones can be deployed in secret, with little or no transparency or accountability, the risk of violating international law is high. There is significant concern that drone strikes are disproportionately and unlawfully killing civilians, including children. These are not things Australia should be rushing to embrace," said Ms Howie.

Whilst accepting that there's nothing inherently wrong with drone technology in itself, Ms Howie said the way armed drones have increasingly been used, was likely to violate international law. Since the inauguration of President Obama in 2009, it's estimated that the USA has killed an estimated 2,500 people in covert drone strikes.

"There are going to be problems with any military operation conducted behind an impenetrable veil of secrecy. If Australia decides to acquire drones, then it will be absolutely vital to introduce transparent and rigorous safeguards to ensure international law is upheld," said Ms Howie.

The HRLC will make a number of recommendations in its submission and will urge the Committee members to request that the Government 'comes clean' about its current role in the USA's drone program.

"If we're going to have a genuine debate, then the Government should put its cards on the table; what kind of assistance exactly are we providing to the USA's deadly drone program? The Australian public have a right to know the facts before the Government takes us further down this troublesome path," said Ms Howie.

The HRLC's written submission can be found here.

DEMOCRATIC FREEDOMS

Australia urged to remove excessive restrictions on the rights to freedom of expression, association and peaceful assembly

2 February 2015

Australia should repeal excessive restrictions on the fundamental rights to freedom of expression, association and peaceful assembly, according to a new report to be considered by the UN Human Rights Council in Geneva.

The report prepared by the International Service for Human Rights, with input from Australia's Human Rights Law Centre, documents a worsening trend of laws, policies and funding arrangements being used by federal and state governments to restrict free speech and peaceful protest, censor and criminalise the work of journalists, and impede the independence and effectiveness of non-governmental organisations and the national human rights institution.

"There is a growing disconnect between Australia's support on the world stage for vibrant civil society, strong national human rights institutions, and the protection of journalists, and its apparent disdain for the vital work of these actors at home," said ISHR Director Phil Lynch.

According to ISHR, Australia's inadequate legal protection of human rights has enabled the enactment of regressive laws restricting the right to peaceful protest and to freedom of the press,

contrary to international human rights law. As examples, the report cites the Tasmanian *Workplaces (Protection from Protesters) Act*, which criminalises protests which 'hinder or obstruct' business operations, and 2014 amendments to the *Australian Security Intelligence Organisation Act* which criminalise the disclosure of information on so-called 'special intelligence operations', including by journalists, even where those operations violate fundamental rights.

"There is a disturbing trend in Australia of governments eroding basic democratic freedoms – such as freedom of expression, association and access to information – which are the basic ingredients of good government and accountability," said Emily Howie, Director of Advocacy and Research at the Human Rights Law Centre.

In addition to calling for repeal of restrictive legislation, the submission recommends that Australia strengthen the legal protection of rights, such as by amending the *Public Interest Disclosure Act* to provide protection to whistleblowers where the disclosure reveals or promotes accountability for alleged human rights abuses.

"Recent revelations in the *Guardian* newspaper that the Australian Government has asked the Australian Federal Police to investigate journalists to uncover their confidential sources for reports on asylum seekers are yet another illustration of the need for stronger laws to protect freedom of expression and access to information in this country," Ms Howie said.

The report highlights that Australia has failed to incorporate the International Covenant on Civil and Political Rights into national law, despite the expert recommendations of United Nations treaty bodies and Special Rapporteurs, together with a major public consultation undertaken in Australia in 2009.

"Building on the positive experiences of the Charter of Human Rights in the state of Victoria and the Human Rights Act in the Australian Capital Territory, the Australian Government and other state and territory governments should enact laws giving full domestic force and effect to the International Covenant on Civil and Political Rights," Ms Howie said.

The ISHR report also documents policies and arrangements that Australian governments are increasingly putting in place to restrict advocacy and silence dissent, including by defunding organisations and through contractual requirements which prohibit or restrict advocacy and law reform work. Organisations working in areas such as indigenous and refugee rights, like the Refugee Council and the National Congress of Australia's First Peoples, have been hit particularly hard.

"A vibrant and critical civil society is essential to democracy and development. In accordance with its obligations under the Declaration on Human Rights Defenders, Australia should reinstate funding to these vital civil society organisations. It should also repudiate contractual provisions which purport to restrict the right and ability of non-governmental organisations to advocate for progress and reform," Mr Lynch said.

ISHR is particularly concerned at government steps to defund and delegitimise the Australian Human Rights Commission, contrary pledges Australia has made on the international stage.

"Substantial funding cuts, the appointment of commissioners without proper processes, and persistent political attacks on the President of the Australian Human Rights Commission are all flagrantly incompatible with Australia's international position and promises," Mr Lynch said.

Australia leads a bi-annual resolution on strengthening national human rights institutions at the UN Human Rights Council which calls on all States to safeguard the independence of human rights commissions, ensure that they are not subjected to unreasonable budgetary limitations,

and are protected from all forms of pressure or reprisal in connection with their work on individual cases, inquiries and reports.

“Australia should heed the advice it frequently dispenses to other nations at the UN by restoring funding to the Commission and by defending the independence and integrity of the Commission’s highly qualified President,” Mr Lynch said.

The ISHR report will be formally considered by the UN Human Rights Council when it meets to review Australia’s human rights record again through the Universal Periodic Review in Geneva in November.

A major coalition of Australian NGOs, coordinated by the Human Rights Law Centre, the National Association of Community Legal Centres and Kingsford Legal Centre, is also expected to submit a report to the UN in the coming weeks.

COUNTER TERROR LAWS

Preserve and enhance oversight of counter-terror laws

29 January 2015

Parliament should pass a proposed law to preserve and enhance the proper oversight of counter-terrorism and national laws that have serious repercussions for human rights.

In a submission to the Senate Legal and Constitutional Affairs Committee, the Human Rights Law Centre has supported the Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014 that seeks to ensure strong and robust oversight of Australia’s counter terrorism and national security laws.

“Counter terrorism and national security laws provide extraordinary powers to police and other security and intelligence agencies. It is critical that these laws do not allow unnecessary or disproportionate intrusions upon peoples’ fundamental human rights,” said Emily Howie, director of advocacy and research at the Human Rights Law Centre.

The Bill, introduced by Greens Senator Penny Wright, aims to preserve and enhance the essential functions of Australia’s Independent National Security Legislation Monitor (Independent Monitor).

“The Independent Monitor provides a much-needed check on the extraordinary powers granted to government agencies under national security and counter terrorism laws. It ensures critical, dedicated oversight and accountability by a fully informed, expert and independent reviewer,” said Ms Howie.

The position of Independent Monitor, previously filled by Bret Walker SC, has been vacant since December 2014, despite the government’s indication that it will recommend Roger Gyles AO QC for the role. The amendments in the Bill would ensure that the monitor’s role is not left vacant and that it is fully resourced.

The Bill would also increase the Monitor’s independence and ensure that the Independent Monitor can review proposed, as well as existing counter terrorism and national security laws.

“At present, the Independent Monitor is only empowered to review laws once they have been enacted. The proposed changes would correctly address what has been a missed opportunity for Parliament to access the Independent Monitor’s expert, independent advice during the development of legislation,” said Ms Howie. The HRLC’s submission is available here.

PRISONER REHABILITATION

Need to address Victoria's soaring imprisonment rates, HRLC tells Victorian Ombudsman

20 January 2015

The Victorian Government should implement justice policies aimed at reducing Victoria's soaring imprisonment rates, the Human Rights Law Centre has recommended in a submission to the Victorian Ombudsman's Discussion Paper on prisoner rehabilitation and reintegration.

The submission calls on the new Victorian Government to seize the opportunity to change course and introduce policies that work to cut crime, cut spending and cut imprisonment rates.

The HRLC's Senior Lawyer, Ruth Barson, said that Victoria has seen unprecedented growth in prisoner numbers over the past few years without a corresponding increase in community safety.

"Evidence shows that locking more and more people up and creating harsher sentencing and parole laws hasn't worked. There are smarter ways to tackle crime and keep the community safe, and it's time to embrace them," said Ms Barson.

The former Government's law and order agenda cost the community greatly. According to current projections, in 2014–15 Victoria will spend more than $940million on prison operations alone, an increase of 47% over two years. Moreover, between 2009 -2015, the prison population is forecast to have grown by approximately 65%. Rather than reducing crime, these swelling prison numbers have actually been accompanied by rises in the rate of reoffending.

"Prisons should not just be used to warehouse prisoners until their release date. There must be a genuine and primary focus on prisoner rehabilitation. In Victoria, prisoner rehabilitation is being compromised by unsustainable growth in prisoner numbers and deteriorating prison conditions," said Ms Barson.

Ms Barson said that current policies are also disproportionately impacting women and Aboriginal and Torres Strait Islander peoples.

"Victoria imprisons Indigenous people at 11 times the rate of non-Indigenous people. It's important that the Victorian Government work in partnership with Indigenous communities to reduce these unacceptably high rates of over-representation. In particular, the Victorian Government should consider expanding the Koori Court initiative and increasing community-based sentencing options," said Ms Barson.

Ms Barson said that if Victoria wants to halt increasing imprisonment rates, it needs to embrace a justice reinvestment approach. This involves reinvesting money from prisons into community based services aimed at strengthening communities and addressing the underlying causes of offending.

"The Victorian Government should reconsider the laws that have seen Victorians spend millions on dead-end solutions. Investment in early intervention, prevention and rehabilitation is what will see both crime and prison rates reduced," said Ms Barson.

A copy of the submission is available here.

Post script: A subsequent media statement from the Victorian Ombudsman can be found here.

PRIVACY

New Data Retention bill exposes Australians to risk of improper access and use of personal data without their permission or even knowledge

12 February 2015

Proposed new data retention laws create significant risks that private information of Australians will be unlawfully accessed and misused, said the Human Rights Law Centre in a submission to the Senate inquiry into the draft legislation.

“The government is trying to force telecommunications companies to indiscriminately stockpile huge amounts of private data of people who have done nothing wrong, just in case it might need it down the track,” said HRLC Executive Director Hugh de Kretser. “This creates significant privacy risks around unlawful access and misuse. The risks outweigh the potential benefits. The bill shouldn’t be passed.”

The proposed changes in the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (Cth) would require telecommunications providers to collect and retain certain “metadata” for a period of two years. Metadata is information about a communication, such as the name, address and contact details of customers, the phone, email or other source from which a communication was made and received, and the date, time and duration of a communication, but not the content of the communication.

Under existing legislation, no warrant or other independent approval process is needed for law enforcement bodies to access or use stored metadata.

“Agencies can effectively ‘self-authorise’ their own access to individuals’ metadata,” said Mr de Kretser. “This needs to change. An independent authorisation process, such as a warrant process, is essential to ensure law enforcement aims are properly balanced against the interference with an individual’s privacy.”

In its submission, the HRLC also recommended the introduction of a mechanism for individuals to be notified and have the opportunity to challenge the legality of access to their telecommunications data.

The HRLC also highlighted that much of the detail of the data retention and access regime will be left to regulations or Ministerial decisions which won’t be properly scrutinised by Parliament.

“The Government is effectively saying ‘trust us’ on key aspects of the proposed scheme including the types of information to be collected and the agencies that will access that information,” said Mr de Kretser. “It’s simply not appropriate.”

“The bill also fails to establish a proper seriousness threshold so that retained metadata can only be accessed where it is necessary for investigating serious crimes, not minor or trivial offences,” he added.

The HRLC’s submission recommends that the Bill not be passed.

A copy of the HRLC’s submission can be found here.

A copy of the Bill can be found here.

FUNDRAISING

Sam's Bloody Big Swim

When dangerous conditions cancelled the Bloody Big Swim open-sea marathon fundraising event, passionate HRLC supporter Sam Drummond wasn't deterred – he simply relocated and swam the 11.2 kilometres at the Fitzroy pool instead! His impressive 224 laps raised $2,800 to support the HRLC's work. Thank you Sam!

STAFFING

Introducing Rachael Hambleton

We are very pleased to introduce the newest member of the HRLC team, Rachael Hambleton, who joins us in the new position of Fundraising Coordinator.

Rachael will be working three days a week to develop the HRLC fundraising strategies and help us better liaise with our many passionate supporters.

With just 6% of our budget coming from government, private donations are absolutely vital to our ongoing human rights impact. The creation of this role will help strengthen existing partnerships and expand our support base.

Rachael has a background in the legal sector, hospitality and events management. She is on the board of Reprieve Australia and the Victorian Gay and Lesbian Rights Lobby and the volunteer coordinator for Lawyers for Animals. Rachael will also continue working with Justice Connect for 2 days a week as their Events Coordinator.

If you have any questions or ideas, please contact Rachael via email at: Rachael.Hambleton@hrlc.org.au

OTHER HUMAN RIGHTS DEVELOPMENTS

Human Rights Watch's World Report 2015

Human Rights Watch has published its 25th annual review of human rights practices around the globe. The report reflects extensive investigative work that Human Rights Watch staff undertook in 2014, usually in close partnership with human rights activists in the country in question. It also reflects the work of its advocacy team, which monitors policy developments and strives to persuade governments and international institutions to curb abuses and promote human rights. You can purchase a print version or download a PDF copy here: http://www.hrw.org/world-report/2015/

Human Rights Watch takes aim at Australia's counter-terror laws, asylum seeker policies and Indigenous over-imprisonment

29 January 2015

Australia's vague and overbroad new counterterrorism laws infringe on the basic rights of all Australians, Human Rights Watch said in its *World Report 2015.* Australian government actions

placed refugees and asylum seekers at greater risk than ever of being returned to a country where they face repression or torture.

“Draconian counterterrorism laws undermining free speech are causing incalculable damage to Australia’s international standing as a rights-respecting country,” said Elaine Pearson, Australia director at Human Rights Watch. “Harsh refugee policies may score domestic political points, but the human toll is unacceptable.”

In the 656-page world report, its 25th edition, Human Rights Watch reviews human rights practices in more than 90 countries. In his introductory essay, Executive Director Kenneth Roth urges governments to recognize that human rights offer an effective moral guide in turbulent times, and that violating rights can spark or aggravate serious security challenges. The short-term gains of undermining core values of freedom and non-discrimination are rarely worth the long-term price.

In 2014, the government of Prime Minister Tony Abbott rushed through several new counterterrorism offenses imposing criminal penalties for “advocating terrorism” and traveling to “declared areas” abroad, as well as making unauthorized disclosures of information related to “special intelligence operations.”

“Australia’s new counterterrorism laws mean journalists, whistleblowers, and activists will risk prison for certain disclosures – even if it’s in the public interest,” Pearson said. “The government rammed these measures through parliament despite their having lasting consequences on Australians’ civil liberties.”

The Abbott government continued its policy of transferring all asylum seekers who arrive by boat to Nauru and Papua New Guinea despite concerns about prolonged refugee status determination procedures, violence and intimidation by local communities, and mistreatment and poor conditions in detention. In September, the government finalized an agreement with Cambodia whereby Cambodia will accept refugees from Nauru in exchange for bilateral aid, despite the Cambodian government’s lack of capacity to integrate refugees and ensure respect for their rights.

Australian authorities violated international law by handing over at least two boatloads of Sri Lankan asylum seekers to the Sri Lankan navy after cursory interviews at sea, possibly putting them at risk of torture or persecution. Human Rights Watch and others have documented cases of torture and rape of ethnic Tamil detainees previously forcibly returned to Sri Lanka, including some from Australia.

In international affairs, Australia used its United Nations Security Council seat effectively to promote human rights in Syria, North Korea, Central African Republic, and elsewhere. Australia is bidding for a seat at the UN Human Rights Council in 2018. However, in its bilateral relationships, the government maintained a position of rarely speaking out publicly on abuses. Besides trade and security, the Australian government’s foreign policy has focused on deterring asylum seekers from coming to Australia at the exclusion of other rights issues.

“The government has muted its criticism of abusive governments in Sri Lanka and Cambodia in recent years in apparent hopes of winning their support for its discredited refugee policies,” Pearson said. “Australia’s aspirations for a more powerful role in world affairs will get nowhere until it acts on human rights concerns both at home and abroad.”

Source: Human Rights Watch

UNHCR Legal Position: Despite court ruling on Sri Lankans detained at sea, Australia bound by international obligations

4 February 2015

UNHCR has followed with deep concern Australia's recent policies and practices of interception at sea, detention and removal of individuals who may be seeking Australia's protection.

UNHCR made a submission as amicus curiae (friend of the court) in the recent High Court case of CPCF v Minister for Immigration and Border Protection, decided on 28 January 2015.

UNHCR's submission focused on the application of non-refoulement obligations – that is, Australia's obligation not to return an individual to persecution or other serious harm when intercepting a vessel outside its territorial waters.

Key principles put forward by UNHCR included that the non-refoulement obligation in Article 33(*) of the 1951 Refugee Convention applies to officials of a Contracting State wherever they exercise jurisdiction; that Australia as a party to the Refugee Convention is obliged to fulfill its obligations in good faith; and that Australian laws, while binding on Australian officials and courts, do not change Australia's international obligations.

While the majority of the High Court found that Australia's detention of the 157 asylum-seekers at sea was permitted under the Maritime Powers Act, subject to some limits, including in relation to ensuring their safety, it did not find it necessary to decide on the scope of Australia's non-refoulement obligations on the facts before it.

The High Court judgment contains some references to judicial decisions in Australia, the UK, and the US as supporting the contention that the refugee non-refoulement obligation only applies within a receiving State's territory but, importantly, also acknowledges that non-refoulement obligations may have extraterritorial effect.

From UNHCR's perspective, it is important to stress that, at international law, the principle of non-refoulement, including under Article 33(1) of the 1951 Refugee Convention, applies wherever and however a State exercises jurisdiction, as set out in UNHCR's written submissions. UNHCR considers that there is only one superior court decision[1] that is at variance with this understanding, and that decision, like the one in CPCF, was based on interpretation of national rather than international law.

Numerous conclusions of UNHCR's Executive Committee, of which Australia is a founding member, have attested to the overriding importance of the non-refoulement principle irrespective of the geographic location of the asylum-seeker or refugee. They have also emphasized the fundamental importance of fully respecting the principle of non-refoulement for people at sea, highlighting that:

> "interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law." (ExCom Conclusion No. 97 (LIV (2003 [(a)(iv)]

When vessels presumed to be carrying asylum-seekers are intercepted, or where there are indications that those on board intend to apply for asylum should they have the opportunity to do so, UNHCR's position is that they must be swiftly and individually screened, in a process which they understand and in which they are able to explain their needs. Such screening is best carried

out on land, given safety concerns and other limitations of doing so at sea. If protection issues are raised, their cases should be properly determined through a substantive and fair refugee status determination procedure on the territory of the intercepting State to establish whether any one of them may be at risk of persecution or other serious human rights violations. This remains the case even when bilateral or multilateral transfer arrangements are involved. Anything short of such a screening, referral and assessment may risk putting already vulnerable individuals at grave risk of danger.

On a more general level, UNHCR appreciates actions taken by the Australian Government to save lives in rescue-at-sea operations and its willingness to work with UNHCR and other States to develop a regional approach to maritime movements. UNHCR urges renewed efforts towards the development of viable regional alternatives to potentially dangerous journeys by sea for asylum-seekers, refugees and stateless persons.

Source: United Nations High Commissioner for Refugees

Burma urged to end restrictions, reprisals and use of force against protesters and human rights defenders

The Government of Burma (Myanmar) should urgently amend laws which unreasonably restrict the right to freedom of expression and assembly and which appear to be increasingly used to criminalise human rights defenders and censor journalists, the International Service for Human Rights in Geneva has said.

Officials should also end reprisals and the use of force against those who promote corporate respect for human rights and protest major development projects and associated land grabs.

The call came as the United Nations Special Rapporteur on Human Rights in Burma, Professor Yanghee Lee, concluded her second official visit to the country, saying "if Burma is truly serious about transitioning to democracy, it must allow persons aggrieved by its actions to express their frustrations without being punished".

"ISHR is deeply concerned at reports of an increase in the arrest, prosecution and imprisonment of people exercising their fundamental rights to freedom of expression, association and assembly, particularly those protesting against land grabs and major development projects," said ISHR's Pooja Patel.

"We join the Special Rapporteur in calling for the amendment of Burma's Peaceful Assembly and Peaceful Procession Act to bring it into line with international human rights standards, including by repealing the requirement under article 4 for organisers of a protest to seek permission from police and article 18, which criminalises participation in an unauthorised protest," Ms Patel said.

"ISHR is also gravely concerned at excessive use of force against protesters, including the use of lethal force against those protesting land confiscations associated with the Letpadaung copper mine project led by China's Wanbao Mining company," Ms Patel said.

Last week, Burma National Human Rights Commission issued a statement on the death of Daw Khin Win, a 53 year old villager killed by a gunshot allegedly fired by police during a protest against the copper mine on 22 December 2014. The Commission found that police and security forces did not take adequate steps to de-escalate or disperse the protest before resorting to force. Eleven other villagers were also injured, including two others who received gunshot wounds.

"The Government of Burma should ensure a prompt, independent and impartial investigation into the use of excessive force against protesters, and prosecute those responsible. It is also incumbent on companies and international investors and donors to ensure that they are not involved, whether directly or indirectly, in human rights abuses and that they respect and restrain from interfering with the work of human rights defenders and others who work to promote corporate accountability," said Ms Patel.

ISHR also called on the Government of Burma to refrain from intimidation and reprisals against those who seek to cooperate or submit information to the United Nations or to national human rights authorities, and to investigate and ensure accountability for any such acts.

"The arrest of U Sein Than while en route to the UN office in Burma to submit information on land grabbing, together with the prosecution of U Brawn Shawng in connection with allegedly 'false information' he submitted to the Burma National Human Rights Commission, are flagrant examples of reprisals against those who seek to expose injustice and seek accountability," said Ms Patel.

"We are also deeply disturbed by the sexist and insulting personal slurs directed at Professor Lee herself by a prominent monk during the Special Rapporteur's country visit. Burma's duty to cooperate fully with the UN's independent experts extends to unequivocally condemning such attacks and we join the High Commissioner's recent call in that regard."

"We also join with the Special Rapporteur herself in calling for the Government of Burma to "eliminate legal avenues that punish the expression of opinions contrary to state policy" as a matter of the utmost priority," Ms Patel said.

Source: International Service for Human Rights

AUSTRALIAN HUMAN RIGHTS CASE NOTES

High Court finds high seas detention of 157 asylum seekers did not breach Australian domestic law

CPCF v Minister for Immigration and Border Protection & Anor [2015] HCA 1 (28 January 2015)

By a narrow majority (4:3) the High Court found that the Australian Government's detention of 157 asylum seekers for nearly a month on board a customs vessel was legal under Australian domestic law.

Facts

The plaintiff was one of 157 Tamil asylum seekers, including 50 children, on board an Indian flagged vessel intercepted on 29 June 2014 by an Australian border protection vessel in the Indian Ocean within Australia's contiguous zone. The asylum seekers were subsequently transferred to the Australian vessel, and on 1 July 2014 the National Security Committee of Cabinet decided that the asylum seekers should be taken to India. At this time, there was no agreement with India under which the asylum seekers would be permitted to disembark or enter India.

The Australian customs vessel then travelled to India, arriving off the Indian coast on 10 July 2014. It stayed near India for 12 days before the Minister for Immigration and Border Protection decided that the asylum seekers should be taken to the Cocos (Keeling) Islands before being

taken into immigration detention. In total, the asylum seekers were detained on the Australian customs vessel for over three weeks.

The plaintiff brought proceedings in the High Court alleging that his high seas detention was unlawful. Shine Lawyers, with assistance from the Human Rights Law Centre, ran the case with a team of barristers led by Ron Merkel QC.

Decision

The key questions at the heart of the case focused on the scope of the Government's power to detain people at sea and send them elsewhere.

The majority of the Full Court of the High Court held that the detention of the plaintiff was lawful under section 72(4) of the *Maritime Powers Act* 2013 (Cth). Section 72(4) states that a maritime office may detain a person on a detained vessel and take the person, or cause the person to be taken, to a place outside Australia.

The narrow majority (4:3) was comprised of French CJ, Crennan J, Gageler J and Keane J, in separate judgments.

The majority also held that:

- The power under s 72(4) was not subject to an obligation to afford the plaintiff procedural fairness; and
- The detention was lawful even though the maritime officer detained the plaintiff in implementation of a decision by the Australian Government, and without independent consideration of whether the detention should have taken place; and
- The detention was lawful even though at no point did an arrangement exist between Australia and India concerning the reception of the asylum seekers in India.

The minority, comprising Hayne and Bell JJ jointly, and Kiefel J separately, held that the detention was not authorized by either the statutory or non-statutory powers of the executive.

Commentary

Neither the majority nor the minority judgments considered Australia's obligations under international refugee law in great detail. Instead, the case turned on matters of statutory interpretation, and as such, this case should be understood within the context of Australian national law. In that respect, the decision highlighted the widening gap between Australia's international human rights obligations and its domestic laws and practices. Keane J observed that:

Australian courts are bound to apply Australian statute law 'even if that law should violate a rule of international law'. International law does not form part of Australian law until it has been enacted in legislation. In construing an Australian statute, our courts will read 'general words … subject to the established rules of 2 international law' unless a contrary intention appears from the statute. In this case, there is no occasion to invoke this principle of statutory construction. The terms of the Act are specific. They leave no doubt as to its operation [para 462].

Accordingly, even though incommunicado detention on the high seas is a clear breach of Australia's international human rights obligations, s 72(4) was construed in a way that allowed the Government to breach those obligations.

Regarding Australia's *non-refoulement* obligations, both majority and minority judgments noted that the relevant question was whether or not the plaintiff faced a risk of *refoulement* from India to Sri Lanka, and that there was insufficient evidence before the Court to answer that question.

The majority did however suggest that it would be unlawful for the Government to detain asylum seekers for the purpose of taking them to an unsafe place. While the court did not, on the evidence before it, determine whether or not India was an unsafe place, the majority's recognition of this limit on the Government's powers at sea may have significant implications on the Government's future maritime operations, including the use of orange lifeboats and returning Tamil asylum seekers directly to Sri Lanka.

Despite the ultimate outcome, the case did succeed in bringing vital legal scrutiny and transparency to the Government's actions at sea. The case also helped to ensure that the 157 asylum seekers will have their refugee claims processed, instead of being sent back with no questions asked.

The full text of the decision can be found here.

Andre Dao *is the editor-at-large of Right Now, a human rights media organisation*.

Note: *The Human Rights Law Centre acted in this case. You can read a detailed account here.*

ACT Aboriginal Community Council not bound by ACT Human Rights Act

Stewart & Ors v Wreck Bay Aboriginal Community Council & Ors [2014] ACTSC 334 (18 December 2014).

The Supreme Court of the ACT has found that the Wreck Bay Aboriginal Community Council (WBACC) did not meet the definition of a public authority pursuant to s 40 of the *Human Rights Act 2004* (ACT) (HRA) and therefore it did not need to take into account human rights considerations in its decision to evict the plaintiffs.

Facts

Mr and Mrs Stewart and a number of their extended family had been living on an area of Wreck Bay called Mary Bay Ridge since 1996. They claimed that they were traditional Aboriginal owners from the area and therefore had a right to live on the land. This area did not have access to amenities such as sewerage, electricity, or running water. The WBACC claimed that the Stewarts were living on Mary Bay Ridge unlawfully. It claimed that as the owner of the Aboriginal land in Wreck Bay vested in it by virtue of the *Aboriginal Land Grant (Jarvis Bay Territory) Act 1986* (Cth)(the ALGA), it had the power to evict people who were unlawfully camping on this land.

The Stewarts argued that the WBACC had an obligation to consider human rights when making its decision to evict them as it was a public authority under s 40 of the HRA.

Decision

Justice Burns considered whether the council came within the definition of a public authority under s. 40 of the HRA, which provides:

(1) Each of the following is a *public authority*:

(a) an administrative unit;

(b) a territory authority;

(c) a territory instrumentality;

Justice Burns carefully considered each of these three categories. Relevant to his decision was the fact that the WBACC was established by a Commonwealth law, the ALGA. The ALGA provided for a grant of land to the Wreck Bay Aboriginal Community which included the Mary Bay Ridge, and for the establishment of the WBACC whose functions include holding title to, and exercising powers over, that land.

For the first two sub-sections to be applicable, the WBACC must have been established by the ACT Chief Minister or established for a public purpose under a Territory Act. A Territory Act includes a former Commonwealth enactment provided for in schedule 2 of the *Australian Capital Territory (Self-Government) Act* (Cth). The ALGA did not fit this definition. Justice Burns further found that for an organisation to be a territory instrumentality under the third sub-section, it must either be established by or under an ACT statutory instrument, or be comprised of people, a majority of whom are appointed by a Minister, or an agent or instrumentality of the Territory.

As this was not the case, the court found that the WBACC was not a public authority for the purposes of the HRA and as such, it was not required to take into account human rights in making its decision to evict the Stewarts.

Commentary

This decision clarified the definition of public authority under ss 40(1)(a)-(c) of the HRA. However Justice Burns did not consider whether the WBACC came within the definition of s. 40(1)(g) of the HRA:

> (g) an entity whose functions are or include functions of a public nature, when it is exercising those functions for the Territory or a public authority.

Section 40A states that a range of factors must be considered to determine if an entity is performing 'functions of a public nature', some of which were present for WBACC and some were not. Factors against such an assessment in this case include whether the function is conferred on the entity under a Territory law, or by an entity that is a company with the majority shares held by the Territory.

Nonetheless, s.40A(3) states that the provision of public housing is taken to be of a public nature. Justice Burns did find that WBACC was providing a housing service, which may have come within the area of 'public housing' for the purposes of the HRA. However, section 40A also lists as a relevant factor if the entity is publicly funded to perform the function. If the WBACC received funding from the ACT Government to provide functions relating to housing, it could have fallen within sub-section 40(1)(g). It is assumed, however, that this is not the case as his Honour did not discuss this in the decision.

The decision suggests that the ACT Supreme Court will take particular notice of the connection an entity has to the ACT Government or Territory Law in determining if it is an ACT Public Authority under the HRA.

The full decision can be found here.

***Jane Thomson** is a Human Rights Law and Policy Adviser at the ACT Human Rights Commission.*

Random stops and license checks by police lawful - coercive questioning not

DPP v Kaba [2014] VSC 52 (18 December 2014)

Summary

The Supreme Court of Victoria found that while the police did have the power to conduct a random stop and license check of Mr Kaba, the officers' subsequent coercive questioning of him disproportionately limited his rights to privacy and freedom of movement under the Victorian Charter and was therefore unlawful.

Facts

Mr Kaba, a young black African man, was the passenger in a vehicle travelling in Flemington one afternoon.

Two uniformed police stopped the driver, without any suspicion of wrongdoing, for a random check of his licence and vehicle registration.

Mr Kaba left the vehicle and walked along the footpath. The officers asked for his name and address three times which he refused to provide, protesting vehemently about racist harassment. One of the officers arrested him for using offensive language and in the course of the arrest, Mr Kaba allegedly assaulted the officer and committed other street offences for which he was charged.

At the hearing of these charges at the Magistrates' Court, Mr Kaba successfully objected to the evidence of the police under section 138(1) of the Evidence Act arguing that the charges were the result of the police's unlawful and improper conduct in carrying out a random licence check for which they had no power. Mr Kaba also argued that there had been a breach of his rights to freedom of movement and privacy under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ("Charter").

At the trial of Mr Kaba for various street offences at the Magistrates' Court in Melbourne, the presiding magistrate exercised the discretion in section 138(1) of the *Evidence Act 2008* (Vic) ("Evidence Act") to exclude particular evidence of the police on the basis that it was illegally or improperly obtained.

The magistrate excluded the evidence on the basis that the police had carried out a random licence check for which they had no power under the *Road Safety Act 1986* (Vic) ("Road Safety Act") and which breached Mr Kaba's Charter rights.

The prosecution sought judicial review of the Magistrate's decision to exclude the evidence of the police, without which the prosecution would collapse.

Decision

Upon judicial review of the magistrate's decision, Justice Bell of the Victorian Supreme Court found that the evidence had been rightly excluded. Justice Bell deemed the actions of the police to be unlawful under section 38(1) of the Charter and inconsistent with the individual rights to privacy and freedom of movement under the International Covenant on Civil and Political Rights ("ICCPR"). However, Justice Bell quashed the decision on the basis that the magistrate had made an error of law on the face of the record in finding the police did not have power under the *Road Safety Act* to carry out random licence checks.

Police have a power of random stop and check under section 59(1) of the Road Safety Act 1986

Contrary to the magistrate's opinion, Justice Bell found that section 59(1) confers a power on police that allows them to conduct a routine or random stop and check for the purposes of the administration of the *Road Safety Act*.

In the present case, stopping the vehicle, requesting the driver's name and address and driver's licence was authorised.

The police exceeded their common law powers and breached Mr Kaba's human rights

Justice Bell held that, up to a certain point, police questioning does not unlawfully interfere with the rights and freedoms of individuals. Police questioning does unlawfully interfere with these rights and freedoms, however, when the questioning becomes coercive, which is when the

individual is made to feel that they cannot choose to leave or refuse to co-operate. In drawing the line between voluntary and coerced questioning, Justice Bell stated that courts will consider the duties of the police to protect the community and prevent crime, as well as the imbalance of power between police in uniform and ordinary members of the community.

In the present case, Mr Kaba did not actually provide the details asked of him by the police. However Justice Bell considered that a reasonable person in Mr Kaba's circumstances would have felt they had no choice but to do so. The conclusion that the line of permissible questioning had been crossed was "*irresistible*".

Section 38(1) of the Charter deems it unlawful for the police to act in a way that is disproportionate or incompatible with human rights. In the present case, the actions of the police did limit human rights, namely freedom of movement and privacy, and the police reasonably could have acted differently in the circumstances. On this basis, Justice Bell held that the coercive questioning of the police was unlawful.

The evidence was rightly excluded

Justice Bell found that the magistrate was correct to exclude the evidence of the police in relation to the criminal charges under section 138(1) of the *Evidence Act* on the basis that the police questioning was improper and unlawful at common law, and additionally on the basis the evidence was obtained in consequence of impropriety or contravention of Australian law.

As required by section 138(3)(f) of the *Evidence Act*, in exercising his discretion to exclude the evidence of the police, Justice Bell took into account the finding that the relevant impropriety or contravention was inconsistent with Mr Kaba's rights under the ICCPR. In particular, the police pressing him to divulge his name and other personal details breached his right to privacy under article 17(1) of the ICCPR. His right to freedom of movement under article 12(1) was also breached because the questioning interfered with his right to walk freely in the public streets.

The decision of the magistrate was quashed

The decision of the magistrate to exercise his discretion in section 138(1) of the *Evidence Act* not to admit the evidence was based upon two legal grounds, one of which was in error. For this reason, Justice Bell quashed the ruling because the magistrate had committed an error of law on the face of the record in relation to the interpretation of section 59(1) of the *Road Safety Act.*

The proceeding was remitted to the magistrate for reconsideration of the exercise of the discretion to exclude the evidence under s 138(1) of the Evidence Act.

Commentary

This case again raises the issue of racial profiling by Victoria Police, following the settlement of the high profile case led by Daniel Haile-Michael and Maki Issa in the Federal Court in 2013.

While the decision confirms the power of police to conduct random stop and checks under section 59(1) of the *Road Safety Act*, it recognises that this power - and the power to ask further questions - is not unfettered. The coercive nature of the police questioning in this case led to the exclusion of evidence which was critical to the prosecution of various offences, including physical assault. Police must ensure that, at least when the individual in question is an ordinary member of the public and not someone reasonably suspected of wrongdoing, questioning is conducted voluntarily and not coercively or it may disproportionately limit the individual's human rights and lead to the evidence obtained being excluded.

***Grace Walton** is a Seasonal Clerk at King & Wood Mallesons.*

Additional commentary from Flemington & Kensington Community Legal Centre

While positive in many respects, the Supreme Court's interpretation of s59(1)(a) of the *Road Safety Act 1986* (the "Act") leaves some aspects of law in an unsatisfactory place. On the positive side, the Court made it clear that s59(1)(a) stops could only be conducted for the purpose of licence and registration checks. On the negative side however, by authorising random vehicle stops the Court makes racial profiling inevitable. For example, in the UK, black people are 12 times more likely than whites to be stopped when police are authorised to conduct suspicion-less stops. There is no reason to believe these patterns would not be repeated in Australia.

One possibility to address this risk is further litigation. Another is for Parliament to amend s59(1)(a) of the *Act* to make random stops unlawful while ensuring that police can undertake licence and registration checks in a genuinely unbiased and human rights compliant manner.

There are five key legislative reforms that would protect people from racial profiling and other forms of discrimination while permitting police to check licences and registration.

Make suspicion-less stopping unlawful

Parliament should remove any authorisation police have to intercept vehicles without reasonable grounds to suspect a person has committed an offence.

Make racial profiling explicitly unlawful

Victoria Police have stated in *Equality is Not the Same* that they have 'zero tolerance for any form of racial profiling'. While Federal anti-discrimination legislation makes, in general terms, racial profiling unlawful, at the State level there is considerable uncertainty. To clarify the position, Parliament should clearly define and make unlawful racial profiling in all legislation that creates powers for police as well as anti-discrimination legislation. A good definition of racial profiling set out by the Human Rights Commission in Quebec in its "*Racial Profiling Context and Definition*" report is as follows:

> Racial profiling is any action taken by one or more people in authority with respect to a person or group of persons, for reasons of safety, security or public order, that is based on actual or presumed membership in a group defined by race, colour, ethnic or national origin or religion, without factual grounds or reasonable suspicion, that results in the person or group being exposed to differential treatment or scrutiny. Racial profiling includes any action by a person in a situation of authority who applies a measure in a disproportionate way to certain segments of the population on the basis, in particular, of their racial, ethnic, national or religious background, whether actual or presumed.

Reverse the onus of proof

Because of the difficulties of proving racial profiling in individual cases, it is essential that the legislature reverse the onus of proof so that a police officer has the burden of proving that a stop was not racially motivated. That is the officer must prove that they had reasonable grounds to suspect an offence or otherwise conduct a stop.

Authorise police to check licences at random breath-testing stations

Random breath testing is explicitly authorised in the *Act*. Most commonly, police conduct random breath testing at roadside stations where vehicles are pulled over in organised batches in a truly random (but not arbitrary) manner. It is possible that if police chose to position their stations in highly racialised communities, such as a housing estate, this could amount to racial profiling.

However, the general practice is to position random breath test stations on major roads. If Parliament wished to provide police with a licence inspection power of drivers who were not suspected of committing offences, it could do so by explicitly authorising police to check licences of people pulled over for random breath testing. Because the process is not subject to officer discretion, but is systematic and controlled, racial profiling is eliminated from the process. Random registration checks are already possible through the mobile registration checking capacity in police patrol cars.

Data collection

In order to monitor the extent of racial profiling, it is essential that Parliament legislate to ensure police collect data on the reason for the stop, the effectiveness of the stop (i.e. whether it lead to an arrest/infringement or warning) and the racial background of the person stopped (as it appears to police). Failure to collect data should attract a penalty similar to the penalty applying to police who fail to provide their name and rank to a person who has requested it under s 246AA of the *Crimes* Act 1958. Failure to collect data should also undermine a defence to any allegation of individual discrimination, that is, the data record should be treated as the central evidence to justify the stop. While data collection is currently the subject of a Victoria Police trial arising from the *Equality is Not the Same* report, leaving such an important mechanism in the hands of police does not sufficiently address the States obligation under the ICCPR to eliminate discrimination.

There are other legislative mechanisms that are also required to eliminate racial profiling. For example creating an independent complaint investigation system, a racial profiling tort and amending the services definition in section 4 of the *Equal Opportunity Act 2010* (Vic) to ensure it applies to people under investigation as well as victims of crime are all important steps. Each of these reforms will increase the transparency, accountability, effectiveness and community support for policing as well as working towards the elimination of racial discrimination.

The full decision can be found here.

*Additional commentary provided by **Tamar Hopkins**, the Principal Lawyer at Flemington & Kensington Community Legal Centre.*

Change in circumstances required before re-certifying discharged involuntary patients

XX v WW and Middle South Area Mental Health Service [2014] VSC 564 ('Patient X')

Summary

The Supreme Court confirmed that when the Mental Health Review Board discharges a patient from involuntary treatment, there must be a change in circumstances before a doctor can make a new involuntary treatment order.

Facts

On 19 August 2013, the plaintiff ('Patient X') was made subject to an involuntary treatment order (ITO) under s 12AA of the then *Mental Health Act 1986* (the Act).

On 27 August 2013, the Mental Health Review Board ('the Board') conducted review of Patient X's status as an involuntary patient under ss 30 and 29 of the Act. Patient X, who was represented by Victoria Legal Aid (VLA) at the hearing, told the Board that she agreed that she had bipolar disorder and wished to continue taking medication. However, she said she preferred to leave hospital and be treated in the community by her private psychiatrist.

The Board decided that Patient X did not meet the criteria for involuntary treatment under s 8(1) of the Act. Specifically, the Board considered that Patient X could receive adequate treatment in a less restrictive manner as a voluntary patient and therefore s 8(1)(e) of the Act was not satisfied. The Board discharged Patient X from involuntary status. The Board said that it recommended that Patient X continue to receive close medical supervision, but told her that it was leaving the decision about whether to remain in hospital on a voluntary basis up to her. The Board made its decision at around 12:45pm.

Patient X returned to the ward to consider her options about treatment and accommodation. After a friend offered her short-term accommodation at his house, she told the ward staff of her decision to leave the hospital and waited on the ward for her medication.

At around 4:00pm, the first defendant ('Dr W') made a new recommendation for Patient X to receive involuntary treatment under s 9 of the Act. Section 9 provides that a registered medical practitioner must not make a recommendation unless he or she considers that (a) the criteria in s 8(1) apply to the person and (b) an ITO should be made.

Dr W also immediately made a new ITO under s 12AA of the Act, pursuant to which Patient X was detained at the hospital and involuntarily treated. Patient X was told of this decision at 5pm.

VLA represented Patient X in seeking judicial review of Dr W's decision to make the new recommendation, on the grounds that it was ultra vires, unreasonable, took into account irrelevant considerations and was incompatible with several rights under the *Charter of Human Rights and Responsibilities Act 2006* (the Charter). Patient X sought a declaration to this effect.

Patient X argued that, properly construed, s 9 of the Act did not permit a registered medical practitioner to make a recommendation following a discharge by the Board unless he or she had information not known to the Board which put a significantly different complexion on the case as compared to that which was before the Board.

She also argued that her rights under sections 10(c), 13(a), 21(1), 21(2) and 21(3) were engaged and that Dr W's decision was not a reasonable limitation on those rights, because it involved an abrogation of a fundamental safeguard (independent oversight) which is essential to ensure that the limitations on rights inherent in involuntary treatment are proportionate and therefore justified.

The defendants argued that the power in s 9 was not limited. Indeed, the defendants argued that if a doctor believed that the s 8(1) criteria were met, and that an ITO should be made, the doctor would have a *duty* to make a recommendation, regardless of the Board's decision to the contrary. The defendants argued in the alternative that, in Patient X's case, Dr W did have new information not known to the Board which put a significantly different complexion on the case.

Decision

Justice McDonald held that the power in s 9 was impliedly limited by, inter alia, the power conferred on the Board, the objects in s 4(2) and the principles of treatment in s 6A of the Act, such that a registered medical practitioner could not make a recommendation following discharge by the Board 'in the absence of any changed circumstances' ([81]). His Honour found that, in considering whether an ITO should be made, a registered medical practitioner 'was required to have regard to any decision of the Board to discharge an ITO, and its reasons for doing so' ([82] and [97]). The power could not be exercised 'capriciously or so as to render the Board's powers nugatory' ([97]). His Honour held that the power could not be used 'simply because [a doctor] disagrees with the decision of the Board ([97]).

His Honour found that, in Patient X's case, there had been a change in circumstances following the Board's decision - namely that Patient X had made changes to her accommodation and travel plans following the Board hearing ([101]). Accordingly, His Honour found that Dr W's decision was not ultra vires or unreasonable and did not take into account irrelevant considerations.

The Charter

His Honour found that the power in s 9 was limited without having recourse to the Charter. His Honour found that s 32 of the Charter did not require reading in the more restrictive limitation contended for by Patient X ('significantly different complexion') as s 32 does not allow the reading in of words which are not explicit or implicit or reading down words so as to change the true meaning of a provision ([96]). His Honour also found that Dr W had not breached s 38 of the Charter because he did consider the Board's decision but believed that circumstances had changed, and therefore his decision was not incompatible with Charter rights ([113]). Further, his Honour found that Dr W complied with the procedural requirement in s 38 as he 'seriously turned his mind to the possible impact… on the plaintiff's human rights and the implications for her' ([117]).

Commentary

The decision provides much needed clarity on the limits of a doctor's powers following an order that a patient be discharged. As noted above, the defendants argued that a doctor could make a new recommendation regardless of whether there had been any change in circumstances. In this sense, a doctor could make a new recommendation based solely on a disagreement with the Board's decision, which would have the effect of rendering the Board redundant. The Court has made it clear that that is not the case, and that doctors may not make decisions that render the Board's decisions 'nugatory'. The decision therefore upholds the rule of law, which requires that effect should be loyally given to the decisions of legally-constituted tribunals.

Since Patient X's case, the Act has been replaced by the *Mental Health Act 2014*. The new Mental Health Act is similarly silent on the circumstances in which a doctor can recommence compulsory treatment over a person who has been discharged from compulsory treatment by the Mental Health Tribunal. Although the Court did not comment on the effect of the new legislation, given the similar architecture of the two Acts, the Court's decision will likely be found to apply to in relation to decisions of the new Mental Health Tribunal.

The full decision can be found online here.

Eleanore Fritze *is a Senior Lawyer at Victoria Legal Aid and appeared as junior counsel in this matter.*

INTERNATIONAL HUMAN RIGHTS CASE NOTES

States must take steps to prevent, redress and prosecute acts of violence against women

González Carreño v Spain, Comm. No. 47/2012, UN Doc. CONVENTION/C/58/D/47/2012 (2014)

Summary

The Committee on the Elimination of Discrimination Against Women affirmed that, in matters of child custody and visitation, the best interests of the child must be a central concern and that national authorities must take into account the existence of a context of domestic violence when

making decisions. The failure of State parties to exercise due diligence to prevent violations of rights or to investigate and punish acts of violence by a marital party will amount to a breach of the Convention. It is not sufficient for a State party to rely upon notions of formal equality in making decisions as to parental custody.

Facts

The author of the communication, Angela González Carreño (Author), married F.R.C in 1996 and gave birth to their daughter in the same year. Throughout their relationship, the Author claims she was subjected to physical and psychological abuse by F.R.C. The Author eventually moved out of their marital home in September 1999 after F.R.C. threatened her with a knife in the presence of their daughter.

The Author reported the situation to the police and to the courts. At the same time, she also requested a trial separation (with her daughter remaining under her guardianship and custody) and a limited regime of supervised visits between father and daughter. A trial separation and regime of supervised visits was granted for a period of 30 days.

After the trial separation, the Author alleges that incidents of intimidation and harassment continued, including:

F.R.C. questioning the child during his visits about the Author's relationships, speaking ill of the Author and repeatedly calling her a "whore". This caused tension and anxiety in the child who began fearing and refusing to spend time with F.R.C.

F.R.C. approaching the Author and her daughter at the entrance of their residence, attempting to pull the child away and then proceeding to follow the Author and the child to the police station where, upon reaching the station, he threatened to kidnap the child and, while seizing the Author's hair, attempted to throw the Author to the ground.

F.R.C. following the Author and her daughter while they were driving and, when the Author stopped the car, proceeding to approach them while shouting and demanding she hand over the girl and banging on the car. This triggered a nervous outburst from the child, who began crying that her father should leave.

As a result of these incidents, the Author filed more than 30 complaints with the police and the courts. She also repeatedly sought protective orders to keep F.R.C. away from her and her daughter.

Despite these many complaints, F.R.C. was only convicted once for harassment and ordered to pay a 45 euro fine.

The courts issued protective orders for the Author but only one of them included the daughter. F.R.C. later appealed this protective order and the courts retracted the protection from the daughter on the basis that it hampered the visitation regime and could harm relations between father and daughter. Other protection orders for the Author were allegedly violated with no legal consequences imposed on F.R.C.

Authorisation of unsupervised visitation regime

Despite numerous alleged incidents of violence during the year and a half that followed, the courts authorised unsupervised visits; basing their decision on a social service report which did not expressly recommend against unsupervised visits. Notably, the report indicated that, while F.R.C. was affectionate with the child, he often acted inappropriately towards her, lacked

empathy and was unable to adapt to the child's young age. The Author unsuccessfully appealed the decision.

During the following months of unsupervised visits, social services issued several reports referring to the child's wish not to spend any more time with her father beyond the current regime.

At the end of a judicial hearing on 24 April 2003, F.R.C. approached the Author and told her that he was going to take away what mattered most to her. Later that day, the Author took her daughter to social services for a planned visit with her father. When she later returned to pick her up, F.R.C. had not returned. The Author went to the police and when police officers attended F.R.C's dwelling, they found the lifeless bodies of the child and F.R.C (who had a weapon in his hand). The police investigation concluded that F.R.C. had shot the girl and then committed suicide.

Application and appeals for remedy

On 23 April 2004, the Author filed a claim with the Ministry of Justice for miscarriage of justice, alleging negligence by the administrative and judicial authorities for failing to protect the life of her daughter, despite her many warnings about the danger the child faced with her father. The claim was denied on a finding that the judicial authorities had acted properly, as was an appeal before the High Court.

The Author finally appealed to the Constitutional Court, alleging violation of her constitutional rights to an effective remedy, to security and to life and physical and moral integrity, not to be subjected to torture or cruel or degrading treatment or punishment and to equality before the law. The Court denied the appeal as lacking constitutional relevance.

In 2012, the Author brought the complaint to the Committee. She alleged that the State party violated articles 2, 5 and 16 of the Convention in that the State party's judicial authorities responded inadequately and underappreciated the seriousness and danger of her situation. She alleged that the views of the authorities were obscured by prejudices and stereotypes about women in relationships of domestic violence.

Decision

The Committee observed that the murder of the child took place in a context of domestic violence which continued for several years and which the State party did not question. The State party argued that F.R.C.'s behaviour was unforeseeable and that nothing in the reports submitted to the courts could have predicted the danger to the life and mental health of the child. The Committee did not accept this argument in light of the many incidents of physical and verbal violence, F.R.C.'s numerous breaches of protective orders which did not attract any legal consequences, the failure of the courts to issue protective orders which extended to the child and the social services reports which stressed F.R.C.'s inappropriate behaviour towards the child.

The Committee noted that the State party, as a signatory to the Convention was obliged to ensure the realisation and practice of equality of men and women and to adopt appropriate measures to amend or abolish not only existing laws but also customs and practices that constitute discrimination against women (articles 2 and 5 of the Convention). Further, the State party was obligated to adopt all appropriate measures to eliminate discrimination against women in all matters relating to family and marriage relationships (article 16 of the Convention).

The Committee observed that in matters of child custody and visiting rights, the best interests of the child must be a central concern. When national authorities adopt decisions in that regard, they must take into account the existence of a context of domestic violence. The Committee

affirmed the comments made in its General Recommendation No. 19 (1992) that gender-based violence which impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms under general international law is discrimination within the meaning of article 1 of the Convention. States may be responsible for the acts of private persons if they do not act with due diligence to prevent violations of rights or to investigate and punish acts of violence and compensate victims.

The Committee found that the State party's authorities failed, before Authorising an unsupervised visitation regime, to conduct necessary due diligence and take reasonable steps with a view to protecting the Author and her daughter from possible risks in a situation of continuing domestic violence. Rather, the authorities applied 'stereotyped and therefore discriminatory' notions that visiting rights are based on formal equality which, in the present case, gave clear advantages to the father despite his abusive conduct which minimised the mother and daughter as victims of violence. In so doing, the State party infringed on its obligations under articles 2, 5 and 16 of the Convention.

Commentary

The Committee's decision reaffirms the obligation upon State parties to act with due diligence to prevent violations of rights and to investigate and punish acts of violence and compensate victims. It is not sufficient for State parties to rely upon simplistic notions of formal equality in making decisions which may affect the ability of individuals to enjoy their rights. Rather consideration must be given in each case to the peculiar circumstances which may apply discriminately to impair an individual's enjoyment of their rights. Particular regard should be given to the discriminatory effect that domestic violence has upon the ability of women and children to enjoy their rights. In such cases, primacy should be given to the rights of those who are likely to be victimised.

The full decision is available here.

***Alison Kwok** is a Solicitor at DLA Piper.*

Conscientious objection provisions don't extend to managerial or administrative tasks

Greater Glascow Health Board - v - Doogan [2014] UKSC 68

Summary

The Supreme Court held that right to conscientious objection in the *Abortion Act 1967* (UK) does not extend to delegating to, supervising or supporting staff who are taking part in the termination of a pregnancy. In making its decision, the Supreme Court took a strict statutory interpretation approach, holding that broader policy arguments and Article 9 of the *European Convention on Human Rights* were extraneous to that enquiry.

Facts

The Abortion Act prescribes circumstances in which it is lawful to terminate a pregnancy in the United Kingdom. Abortions performed contrary to the Act are deemed unlawful both under the Act and by virtue of preceding legislation. Section 1 of the Act states that terminations can only be performed by registered medical practitioners and must take place in an approved hospital (unless the termination is required immediately). Section 4 of the Act provides that a person does

not have to "participate in any treatment authorised by this Act to which he has a conscientious objection".

The two petitioners to the Court were Labour Ward Co-ordinators employed by the Greater Glasgow Health Board. The petitioners duties as Labour Ward Co-ordinators included management of resources within the Labour Ward, booking patients, allocating staff to patients, advice and support to mid-wives and occasionally taking part in direct patient care. Upon commencing their employment in 1988 and 1992 respectively, the two petitioners informed the Board that they conscientiously objected to taking part in the termination of a pregnancy.

A reorganisation of maternity resources in the Glasgow area in 2004 meant that an increased number of abortions took place in the Labour Ward (rather than in the Fetal Medicine Unit where they were previously performed). The petitioners objected to performing their managerial roles of delegating, supervising and/or supporting staff providing care to patients throughout the termination process. The Board rejected their objection and the petitioners applied to the Supreme Court seeking judicial review of the Board's decision.

Decision

Lady Hale (with whom the other Justices agreed) gave the key judgment. She described the issue before the Court as one of 'pure' statutory interpretation to determine whether the petitioners' duties required fell within the scope of section 4 of the Abortion Act. The Court answered this question by firstly identifying what treatment was authorised by the Abortion Act and secondly whether the petitioners' duties required them to participate in that treatment.

Treatment authorised by the Act

The Court considered a 'spectrum' of possible interpretations of "treatment authorised by the Act". At one end of that spectrum, "treatment authorised by the Act" is limited to the actual causes of the termination; that is, only the administration of the drugs to induce labour. Such an interpretation would not cover care of the patient during the delivery of the foetus. At the other end of the spectrum, as was argued by the petitioners, the scope of the treatment is to be determined by the scope of the conscientious objection (in other words, the scope is to be determined by the person to whom it applied) and could cover taking bookings for terminations, admissions, assigning mid-wives, supervision of all staff caring for the patient before and after the actual termination. In between these two positions was the position put forward by the Board that the scope covers direct participation in the tasks from the administration of the drugs to the delivery of the foetus.

The Court agreed with the interpretation provided by the Board. Citing the House of Lord's decision in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, the Court concluded that "treatment authorised by the Act" was the "whole course of medical treatment bringing about the end of the pregnancy", which included the administration of drugs, delivery of the foetus, nursing care associated with the labour and birth, administering drugs and disposal of the foetus. Importantly, however, the Court observed that ordinary nursing and pastoral care of a patient following birth was not unlawful prior to the enactment of the Abortion Act and thus could not be considered treatment authorised by the Act for the purposes of objection.

The Court also observed that the right to conscientious objection provided by the Abortion Act does not affect any duty to participate in treatment which is necessary to save the life or prevent

grave permanent injury to a pregnant woman. That duty would include medical and nursing care during the process of termination that was necessary for such a purpose.

Participating in treatment

The next question for the Court to determine was whether the petitioners' duties required them to participate in those acts that brought about the end of a pregnancy. In determining the scope of what is meant by "participate in", the Court looked at what Parliament would have contemplated when the Act was passed. The Court concluded that it was unlikely that Parliament would have considered the host of administrative and managerial tasks associated with a termination as within the scope of section 4. What Parliament was really contemplating was the "hands on" participation in the termination process and not the broader interpretation given to that phrase in criminal law. The Court therefore concluded the majority of the roles to be performed by the petitioners were closer to administrative and ancillary and could not be conscientiously objected to. These tasks included arranging terminations, allocating staff to terminations, providing support and guidance to midwives and assisting a patient's family. The Court did however conclude that providing guidance to midwives directly on the care of a particular patient undergoing a termination was included within scope of section 4, along with any requirement to directly provide care to a particular patient undergoing a termination.

European Convention on Human Rights

In determining the scope of section 4, the Court considered that it was not necessary to consider Article 9 of the *European Convention on Human Rights* (ECHR). Article 9 requires all legislation to be interpreted in a manner that protects a person's right "to manifest his religion or belief in worship, teaching, practice or observance". The Court considered that it did not have to consider the article as the answers given would be context specific and not necessarily point to a specific (wide or narrow) interpretation of section 4. These were matters best suited to decision by an employment tribunal.

Commentary

The response to the decision has been mixed. Anti-abortion groups have claimed the decision prevents anti-abortion doctors, nurses and health professionals from being able to progress their careers to upper management. On the other hand, pro-choice groups have welcomed the decision for clarifying the scope of conscientious objection.

The claims of the anti-abortion groups are probably overstated given that the decision confirms the previous understanding most health professionals had of the scope of the conscientious objection clause. Additionally, the Court suggested that while section 4 does not allow an employee to absolutely object, it would be sensible for an employer to accommodate an employee's "reasonable" objection. That is, common sense should be adopted when dealing with conscientious objectors where resources allow their objections to be accommodated.

It is unfortunate that the Supreme Court decided to not divert from a strict statutory interpretation to consider the implications of Article 9 of the ECHR. The Court has been seen by some as passing on a key opportunity to clarify the confusing case law around Article 9. However, this point was not strongly argued by either party during the proceedings and the Court was not presented with the necessary evidence with which to make a decision on that point. Some looking for direction on Article 9 may take some solace from Lady Hale's statement suggesting that employers accommodate an employee's "reasonable" conscientious objection.

The full decision is available online here.

***Jonathon Lunn** is a Solicitor at DLA Piper.*

NOTICEBOARD

UN Human Rights Office launches major online database of treaty body case law

The UN Human Rights Office has launched a major public online database, http://juris.ohchr.org, that contains all case law issued by the UN human rights expert committees, the Treaty Bodies.

"The database is designed to be a key reference tool for scholars, lawyers, civil society organisations, governments and civil servants, our UN partners and the general public," said Ibrahim Salama, Director of the UN Human Rights Treaties Division.

"Just as importantly, we hope it may help individuals who are preparing to submit complaints to the committees by giving them access to the views and decisions taken by the expert members on specific human rights issues."

The database was developed using data from the Netherlands Institute of Human Rights (SIM) of Utrecht University School of Law. Since the mid-1990s, the SIM had developed a comprehensive record on the jurisprudence stemming from the decisions by four Treaty Bodies on complaints brought by individuals.

There are 10 Treaty Bodies that review and monitor how States that have ratified a particular treaty are implementing the rights contained in it. Eight * can also consider complaints by individuals who believe their rights have been violated and who have exhausted all the legal steps in their own country.

The site http://juris.ohchr.org contains case law indexed by various categories, including State, date, subject and keywords, which can all be used as search criteria. Users can submit their comments on the functioning of the database as part of ongoing efforts to improve it.

The Committees that can receive and consider individual complaints are:

- Human Rights Committee (CCPR)
  Committee against Torture (CAT)
  Committee on the Elimination of Discrimination against Women (CEDAW)
  Committee on the Elimination of Racial Discrimination (CERD)
  Committee on the Rights of Persons with Disabilities (CRPD)
  Committee on Enforced Disappearances (CED)
  Committee on Economic, Social and Cultural Rights (CESCR)
  Committee on the Rights of the Child (CRC)

Source: OHCHR

Launch of The Change Toolkit

The Change Toolkit is a guide for people in community legal centres – and elsewhere – who are interested in improving the lives of people in their community through law reform, policy and advocacy. With fourteen chapters covering everything from planning and evaluation to strategic litigation and storytelling, the Change Toolkit is a fantastic "how-to" guide for anyone interested in

promoting better laws and policies. Produced by the Federation of Community Legal Centres (Victoria) with funding from the Legal Services Board, the Toolkit features contributions from a range of community legal centres including the Human Rights Law Centre.
www.thechangetoolkit.org.au

Conference: 40 years of the Racial Discrimination Act

19 & 20 February, Sydney

The year 2015 marks the 40th anniversary of the Racial Discrimination Act 1975 (Cth), Australia's first federal human rights and anti-discrimination legislation.

What is the historical background to the Racial Discrimination Act, and how has it evolved? What has been achieved since its introduction? What is the ongoing role of the Racial Discrimination Act in addressing racism? What outcomes have been achieved under the Racial Discrimination Act through conciliation and litigation?

The Australian Human Rights Commission invites you to attend a conference in Sydney 19th-20th February 2015 that will explore these issues over two days.

Details and booking forms here: https://www.humanrights.gov.au/rda40-conference-2015-40-years-racial-discrimination-act

Mercy Foundation: Small Grants Program

The Mercy Foundation offers a Small Grants Program once a year. The Small Grants Program provides seed funding and prioritises those activities and projects which focus on addressing disadvantage in regards to women and children. Next round of small grant applications close on 31st March 2015. Details online here.

Jobs: Justice Connect

Justice Connect are currently seeking an Executive Assistant, a Principal Lawyer and Manager, and a Lawyer. Details online here.

Civil society space and the United Nations Human Rights System

The sixth in OHCHR's series of practical guides for civil society aims to assist civil society actors who are not yet familiar with the UN human rights system. It highlights issues related to the work of civil society actors and provides an overview of the conditions needed for a free and independent civil society.

Event: 'Discrimination: Just another compliance cost?

10 March, 5.30pm, Sydney

Join DLA Piper and the HIV/AIDS Legal Centre for a discussion between a distinguished panel of experts: Magistrate Nancy Hennessey (Deputy President of NCAT), Mark Dreyfus QC MP, Graeme Innes AO, and Brett Feltham (Partner in Employment law, DLA Piper) for an engaging conversation on the strengths and weaknesses of current anti-discrimination law, facilitated by Dr Chris Ward.

Practitioners may count this session towards their CPD if it is relevant to their professional development. Drinks and light refreshments from 5:30pm, for a 6:00pm sharp start. All proceeds

from this event will go towards the HIV/AIDS Legal Centre's ongoing funding campaign to maintain its provision of legal services to vulnerable people living with HIV.

Details and booking forms online here.

South Asia: New training course to bolster gender equality

Representatives from the national human rights institutions (NHRIs) of South Asia have begun a new APF blended learning course to support their critical work to promote and protect the human rights of women and girls.

The course will focus on international standards and mechanisms pertaining to the rights of women and girls and the ways in which NHRIs can use their legal powers and mandates to promote gender equality and respond to the human rights abuses experienced by women and girls.

It will also explore the practical steps that NHRIs can take to “mainstream” gender equality and the rights of women and girls across all areas of their work and operations.

“Women and girls in all countries across the Asia Pacific are at risk of serious violations of their human rights, such as gender-based violence and harassment” said Pip Dargan, APF Gender Focal Point and Deputy Director of the APF secretariat.

“Many also experience poverty, discrimination in employment and unequal access to health services and the education and justice systems. Some women, because they have a disability or are indigenous, face even greater barriers to equality,” she said.

“This course aims to provide opportunities for staff and Commissioners of NHRIs to share experiences and develop their skills to lead legislative, policy and attitudinal change that can make a genuine difference for all women and girls in their countries.”

The course will draw on Promoting and Protecting the Rights of Women and Girls: A Manual for National Human Rights Institutions, published by the APF in 2014. The Manual includes a special focus on efforts by NHRIs in the region to promote reproductive rights; counter violence against women and girls; and protect the rights of female migrant domestic workers.

Participants who successfully complete the online course will attend a face-to-face workshop in Kathmandu, from 13-17 April 2014, hosted by the National Human Rights Commission of Nepal.

As part of the workshop, participants will develop a set of practical “action points” to promote and protect the rights of women and girls, for implementation by their NHRIs. NHRIs will also be required to report back to the APF on how the action points have been implemented.

The course will be facilitated by Alison Aggarwal, Principal Adviser at the Australian Human Rights Commission. Other international experts will be invited to lead different parts of the training program.

Source: Asia Pacific Forum

First book entirely dedicated to the UPR

"Human Rights and the UPR - Rituals and Ritualism" is a collection of papers by scholars and practitioners and edited by Professor Hilary Charlesworth and Emma Larking.

The book provides the first sustained analysis of the UPR and explains how the UPR functions within the architecture of the United Nations. It draws on socio-legal scholarship and the insights of human rights practitioners in order to consider its regulatory power and its capacity to influence

the behaviour of states. The book also highlights the significance of the embodied features of the UPR, with its cyclical and intricately managed interactive dialogues. The book is published by Cambridge University Press and is available for order here.

Source: UPR Info

Seminar: UN Human Rights Communications

6pm Thursday, 26 February 2015 in Melbourne

The Office of International Law, Commonwealth Attorney-General's Department invites you to a CLE seminar on *United Nations Human Rights Communications: practice and procedure*. This seminar provides practitioners and human rights advocates with an overview of practice and procedure in lodging individual communications to UN human rights treaty bodies, including admissibility requirements and arguing the merits of the communication. Email trina.malone@ag.gov.au for details. (Limited places.)

A COFFEE WITH...

Graeme Innes

Graeme Innes AM is a lawyer, mediator and company director. He was a Commissioner at the Australian Human Rights Commission for nearly ten years, responsible for issues relating to disability, race and human rights. Editor at large of Right Now and HRLC volunteer, ***Andre Dao****, recently had a quick chat with him about what he's been up to.*

What have you been doing since you moved on from the Human Rights Commission last year and how are you finding your new roles?

I'm doing a number of things, but on a voluntary basis I'm chair of Attitude Foundation and the reason that I'm the chair of that organisation is that I know that changing attitudes towards people with disability changes lives. So I'm very keen to lead an organisation that is all about doing that.

What's one of the main challenges facing people with a disability?

I think the challenge is the negative assumptions that are made about us, because that drives so many decisions that disadvantage us. Forty five percent of us live in poverty, we're 30 percent less employed than people without disability, and our completion rate of Year 12 is half that of people without disabilities. So we're significantly disadvantaged.

But if we can change community attitudes so that people don't think of people with disabilities in that negative way, then all the other decisions that people in the community make about us will be different. It will change our lives, but it will also change the lives of those in the broader community, because we will be able to make a bigger, more effective contribution to the community.

What do you think are the most effective means of changing people's attitudes towards people with disabilities?

I think the best way to change those attitudes is to tell real life stories about people with disabilities and what we are doing. And that's what the Attitude Foundation does.

We're at the moment running a crowdsourcing campaign to fund the first ABC TV program for Attitude, and we're doing that through our website at www.attitude.org.au. Once we've raised the money for that program, then we'll go to corporates and government and philanthropists to

supplement that funding with other funding to make more programs and we aim to have a series on television in the second half of this year.

What did you find most difficult about your role at the Australian Human Rights Commission?

I guess the breadth of challenges that people with disability experience. I've outlined some of them, but we experience challenges in terms of access to buildings, access to transport, opportunities to participate in other community activities.

What are you proudest of in your professional career?

I've been asked this question a few times and it's hard to name one thing. I guess I'm proudest of my involvement in the development and implementation of Australia's disability discrimination legislation, because it's had such a broad impact on the lives of people with disability and making our lives easier and more effective.

I'm also proud of the case that I ran as an individual against Railcorp in Sydney, to get them to make appropriate announcements on trains because not only has that allowed me to travel on trains more easily but its changed the lives of thousands of other people who either live in or who visit Sydney because it makes their access easier as well. And that was a very tough thing to do. I didn't do it as Commissioner because I didn't have that authority, so I had to do it as an individual. And to run a case against a major government department who were prepared to spend more than half a million dollars to defend their position, rather than using that half a million dollars to fix the problem, is quite a scary process. So I was very proud of being able to do that, and very appreciative of the family and broader support that I got in that endeavour.

You can follow both Graeme and Andre on Twitter at @GraemeInnes & @AndreHuyDao

HRLC MEDIA COVERAGE

Since the last edition of *Rights Agenda*, media coverage of the HRLC has included:

- Jared Owens, High Court orders Immigration Minister to grant protection visa, *The Australian*, 12 February 2015
- Anneke Ray, Locked up for life?, *Marie Claire*, March edition 2015
- Ben Doherty, Scott Morrison's denial of visa to refugee from Pakistan unlawful, High Court finds, *Guardian Australia*, 11 February 2015
- Zara Zaher, Australia urged to remove restrictions on rights, *SBS,* 5 February 2015
- Felicity Nelson, Practise what you preach, Australia! *Lawyers Weekly,* 3 February 2015
- Australia detention of 157 refugees at sea ruled legal, *Oman Tribune ,* 1 February 2015
- Sarah Whyte, Asylum seekers legally detained on Customs vessel, High Court rules, *The Age,* 29 January 2015
- Felicity Nelson, HRLC dismayed by High Court judgement on high seas detention, *Lawyers Weekly,* 29 January 2015
- Q&A: 'Inhumane, unsafe and unfit for children', *Al Jazeera,* 29 January 2015
- Kevin McSpadden, Australia Court Rules the Month-Long Detention of Migrants at Sea Was Legal, *Time Magazine,* 28 January 2015

- Andrew Purcell, US teenage lifers - children sentenced to jail forever, *The Age*, 25 January 2015
- Royce Millar and Rania Spooner, Jury out on Labor prison plan, The Age, 24 January 2015

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.

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