Human Rights Law Centre

Edition 85, June 2013

RIGHTS AGENDA

Monthly bulletin of the Human Rights Law Centre

OPINION: OUT-SOURCING OUR DIRTY WORK – AUSTRALIA'S APPROACH TO ASYLUM SEEKERS

Legal action in the Nauruan Supreme Court highlights Australia's attempts to hide behind the sovereignty of our former colonies writes the HRLC's **Daniel Webb**.

NEWS: FORMER DIAC OFFICIAL FEARS GENUINE REFUGEES HAVE BEEN RETURNED UNDER 'SCREENING OUT' PROCESS

A former manager of Operations at the Nauru detention centre has told the ABC that some asylum seekers have been returned to Sri Lanka on the basis of their answer to a single question. The official also acknowledges that returnees may face rape and torture back in Sri Lanka.

CASE NOTES: CALLS FOR CLEAR REGULATIONS ON ASSISTED

The European Court of Human Rights has held that Switzerland's failure to provide clear guidelines as to when assisted suicide is permitted breached the right to respect for private life.

TABLE OF CONTENTS

END OF FINANCIAL YEAR HUMAN RIGHTS APPEAL:

A message from Hugh de Kretser

Dear supporters

Investing in principled human rights leadership

I appreciate that many worthy organisations ask for donations at this time of year, so let me tell you why and how your investment in the Human Rights Law Centre will make a difference.

At a time when much of the policy debate in this country is devoid of compassion, it is crucial that a principled voice continues to stand up for human rights and the rule of law.

The Human Rights Law Centre has a proven track record in influencing policy and strengthening legal protections for human rights.

Whether through our evidenced-based advocacy or our strategic legal actions, your support allows us to better ensure that governments are meeting their human rights obligations in good faith. It also helps us to promote public understanding and appreciation of the importance of protecting the rights of all Australians.

Your support. Your impact.

With your support, our work over the next six months will promote national action to address the shocking over-representation of Aboriginal and Torres Strait Islander peoples in prisons and youth detention. It will continue to address the inhumane and illegitimate treatment of asylum seekers by challenging prolonged, indefinite detention and the denial of due process. It will continue to use human rights law in areas ranging from public housing to access to reproductive health services to achieve practical and just outcomes.

Power in partnerships

Through our pro bono partnerships, which leverage the capacity and resources of leading law firms and barristers, we're able to deliver at least $500 of human rights legal services for every $100 donation we receive.

We know many human rights challenges lie ahead, but you can be certain that with your help the Human Rights Law Centre will be there defending freedom, respect, equality, and dignity.

Strong, proactive, independent advocacy

With less than one fifth of our funding coming from government, your support is central to our ability to deliver strong, proactive, independent advocacy on key human rights issues.

Invest in human rights leadership today: **Invest in the Human Rights Law Centre**.

Thank you

Hugh de Kretser
Executive Director
Human Rights Law Centre

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution, meaning that all donations are tax deductible.

www.hrlc.org.au/donate

OPINION

Out-sourcing our dirty work: Australia's approach to asylum seekers

The Nauruan Supreme Court is currently considering a case brought by a group of asylum seekers challenging the lawfulness of their indefinite detention on Nauru.

The challenge, led by prominent refugee advocate Julian Burnside QC, strikes at the core of Australia's transfer of asylum seekers to its isolated former colony. It also shines a light on our practice of employing former colonies to do our dirty work but then using their sovereign status to deflect criticisms their way.

The asylum seekers claim they're detained in circumstances which violate the protection of personal liberty in the Nauruan Constitution. They seek, among other things, immediate release. A similar proceeding is on foot in PNG.

Since 14 September 2012, about 430 asylum seekers have been transferred to Nauru and a further 300 to Manus Island. Indefinite detention in remote places is a central component of the Australian Government's "no-advantage" policy. It's perhaps the most draconian of all the threats being used to deter people from coming to Australia by boat.

A court decision that such detention is prohibited by local laws would raise questions as to the future of our regional processing policy in its current form. It may well be that Australian Government policy will be frustrated, at least in part, by the Constitutions of its former colonies.

In addition to the issues of local law at their heart, the cases raise much broader questions about Australia's post-colonial politics.

The Australian Government's line on the Nauru case - that it's a matter for the sovereign state of Nauru – is a familiar response.

When funding was sought from the Australian Government to provide the applicants in the Nauruan case with access to lawyers, they said it was a matter for Nauru as a sovereign nation.

When criticisms have been raised about the lack of media access to the detention centres on Nauru and Manus, the Government has said that regulating access is exclusively the responsibility of Nauru and PNG as sovereign states.

When allegations have been raised that the detention of people in the processing centres violates international human rights protections, Australia has said that our human rights obligations end once we've transferred people offshore to other sovereign states.

It's a matter for them, not us, seems to be the default defence. But this persistent deflection of responsibility belies the extent to which the Australian Government maintains effective control over the arrangements.

Under Australian law, asylum seekers who arrive in Australia are being taken by Australian authorities to Australian funded processing centres. While there, they receive services pursuant to contracts between service providers and the Australian Government.

At least in Nauru, Australian officers will be involved in their processing and our Department of Immigration has conceded that once the period of 'no-advantage' has run its course, the likelihood is that most will be transferred back to Australia.

All this is being underwritten by extraordinary amounts of Australian public expenditure. In relation to Nauru, costs to date have been estimated at around $1 million per asylum seeker transferred there.

It is plainly inaccurate, if not disingenuous, for Australia to deny effective control and responsibility over its offshore processing arrangements.

It is also incongruous for Australia to be employing Nauru and PNG as agents of our domestic policy, but then invoking their sovereignty and independence to seek to absolve ourselves of responsibility for any grievances raised.

There is incongruity too between what Australia is doing in PNG and Nauru to what said it would do in its successful UN Security Council election campaign. Australia held itself out as being a "principled advocate of human rights for all" and a country that "does what it says". But rather than being a principled advocate for human rights, Australia may well be sub-contracting their violation.

Australia's selectivity when it comes to human rights and respect for sovereignty are yet further indictments of our flawed approach to a difficult issue. Preventing asylum seekers from dying at sea is a legitimate, indeed essential, policy objective. But instead of punishing those who make it here to send a message to those yet to come, we should be focussing on developing alternative, safer pathways to protection for those who need to seek it.

Punishment and deterrence is the wrong paradigm for addressing the actions of desperate people who lack viable alternatives. A thoughtful regional solution is required, but our current policy achieves only regional complicity in an ineffective, harmful and potentially unlawful approach.

Daniel Webb *is a Senior Lawyer at the Human Rights Law Centre.*

This piece was first published on the ABC's The Drum.

NEWS IN BRIEF

Former DIAC official fears genuine refugees have been returned under 'screening-out' process

A former manager of Operations at the Nauru detention centre has told the ABC that some asylum seekers have been returned to Sri Lanka on the basis of their answer to a single question. The official also acknowledges that returnees may face rape and torture back in Sri Lanka.

Mother and child released after 18 months in immigration detention

A Sri Lankan mother who had been in indefinite detention with her child has been released after ASIO reversed its previously adverse security assessment highlighting the need for more scrutiny of the ASIO process. 54 other asylum seekers are being held indefinitely due to adverse assessments.

Human rights commissioner barred from Nauru and Manus Island

The Government will not allow Australia's human rights commissioner to inspect offshore detention centres in Nauru and Manus Island despite the Commonwealth ombudsman releasing a report expressing serious concerns about the impacts of long-term detention and inadequate policies on mental health. The human rights commissioner has also criticised the Government's 'screening out' process during which asylum seekers are not informed of their rights and are given a phone book if they ask for a lawyer.

No work policy risks developing an underclass of asylum seekers

Despite the risks of the Government's 'no advantage' policy creating a new underclass of asylum seekers, living on as little as $220 a week and with no rights to work, the Opposition has suggested a process in which asylum seekers would be allowed to work in exchange for food and accommodation vouchers. Immigration Minister Brendan O'Connor said the idea was worth considering.

Marriage equality debates continues, but not in Parliament

Former PM Kevin Rudd has come out in support of marriage equality saying his change of heart was the result of a "personal journey". The Coalition's Wyatt Roy has also stated his support both for marriage equality and a free vote in Parliament. However, the ALP an Opposition have ensured the Greens' marriage equality bill twill not be debated in Parliament before the election. Meanwhile in the UK, the House of Lords has rejected an attempt to scuttle proposed marriage equality laws.

Alarm over growing Aboriginal and Torres Strait Islander incarceration rates and deaths in custody

A report from the Australian Institute of Criminology has revealed in some areas Indigenous people are close to 20 times more likely to be jailed than non-Indigenous people. Two-and-a-half per cent of the Australian population are Indigenous, but they make up 26 per cent of the adult prison population sparking alarm from Indigenous leaders.

Government to tackle Aboriginal and Torres Strait Islander suicide rates

A new government strategy provides $17.8 million over four years for suicide prevention measures aimed at Aboriginal and Torres Strait Islander peoples, who have a rate of suicide about double that of the rest of the population.

NSW court case delivers legal recognition for the non-binary nature of sex

The NSW Court of Appeal has recognised that 'sex' is not binary – it is not only 'male' or 'female' – and that we should have recognition of that in the law and in our legal documents.

Police detention and incarceration in Victoria warrant scrutiny

As data reveals that the rates of imprisonment in Victorian prisons are the highest in a century, senior corrections officials have confirmed an unprecedented number of deaths in custody so far this year. Police are also attempting to suppress a video showing a man, who died hours after being released from custody, crawling out of a cell and then collapsing in front of the Dandenong police station. Meanwhile community leaders have expressed disgust about racist stubby holders mocking African migrants.

Victoria to scrap its family violence unit

A team set up to prevent family violence related deaths is due to be scrapped in a restructuring of the Coroner's Court despite evidence showing the need for such a unit.

Papua New Guinea to enforce death penalty

Despite international criticism, PNG plans to respond to the country's law and order problems by executing people using a range of methods including electrocution, hanging, lethal injection, suffocation following anaesthetic or firing squad.

HRLC POLICY WORK AND CASE WORK

Mother takes Tyler Cassidy's story to UN in push for increased oversight for police related deaths in Australia

The mother of Melbourne teenager, Tyler Cassidy, who was shot dead by police in 2008, has filed a communication with the United Nation's Human Rights Committee to highlight Australia's failure to ensure police-related deaths are properly investigated by an independent body.

Shani Cassidy said she was seeking a ruling from the highest authority on human rights law because she didn't want any other mother to have to go through what she has.

"The investigation was conducted by Victoria Police because, in Victoria, there is no independent body able to investigate deaths like my son's. Until such a body exists there can be no justice here," Ms Cassidy said.

See the complete statement by Shani Cassidy below.

Speaking from the UN in Geneva, the Human Right Law Centre's director of Strategic Litigation, Anna Brown, said Australia had a legal obligation to improve the current practice of allowing police to investigate themselves.

"Not only is it commonsense to ensure investigations into police violence are independent, but it is also in keeping with international human rights law and in Victoria it would be in keeping with Victoria's Charter of Human Rights," Ms Brown said.

Only 73 seconds elapsed between the police first approaching Tyler and him being shot dead, during which time he was sprayed with capsicum foam twice and answered a phone call. Ten shots were fired, five of which hit Tyler.

Ms Cassidy is angered that the police officers who killed her son were not treated as suspects. Contrary to usual practices of dealing with people involved in homicides, the interviews of the police officers who shot Tyler were not audio or video recorded – only written statements were provided. By contrast, Ms Cassidy said investigating officers treated her and her family like criminals and even secretly recorded conversations and meetings with police.

The communication prepared for Ms Cassidy by the Human Rights Law Centre with the generous pro bono assistance of leading law firm Allens, outlines the case for the Committee to find that Australia is in breach of its obligation to uphold the right to life by failing to introduce independent investigations into deaths resulting from the use of force by police."Tyler has gone, and nothing will bring him back. However, ensuring a better, independent investigation process will help other families to avoid the kind of suffering we are going through," Ms Cassidy said.

The HRLC and Ms Cassidy hope a ruling from the UN Human Rights Committee will spur both the Federal and State governments in Australia into establishing independent models for investigating police related deaths.

"It's important that families of victims and the general public have confidence in the impartially and credibility of investigations into police related deaths and violence. The good news is, there are practical steps governments can take to ensure this happens," Ms Brown said.

Background to the Communication can be found here. A copy of the entire Communication can be found here.

They didn't even ask him his name: Complete statement from Shani Cassidy regarding UN Communication

I have submitted a complaint to the United Nations Human Rights Committee with the assistance of the Human Rights Law Centre. I submitted this complaint on behalf of my son, Tyler.

Tyler was shot dead by three Victoria Police officers on the night of 11 December 2008. He was 15 years old. My son died just 73 seconds after police officers first approached him. They sprayed him with two canisters of OC foam. They then fired 10 bullets at him, five of which hit him and ultimately killed him. They didn't even ask him his name.

The investigation into Tyler's shooting by Victoria Police officers was conducted by Victoria Police. The investigation was not independent or thorough. It did not deliver justice for my son.

I do not believe that Australia is fulfilling its obligation to protect and uphold the right to life when it doesn't have independent investigations for police use of force resulting in death as required by international law.

I have made a complaint to this Committee because I feel it is so important that deaths like Tyler's be investigated properly by a truly independent body. The investigation was conducted by Victoria Police because, in Victoria, there is no independent body able to investigate deaths like my son's. Until such a body exists there can be no justice here.

The night he died, Tyler was upset and he was armed with knives. But he was also a child – just fifteen years old, alone, and distressed in an empty outdoor skate park.

It saddens me deeply that, when my son was dying, when he was taking his last breath, there was not one compassionate human being at his side. He might have wanted to say something of importance; offer his last thoughts. As a mother, to lose a child in this manner is the most horrific of outcomes. Tyler belonged to a family who loved him very much. We miss him very much.

Tyler's death was investigated by members of the same police force at whose hands he died. The police officers who killed my son were not even treated as suspects. Contrary to the usual practice of Victoria Police when dealing with others involved in homicides, the interviews of the police officers who shot Tyler were not audio or video recorded. The police officers were asked if they would agree to have their statements audio or video recorded, and they all refused and gave written statements instead. The police officers only agreed to give evidence at the coronial inquest into Tyler's death once they were given immunity from prosecution.

By contrast, the investigating officers treated me and my family like the criminals rather than the victims. For example, our conversations and meetings with Victoria Police were secretly recorded by them.

There was ongoing support for the police officers who killed my son during the inquest, but nothing for me.

I wasn't able to protect my son's body from autopsy because the Police did not informed me of my right to object. The police officers involved were told about the autopsy results within the week the autopsy was conducted but I had to wait until April to be informed.

The investigators also withheld vital information from me about my son's death, information that I only found out during the inquest.

Victoria Police made comments to the media that demonised my son including on the very night he died. They breached their policy on Media Interaction Following a Critical Incident and didn't seek the Coroner's approval before they released a statement – on the very night my son died before any investigation had been undertaken – which argued that the use of fatal force on Tyler was justified. The most distressing and personal challenges of my son's life were made public. His dignity and privacy were disregarded, and our memories defaced.

Further, the investigation was not properly conducted, there were many deficiencies in how the police carried out the investigation. Given these failings, how can I trust that the investigation into Tyler's death received the attention and proper process that it needed and deserves? How can I be assured that the Police Officers were really trying to uncover the truth and not simply cover for their mates – either deliberately or subconsciously? To me, this still feels like a completely senseless killing of a child and I don't really know why or how it happened. I'm not confident there isn't some sort of cover up or that I know all the facts about whether the force the police officers used was necessary because no one independent came in and investigated what happened.

When you lose a child in circumstances like these, you need to know the truth of what happened. We, the Australian community and grieving families, also need to be able to have confidence in our institutions. My son Tyler, my family and I have been denied this, because the investigation that followed Tyler's death was a disgrace, and our treatment by the investigating officers compounded our grief and suffering.

I don't want any other mother to have to go through what I have.

We live with Tyler's loss every waking moment. We also live with the trauma and memories of the tarnished investigation that followed, and of watching his life – and ours – be publicly scrutinised and distorted in the media.

Tyler has gone, and nothing will bring him back. However, ensuring a better, independent investigation process will help other families to avoid the kind of suffering we are going through. I will never hold my son again, but I will do everything I can to ensure that no one else has to experience the horror that we have lived with since he died.

I am asking the Committee to find that Australia is in breach of its obligation to uphold the right to life every day that it fails to introduce independent investigations into deaths resulting from the use of force by police.

Thank you.

Serious concerns raised over Australia's human rights record at UN

Serious violations continue to blight Australia's human rights record, according to a joint NGO statement delivered to the United Nations Human Rights Council in Geneva by the Human Rights Law Centre's Director of Advocacy, Anna Brown.

"Two years after Australia made a number of welcome human rights commitments to the international community, serious violations continue to blight Australia's human rights record and we have witnessed regression in key areas," Ms Brown said.

Australia is due to provide its mid-term report to the Human Rights Council regarding its progress in implementing a number of recommendations accepted during its Universal Periodic Review (UPR) by the Human Rights Council, the UN's chief human rights body. In 2011 NGOs welcomed Australia's acceptance of a large number of UPR recommendations and its commitment to translate them into practical action. Two years later, however, NGOs in Australia are disappointed by the lack of progress.

The joint NGO statement highlighted a number of concerns relating to the treatment of asylum seekers and refugees.

"Off-shore processing has been re-introduced with over 850 asylum seekers held in austere conditions in Papua New Guinea and Nauru, and not one claim has been processed since August 2012.

"1632 children are currently held in immigration detention in flagrant disregard of international human rights standards and the Government's own policies," added Ms Brown. "56 people are indefinitely detained following adverse security assessments, in a legal black hole without judicial oversight.

"Disturbingly, Australia has introduced a policy of 'screening out' asylum seekers arriving from particular countries. 'Screening out' involves returning asylum seekers to their country of origin even before they have an opportunity to lodge an asylum claim, in clear breach of Australia's obligation of non-refoulement under the Refugee Convention," said Ms Brown.

Australia's continuing failures in relation to Aboriginal and Torres Strait Islander peoples were also raised.

"Indigenous peoples in Australia continue to be among the most incarcerated in the world, with rates continuing to rise. Indigenous young people make up 97% of the juvenile prison population in the Northern Territory," said Ms Brown.

NGOs did welcome the release of a National Human Rights Action Plan in 2012, actions such as the establishment of a new Children's Commissioner and National Disability Insurance Scheme, and steps to improve recognition of sex and gender diversity in Government documentation.

"Despite a number of positive steps, we are disappointed by the lack of sustained implementation and accountability measures in Australia's new Human Rights Action Plan," said Ms Brown.

The indefinite deferral of the Federal Government's longstanding commitment to consolidate and strengthen federal anti-discrimination laws also attracted criticism, given it was a key commitment under Australia's Universal Periodic Review and the Federal Government's Human Rights Framework. However, the introduction of the Sex Discrimination Amendment Bill 2013 (Cth) was recognised as a positive recent development.

"The introduction of a Bill to prohibit discrimination against lesbian, gay, bisexual, transgender and intersex people represents a long overdue but significant advance for these communities and their families," said Ms Brown.

Australia's lack of statutory protection of human rights continues to attract criticism.

"We are a stable, democratic and highly developed state with a government that espouses a commitment to human rights leadership. Yet we are the only modern democracy without a Human Rights Act or Charter," said Ms Brown.

Australia is due to review its Human Rights Framework in 2014 and will be reviewed again by its peers at the Human Rights Council in 2015.

Sidestepping due process: more Sri Lankans returned after being 'screened out'

Australia's decision to forcibly return 31 Sri Lankan nationals to Colombo on 23 May was based on a flawed process that fails to ensure Australia is not breaching its international human rights obligations by returning genuine refugees.

The group were deported without any proper assessment of their need for protection, a procedure the Department of Immigration and Citizenship has described as 'enhanced screening'.

Senior Lawyer at the Human Rights Law Centre, Daniel Webb, said that the Department's increasing reliance on 'enhanced screening' is a shortcut designed to deliberately sidestep processes under Australian law that safeguard against returning genuine refugees.

"There is nothing 'enhanced' about the practice of screening out. It's an informal and secretive process that deliberately circumvents existing processes and safeguards under the Migration Act," said Mr Webb.

People who are screened out are deported at short notice after being interviewed without legal advice. The determination that they aren't entitled to Australia's protection is not subject to independent review.

Adding to these concerns are recent statistics revealing that when the Department determines a maritime arrival is not a refugee, appeals against those decisions are successful about 75 percent of the time.

"The Department often gets it wrong when they follow a far more rigorous and thorough assessment process. Shortcuts like 'screening out' are bound to increase the risk of error," Mr Webb said.

Australia has clear international obligations under the Convention Against Torture, the International Convention on Civil and Political Rights as well as the Refugee Convention not to return people in our custody to a place where they are at risk of persecution, torture or cruel, inhuman or degrading treatment.

"International law prohibits Australia from sending people to places where they are at risk of human rights violations. A fair assessment process is a reasonable and necessary safeguard to ensure these international law obligations are met," Mr Webb said.

Recent reports by Human Rights Watch, the International Bar Association and Amnesty International have documented the many serious and ongoing human rights problems in Sri Lanka, reinforcing the need to ensure due process is afforded to all Sri Lankan arrivals.

There have been 966 involuntary returns to Sri Lanka since last August.

AUSTRALIAN HUMAN RIGHTS CASE NOTES

Courts may stay criminal trials where absence of instructing solicitor likely to cause unfair trial

R v Chaouk [2013] VSCA 99 (2 May 2013)

Summary

The Victorian Court of Appeal has unanimously confirmed that a court can stay a criminal trial where the absence of an instructing solicitor on a day to day basis throughout the trial is likely to result in an unfair trial. The decision upholds the first instance finding by Justice Lasry in *R v Chaouk* [2013] VSC 48 (15 February 2013).

Facts

Mr Chaouk was to stand trial on several charges, including a charge of murder. The trial was estimated to take two to three weeks. Victoria Legal Aid determined to fund an instructing solicitor for Mr Chaouk for only two half days of the trial.

The issues for trial were not regarded as complex. There was, however, a great deal at stake for Mr Chaouk. At first instance, Justice Lasry in the Victorian Supreme Court held that the absence of an instructing solicitor would "substantially increase the likelihood of errors being made or important matters being overlooked by counsel". The trial of Mr Chaouk was therefore "likely to be unfair in the sense that it carries a risk of improper conviction". Justice Lasry adjourned the further hearing of the trial until counsel for Mr Chaouk had the assistance of an instructing solicitor on a day to day basis for the duration of the trial.

The Director of Public Prosecutions sought leave to appeal the order. As Victoria Legal Aid declined to alter its determination, it was argued the order had become "in effect, a permanent stay of the serious criminal charges the subject of the indictment" with the result that "there is a very strong public interest that the correctness of that decision be the subject of appellate scrutiny". As a matter of law, it was argued that Justice Lasry's determination involved an erroneous departure from the principles laid down by the High Court in *Dietrich v The Queen* (1992) 177 CLR 292, as interpreted in *Attorney-General for New South Wales v Milat* (1995) 37 NSWLR 370.

Decision

A preliminary issue was whether the court would hear the appeal, given the Director did not oppose the order at the time it was made. The court does not ordinarily entertain an appeal by a party on the basis of a point of law raised for the first time on appeal.

The Director argued there were exceptional circumstances, as the stay ordered was in substance a temporary stay, and the stay now being appealed was a permanent stay. It was argued that the stay became permanent only when the relevant bodies confirmed they would provide no or no further funding, whereupon the Director applied to the judge to vary the order.

The court rejected this argument for a number of reasons:

- Justice Lasry's order was conditional, but not temporary.
- The orders were also made on the basis of Justice Lasry's finding that a trial without an instructing solicitor for each day would not be a fair trial. It necessarily followed that to render the trial fair, Mr Chaouk must be allowed an instructing solicitor for each day of the trial.
- The determination that a fair trial requires the attendance of an instructing solicitor for the duration of the trial is "logically unaffected" by the relevant bodies refusing or reiterating their refusal to provide funding.

Accordingly, to allow the Director to oppose the making of the order on appeal would be "to allow the Crown to advance a new and radically different point for the first time on interlocutory appeal". This was not justified by the circumstances of the case.

In any event, even if the Director was permitted to advance that point for the first time on appeal, their Honours were not persuaded that Justice Lasry had erred in his finding. They reasoned as follows:

- His Honour had correctly applied the decision in Dietrich when he considered whether the trial was "likely to be unfair" in the circumstances. Contrary to the Director's submission, Justice Lasry did not say that the test was whether there was a "mere risk", but rather whether the absence of an instructing solicitor would produce a "substantially increased … likelihood of errors being made or important matters being overlooked by counsel" such that "the trial [was] likely to be unfair".
- The Court of Criminal Appeal in Milat held that it is not necessary for trial judges, in dealing with stay applications, to assess the relative degrees of competence and experience of lawyers. The question before Justice Lasry was whether the trial would be unfair because Mr Chaouk would only have a solicitor present for two half days of trial. The reasoning in Milat was "not in the least determinative" of that question.
- It had not been shown that Justice Lasry had, in exercising his discretion to grant a stay, proceeded upon wrong principle, taken into account irrelevant matters, failed to take into account relevant considerations or made a decision so plainly unjust that it may be inferred he failed to properly exercise his discretion.

The court went further, saying that "so far from his conclusion being so plainly unjust as to imply that his Honour must have failed properly to exercise his discretion, we find it difficult to imagine on the particular facts of this case that his Honour could properly have come to any other conclusion".

During the proceedings, lawyers for Mr Chaouk had argued that rights in the Victorian Human Rights Charter to a fair hearing and rights in criminal proceedings provided an additional basis for the grant of a stay. The court declined to consider these issues, as the case was capable of being decided in favour of Mr Chaouk without resort to the Charter.

Commentary

The Court of Appeal's decision confirms that a court may stay a criminal trial where the absence of an instructing solicitor is likely to result in an unfair trial. Justice Lasry's decision suggests that this will be the case where the charges are serious or the issues are complex.

The Court of Appeal decision also confirms that *Charter* issues will not be entertained on an interlocutory criminal appeal where it is unnecessary to do so. Despite the intervention of the

Attorney-General of Victoria and the Victorian Equal Opportunity and Human Rights Commission, and the proposed intervention of Victoria Legal Aid, the Victorian Bar and the Law Institute of Victoria, the court in this case declined to consider *Charter* issues. Nevertheless, their Honours did note, with respect to the submissions provided by each of the parties, that:

> It should not be thought, however, that we are unappreciative of the work so obviously devoted by all parties to their written submissions or that we have failed to derive considerable benefit from them in coming to our conclusion.

This decision is available online at: http://www.austlii.edu.au/au/cases/vic/VSCA/2013/99.html

***Emma Newnham**, Law Graduate, King & Wood Mallesons.*

High Court decision provides much needed clarity about the law surrounding social security fraud – but more questions remain to be answered

Director of Public Prosecutions (Cth) v Keating [2013] HCA 20 (8 May 2013)

Summary

The High Court of Australia has provided much needed clarity on the question of when an omission to do an act can constitute an element of the Commonwealth offence of obtaining a financial advantage.

Whilst the High Court found a key piece of retrospectively enacted legislation to be insufficient to establish the relevant legal duty, it found that notices, sent out from time to time by Centrelink, are capable of creating such a duty.

The decision has far reaching implications for the future conduct of low level social security fraud prosecutions in Australia. It also has the potential to affect around 15,000 previous prosecutions, where people have been charged with welfare fraud because they omitted to tell Centrelink of a change in circumstances.

Background

Social security recipients, when charged with a crime due to overpayment, are usually charged under section 135.2 of the *Criminal Code Act 1995* (Cth). Charges are based on *commissions* (false statements) and/or *omissions* (failure to declare).

Section 135.2 states that a person is guilty of the offence of obtaining a financial advantage from a Commonwealth entity where the person "engages in conduct" that results in the person knowingly obtaining a financial advantage, to which they are not entitled, for themselves or another person.

Section 4.1(2) of the Code defines "engage in conduct" as doing an act or omitting to perform an act. Further, section 4.3 provides that an omission to perform an act can only be a physical element of an offence if the law creating the offence makes it so, or impliedly provides that the offence is committed by an omission to perform an act that by law there is a duty to perform.

Victoria Legal Aid acted for Ms Keating who was charged with three offences under section 135.2, in relation to a debt of parenting payments of $6,292 for the period May 2007 to September 2009. Whilst Ms Keating had reported her initial fortnightly income she was not required to report on a regular basis. Her fortnightly income fluctuated – sometimes over and sometimes under her initial report. During this time, Centrelink issued a number of notices to Ms Keating requiring her to advise of various matters, including changes to her income. However, it was not agreed that Ms Keating ever received these notices.

Relevant to Ms Keating's prosecution was an earlier decision of the High Court in *Director of Public Prosecutions (Cth) v Poniatowska* (2011) 244 CLR 408 which considered section 135.2 of the Code. In *Poniatowska* the High Court held that for a person to breach section 135.2(1) by omitting to do something, the omission needs to relate to an act that the person was under a legal duty to perform.

In response to *Poniatowska* (and, in fact, prior to the High Court handing down its decision), the *Social Security and other Legislation (Miscellaneous Measures) Act* 2011 (Cth) ("the Amending Act") was passed and received Royal Assent on 4 August 2011. This Amending Act, introduced a new section 66A into the *Social Security Administration Act* 1999 (Cth) ("the Administration Act"). Section 66A stipulates that if an event or change of circumstances occurs that might affect the payment of a social security payment, a person must notify the Department within 14 days after the event or change occurs.

As the Amending Act provided that section 66A was taken to have commenced on 20 March 2000, this amendment *retrospectively* imposed a legal obligation on welfare recipients.

On 23 July 2012, VLA lodged an application with the High Court under section 40 of the *Judiciary Act 1903* (Cth), seeking the removal of Ms Keating's prosecution from the Magistrates' Court of Victoria to the High Court, in order to test the validity and construction of section 66A. The removal application was granted on the basis that it involved a matter in need of "urgent decision" by the High Court.

Decision

In relation to section 66A, the High Court unanimously agreed that the section created a "statutory fiction". It has the effect of attracting criminal liability for failure to advise of an event within 14 days of its occurrence, notwithstanding that at the time of the failure, there was no legal requirement to inform the Department of the event. The duty is therefore incapable of discharge. The Court also noted that there must be a "clear statement of legislative intention" before a court will retrospectively find criminal liability.

In relation to the "information notices", which are typically sent to Centrelink customers at irregular intervals, the Court observed that the duty to comply with notices from the Department is contained in section 74 of the Administration Act. There is a legal obligation on a person to comply with a notice "only to the extent to which the person is capable" and does not apply where a person has a reasonable excuse for refusing or failing to comply with the notice. Whilst the Court considered that an intentional failure to comply with a notice, where the failure results in a financial advantage, could amount to an offence under section 135(2) of the Code, whether it actually did so in a particular case would depend on the scope of the obligation contained in the relevant notice, and whether the limits on the obligation in section 74 applied.

Commentary

In finding that section 66A does not create a retrospective duty, the decision affirms one of the fundamental tenets of criminal law – that the law should be certain and only an intentional failure to comply with a legal duty should give rise to a criminal offence. Therefore, the case has provided urgently needed reassurance against the harsh and unfair effects of retrospective legislation.

In finding that the information notices sent by Centrelink are capable of creating a legal duty for the purposes of the Code, the Court has left for determination by the Magistrates' Court, the scope of the obligation created by individual notices, which are in varying terms.

Accordingly, a defence may be available where:

- there is a live issue regarding the person's capacity to comply with the notices;
- a person did not receive the notices; or
- a person had some other reasonable excuse for not complying with the notices.

So, for a large number of vulnerable welfare recipients experiencing mental health, intellectual disability or language and literacy issues, which may compromise their ability to comply with Centrelink notices, this High Court decision provides some clarity around the legal obligation imposed by such notices. Whilst a number of questions remain to be tested, such as the actual scope and effect of the notices, at the very least, the legal waters affecting some of the most vulnerable members of our community are now less murky.

Lawyers acting for clients with past and pending prosecutions that may be affected by this decision are encouraged to seek advice from VLA.

The full decision can be found at: http://www.austlii.edu.au/au/cases/cth/HCA/2013/20.html

Nive Achuthan, David Grove and Fiona Brice *are lawyers at Victoria Legal Aid.*

The Court's *parens patriae* jurisdiction allows it to order the deprivation of a child's liberty for protective purposes where statutory powers are inadequate

Re Beth [2013] VSC 189 (23 April 2013)

Summary

The Supreme Court of Victoria has held that a Court's exercise of *parens patriae* jurisdiction can allow it to grant orders substantially restricting the liberty of a child where such orders are in a child's best interests and necessary for the child's ongoing care and protection. The Court further held that neither the statutes in issue nor the Victorian Human Rights Charter operate to exclude the exercise of *parens patriae* jurisdiction.

Facts

Beth (a pseudonym) is a 16 year old girl with an intellectual disability. The Secretary to the Department of Human Services has been Beth's guardian since she was four years old. Beth comes from a dysfunctional family background, has suffered sexual abuse and violence and has exhibited self-destructive and violent behaviour.

Beth was placed in a number of different residential care environments. Each of those placements ultimately saw Beth's behaviour deteriorate.

On 27 November 2012 Justice Cavanough made interlocutory orders that enabled Beth to be placed in a purpose-renovated house where she could be treated and supported by staff. The house can be locked to prevent Beth from absconding and it contains a "calm down room".

After moving to the house, Beth's ability to behave appropriately improved dramatically. The Secretary subsequently sought orders in the *parens patriae* jurisdiction of the Court that would permit Beth to continue to reside in the house at least until a review by the Court 12 months from the date of the orders.

The Court was assisted by the Victorian Equal Opportunity and Human Rights Commission as intervenor and the Public Advocate and Victoria Legal Aid as amici curiae. Those parties did not oppose the primary orders sought by the Secretary. However, they did submit that the orders should provide for independent representation for Beth in future proceedings relating to the orders, although this was opposed by the Secretary.

Decision

The statutory framework

Justice Osborn considered at length the provisions of the *Children, Youth and Families Act 2005* (Vic) and the *Disability Act 2006* (Vic), and looked at the extent to which those statutes permit the Secretary to house Beth in the manner proposed.

His Honour held that the placement fell within the terms of a "secure welfare service" under section 173(2)(b) of the CYF Act. That section limits such placements to a maximum duration of 42 days. In the Secretary's view, Beth's situation required a placement longer than 42 days. His Honour held, therefore, that the orders sought exceeded the statutory powers of the Secretary.

His Honour also considered the Disability Act, and held that provisions of that Act in relation to restrictions on liberty had to be "read as subject to such rights to detention as are created: (a) by an order made in the parens patriae jurisdiction; and (b) by a decision made in the best interests of a child under the CYF Act".

Given the orders sought by the Secretary went beyond what was permitted by statute, his Honour then considered whether the Court could "supplement the statutory schemes" and make the orders in any case.

Parens patriae jurisdiction

The question before Justice Osborn was whether the *parens patriae* jurisdiction of the Court would allow the Court to make the orders sought.

Justice Osborn restated the principles of *parens patriae* jurisdiction emerging from cases like *Marion's Case* [1992] HCA 15. His Honour stated that the exercise of *parens patriae* jurisdiction is "directed to the protection of children who are not legally competent to look after themselves". His Honour held that the authorities established "the essential function of a court exercising jurisdiction of the kind in issue as being that of deciding whether in the circumstances of the case the order sought is in the best interests of the child".

Justice Osborn further held that neither the CYF Act nor the Disability Act displace the Court's *parens patriae* jurisdiction, and that "[b]y its nature the jurisdiction may be invoked to supplement a statutory scheme". On this basis, Justice Osborn granted the orders sought substantially on the conditions proposed as his Honour was satisfied that they were in the best interests of Beth.

Independent representation

Justice Osborn was also required to consider whether the proposed orders should provide for independent representation for Beth.

His Honour considered a range of decisions of the NSW Supreme Court in its *parens patriae* jurisdiction which had all adopted the practice of affording representation to children of the same type as they would receive in child protection proceedings before the Children's Court. His Honour noted the statement of Justice White in *Re Alexis* [2011] NSWSC 1545 that representation was "customary in such matters".

Justice Osborn stated that "[i]ndependent representation is…a significant safeguard against the inappropriate exercise of the disproportionate power which the Secretary will hold in respect of Beth under the proposed order". Further, his Honour stated that the future review of the proposed orders would "be fixed at a time when it may reasonably be expected that Beth's ability to give meaningful instructions will have improved somewhat after a relatively significant period in her current accommodation".

Justice Osborn ordered that the representation proposed be provided to Beth on a "best interests" basis. His Honour referred to the decision of Justice Garde in *A & B v Children's Court*

of Victoria & Ors [2012] VSC 589 which described best interests representation as "the legal practitioner [acting] in what he or she considers to be the best interests of the child … even in best interests legal representation, the legal practitioner to the extent that it is practicable to do so must communicate to the Court the instructions given or wishes expressed by the child".

Commentary

The decision is significant in its finding that the Charter does not fetter the Court's powers to make orders in its *parens patriae* jurisdiction. It is of interest that the Commission did not oppose the orders sought by the Secretary, despite the substantial limitations which the orders placed upon Beth's Charter rights to liberty, privacy, freedom of movement and freedom from medical treatment without consent. The Commission conceded that the orders would be compatible with the Charter if they "were only those necessary to achieve the purpose of caring for and protecting Beth and continue to be the least restrictive means reasonably available to achieve this purpose". As his Honour noted, there is an awareness of the parties in the case that if the orders were not made then Beth would suffer substantial involuntary confinement either within secure welfare services or the youth justice system.

Re Beth is one of a number of recent decisions like *A & B v Children's Court of Victoria* and *R v Chaouk & Ors* [2013] VSCA 99 which have all emphasised the importance of independent legal representation as a safeguard in court proceedings. This judgment is of particular importance given that recent amendments to the CYF Act have resulted in children 7–9 years of age losing their right to legal representation in child protection proceedings. This decision will ensure that the issue of legal representation and its importance in the justice system remains a live one.

The decision can be found online at: http://www.austlii.edu.au/au/cases/vic/VSC/2013/189.html

James Apps *is a solicitor in the King & Wood Mallesons Human Rights Law Group*

INTERNATIONAL HUMAN RIGHTS CASE NOTES

Obligation to provide personal information in "Long Form" Census not a breach of the right to privacy

Finley v The Queen, 2013 SKCA 47 (2 May 2013) (Saskatchewan Court of Appeal)

Summary

The Court of Appeal for Saskatchewan in Canada has held that the government did not contravene the right to privacy protected under the *Canadian Charter of Rights and Freedoms* by requesting personal information from individuals through Census questions. A person is compelled to complete the Census, even though they are required to divulge personal information over which they could claim the right to privacy in other, non-regulatory settings.

Facts

In 2006, Canada required its population to complete the "2006 Long Form Population Census". Ms Finley refused to complete the Census questions on the basis that it required her to divulge information from within a biographical core of personal information over which she claimed the right to privacy protected by section 8 of the *Canadian Charter of Rights and Freedoms*.

Following her refusal to complete the Census, Ms Finley was charged with an offence for failing to complete the Census pursuant to section 31(b) of the *Statistics Act*. The Act provided that any person who, without lawful excuse, refused to furnish information that they are required to provide, is guilty of an offence. Imprisonment was a possible punishment.

The Court of Appeal largely affirmed the decision at first instance, so it is necessary to canvass the trial judge's reasoning below.

At first instance, Ms Finley argued (among other things) that:

- by compelling her to provide personal information by way of a criminal sanction, the State interfered with her reasonable expectation of privacy (protected by the Charter); and
- the right to privacy under the Charter amounted to a "lawful excuse" under the *Statistics Act* for refusing to answer the Census.

Before Ms Finley could be afforded protection under the Charter, she had to demonstrate that the Census amounted to a "search or seizure of an existing thing" which would trigger the right to privacy under the Charter. Ms Finley also needed to demonstrate that in all the circumstances, she had a reasonable expectation of privacy (i.e. an objective test) that ought to be protected by the Charter.

The trial judge was called upon to balance the individual's right to privacy against the interests of the State in collecting information about its population.

The trial judge found that the government's request for personal information by way of a Census did not contravene Ms Finley's right to privacy under the Charter because:

- the information was sought and used for statistical purposes;
- the information was not sought for personal use but rather formed a small part of an aggregate collection of statistical information about the entire population;
- Ms Finley was afforded sufficient anonymity and confidentiality;
- Census data forms an integral part of the decision-making and policy formulation processes of the Canadian government; and
- the enforcement provision contained in the *Statistics Act* was aimed at ensuring the integrity of the data, rather than punishing individuals for failing to respond to the Census - the data was collected for a regulatory purpose.

The trial judge found that the Census was a "search and seizure" and as such the protection of the right to privacy under the Charter could be invoked. However, on the basis of the factors outlined above and applying an objective test, the Census questions did not amount to an unreasonable interference with privacy. The trial judge concluded that an "appropriate balance has been struck between the societal interests of the individual's dignity, integrity and autonomy and the goal of effective information gathering for statistical purposes". Therefore, Ms Finley could not invoke the right to privacy as a "lawful excuse" for failing to respond to the Census and was guilty of an offence under the Statistics Act.

Ms Finley appealed to the Queen's Bench, which upheld the trial Judge's findings at first instance. She then appealed to the Court of Appeal.

Decision

The Court of Appeal affirmed the findings of the trial Judge and the Queen's Bench. The Court of Appeal considered the issue of importance to be whether a person should expect privacy in all the circumstances and, if so, whether that expectation of privacy is objectively reasonable.

The Court of Appeal held that although the information sought to be gathered by the Census was clearly personal information, a balance must be struck between an "individual's desire for privacy and society's desire for good government".

The Court of Appeal stated that "[u]nless a Court is satisfied that the state has intruded upon an individual's reasonable expectation of privacy, the individual will not be able to assert successfully that there has been a search let alone an unreasonable search or seizure" of information.

Accordingly, the Charter does not protect *all* privacy interests but only *reasonable* expectations of privacy. The Court of Appeal considered that in regulatory contexts (such as a request from the State for information), an individual's expectation of privacy is (or at least ought to be) considerably lower than in other contexts.

Commentary

The Victorian Human Rights Charter also protects individuals from unlawful or arbitrary interference with their privacy. However, as in Canada, the right to privacy is not absolute and can be subject to reasonable limitations. Victorian Courts would be likely to weigh similar considerations, such as the extent and purpose of the interference, when assessing whether any alleged breach of the right to privacy is lawful.

The need to balance the competing considerations of individual privacy and the public interest in the free flow of information (and, more to the point, its collation by the State for regulatory purposes) is acknowledged in the *Information Privacy Act 2000* (Vic), which governs the collection, use and management of personal information obtained by government authorities. The Act specifically provides that the right to privacy needs to be balanced with the public interest in the free flow of information.

This decision is available online at:
http://canlii.ca/en/sk/skca/doc/2013/2013skca47/2013skca47.html

***Jane Coventry** is a lawyer at DLA Piper.*

How absolute is your right to vote? Considering the legality of non-resident voting restrictions

Shindler v United Kingdom [2013] ECHR, *Application no. 19840/09* (7 May 2013)

Summary

The European Court of Human Rights has considered whether the United Kingdom's law denying voting rights to those non-resident citizens living overseas for 15 years or more is a contravention of article 3 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. The Court found that the UK laws denying voting rights to persons living abroad for more than 15 years fell within the margin of appreciation afforded to States and did not violate the article 3 right to free elections.

Facts

The applicant was a UK citizen who resided in Italy. He had left the UK upon retirement in 1982. Under the *Representation of the People Act 1958* (UK), British citizens residing overseas for less than 15 years are permitted to vote in parliamentary elections in the United Kingdom, but those resident abroad for any longer lose that permission. The complaint arose after the applicant attempted to vote in the general election of 5 May 2010 but was unable to do so because he fell well outside the 15 year time period.

The applicant contended that his ineligibility to vote constituted a violation of article 3 of Protocol No. 1 to the Convention, which states:

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Decision

Jurisprudence to date confirms that the right of an individual to vote in an election is implicit in article 3 but is not absolute. Further, within this rule there exists a margin of appreciation for contracting States to impose limitations on the implied right. The central issue for the Court in this case was whether the UK's non-resident voting restriction fell within this margin of appreciation and thus constituted an acceptable limitation under article 3 of Protocol No. 1.

The issue of non-resident restrictions is not a novel one. The Court identified a number of authorities which considered that complaints concerning restrictions on the right to vote based on residence are ill-founded. The justification for upholding the restriction in these cases relied on a number of factors. Most importantly was the presumption that non-residents are less directly affected or continually concerned with their country's current issues and have less knowledge of them. Non-residents are also unlikely to be affected by changes in policy, particularly in relation to financial policy.

These points were raised by the UK, which argued that imposing a 15 year time limit for non-residents was an acceptable limitation because after such a lengthy period of absence, an individual's connection with the country was likely to diminish. This contention was supported by the number of registered non-resident voters. In 2012, of the 4.4 million potential overseas voters, only some 233,888 were registered to vote. Furthermore, it was 'undeniable', in the view of the Government, that a non-resident who was absent for more than 15 years would be affected to a lesser extent by a decision of a government.

In response, the applicant contended that with the emergence of new technologies and cheaper transport, the justification of the non-resident disconnect was no longer relevant. A non-resident could now easily stay up to date with current affairs in their State of nationality and maintain more frequent contact. As was noted by the Court, quoting from a House of Lords Committee bill proposal:

> Britons overseas can listen to our radio via their computer, they can watch British television and read British newspapers just as rapidly as anyone living here … [there are] many British overseas residents who are as well, if not better, informed about British political affairs than the average voter here. So the old argument about expatriates' inability to make an informed judgment about the great issues in our political life no longer holds.

This was particularly relevant in the applicant's case because he had retained very strong ties with the United Kingdom, despite the fact he had lived abroad for 30 years. He received a military pension from the State, he paid tax, he had family members in the United Kingdom and was also a member of a number of clubs and organisations based there. He pointed out that as a tax paying member of the State, he was entitled to return to United Kingdom to receive treatment from the National Health Service. Moreover, policy decisions relating to pensions, finance, taxation and health would also directly affect him.

Despite the applicant's submissions, the Court did not consider that the non-resident voting restriction fell outside the state party's margin of appreciation in fulfilling its obligations under article 3 of Protocol No. 1. The Court also agreed with the Government's submission that the

existing 15-year time limit was an acceptable one. Whilst in individual cases, such as the applicant's, the rule may be unfair, most non-residents living abroad for this length of time would be sufficiently disconnected so as to not be affected. A general rule also promoted legal certainty. The Court stated that it would not be feasible to have a State ascertain on a case-by-case basis whether a non-resident displayed a sufficient connection to the country to warrant a vote. This approach would also lead to problems of arbitrariness and inconsistency.

Commentary

The relevance and contentiousness of non-resident voting restrictions is likely to continue to increase, particularly in the European context as freedom of movement between States within the European Union increases. As the Court recognised, there is growing awareness within Europe of the problems posed by migration in terms of political participation in the countries of origin and residence. It may well be that as international migration increases, so does the pressure on States with non-resident voting restrictions to review their legislation. For now, however, this case continues the line of authority that upholds the legitimacy of non-resident voting restrictions falling within the broad margin of appreciation afforded to States in the context of their article 3 obligations.

This decision is available online at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119229

Rohan Phelps *is a lawyer at DLA Piper*.

ECHR calls for clear regulations on assisted suicide but leaves content to the States

Gross v Switzerland [2013] ECHR, *Application no. 67810/10* (14 May 2013)

Summary

The European Court of Human Rights has held that Switzerland's failure to provide clear guidelines as to when assisted suicide is permitted breached the right to respect for private life under article 8 of the *European Convention on Human Rights*. The Court declined to comment as to whether Switzerland breached article 8 by failing to assist a person, who wished to die but was not suffering from a terminal illness, to end her life.

Facts

The applicant, Ms Gross, is 82 years old and has for a number of years expressed a wish to die. She is not suffering from a terminal illness, however, she had noticed a continual decline in her health and for the last five years has consistently expressed a wish to end her life. A psychiatrist confirmed that Ms Gross was able to form her own judgment, her wish to die was reasoned and well-considered, had persisted for several years and was not based on any psychiatric illness. However, although Ms Gross approached a number of physicians for a prescription for a lethal dose of sodium pentobarbital, she was unable to obtain one. It appeared that the physicians were reluctant to provide a prescription to a person who did not appear to be in intense pain or in the final weeks of a terminal illness as it may breach the code of medical conduct. Ms Gross also requested a prescription from the Health Board, again this was declined.

Ms Gross alleged that her right to respect for privacy, under article 8 of the Convention, includes the right to decide how and when to end her life. She argued this right had been breached and requested authorisation to acquire a lethal dose of sodium pentobarbital.

Applicable Law

Domestic

In Switzerland, while it is not a criminal offence to assist a person to commit suicide so long as the assistance is altruistic, there are no binding regulations or guidelines on assisted suicide. As such, it is not clear when a doctor may prescribe a lethal dose of sodium pentobarbital.

European Convention on Human Rights

Article 8 of the European Convention on Human Rights states that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The European Court of Human Rights has previously acknowledged that an individual's right to decide the way in which and at which point his or her life should end, provided that he or she was in a position to freely form his or her own judgment and to act accordingly, "was one of the aspects of the right to respect for private life within the meaning of article 8 of the Convention" (*Haas v Switzerland,* no.31322/07 §51 ECHR 2011). The court has previously held that a State may decide that, under article 8(2), it would be against the public interest to legalise assisted suicide, or provide facilities or infrastructure to facilitate suicide, assisted or otherwise (*Haas*). However, in States where assisted suicide is legal, article 8 imposes obligations as to how such a legislative regime operates.

Decision

The court considered that the lack of clear guidelines is likely to have a chilling effect on doctors who would be otherwise likely to provide a prescription. The resulting uncertainty for Ms Gross as to the outcome of her request in a situation concerning a particularly important aspect of her life must have caused the applicant a considerable degree of anguish. This would not have occurred if there had been clear, State-approved guidelines defining when a prescription may be provided where death is not imminent as a result of a specific medical condition. The failure to provide such guidelines ensuring clarity as to the extent of the right to a lethal dose of sodium pentobarbital was therefore a violation of article 8 of the Convention.

The court declined to order Switzerland to grant authorisation to acquire a lethal dose of sodium pentobarbital. The court limited its decision to the lack of clear guidelines and refused to adopt a stance on the substantive content of such guidelines. The contents of any future guidelines, it appears, would possibly be within the margin of appreciation afforded States to balance the right to privacy against the public interest issues outlined in article 8(2).

Commentary

The Court has been called upon to decide assisted suicide cases a number of times before, however this is the first time the Court has been asked to decide on a case where the individual was not suffering from a terminal illness. The Court has continued to hold that the right to respect for private life is an incredibly broad right, and includes the right to personal autonomy and self determination. The expansion of the jurisprudence here to require clear binding guidelines so people are able to make appropriate decisions about their life is a useful development for all end of life care, not just assisted suicide.

Australia does not currently allow assisted suicide, although it has decriminalised non-assisted suicide. When it comes to end of life care, the withdrawal or refusal of treatment, or the provision of a lethal dose of medication is covered by common law and in some limited situations, such as advanced care directives, legislation. There are no regulations or binding guidelines and the common law is by no means clear. As such, there is a constant threat of criminal prosecution even when doctors are acting in good faith and in the patient's best interests. The chilling effects described by the Court and the uncertainty felt by Ms Gross would be similar to those faced by doctors and patients in Australia.

However, the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic), similar to the Convention, does recognise a person's right not to have her or his privacy arbitrarily interfered with under section 13. Should similar views regarding the right to privacy find there way into Victorian jurisprudence, this may have implications for Victorian health law where the current common law and limited legislation do not provide sufficient clear guidance for doctors and patients when it comes to end of life care.

This decision is available online at: http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-119703

Emily Christie *is a Secondee Lawyer at the Human Rights Law Centre.*

Display bans on tobacco products limit freedom of expression, but justifiably so

R v Mader's Tobacco Store Ltd, 2013 NSPC 29 (1 May 2013) (Nova Scotia Provincial Court)

Summary

The Nova Scotia Provincial Court has upheld the validity of a law prohibiting tobacco vendors from displaying tobacco products. The Court found that although the law limits freedom of expression, such limits can be demonstrably justified in a free and democratic society.

Facts

The decision concerns a provincial law prohibiting tobacco vendors from displaying tobacco products. Mader's Tobacco Store breached the law by displaying tobacco products in a manner that failed to comply with the display restrictions. However, the store claimed that the display restriction constituted an unjustifiable violation of its freedom of expression, protected by the Canadian Charter of Rights and Freedoms.

The court had previously ruled that the display restriction did infringe the store's freedom of expression. However, section 1 of the Charter allows rights to be limited to an extent that is "demonstrably justified in a free and democratic society." The remaining question to be determined by the Court was thus whether the rights limitation was justifiable in the requisite sense.

Decision

The Court cautioned against applying a rigid formula when assessing the justifiability of a particular rights limitation. Whilst emphasizing the importance of a flexible, contextual analysis, the judgment sets out the general criteria a limitation on a Charter right or freedom must satisfy in order to be deemed reasonable and demonstrably justified.

The objective pursued by the rights limiting law must be substantial and pressing. Further, the means utilized to pursue the objective must be reasonable and proportionate. In assessing a

rights limitation for reasonableness and proportionality, the court must balance the interests of society with those of individuals and groups. The court must assure that:

- the measures adopted have been carefully designed to meet the objective – they must not be arbitrary, unfair or based on irrational considerations;
- the measures must impair the right or freedom as little as possible; and
- the rights limitation must be proportionate to the objective it pursues.

The Provincial Court referred to a line of authority from the Canadian Supreme Court emphasizing that the level of protection to which expression is entitled under section 1 of the Charter will vary with the nature of the expression. The Provincial Court considered that the display of tobacco products was a form of commercial expression which, the Court reasoned, is not as protected as political expression.

The Court proceeded to examine the objectives of the legislation, the stated purpose of which was "to protect the health of Nova Scotians, and in particular young persons, by restricting their access to tobacco products and protecting them from inducements to use tobacco". The Court found that this objective was clearly "pressing and substantial".

The Court proceeded to examine the connection between the measures and the objective they pursue. The statistical data produced was inconclusive as to the impact of the display ban. However, the Court noted that because the ban is part of a comprehensive and multi-faceted strategy designed to reduce tobacco consumption, the effect of the display ban is not independently measurable.

The Court was also mindful of expert reports pointing to the fact that former smokers or smokers trying to quit can easily be triggered by cues such as tobacco displays, driving them to impulsively consume tobacco products. Paradoxically though, the Court also considered evidence that graphic health warnings placed on cigarette packages have some deterrence value, so removing cigarettes from display also removes health warnings from display and potentially undermines their deterrence value.

Despite this apparent conundrum, the Court found that on the balance of probabilities there was a rational connection between the rights infringing law and its objective of reducing tobacco consumption.

The Court then turned to consider the notion of minimal impairment; whether the display ban restricted the freedom of expression more than was necessary. The Court acknowledged that when tackling a complex social problem such as tobacco consumption, the requirement of minimal impairment is met as long as the legislature has chosen one option within a range of reasonable alternatives – in effect, the legislature is given some leeway.

In this instance, the law states that communication between vendor and customer is far from prohibited – a customer can still obtain information from the vendor directly, or by looking at a magazine or price list which states the price and brand of cigarettes sold. This legislation therefore pursues the objective of reducing tobacco consumption while still allowing for freedom of expression, even though that freedom has been narrowed in order to tackle a pressing and substantial issue.

Finally, the Court considered the related question of proportionality - whether the benefits of the rights limitation outweigh the deleterious effects. The Court observed that unlike other consumer products, such as alcohol, there is no safe level of tobacco use. Nicotine is a highly addictive poison that is unsafe when consumed as intended. Therefore when freedom of expression is used for the purpose of selling harmful and addictive products, its value is tenuous. The benefits

of the legislation in pursuing the objectives of reducing disease, disability and death clearly outweighed, in the Court's view, the deleterious effects of limiting freedom of expression.

On the basis of these considerations, the Court found that the limitation imposed on the freedom of expression by the tobacco display ban was reasonable and demonstrably justified in the sense required by section 1 of the Charter.

Commentary

The decision turned on the Court's application of section 1 of the Canadian Charter, the terms of which are very closely reflected in section 7(2) of the Victorian Human Rights Charter. Section 7(2) requires a similar approach to questions of the proportionality and justifiability of rights limitations as that followed by the Nova Scotia Provincial Court.

The decision confirms the importance of assessing the proportionality and justifiability of rights limitations in context – the balancing exercise is complex and delicate and courts are required to closely examine the extent to which rights are limited and the extent to which such limitation further some important objective.

Also of note was the Court's observation that the importance of freedom of expression varies depending on the nature of the expression sought to be protected. It was the court's view that 'commercial expression' warrants a lower degree of protection than other forms of expression, particularly political expression.

The full decision can be found at: http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html

Candice Van Doosselaere *is a volunteer at the Human Rights Law Centre.*

INTERNATIONAL HUMAN RIGHTS DEVELOPMENTS

No Progress for Sri Lanka four years on

Respect for basic rights and liberties has declined in Sri Lanka in the four years since the government defeated the Liberation Tigers of Tamil Eelam. Since the end of the 26-year-long civil war in 2009, the Sri Lankan government of President Mahinda Rajapaksa has resisted taking meaningful steps to investigate and prosecute alleged war crimes by government forces and the LTTE, end the crackdown against the independent media and human rights activists, and stop ongoing abuses against suspected LTTE supporters. Government pledges to address the concerns of the ethnic Tamil population have gone unfulfilled.

"Four years after Sri Lanka's horrific civil war ended, many Sri Lankans await justice for the victims of abuses, news of the 'disappeared,' and respect for their basic rights," said Brad Adams, Asia director at Human Rights Watch. "Instead, the Rajapaksa government has rejected investigations, clamped down harder on the media, and persisted in wartime abuses such as torture."

Rajapaksa's assurances to United Nations Secretary-General Ban Ki-moon to investigate allegations of war crimes by all sides remain unmet, Human Rights Watch said. The government simply disregarded the Secretary-General's Panel of Experts report, which found that up to 40,000 civilians had died in the final months of the fighting, many from indiscriminate government

shelling. The government has similarly not implemented most of the accountability-related recommendations of its own Lessons Learnt and Reconciliation Commission, which was called for by the UN Human Rights Council at its March 2012 and March 2013 sessions.

Tamils with alleged links to the LTTE remain targets of arbitrary arrest and detention, and are at risk of torture and other ill-treatment. Sri Lankan security forces have used rape and other forms of sexual violence against alleged LTTE supporters, as documented by Human Rights Watch in a February report. On the strength of the evidence presented by Human Rights Watch and other organizations, since 2012 several courts in the United Kingdom suspended the deportation of Tamils considered to fall within this risk category.

“The Rajapaksa government seems to be hoping that broad-based repression will dampen the exercise of fundamental freedoms,” Adams said. “But Sri Lankan activists and journalists who showed incredible resilience during wartime to bring forth the truth, will undoubtedly find a way to do so when the country is at peace.”

Human Rights Watch urged governments to demonstrate their concerns for Sri Lanka’s deteriorating human rights situation at the United Nations and other international venues. This includes continuing to press for an independent international investigation into wartime abuses, speaking out against ongoing abuses, and providing support for Sri Lankan civil society.

Source: Human Rights Watch.

Amnesty International 2013 annual report shows world increasingly dangerous for refugees and migrants

Global inaction on human rights is making the world an increasingly dangerous place for refugees and migrants, Amnesty International said as it launched its annual assessment of the world’s human rights.

The organisation said that the rights of millions of people who have escaped conflict and persecution, or migrated to seek work and a better life for themselves and their families, have been abused. Governments around the world are accused of showing more interest in protecting their national borders than the rights of their citizens or the rights of those seeking refugee or opportunities within those borders.

“The failure to address conflict situations effectively is creating a global underclass. The rights of those fleeing conflict are unprotected. Too many governments are abusing human rights in the name of immigration control – going well beyond legitimate border control measures,” said Salil Shetty, Secretary General of Amnesty International.

“These measures not only affect people fleeing conflict. Millions of migrants are being driven into abusive situations, including forced labour and sexual abuse, because of anti-immigration policies which means they can be exploited with impunity. Much of this is fuelled by populist rhetoric that targets refugees and migrants for governments’ domestic difficulties,” said Shetty.

“Refugees and displaced people can no longer be ‘out of sight, out of mind’. Their protection falls to all of us. The borderless world of modern communications makes it increasingly difficult for abuses to be hidden behind national boundaries – and is offering unprecedented opportunities for everyone to stand up for the rights of the millions uprooted from their homes,” said Shetty.

Refugees who were able to reach other countries seeking asylum often found themselves in the same boat – literally and figuratively – as migrants leaving their countries to seek a better life for themselves and their families. Many are forced to live in the margins of society, failed by

ineffective laws and policies, and allowed to be the targets of the kind of populist, nationalist rhetoric that stokes xenophobia and increases the risk of violence against them.

The rights of huge numbers of the world's 214 million migrants were not protected by their home or their host state. Millions of migrants worked in conditions amounting to forced labour - or in some cases slavery-like conditions – because governments treated them like criminals and because corporations cared more about profits than workers' rights. Undocumented migrants were particularly at risk of exploitation and human rights abuse.

"Those who live outside their countries, without wealth or status, are the world's most vulnerable people but are often condemned to desperate lives in the shadows," said Shetty. "A more just future is possible if governments respect the human rights of all people, regardless of nationality. The world cannot afford no-go zones in the global demand for human rights. Human rights protection must be applied to all human beings – wherever they are."

Source: Amnesty International

NATIONAL HUMAN RIGHTS DEVELOPMENTS

New 'excision' law does not relieve Australia of its responsibilities

The Office of the United Nations High Commissioner for Refugees has reiterated its concerns about the treatment of asylum-seekers arriving by sea to Australia.

According to new legislation, all asylum-seekers arriving by boat anywhere in Australia are now subject to transfer to Nauru or Papua New Guinea for processing and will only have their claims for refugee status assessed in Australia if the Minister for Immigration and Citizenship makes a personal decision to allow them to, on the basis of it being in the public interest to do so.

UNHCR's longstanding view is that under international law any excision of territory does not relieve Australia of its responsibilities to asylum-seekers.

"Under international law any excision of territory for a specific domestic purpose has no bearing on the obligation of a country to abide by its international treaty obligations which apply to all of its territory. This includes the 1951 Refugee Convention, to which Australia is a party," said Volker Türk, UNHCR's Director of International Protection.

"UNHCR's position has always been for all asylum-seekers arriving into Australian territory, by whatever means, and wherever, to be given access to a full and efficient refugee status determination process in Australia. This would be consistent with general practice, and in line with international refugee law," Türk emphasised.

"If asylum-seekers are transferred to another country, the legal responsibility for those asylum-seekers may in some circumstances be shared with that other country."

UNHCR has found serious shortcomings at the Nauru and PNG processing centres to which asylum-seekers have been transferred, including the reception conditions and delays in establishing legal frameworks for refugee status determination.

UNHCR also considers it imperative that the more than 18,000 asylum-seekers who have arrived by boat to Australia since 13 August 2012 be provided with a fair and effective asylum procedure, with due process, as soon as possible, and that any detention of asylum-seekers be strictly in accordance with Australia's refugee and human rights law obligations.

This applies whether the asylum-seeker has arrived in an excised place or not, and it applies whether they have subsequently been transferred to Nauru, Papua New Guinea or are in Australia.

Source: UNHCR.

Lesbian, gay, bisexual, transgender and intersex people one step closer to discrimination protections

The Sex Discrimination (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (SDA Bill) passed through the House of Representatives on 30 May 2013 after the Commonwealth Government announced welcome amendments to eliminate discrimination in the provision of Government funded aged care.

The Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 will, if passed, extend protection under the *Sex Discrimination Act 1984 (Cth)* to "gender identity", "sexual orientation", "intersex status" and "relationship status". This will mean that lesbian, gay, transgender and intersex people will be protected from discrimination for the first time at a national level and able to make claims against the federal government and agencies such as Centrelink and Medicare.

The HRLC prepared a comprehensive submission on the SDA Bill in April 2013. In particular, the HRLC submission welcomed the definitions of the new attributes, including the explicit recognition and protection of intersex people. If passed, the Bill will represent leading international best practice for the protection of sex and gender diverse people. However, the HRLC made a number of recommendations that focused on removing unjustified exemptions in the Bill, including narrowing the broad exemptions available to religious organisations and schools.

The SDA Bill was introduced after the Government shelved its Human Rights and Anti-Discrimination Bill 2012 which would have consolidated federal anti-discrimination legislation – a decision met with extreme disappointment from the HRLC and other rights organisations. The HRAD Bill contained a limitation on discrimination in aged care services, even when delivered by a faith based organisation, which was not reflected in the SDA Bill when it was first tabled in parliament. At the time, the Attorney-General in his comments to the media said it was still government policy to include the limitation, but did not explain why it was not included in the SDA Bill.

Thankfully, the amendments announced last week will amend the Bill to introduce a limitation on discrimination in Commonwealth funded aged care services, as well as updating references to "sexual preference" in the *Fair Work Act 2009 (Cth)* and other federal laws with the new terminology "sexual orientation". Unfortunately, the Government has not proposed also extending protections under the Fair Work Act to "relationship status", "gender identity" and "intersex status" to further harmonise anti-discrimination protections in federal law. The HRLC and others will continue to lobby for these and other improvements to the Bill.

The Bill is expected to pass through the Senate with the support of the Greens when it is debated later this month. The Bill would then need to pass the House of Representatives in its amended form, with the support of four of the five independents. While the Shadow Attorney-General Senator Brandis has confirmed the Coalition's support for the SDA Bill it remains to be seen whether the Coalition will support the Bill in its amended form and/or introduce its own amendments. The Coalition is due to make its decision in a party room meeting later in June.

The Bill will be debated in the Senate in the next sitting week of parliament, commencing 17 June 2013, the same time the Senate Legal and Constitutional Affairs committee is due to report on its inquiry into the Bill.

Anna Brown *is the HRLC's Director of Advocacy and Strategic Litigation*

STATE-BASED HUMAN RIGHTS DEVELOPMENTS

No to Homophobia launches 'promise' campaign

On 17 May, No to Homophobia launched a new campaign to celebrate the International Day against Homophobia, Biphobia and Transphobia. The initiative is asking Australian individuals and organisations to give their word to stand up against homophobia, biphobia and transphobia in every part of their lives. They want every member of the Australian community to give their word: "I will stand up against homophobia, biphobia and transphobia. Always."

HRLC MEDIA COVERAGE

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

- Paul Bibby, Please, just call me Norrie, this is a whole new agenda, *The Sydney Morning Herald,* 1 June 2013
- Steve Lillebuen, UN asked to look at Vic police shooting, *The Australian*, 30 May 2013
- ABC News, Tyler Cassidy's mother goes to UN to call for independent body to investigate police shootings, *ABC News*, 30 May 2013
- Adrian Lowe, They didn't even as his name: UN asked to probe police shooting, *The Age*, 30 May 2013
- Oliver Laughland, Mother of boy shot by police goes to UN to force overhaul of investigations, *The Guardian*, 30 May 2013
- AFP, Australian mother takes son's police shooting to UN, Seven News, 30 May 2013
- Jane Lee, Tamil asylum seekers granted lawyers after court plea, *Sydney Morning Herald,* 24 May 2013

SEMINARS & EVENTS

Discussion on North Korea: action to improve human rights in the world's most brutal regime

Monday 24 June in Sydney & Wednesday 26 June in Melbourne

The Human Rights Law Centre is very pleased to be hosting public lectures and discussions in both Melbourne and Sydney with **Jared Genser**, legal counsel for the International Coalition to Stop Crimes Against Humanity in North Korea.

These events will be a great opportunity to discuss the UN Human Rights Council's Inquiry into human rights violations in North Korea – to be led by Michael Kirby, as well as Jared's other human rights experience as the Founder and President of FreedomNow representing Nobel Peace Prize Laureates Aung San Suu Kyi, Liu Xiaobo, Desmond Tutu, and Elie Wiesel. For details and to register, go to: www.hrlc.org.au/events

Australian Tour of the feature documentary "No Fire Zone: The Killing Fields of Sri Lanka"

24 – 28 June, Sydney, Canberra, Melbourne

To launch Director Callum Macrae's Australian tour with his film *No Fire Zone*, the Human Rights Law Centre is hosting a parliamentary preview screening and briefing session for MPs, journalists and political advisers in Parliament House.

No Fire Zone is a Channel 4 documentary that follows the Sri Lankan government's final offensive in the 26 year war against the rebel forces of the Tamil Tigers. It was screened at the UN earlier this year before the Human Rights Council passed a resolution asking Sri Lanka to investigate accusations of war crimes.

In collaboration with a number of other organisations, the HRLC is also supporting a number of public screenings in Sydney, Canberra, Melbourne and Perth.

Details at: http://www.hrlc.org.au/australian-tour-of-no-fire-zone-the-killing-fields-of-sri-lanka

Access to Justice in the Criminal Justice System for People with Disabilities: training session and public meeting

18 June, Brisbane

Disability Discrimination Commissioner, Graeme Innes will be holding public meetings around Australia to hear directly from people with disability who need communication supports, or who have complex and multiple support needs, about their experiences with the criminal justice system. A public meeting will address this subject in Brisbane on 18 June, directly following a training session for people with disability about rights of people with disability. Bookings for both are essential - please call Karlie at Queensland Advocacy Incorporated on 07 3844 4200 or email karlie@qai.org.au

Public forum: Sentencing – Does one size fit all?

18 June, Melbourne

International Commission of Jurists Victoria warmly invites you to its upcoming sentencing forum featuring:·Victorian Attorney-General the Hon Robert Clark MP, Prof Arie Frieberg AM, Sentencing Advisory Council, and Andrea Petrie, Court Reporter, The Age. Details online here.

International Commission of Jurists Fundraising Dinner

26 July, Melbourne

The Annual ICJ Victoria Fundraising Dinner will feature the Commonwealth Attorney-General, the Hon Mark Dreyfus QC MP will being interviewed by Leigh Sales, host of the ABC current affairs program 7.30. Details online here.

VEOHRC June–July compliance training

June and July, Melbourne

The Victorian Equal Opportunity and Human Rights Commission has designed compliance workshops to help employers and service providers meet their obligations under Victoria's equal opportunity laws, and help government agencies and public authorities and meet their obligations under Victoria's human rights charter. Register at humanrightscommission.vic.gov.au/training. All workshops can also be tailored to meet your specific needs and delivered on-site in your organisation.

Human Rights vs Restrictive Practices forum

30 August, Brisbane

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

HUMAN RIGHTS JOBS

Public Interest Law Clearing House (PILCH)

PILCH are seeking an experienced Executive Assistant to play a key role in PILCH's work by providing professional executive support to the Executive Director as well as supporting the Director of Operations and Director of Development and Engagement.

FOREIGN CORRESPONDENT

It's time for principled leadership to combat senseless discrimination

23rd Session of United Nations Human Rights Council

A draconian bill passed by the Nigerian House of Representatives is yet another example of discrimination on the grounds of sexual orientation and gender identity that is widespread and invidious throughout the world. If enacted, the bill will criminalise same-sex relationships and the 'aiding or abetting' of same-sex relationships. It would also forbid the formation of Lesbian, Gay, Bisexual and Transgender (LGBT) groups, and even criticism against the bill itself.

Against this backdrop, it is profoundly disappointing that Member States of the UN Human Rights Council have not exercised the principled leadership necessary to ensure that the world's peak human rights body condemn such flagrant violations at its current session in Geneva.

Civil society organisations had a strong and well-founded expectation that the Council would act during its 23rd session. It is a year since the UN High Commissioner for Human Rights presented a report to the Council documenting the widespread incidence and devastating impact of human rights violations against lesbian, gay, bisexual, transgender and intersex persons, including killings, rape, torture, arbitrary arrest and systemic discrimination. And it is more than two years since years the Council adopted its first, and to date only, resolution on sexual orientation and gender identity – a resolution that many States have failed to implement.

With the Council deferring meaningful action on sexual orientation and gender identity until at least September – at which point many NGOs hope and expect it to establish a procedure or mechanism to ensure sustained and systematised attention to violations of LGBTI rights – there are a range of steps that States can take in the meantime.

Firstly, States should amend or repeal laws – such as that proposed in Nigeria – which criminalise homosexuality or same-sex relations. Such laws violate both the international law prohibition against discrimination and the rights to freedom of expression and association. Such laws also serve to stigmatise same-sex relations and increase the incidence of homophobic violence and harassment. A coalition of Nigerian human rights defenders, in a statement released earlier this week, condemned the bill as likely to lead to an 'increased rate of harassment, witch-hunt and vindictive accusations which will impact on every Nigerian'. (While homosexuality was decriminalised in Australia largely during the 1980s it is of note that gay men today remain haunted by the shame and stigma of past criminal convictions for gay sex offences.)

Secondly, States should enact and strengthen laws to prohibit and redress discrimination on the grounds of sexual orientation or gender identity. Such discrimination is as reprehensible as that based on race, religion or nationality and is deserving of at least the same level of legal recognition and protection. (Australia is on the cusp of enacting federal legislation that will, for the first time, introduce the new grounds of 'sexual orientation', 'gender identity' and 'intersex status' into federal anti-discrimination law - this represents a long overdue but very welcome advance for the rights of LGBTI people in Australia.)

Thirdly, States must take positive action to prevent, investigate and prosecute all forms of discrimination and violence based on sexual orientation or gender identity. (Such action in Australia could include supporting social marketing and education campaigns such as "No To Homophobia" that work to shift attitudes and behaviours and increase reporting rates for those suffering discrimination and abuse.)

The UN Human Rights Council will rise at the end of this week and commence its 24th session in September. At that session, the Council must adopt a response – or at least a concrete road map – to ensure that there is regular and systematised reporting on LGBTI rights. Such an approach is necessary to document violations, identify protection gaps, highlight best practice and provide some redress for victims of these senseless violations.

***Dr Heather Collister** leads ISHR's work to protect LGBT rights and support LGBT human rights defenders and **Anna Brown** leads the HRLC's work on LGBTI rights.*

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

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

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

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

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

Follow us at http://twitter.com/rightsagenda for updates as they occur.

Join us at www.facebook.com/pages/HumanRightsLawResourceCentre.