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Human Rights Law Centre

Rights Agenda

Monthly Bulletin of the Human Rights Law Centre

NEWS

UN investigator finds Australia's treatment of asylum seekers violates the Convention Against Torture

HRLC CASE WORK

Parliamentary submission: Australia's counter-terrorism and migration laws unjustifiably interfere with our rights and freedoms

EVENTS

Save the dates for the 10th Annual Human Rights Dinner: 5 June in Melbourne and 12 June in Sydney

CASENOTES

Important decision from the Victorian Supreme Court regarding Community Corrections Orders

TABLE OF CONTENTS

UN TORTURE REPORT

UN investigator finds Australia's treatment of asylum seekers violates the Convention Against Torture

9 March 2015

The United Nations Special Rapporteur on Torture has found that various aspects of Australia's asylum seeker policies violate the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The findings from the Special Rapporteur, Juan Mendez, will be formally submitted to the UN Human Rights Council today in a report prepared by the independent UN expert tasked with investigating breaches of the Convention around the world.

Human Rights Law Centre Director of Legal Advocacy, Daniel Webb, said that the report's findings made it clear that the Australian Government's actions breach international law.

"The Government always assures the Australian people that it complies with its international human rights obligations. But here we have the United Nations once again, in very clear terms , telling the Government that Australia's asylum seeker policies are in breach of international law," said Mr Webb.

The report finds that Australia's indefinite detention of asylum seekers on Manus Island, the harsh conditions, the frequent unrest and violence inside the centre and the failure to protect certain vulnerable individuals all amount to breaches of the Convention.

"The Torture Convention prohibits subjecting people to cruel, inhuman or degrading treatment. The report confirms that by leaving people locked up indefinitely in appalling conditions on a remote island, Australia is failing to meet this basic standard," said Mr Webb.

The report also finds that the recent amendments to the Maritime Powers Act, which give the Government unprecedented powers to detain and return asylum seekers intercepted at sea, also violate the Convention.

"Under international law, Australia can't lock people up incommunicado on a boat somewhere in the middle of the ocean. Nor can we return people to a place where they face the risk of being tortured. Yet these are precisely the powers the Government has sought to give itself through recent amendments to its maritime law," said Mr Webb.

The report notes that Australia repeatedly breached the obligation to fully cooperate with the UN Special Rapporteur in their investigations and criticises the Australian Government for providing inadequate responses to the complaints made against it.

"Australia needs this system of international law and order. Our Government often relies on it to protect our own national interests. So it's incredibly short-sighted for the Government to start thumbing its nose at the UN system just because it doesn't like what it's being told," said Mr Webb.

Mr Webb also said that, more broadly, the report confirmed that Australia's asylum seeker policies were of growing concern internationally and were clearly damaging Australia's hard-won reputation as a decent, rights-respecting nation.

"Australia signed up to the Convention Against Torture 30 years ago. We did so because as a nation we agreed with the important minimum standards of treatment it guaranteed. Yet here we

are 30 years on, knowingly breaching those standards and causing serious damage to our reputation," said Mr Webb.

Mr Webb said Australia needed to focus on developing genuine regional solutions to provide safe ways for asylum seekers to apply for protection.

"Being called out as a nation that breaches the Torture Convention should be a wake-up call for Australia. Rather than persuing costly, cruel and unlawful policies, Australia should work with the United Nations and regional partners to develop safe pathways to protection for refugees," said Mr Webb.

A copy of the Special Rapportuer's findings can be found here: http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_68_Add.1_AV.doc

OPINION

Violence against women must be framed as the human rights violation that it is

While ongoing commitments and efforts to secure the rights of the world's women and girls are commendable, on no measure can we say that our work is done, writes ***Natasha Stott Despoja****, Australia's Ambassador for Women and Girls.*

Violence against women and girls is a global pandemic that destroys lives, fractures communities and holds back development - United Nations Secretary-General Ban Ki-moon

March is a key period for scrutiny of progress towards achieving women's rights, every year.

We do this at the community and national level through our programs to celebrate International Women's Day. Globally, the annual UN Commission on the Status of Women brings together leaders and experts on the rights of women to review international efforts, achievements and challenges. This year, the review process commands particular attention as we mark the twentieth anniversary of the Beijing Declaration and Platform for Action on gender equality.

While ongoing commitments and efforts to secure the rights of the world's women and girls are commendable, on no measure can we say that our work is done. Women continue to be outnumbered in parliaments globally – five to one – by male counterparts, women make up two thirds of the world's illiterate and women are paid 10 to 30 per cent less than men.

In my roles as Chair of Our Watch and Australia's Ambassador for Women and Girls, another area of particular concern is gender-based violence.

Globally, at least one in three women is beaten, coerced into sex, or otherwise violently abused in their lifetime. In some parts of the Pacific, as many as two in three surveyed women report having experienced violence. The World Health Organisation has called Violence Against Women an epidemic. It is a national emergency.

In the first two months of 2015, 14 women have been murdered allegedly by a former or current partner. Previously, we talked about 'one woman a week,' but now it is closer to two. Prevalence studies reveal 27 per cent of Australian women have reported experiencing physical and/or sexual intimate partner violence over their lifetime.

Supported by the Australian Government, Partners for Prevention (P4P) undertook a recent study interviewing more than 10,000 men and 3,000 women in six countries to identify what drives

some men to use violence against women, and recommending prevention measures. The proportion of men who reported being physically or sexually violent to their partner in the surveyed countries ranged from 26 to 80 per cent. The study found that the primary motivation for men to commit rape was their sense of sexual entitlement.

The sense of entitlement among some, and broader social attitudes that sustain gender inequality and underpin men's use of violence, remain pervasive. It is what gives violence against women it's essentially normative character and makes it a public issue of human rights. Violence against women is not a private matter. Effective violence prevention and response requires a systematic focus on transforming social norms, attitudes and behaviours that support gender inequality and the empowerment of women and girls.

A focus on primary prevention is a key part of the Australian Federal Government's National Plan to Reduce Violence against Women and their Children 2010-2022 (the National Plan), released in February 2011. It brings together the efforts of all Australian governments to make a significant and sustained reduction to violence against women and their children over a twelve-year timeframe. The Second Plan, *Moving Ahead 2013-2016*, was released mid-last year (June 2014). The National Plan and the Second Action Plan clearly recognise that gender equality must underpin primary prevention efforts.

Side by side with domestic initiatives, Australia actively partners with countries across the Indo-Pacific on programs to end violence. We are working with Women's Crisis Centres in Fiji, Tonga and Vanuatu to provide essential services to survivors. In Papua New Guinea, we have supported the training of women village magistrates and the establishment of Family and Sexual Violence Units in police stations. Through the Channels of Hope program in Solomon Islands, we are working with community and faith leaders to change attitudes to the roles of women and men. In Afghanistan, Australia is supporting national efforts to improve access to services and justice for women and girls.

At the Beijing Conference on Women in 1995, Hillary Rodham Clinton pronounced that 'women's rights are human rights' – a catchcry that has shaped approaches to gender equality in the 20 years since. Still, for many, violence is cast as a private affair. This must change.

Momentum is building. On the eve of the UN's International Day for the Elimination of Violence against Women last year, I joined Chiefs of Police from across Australia and New Zealand, along with our Governor-General, the Prime Minister and the Leader of the Opposition, to condemn the shocking reality of violence against women in Australia. The inspirational Rosie Batty, Australian of the Year 2015, has given voice to many thousands of victims and survivors of domestic and family violence. Her courage, work and dedication is helping ensure domestic and family violence is on the policy agenda.

For generations, women's rights lawyers, human rights defenders and feminists have worked to bring gender-based violence into the public domain and, with varying degrees of success, into legal systems. The hurdles faced by domestic violence campaigners are illustrative of how deeply gender inequality and violence against women are embedded in our community.

To be effectively addressed, human rights issues must be firmly fixed in the public eye and violence against women must be framed as the human rights violation that it is. The good news: violence against women is preventable.

Natasha Stott Despoja *is the Australian Ambassador for Women and Girls. You can follow her on Twitter @AusAWG.*

ATTACKS ON AUSTRALIAN HUMAN RIGHTS COMMISSION

Attacks on human rights watchdog are dangerous for human rights and for democracy

25 February 2015

Confirmation that the Attorney-General sought the resignation of the President of the Australian Human Rights Commission reveals the depths of the Government's willingness to undermine Australia's independent human rights watchdog, said the Human Rights Law Centre.

"This is a blatant political attack to punish the Commission for doing its job reporting on the harm being inflicted on children in detention," said the HRLC's Executive Director, Hugh de Kretser.

"The Commission's report is thorough and balanced. Its criticism of the policies of successive governments is fair. The allegations of bias against the Commission are totally unfounded and have been answered by the Commission in evidence provided to the Senate committee," said Mr de Kretser.

The Government received the Commission's *Forgotten Children* report on 11 November 2014 but waited until the last possible day, 11 February 2015, before publishing it. In the meantime, it slashed the Commission's funding by 30% in December. In January, the Prime Minister and senior Ministers condemned a ruling from the Commission and criticised its President. In early February, the Attorney-General sought the President's resignation, offering her another legal position if she resigned.

"An independent, properly funded national human rights watchdog is vital to protecting the rights of vulnerable people in Australia. The political attacks must end. The Government should focus on stopping the severe harm being caused to children in detention and legislating to ensure it never happens again," said Mr de Kretser.

The UN body responsible for accrediting national human rights institutions has written to the Prime Minister expressing "grave concerns" over the "public attacks" on the Commission and its President. A copy of the letter is here:
http://www.ishr.ch/sites/default/files/article/files/the_prime_minister_of_australia.pdf

"Not only are the political attacks damaging for our democracy and the protection of human rights, they are damaging our international reputation," said Mr de Kretser.

Opinion: Attacks on our Human Rights Commission are part of a broader disturbing trend

The federal government is actively undermining a range of vital checks and balances and stifling criticism of its actions. This is corrosive for democracy and human rights.

The extraordinary revelations in Senate estimates on Tuesday reveal the depths of the government's attacks on the Australian Human Rights Commission. In early February, Attorney-General George Brandis asked the commission's president, Gillian Triggs, to resign. Triggs described the request, and the associated suggestion that she would be offered other work if she accepted it, as a "disgraceful proposition". It was.

Worse, these attacks are a nasty symptom of a much broader malaise. The federal government is actively undermining a range of vital checks and balances and stifling criticism of its actions. This is corrosive for democracy and human rights.

The commission handed the government its damning report into the harm being inflicted on children in immigration detention on November 11, 2014. The government waited until the last possible day, February 11, 2015, before publicly releasing it. In the meantime, it launched an unprecedented dirty political attack.

In December it announced a 30 per cent funding cut to the commission.

In January Prime Minister Tony Abbott and senior ministers condemned a commission ruling as "pretty bizarre", "offensive" and "likely to shake confidence in the institution."

In early February the government sought Triggs' resignation.

When the report was finally made public, instead of addressing the overwhelming evidence of severe damage to children, the Prime Minister rejected the findings and attacked the report as "blatantly partisan", saying the "commission ought to be ashamed of itself."

The pattern and intent is clear – the government is punishing the commission.

Forget that the commission was doing its job by investigating and reporting on an important human rights issue in Australia. Forget that the commission was even-handed in its criticism of both sides of politics over their handling of the issue. Forget that on the international stage, Australia is leading the charge to tell other nations to respect the independence of their national human rights institutions. This is a calculated political attack designed to undermine our independent national human rights watchdog.

Bad enough in isolation, what makes these attacks worse is that they are part of broader trend.

Checks and balances – such as independent statutory watchdogs, our independent court system, the rule of law, press freedom, and the ability of non-government organisations to speak freely – are vital to the health of our democracy and for protecting human rights, particularly in the absence of a constitutional or legislative bill of rights.

Since taking office, the government has actively undermined these protections.

A combination of funding cuts, changes to funding agreements and intimidation has been used to stifle advocacy by the NGO sector.

The government changed community legal centre contracts so that federal funding can no longer be used for law reform advocacy, and removed a "no-gag" clause from contracts that had explicitly recognised their freedom to advocate.

It cut funding to a range of centres and announced there will be more cuts to come, without saying where they would land – creating a climate in which organisations are reluctant to speak out for fear of moving to the top of the list for the next round of cuts.

Similar cuts and restrictions have been inflicted on Environment Defenders offices, Aboriginal legal services, refugee legal services, the Refugee Council of Australia, homelessness services, the national drug and alcohol peak body and more.

The cuts send a clear message: organisations that advocate are at risk.

The cuts also damage efforts to address key problems that even the government has identified as priorities. At the same time as appointing an anti-family-violence campaigner as Australian of the year, the government is slashing funding to services that use their experience working with women facing violence to highlight what's wrong with our system.

Press freedom is being curtailed by new anti-terrorism laws that threaten up to 10 years' jail for journalists and others who disclose information about operations the Attorney-General has deemed "special intelligence operations". Journalists attempting to pierce the secrecy around the

harm being done to asylum seekers have repeatedly been referred to the federal police in attempts to uncover confidential sources and whistleblowers.

Even the courts and international law are being sidelined.

Migration and counter-terrorism laws are granting extraordinary powers to be exercised at the personal discretion of ministers with court scrutiny curtailed. In a recent hearing into legislation that sought to restrict court review of asylum seeker decisions, Senator Ian Macdonald said the government "doesn't want to be beholden to the High Court who will pick every comma in the wrong place".

Access to the courts is critical in ensuring the law operates in a fair, coherent and predictable way – and to make sure wrong decisions are fixed. Excluding court review is even more concerning where the consequences of mistakes can include the prolonged loss of liberty or deportation to serious risks of harm.

Meanwhile, the government keeps promising it complies with international human rights law in its asylum seeker policies while at the same time legislating to ensure there are no consequences under Australian law if it doesn't.

This undemocratic slide is deeply concerning. We need political and community leadership to respond; to create a climate in which the independence of institutions is protected; where the separation of powers and the rule of law are understood and respected; where freedom of information, not secrecy, is the standard; where NGO advocacy is valued, even when it is uncomfortable for government.

Hugh de Kretser *is the executive director of the Human Rights Law Centre. You can follow him on Twitter @hughdekretser This article was first published in The Age.*

CHARTER OF HUMAN RIGHTS

Review of Victoria's Charter of Human Rights welcomed

2 March 2015

The Human Rights Law Centre welcomed today's announcement by the Victorian Government that Michael Brett Young will lead the 8 year review of Victoria's Human Rights Charter.

"The Charter has been a force for good in protecting Victorians' rights. This review provides an important opportunity to recognise the Charter's positive impact and recommend ways to extend that impact," said Hugh de Kretser, Executive Director of the HRLC.

In 2011, then Premier Ted Baillieu supported the Charter against controversial recommendations to wind back its operation and the Charter remained unchanged.

"We welcome the current government's commitment to ensure the Charter's effectiveness, develop a human rights culture in Victoria and expand human rights education," said Mr de Kretser.

"The main impact of the Human Rights Charter has been in improving government decision-making processes. A human rights culture and education across government is vital in achieving this," said Mr de Kretser.

"The Charter can also be improved by strengthening compliance mechanisms – by making it easier and simpler to understand and enforce the Charter," said Mr de Kretser.

"There are simple amendments that can be made to make the Charter more accessible to more Victorians who need its protection," said Mr de Kretser.

Mr Brett Young is due to report to the Attorney-General on his review by 1 September 2015. The review's terms of reference are here: http://www.premier.vic.gov.au/review-to-strengthen-victorias-charter-of-human-rights

POLICE ACCOUNTABILITY

Mother of Tyler Cassidy progresses UN complaint in push for increased oversight for police related deaths

12 March 2015

The mother of fifteen year old Melbourne boy, Tyler Cassidy, who was shot dead by police in 2008, has progressed her individual communication to the United Nation's Human Rights Committee aimed at highlighting Australia's failure to ensure police-related deaths are properly investigated by an independent body.

This week Ms Cassidy filed a reply in response a submission from the Australian Government. Ms Cassidy hopes her complaint can help change the system to be fair and independent so that other families don't have to go through the suffering that she did.

"It's important that deaths like Tyler's are investigated properly by a truly independent body rather than by the police themselves. It's taken a long time to get to this point and I understand a ruling from the UN is still some time away, but I'm glad we're getting closer to a outcome," said Ms Cassidy.

The Human Rights Law Centre's Director of Advocacy & Strategic Litigation, Anna Brown, who has been assisting Ms Cassidy, said that the complaint was emblematic of a systemic problem.

"Sadly, in no state in Australia do we have a system where an independent body takes the investigation out of the hands of police. Ensuring that these deaths are independently investigated makes common sense and complies with international human rights law," said Ms Brown.

Since the complaint was filed in 2013, there continue to be police shootings across Australia that are investigated by members of the same police force responsible for the death.

"When I saw that NSW police had shot that poor young woman with Asperger's syndrome, I couldn't believe that all these years later nothing has changed and police are still investigating their own mistakes. If we want to learn, we need to make sure the investigation is done properly," said Ms Cassidy.

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.

In its submission the Australian Government acknowledges the "regrettable practices" that occurred during the investigation into Tyler's death, and refers to a number of changes which are said to have been made to investigative processes since Tyler's death. However, critically, the conduct of the primary investigation into the death remains in the hands of police.

"In the same way that employers don't investigate workplace deaths, the police shouldn't investigate deaths where police are involved. Their interest in the welfare and reputation of their officers and their organisation conflicts with ensuring that the investigation is conducted in a completely impartial and independent manner," said Ms Brown.

The reply submission has been filed as the new Victorian Government committed to consulting widely on changes to the Independent Broad-based Anti-Corruption Commission, which subsumed the former Office of Police Integrity. The HLRC and Ms Cassidy hope that her complaint will prompt consideration of a properly independent and effectively model of investigation of police related deaths in Victoria and elsewhere in Australia.

"When things go wrong, it's critical that we have faith in the impartiality and credibility of investigations into the death – this is in the public interest and also in the interest of the families of victims and officers involved. The good news is, we can learn from examples overseas and take practical steps to ensure this happens," Ms Brown said.

The reply submission and original communication was prepared for Ms Cassidy by the Human Rights Law Centre with the generous pro bono assistance of leading law firm Allens and barrister Tim Goodwin, and 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.

Background to the Communication and Reply submission can be found here.

A copy of the entire Communication can be found here.

A copy of the Government's submission can be found here.

A copy of Ms Cassidy's Reply submission can be found here.

Shani Cassidy will not be making any further statements to the media, but her full public statement made when the complaint was lodged can be found here.

PROTEST RIGHTS

Excessive anti-protest laws in Western Australia risk criminalising peaceful protest & breaching international human rights law

12 March 2015

Proposed legislation being debated today in the Western Australian Parliament risks criminalising peaceful protest in breach of international human rights guarantees.

The Human Rights Law Centre's Executive Director, Hugh de Kretser, urged the parliament not to pass the proposed legislation.

"This new legislation goes too far. The offences are vague and will be prone to misuse. There are real risks they could criminalise peaceful protest in breach of our international human rights obligations," said Mr de Kretser.

The *Criminal Code Amendment (Prevention of lawful activity) Bill 2015* creates vague new offences of "physically preventing a lawful activity" and "possessing a thing for the purpose of

preventing a lawful activity". Both offences carry serious penalties of prison of up to 1 year and a fine of up to $12,000. In certain circumstances, the penalty for preventing a lawful activity can rise to 2 years and $24,000.

"This vague and excessive legislation is simply not needed. Police already have a suite of offences like trespass, property damage and breach of the peace at their disposal as well as overly broad powers to move protesters on if they reasonably suspect they are breaching the peace, preventing a lawful activity or about to commit an offence.

"There is no time period specified in the legislation so even a brief interruption to a lawful activity will trigger the offence. Further, the legislation effectively reverses the onus of proof requiring people to disprove that they intended to prevent the lawful activity if there are reasonable circumstances suggesting they did.

"This bill is further confirmation of the trend of eroding fundamental democratic freedoms in Australia. Over the past 18 months, we've seen the excessive Queensland G20 anti-protest laws, Tasmanian laws that unjustifiably prioritise business over human rights and overly broad Victorian move on powers. The Western Australian Parliament should reject this bill," said Mr de Kretser.

NAURU'S UPR

Nauru should lift the veil of secrecy on human rights

26 March 2015

The Government of Nauru should take urgent steps to respect and protect journalists, strengthen judicial independence and enact specific legislation protecting human rights defenders, the International Service for Human Rights and the Human Rights Law Centre said in a joint briefing paper on Nauru.

Nauru's Universal Periodic Review – a major review of each State's human rights record - is scheduled to take place in November 2015 at the United Nations Human Rights Council in Geneva.

ISHR Director, Phil Lynch, said it was vital that Nauru enact and implement laws to protect journalists, whistleblowers and human rights defenders and to ensure greater public access to government information.

"In recent years a veil of secrecy has descended on government in Nauru, with significant restrictions imposed on journalists wanting to travel to the country and the denial of requests to visit by both United Nations human rights experts and leading non-governmental organisations such as Amnesty International. The Universal Periodic Review of Nauru later this year provides States an opportunity to lift this veil and emphasise to Nauru the importance of an independent media, access to information and a critical civil society to good government and accountability," Mr Lynch said.

HRLC's Director of Legal Advocacy, Daniel Webb, said that Nauru's decision to allow Australia to detain asylum seekers in its territory had contributed to its failure to implement many of the key recommendations from its last performance review at the United Nations.

"Australia should be a positive force for human rights protections in the region. Instead, its asylum seeker policies have been a catalyst for regression," said Mr Webb.

"At times about 10 percent of the people on Nauru have been asylum seekers sent there by Australia. They've been held in mandatory and indefinite detention in clear breach of international law. Controversy and concern around their treatment has contributed to Nauru's deterioration on matters of access, transparency and respect for the rule of law," Mr Webb said.

Many of the key recommendations from Nauru's last Universal Periodic Review in 2011 are yet to be implemented.

"After its last UPR, Nauru committed to allowing greater UN access and to strengthening its legal and judicial sectors, yet on these matters Nauru has actually regressed. In addition to imposing barriers to the UN, NGOs and journalists visiting Nauru, the entire judiciary was effectively removed in January 2014, undermining both the actual and perceived independence of the courts," said Mr Webb.

"ISHR and the HRLC are particularly concerned about the imposition of gag clauses by Australia in contracts pertaining to Nauru and reports of retribution and reprisals against those who speak out about human rights abuses in the country," ISHR's Mr Lynch said.

"States should use the opportunity presented by the UPR to push Nauru to enact legislation which enshrines the right to access and disclose information about human rights and to guarantee that individuals who publically criticise the government or who disclose information about human rights abuses are not subject to reprisals," Mr Lynch said.

The ISHR and HRLC joint briefing paper is intended to assist States and other stakeholders to formulate questions and recommendations regarding the protection of human rights defenders during the UPR.

COUNTER-TERROR

Australia's counter-terrorism and migration laws unjustifiably interfere with our rights and freedoms

4 March 2015

Australia's counter-terrorism and migration laws unnecessarily and disproportionately interfere with fundamental rights and freedoms and ought to be repealed, the Human Rights Law Centre has said in a submission to the Australian Law Reform Commission's (ALRC) inquiry into "Traditional Rights and Freedoms".

HRLC Director of Advocacy and Research, Emily Howie, said the counter-terrorism laws addressed in the submission were a classic case of government overstepping the mark and neglecting to adequately safeguard fundamental legal and democratic principles.

"In a modern democracy like ours, law enforcement agencies should not have unfettered powers to lock people up without review. Oversight, accountability and fairness are essential for the health of our democracy and mustn't be simply discarded in the pursuit of national security," said Ms Howie.

The HRLC recommends the repeal or substantial amendment of the control order regime, travel bans and ASIO's extraordinary questioning and detention powers.

"Australia's national security and counter-terrorism laws have proliferated since 9/11 and some of those laws drastically erode basic rights. The government has an important duty to protect its people, but that duty must not be discharged in a way that unnecessarily or disproportionately

interferes with our human rights. If we keep chipping away at safeguards, we'll be left with very little protection from dangerous practices such as arbitrary detention and the silencing of critical voices in our community", said Ms Howie.

Ms Howie highlighted laws passed in 2014 which make it an offence with a penalty of up to 10 years imprisonment to disclose information related to ASIO's "special intelligence operations." The laws were opposed by all the major news organisations on the basis that they would have a chilling effect on legitimate reporting on ASIO's work, including matters on which the public had a right to know.

The HRLC submission also examines some aspects of the deliberate and dramatic erosion of rights in Australia's migration laws.

HRLC Director of Legal Advocacy, Daniel Webb, said it was disappointing and artificial that the scope of the review had been limited to a select few traditional rights, freedoms and privileges hand-picked by the Attorney-General.

"The UN High Commissioner for Human Rights has said that Australia's asylum seeker policies are leading to a 'chain of human rights violations'. Yet as obvious as these rights abuses are, only a few of them fall within the narrow scope of this review. It's tremendously disappointing that the current Attorney-General doesn't regard the protection against arbitrary detention or the right not to be returned to torture as important enough to be included," said Mr Webb.

The HRLC submission can be viewed here.

AUSTRALIA'S HUMAN RIGHTS SCORECARD

Joint NGO Submission to the Universal Periodic Review of Australia now open for endorsement

Australia's human rights record is scheduled to be reviewed under the Universal Periodic Review (UPR) process at the Human Rights Council in Geneva. Each country is reviewed once every four years by other countries at the United Nations, and Australia's second review is taking place in November this year.

The UPR provides a significant opportunity for Australian NGOs to encourage and influence the Australian Government to improve the protection and promotion of human rights and to fulfill its international legal obligations.

A Joint NGO Submission has been prepared and we are now seeking endorsement of the report from NGOs by next **Friday 20 March 2015**.

The Joint NGO submission was prepared following input received through NGO workshops and teleconferences across Australia and was guided by an Advisory Committee comprised of representatives from a range of community organisation. Each section has been prepared by lead NGOs representing vulnerable groups or with particular subject matter expertise, using a variety of consultation methods and within the very strict word limit, and the whole report was reviewed by the Advisory Group and expert reviewers.

If your organisation would like to endorse the Joint NGO Submission and have your organisation listed as supporting the recommendations please email

Anna Brown, Human Rights Law Centre (anna.brown@hrlc.org.au)

More information about the UPR can be found here.

VOTING RIGHTS

Queensland government set to repeal discriminatory voter ID requirements

11 March 2015

The Queensland government's commitment to abolish voter ID requirements introduced by the previous government has been welcomed by the Human Rights Law Centre.

The HRLC's Director of Advocacy and Research, Emily Howie, said voter ID laws placed unnecessary and unwarranted barriers to some groups of people voting.

"Governments should support efforts to engage people in the electoral system, not erect hurdles to their participation," said Ms Howie.

The votes of tens of thousands of vulnerable people are threatened by the voter ID requirements.

"Those most at risk of losing their vote are elderly and young voters, people in remote rural regions, Aboriginal and Torres Strait Islander people and the homeless," said Ms Howie.

Although the former Queensland government asserted that the laws were necessary to address voter fraud, there has been no evidence of any notable amount of electoral fraud in Queensland.

"Voter ID laws are a solution in search of a problem. Without evidence of voter fraud to justify the laws, there is simply no proven need for this law that will deny some Queenslanders their right to vote," said Ms Howie.

Attorney-General Yvette D'Ath announced that reforms will be made through legislation introduced in the first sitting week of the new Parliament.

"We welcome the Attorney-General's commitment to removing these excessive provisions. Queensland's voter ID laws were the first and hopefully last of their kind in Australia. They came at a time of diminishing voter turn-out at Australian elections, when we should actually be striving to increase participating in the democratic process," said Ms Howie.

The Human Rights Law Centre made submissions to the Queensland parliament's inquiry into voter ID laws opposing their introduction.

The HRLC also had the following opinion pieces published on voter ID laws, one concerning the voters that will be left behind by the laws, co-written with Graeme Orr and another on the political motivations behind the laws.

HUMAN RIGHTS DINNER

Save (the changed) Dates!

The Human Rights Law Centre and Justice Connect are extremely pleased to announce that **the keynote speaker at our Annual Human Rights Dinners** this year will be the Australian Human Rights Commission President, **Gillian Triggs**.

Melbourne: **Friday 5 June** (Note the new date) | Sydney: **Friday 12 June**

Emeritus Professor Triggs has successfully combined a distinguished academic career with international commercial legal practice, and has worked with governments and international

organizations on human rights law. Professor Triggs has accomplished an extraordinary amount. She is the former Dean of the Faculty of Law at the University of Sydney, has written five books and was a Director of the British Institute of International and Comparative Law. She is also a former Barrister with Seven Wentworth Chambers and a Governor of the College of Law. She became the President of the Human Rights Commission in 2012.

Tickets for the 2015 Human Rights Dinners will be available at www.hrlc.org.au/events in coming weeks.

The Human Rights Dinners are an opportunity to come together to celebrate achievements and to energise the human rights movement to tackle the challenges that lie ahead. They are also an important fundraiser for Human Rights Law Centre and Justice Connect.

Be sure to save the date so you can join us and our friends at Justice Connect for what is sure to be a great night!

OTHER HUMAN RIGHTS DEVELOPMENTS

States should strengthen legal protection and end impunity for attacks against human rights defenders

10 March 2015

The UN Special Rapporteur on Human Rights Defenders, Michel Forst, should continue to focus on strengthening the legal and institutional protection of human rights defenders and promoting accountability and an end to impunity for attacks against them, key States and NGOs have told the UN Human Rights Council.

The Special Rapporteur yesterday concluded an interactive dialogue with delegates from States and civil society following the presentation of his first report to the Human Rights Council on 9 March.

The report, which summarises the work undertaken by the Special Rapporteur since his appointment in June 2014 and outlines his strategic work-plan, was warmly received by civil society delegates and by the majority of State representatives present. An ISHR summary and analysis of the report was published online last month.

‘The Special Rapporteur is to be commended for his strong affirmation of the urgent need for action to combat impunity for threats, attacks and reprisals against defenders,’ said ISHR Director Phil Lynch.

‘Such action should include increasing the political cost of attacking and threatening human rights defenders,’ Mr Lynch added. ‘We also welcome the Special Rapporteur's announcement, in response to ISHR’s oral statement, of his intention to meet with business leaders during country visits with a view to increasing the recognition of corporate accountability activists and discussing the role and responsibility of business in protecting civil society space’.

Focusing on human rights defenders who are most exposed or at risk

In his opening statement (login using 'HRC extranet' and password '1session'), and throughout the interactive dialogue, the Special Rapporteur repeatedly emphasised the importance of strengthening the protection of the most exposed and vulnerable defenders, including those who work on economic, social and cultural rights; minority rights; environmental defenders; defenders

of LGBTI rights; women human rights defenders; and those who work on issues of business and human rights. This approach was greeted with approval in several statements made by civil society organisations participating in the interactive dialogue, including ISHR, and praised by State delegations, notably Botswana, the United Kingdom and Costa Rica.

‘That the Special Rapporteur included whistle-blowers in his conception of the most at-risk defenders is encouraging,’ said ISHR advocacy manager Ben Leather. 'This is particularly so in the context of troubling comments made today by certain States actors - including Iran, Egypt and Russia - comparing and conflating the legitimate work of human rights defenders with terrorist activities’.

'ISHR joins with Norway and other States in calling for all governments to implement Human Rights Council resolution 22/6 by which calls on States to ensure that "measures to combat terrorism and preserve national security … do not hinder the work and safety" of human rights defenders,' Mr Leather said.

Strengthening the legal recognition and protection of human rights defenders

Reiterating the comments in his report on the responsibility of States to foster conducive legal environments for the work of human rights defenders, the Special Rapporteur committed to addressing the gap between international standards accepted by States and the realities faced by defenders on the ground.

A number of States welcomed and committed to act in response to the Special Rapporteur's call to develop and implement specific national legislation on the protection of defenders. Both Burkina Faso and Sierra Leone stated during their oral interventions that they are consulting civil society on such legislation, while during an ISHR side-event the representative of Tunisia indicated that Tunisia would welcome technical assistance from the Special Rapporteur to draft a national human rights defender law. ISHR's proposed model law on the protection of human rights defenders will be a valuable tool in this regard.

'At the national level, a process on the adoption of a law on the protection of human rights defenders is in process. The draft has been elaborated in an inclusive fashion. The draft law provides guarantees for the protection of human rights defenders and allows them to carry out their mission in a secure and enabling environment,' said Burkina Faso's representative to the UN in Geneva.

'Sierra Leone believes that human rights defenders have an important role to play in the promotion and protection of human rights and notes that the protection of human rights defenders by the state can be guaranteed by legislation and enforceable mechanisms that will guard against reprisals...Sierra Leone will raise its voice at the acts perpetrated by persons who cowardly seek to frustrate the promotion of human rights by harming its defenders. We would urge states to implement legislative measures of protection for the guarantee of their continued safety,' said Sierra Leone's Ambassador to the UN, Yvette Stevens.

Addressing reprisals and individual cases

The Special Rapporteur was unequivocal in his commitment to address and promote accountability for reprisals against human rights defenders and others for their cooperation with the UN. During his opening statement, the Special Rapporteur publicly named 22 States to whom he had sent communications concerning allegations of intimidation and reprisals - from travel bans to assassinations - against people for seeking to cooperate or communicate with the UN, including Bahrain, China, Cuba, Cyprus, Egypt, Honduras, India, Iran, Malaysia, Maldives,

Mexico, Myanmar, Oman, Pakistan, Russia, Sri Lanka, Syria, Tajikistan, Thailand and Vietnam and the United Arab Emirates.

'The UN depends entirely on the free cooperation of civil society to function. Without this cooperation the UN loses legitimacy. To this end, I exhort States to support the designation of a senior focal point on reprisals by the Secretary-General,' Mr Forst said.

The Special Rapporteur's calls for States to fully support and implement HRC Resolution 24/24, including in relation to the appointment of a senior high-level focal point on reprisals by the Secretary-General, received explicit support from a number of States, including Hungary and Botswana.

A number of States also intervened to to raise individual cases of threats and attacks against human rights defenders, most notably the United States, which raised cases concerning the criminalisation, detention and ill-treatment of defenders in Egypt, Sudan, Swaziland, Venezuela, Belarus, Cuba and Azerbaijan.

NGOs similarly raised individual cases during their oral statements, with ISHR speaking out against the recent arbitrary arrest of women human rights defenders in China and the East and Horn of Africa Human Rights Defenders Project sharing a disturbing case of threats at gun point against South Sudanese human rights defender Edmund Yakani to prevent his attendance at the Human Rights Council.

Mandate and activities of the Special Rapporteur

The shape and scope of the Special Rapporteur's plans for his mandate going forward formed a substantial part of the interactive dialogue. In his response to Russia's statement, the Special Rapporteur rejected the suggestion that his plans exceeded the powers and responsibilities conferred on him by his mandate, stating that the protection of defenders must be the 'essential aspect' of the work of his office. 'In the pursuit of that end,' the Special Rapporteur went on to explain, 'I will keep within the limits of my mandate, as my predecessors have, but I intend to explore, and perhaps to push, those limits'. Notably, the Special Rapporteur expanded on his intention to strengthen follow-up procedures by systematically pursuing a response from the State concerned in all cases of reprisals suffered by individuals. The Special Rapporteur repeated his conclusion, stated in his report, that silence by States 'is the worst possible response', one that he intends to overcome through closer collaboration with other mandate holders including by issuing joint letters of allegation and urgent appeals. He further proposed to institute a practice of pursuing engagement with State delegations in Geneva in cases where the State concerned repeatedly fails to formally respond to such communications. He added that addressing the grave lack of cooperation from many States, as evidenced in his additional Observations on Communications Report published last week, is an urgent priority in the context of the increasing incidence and severity of reprisals across all regions.

As part of the fight against the culture of impunity, the Special Rapporteur confirmed his intention to fully update and reissue the 2006 report of his predecessor on the progress made in and the main obstacles to, the implementation of the Declaration on Human Rights Defenders. The proposed revised report will include the formulation, specific to each country, of targeted recommendations on the protection of human rights defenders in more than 120 States and a compilation of best practices as an annexure. This proposal received praise from several members of the Council, including delegates from Paraguay and the Czech Republic, together with the representative of the Netherlands, which today put forward its Shelter City initiative for consideration by the Special Rapporteur as an example of good practice.

The Special Rapporteur concluded his presentation by thanking civil society for its ongoing and extensive support to date.

Source: International Service for Human Rights

Discrimination complaints launched against TV stations over audio descriptions

26 February 2015

Vision Australia has lodged complaints in the Australian Human Rights Commission against Channels Seven, Nine, Ten, SBS and Foxtel, calling for an audio description service that will make television more accessible to people who are blind or have low vision.

The Public Interest Advocacy Centre represents Vision Australia in the complaints.

Audio description is a second audio track that can be turned on and off. It describes the important visual elements of a television program – such as actions, scene changes, gestures and facial expressions – that a person who is blind or has low vision can't see.

The complaints state that by failing to make their television broadcasting service accessible for people who are blind or have low vision, these broadcasters have engaged in indirect discrimination.

Vision Australia is asking for a minimum of 14 hours of audio described content per week on each channel named in the complaint.

Blind Citizens Australia has already lodged complaints on behalf of 31 people who are blind or vision impaired against the ABC. These are currently before the Australian Human Rights Commission.

'Australia lags behind the rest of the world in providing audio description. Countries such as the UK, the US, Ireland, Germany, Spain and New Zealand already provide audio description on free view or subscription television,' said Edward Santow, PIAC's CEO.

'For comparison, the UK's Channel 4 offers audio description on 20% of their programs - which works out at more than 33 hours per week.'

'In the same way as captioning has facilitated media access for people who are deaf, audio description has the potential to significantly improve access to Australia's cultural life for the 350,000 Australians who are blind or have low vision.'

'The technology and accessible content exists, and it has already been successfully trialled on the ABC in 2012, so we are calling on the other Australian broadcasters to take this important, permanent step towards equality now,' said Mr Santow.

Vision Australia's General Manager of Advocacy and Engagement, Maryanne Diamond, said a recent survey by the organisation suggests Australian Story, The Big Bang Theory and Home and Away are among the most popular TV shows for viewers who are blind or have low vision.

'Spending an evening in front of the box is a favourite way for people who are blind or have low vision to relax and spend time with their family.'

'They enjoy the same programs as fully sighted Australians, so why should they be prevented from fully experiencing them like everyone else?'

'It's ridiculous that blind or low vision people can watch Home and Away with audio description in the UK but not in Australia.'

'Permanent, real-time, audio description on Australian television, similar to what is available now in many other countries, is the only way to remove current discriminatory barriers for Australians who are blind or have low vision,' said Ms Diamond.

You can see an example of audio description here:

Source: Public Interest Advocacy Centre

Mercy Campaign

Time is running out for Andrew Chan and Myuran Sukumaran, the two Australians on death row in Indonesia. Support Reprieve Australia's Mercy Campaign and add your voice to efforts to 'keep hope alive'.

AUSTRALIAN HUMAN RIGHTS CASE NOTES

Court issues first guideline judgment on Community Corrections Orders

Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen [2014] VSCA 342 (22 December 2014)

In Victoria's first guideline judgment the Court of Appeal stated that the availability of community correction orders (CCOs) dramatically changes the sentencing landscape. The Court of Appeal unanimously held that CCOs enable punitive and rehabilitative sentencing purposes to be served simultaneously, positing CCOs as punitive non-custodial sentences.

Facts

Since January 2012 courts have been able to impose CCOs as sentencing outcomes. CCOs replaced Intensive Correction Orders, Community Based Orders and Combined Custody and Treatment Orders.

In 2013 three sentence appeals were lodged against lengthy CCOs – the appellants Boulton, Clements and Fitzgerald had respectively received an eight year, 10 year and five year CCO.

In the context of three sentence appeals, in November 2013 the Director of Public Prosecutions applied for a guideline judgment pursuant to s6AB(1) of the *Sentencing Act 1991* (the Act). A guideline judgment contains guidelines to be taken into account by courts in sentencing offenders. The Court of Appeal concluded that the application should be heard by a bench of five, recognising that there was a unique opportunity to avoid sentencing disparity in relation to this new sentencing order.

Decision

There were two main questions that the Court needed to address in this matter – should there be a guideline judgment, and if so, what should be included in that guideline judgment.

The threshold question – should the Court give a guideline judgment

Pursuant to s6AD of the Act, the Sentencing Advisory Council (SAC) and Victoria Legal Aid (VLA) were invited to make submissions. The Attorney General also joined the proceedings. On the threshold question, the Director, VLA, SAC and Boulton all submitted that the Court should give a guideline judgment. The Attorney General indicated general support for a guideline judgment, whilst Clements and Fitzgerald opposed a guideline judgment, respectively stating that there was

a lack of evidence about inconsistent sentencing to warrant a guideline, and that it was premature.

In support of a guideline judgment VLA submitted that the CCO is a new and highly flexible order and is arguably not being used as intended by Parliament; that there is a lack of transparency in reasoning adopted by Courts imposing CCOs; that there is a need for clarity and appellate guidance regarding appropriate use of CCOs; that there is uncertainty about the reach of CCOs; a guideline judgment would assist Courts in structuring CCOs; and that the need for guidance is timely in light of the abolition of suspended sentences.

In accepting VLA's submissions the Court considered it appropriate to issue a guideline judgment, noting in particular at [25] that the judgment should promote consistency in sentencing and public confidence in the criminal justice system; and ensure that the CCO system operates as intended.

What should be the content of the proposed guideline judgment

Overarching principles – proportionality and suitability

The Court accepted the submissions of VLA and SAC that the overarching principles which should govern a CCO regime were proportionality and suitability. In respect of proportionality the Court at [67] noted that proportionality precludes the imposition of a longer sentence merely for the purposes of protecting society. As regards suitability, the Court referred to the requirement in s36 of the Act that courts consider whether the terms of a CCO suit an offender's personal circumstances.

A CCO is punitive in nature

The Court concluded that a CCO has obvious punitive elements, including the mandatory conditions, the fact that contravention of the CCO is an offence punishable by imprisonment, and the range and nature of optional conditions (which are variously coercive, restrictive and/or prohibitive).

In comparing a CCO with imprisonment, the Court pointed out that imprisonment is often seriously detrimental for the prisoner and the community and that imprisonment is a sentence of last resort. The Court stated at [113]-[115] that a CCO 'offers the court something which no term of imprisonment can offer, namely, the ability to impose a sentence which demands of the offender that he/she take personal responsibility for self-management and self-control and (depending on the conditions) that he/she pursue treatment and rehabilitation, refrain from undesirable activities and associations and/or avoid undesirable persons and places… the CCO offers the sentencing court the best opportunity to promote, simultaneously, the best interests of the community and the best interests of the offender...'.

The Court accepted that the CCO is intended to be available for serious cases where an offender is at risk of immediate imprisonment, and that it is undesirable and unnecessary to impose any outer limits on the availability of CCOs. At [121] the Court suggested that in sentencing an offender the court should ask itself the following question - *Given that a CCO could be imposed for a period of years, with conditions attached which would be both punitive and rehabilitative, is there any feature of the offence, or the offender, which requires the conclusion that imprisonment, with all of its disadvantages, is the only option?*

CCOs combined with imprisonment

The ability for sentencing courts to impose CCOs in combination with terms of imprisonment, according to the Court, adds to the flexibility of a CCO and also reduces the negative effects of

having served a custodial term. The Court accepted VLA's submission that there are significant practical and conceptual difficulties in considering the imposition of a non-parole period and/or a CCO, and that a non-parole period and a CCO should be treated as alternatives.

Determining the length of a CCO

On the basis that sentencing purposes inform the length of sentencing orders, the Court accepted VLA's submission that the CCO operates punitively for its entire duration, and stated that the punitive effect will be determined by the extent and duration of the curtailment of the offender's freedoms. As to the provisions allowing courts to vary or cancel a CCO, the Court at [162] said future variation or revocation is not a matter that should be taken into account in fixing the duration of a CCO, as the assumption is that the offender will have to comply with the CCO for every day of its duration.

Difficulties with compliance with conditions

Acknowledging that for many offenders difficulties which contributed to their offending (for example mental illness, drug addiction, and/or homelessness) may also present problems in compliance with a CCO, the Court at [171-172] stated that it would be a paradoxical outcome if anticipated difficulties led the court to conclude that a CCO was inappropriate. The Court stated that for offenders who have been assessed as suitable for a treatment and rehabilitation condition, the sentencing court should assume that compliance difficulties are likely to be abated once treatment commences. Additionally, the Court noted that relapses are common, that courts should resist arriving at pessimistic conclusions about future non-compliance, and that if non-compliance persists there is capacity to apply for variation or cancellation.

CCOs and young offenders

The Court considered that CCOs can be fashioned to adequately punish and rehabilitate young offenders, accepting VLA's submission that a lengthy CCO should be avoided for a young offender as most young offenders disengage from criminal behaviour, that long orders have a greater impact on a young offender, and that young offenders are more receptive to change and will respond more quickly to interventions.

Commentary

Appearing on behalf of VLA, Director Criminal Law, Helen Fatouros describes the guideline judgment as historic, a judgment which has the capacity to serve the community by leading a shift towards meaningful and supported rehabilitation of offenders.

A CCO is not a lenient sentence

The guideline judgment is designed to promote the flexibility and robustness of CCOs and ensures that imprisonment remains the punishment of last resort. Non-custodial sentences have traditionally been viewed as lenient dispositions given the way previous community based orders operated. The guideline judgment makes clear that CCOs constitute serious punishment and that CCOs should assume a greater role in the sentencing hierarchy.

The Court acknowledged the need to change public opinion and inform the community that CCOs are not only very significant punishment but that they better serve the community than imprisonment, as CCOs seek to address the causes of offending behaviour and ultimately prevent future offending. This change relies on appropriate use of CCOs, and their effectiveness in addressing criminal behaviour.

As to effectiveness, VLA data for the last two financial years shows the breach rate of CCOs is 16.5%. This is lower than the breach rate for previous community-based orders, and

demonstrates the recidivism potential of CCOs, particularly if supports and programs are sufficiently tailored and resourced.

Evidence-based decision making

The Court stressed the need for the provision of pre-sentence reports and expert evidence by government agencies and defence counsel to allow a sentencing court to impose a CCO which appropriately details the rehabilitative needs of an offender, and to the extent possible provide material about the estimate of the period of time required for rehabilitative programs to be effective.

The guideline calls on all parties to take a more thorough approach in assisting courts to impose well-crafted sentences. The Court explicitly stated that defence counsel will need to direct submissions at the formulation of a CCO which directly addresses the causes of offending, and which promote changes in the offender's life to minimise the risk of reoffending. In the absence of sufficient expert guidance and full submissions from practitioners around duration, conditions and programs the guideline will not deliver on its important aims.

Impact of the guideline judgment

Proper application of the guideline will lead to an increase in CCOs, as they are imposed in matters which would have previously received a suspended sentence and also in matters where the offender is facing immediate imprisonment but is suitable for a CCO. This should in turn promote greater community confidence in the criminal justice system whilst going some way to address over-reliance on imprisonment and the many risks that flow from overcrowded prisons. Anecdotally, we note that the judgment has been relied on by VLA lawyers in a significant number of matters, including successfully in bail applications and in sentence appeals.

The true impact of the guideline judgment will depend on whether sentencing courts have confidence in the effectiveness of CCOs. As the Court cautioned, this will depend on Corrections Victoria providing adequate resources and supports to enable CCOs to produce meaningful results.

In relying on the guideline judgment, a shift in both focus and investment away from prisons to effective treatment and support programs for offenders is possible, and to this extent advocates who rely on the guideline judgment appropriately can play a role in shaping the sentencing landscape.

The full decision can be found online here:
http://www.austlii.edu.au/au/cases/vic/VSCA/2014/342.html

Helen Fatouros *is the Director of Criminal Law at Victoria Legal Aid.*

High Court holds that arrival by boat is not a ground for refusing a protection visa

Plaintiff S297/2013 v Minister for Immigration and Border Protection [2015] HCA 3 (11 February 2015)

Summary

The High Court of Australia has unanimously held that the Minister cannot refuse to grant a protection visa to an individual who has validly applied for a visa on the sole basis that the individual is an "unauthorised maritime arrival".

In this case, as the Minister had refused to grant a protection visa to the plaintiff on this basis, and therefore failed to consider the plaintiff's visa application according to law as he had been directed to do by the Court, the Court issued a writ of peremptory mandamus requiring the Minister to grant the plaintiff a protection visa.

Facts

The plaintiff, a Pakistani national, arrived on Christmas Island by sea in May 2012 without a visa. He is therefore an “unauthorised maritime arrival” (formerly an “offshore entry person”) within the meaning of section 5AA of the *Migration Act 1958* (Cth). The Minister exercised his discretion under section 46A(2) of the Act permitting the plaintiff to apply for a Protection (Class XA) visa under the Act, despite the plaintiff being an “unauthorised maritime arrival”.

The plaintiff made an application for a Protection (Class XA) visa in February 2013, which was rejected by a delegate of the Minister. The plaintiff sought review of this decision in the Refugee Review Tribunal which. Upon finding that the plaintiff was a refugee, the Tribunal remitted his application to the Minister for reconsideration.

The Minister did not make a decision regarding the plaintiff's application. This was because a series of regulatory steps were taken by the Minister to purportedly enable the Minister to not make decisions in relation to applications for visas by “unauthorised maritime arrivals”. One such regulatory step was a purported determination under section 85 of the Act placing a cap the number of protection visas that could be granted in a year (which was not limited to unauthorised maritime arrivals). As the cap had already been reached, the plaintiff's application did not need to be considered.

The plaintiff brought proceedings in the High Court of Australia in June 2014 challenging the validity of some of these regulatory steps that were preventing him from being granted the visa. The High Court found in favour of the plaintiff and granted a writ of mandamus directing the Minister to consider and determine the plaintiff's application according to law (see *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 735).

On 17 July 2014, the Minister refused to grant the plaintiff a Protection (Class XA) visa on the basis that the grant was not in the “national interest”. This was a criterion requiring the Minister's satisfaction for the granting of a visa, found in cl 866.226 of Schedule 2 of the *Migration Regulations 1994* (Cth). The Minister's decision record showed that he had rejected the plaintiff's visa application on the sole basis that he considered it in the “national interest” to refuse Protection (Class XA) visas to all “unauthorised maritime arrivals”.

On 21 July 2014, the Minister filed a certificate stating that he had fulfilled the requirements of the writ of mandamus and made a decision about the plaintiff's application according to law. The plaintiff brought proceedings in the High Court alleging that the cl 866.226 criterion was invalid and claimed a peremptory writ of mandamus directing the Minister to grant him the Protection (Class XA) visa for which he applied.

Decision

The Court declined to consider the validity of the cl 866.226 criterion, but rather considered its operation in the context of the Act as a whole. The question before the Court was whether the cl 866.226 criterion permitted the Minister to conclude that it was not in the “national interest” to grant the plaintiff a Protection (Class XA) visa, wholly on the basis that he was an “unauthorised maritime arrival”. The Court found that it did not.

The Court held that section 46A of the Act exhaustively states the visa consequences for "unauthorised maritime arrivals" (that they may not apply for Protection (Class XA) visas unless the Minister considers it is in the public interest that they make such an application). Therefore, the Minister could not attribute further consequences to that status beyond what Parliament had expressly intended.

The Court found that as the Minister had incorrectly exercised his discretion under cl 866.226, he did not consider and determine the plaintiff's application according to the law. It was not appropriate to allow the Minister a further opportunity to consider the plaintiff's application because the only basis for the Minister's decision was the cl 866.266 criterion, which was legally wrong. Further, there had been no relevant change in the plaintiff's circumstances which warranted his application being reconsidered.

One further issue before the Court was the effect of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). The amending Act came into operation after the plaintiff had made his application for a visa and sought to convert certain applications for Protection (Class XA) visas into applications for Temporary (Class XD) visas. The Court rejected the defendant's argument that the plaintiff's application had been converted into an application for a Temporary (Class XD) visa because the plaintiff's application fell outside the circumstances in which an application was to be converted under the amending Act.

The Court issued a writ of peremptory mandamus requiring the Minister to grant the Plaintiff a Protection (Class XA) visa.

Commentary

In this case the High Court has stated that the consequences for individuals who are given "unauthorised maritime arrival" status under the Act have been exhaustively defined in the Act. This means that the consequences cannot extend to the refusal of a valid application for a protection visa on the basis (either wholly or partially) of the applicant's status as an "unauthorised maritime arrival".

The full decision can be found online here:
http://www.austlii.edu.au/au/cases/cth/HCA/2015/3.html

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INTERNATIONAL HUMAN RIGHTS CASE NOTES

Domestic violence victims unable to sue police in negligence: UK Supreme Court

Michael and others v The Chief Constable of South Wales Police and another [2015] UKSC 2

Summary

The United Kingdom Supreme Court has rejected a challenge to the long-standing rule that the police owe no duty of care in negligence in the context of protecting victims from potential future crimes.

Facts

The background facts to the case are shocking. On 5 August 2009, at 2.29am, Ms Michael dialled 999 from her mobile phone. She told the call handler at the Gwent Police call centre that her ex-boyfriend was aggressive; he had just turned up at her house; he had found her with another man; he had bitten her ear really hard; he then drove the other man home with Ms Michael's car but, before doing so, told her that he would return to hit her; that he was going to be back "any minute literally" and, according to the recorded transcript of the conversation, that her ex-boyfriend had told her "I'm going to drop him home and (inaudible) [fucking kill you]".

The call handler later gave evidence that she had heard "hit you" rather than "kill you". Gwent Police graded the call "G1"; it required an immediate response. The call handler immediately called South Wales Police, in whose area Ms Michael lived, and summarised their conversation. No mention was made of a threat to kill. South Wales Police graded the call "G2"; officers should respond within 60 minutes.

Ms Michael's home was five or six minutes from the nearest police station.

Ms Michael called 999 again at 2.43am. Following a scream from Ms Michael, the line went dead. South Wales Police were informed immediately and officers arrived at Ms Michael's address at 2.51am. They found that she had been brutally attacked, stabbed many times and was dead. Her attacker subsequently pleaded guilty to murder and was sentenced to life imprisonment.

The Independent Police Complaints Commission later seriously criticised both police forces for individual and organisational failures.

Claims

Ms Michael's parents and children claimed against the two police forces for damages in negligence and under the *Human Rights Act 1998* (UK), invoking the right to life under article 2 of the European Convention on Human Rights. The police forces sought a strike out of these claims or summary judgment. At first instance, HHJ Jarman QC refused to strike out or give summary judgment but on appeal the Court of Appeal held that unanimously there should be summary judgment for the police forces on the negligence claim but, with Davis LJ dissenting, the article 2 ECHR claim should proceed to trial.

Supreme Court judgment

The Supreme Court upheld the Court of Appeal judgment by a 5-2 majority. Lord Toulson gave the lead judgment, with whom Lord Neuberger, Lord Mance, Lord Reed and Lord Hodge agreed. Lady Hale and Lord Kerr dissented.

The Supreme Court considered two possible principles put forward as a basis for the police to be liable in negligence in the context of protecting victims from potential future crimes.

First, the so-called “Interveners’ Liability Principle” (because it was advanced by the interveners Refuge and Liberty), that the police owe a duty of care in negligence where they are aware or ought reasonably to be aware of a threat to the life or physical safety of an identifiable person, or member of an identifiable small group.

Second, “Lord Bingham’s Liability Principle” (from Lord Bingham’s dissenting judgment in *Smith v Chief Constable of Sussex Police* [2009] AC 225, heard together with *Hertfordshire Police v Van Colle*), that the police owe a duty of care in negligence where a member of the public gives the police apparently credible evidence that a third party, whose identity and whereabouts are known, presents a specific and imminent threat to his life or physical safety.

The majority

Lord Toulson’s judgment contains a comprehensive survey of case law on the liability of police in negligence, the liability of other emergency services and exceptions to the general rule that liability is not imposed for harm to a claimant caused by the conduct of a third party, including case law from Scotland and the Commonwealth.

The Interveners’ Liability Principle was rejected by the majority for four reasons.

First, because it was hard to see why the duty should be confined to physical injury or death or to particular victims and not others.

Lord Toulson explained:

> It is also hard to see why it should be limited to particular potential victims. If the police fail through lack of care to catch a criminal before he shoots and injures his intended victim and also a bystander (or if he misses his intended target and hits someone else), is it right that one should be entitled to compensation but not the other, when the duty of the police is a general duty for the preservation of the Queen’s peace?

Second, because it is speculative whether a duty would improve the performance of individual officers in domestic violence cases and it was not in the public interest for police priorities to be affected by the risk of being sued. The interveners and the appellants had referred to a substantial body of material about the deep-rooted problem of domestic violence in society, its prevalence and the weaknesses in response to it, as well as the UK’s international law obligations under the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on Preventing and Combating Violence Against Women and Domestic Violence (which came into force on 1 August 2014 – and which the UK has signed but not yet ratified).

Third, because it would have potentially significant financial implications for the police and/or public.

Fourth, because it is not necessary to develop the law of negligence to mirror or go beyond what is required by articles 2 and 3 ECHR. ECHR claims have different objectives from civil actions such as negligence.

Lord Bingham’s Liability Principle was rejected for the additional reasons that it would be unsatisfactory to draw dividing lines according to who reports the threat, whether the threat is credible and imminent or credible but not imminent, and whether the whereabouts of the threat-maker are known or not, and whether the threat was aimed at physical injury or not. It was for Parliament to determine the existence and scope of such a compensatory scheme.

The Supreme Court held that it was untenable that what the call handler said to Ms Michael gave rise to an assumption of responsibility. The call handler gave no promise as to how quickly the police would respond and did not advise or instruct her to remain in her house.

The question of whether the call handler should have heard Ms Michael say that her ex-boyfriend was threatening to "kill her" was a question of fact to be investigated at the trial of the Article 2 claim.

Dissenting judgments

Lord Kerr dissented. He would have allowed the appeal on the basis that there should be recognised a sufficient proximity of relationship, such as to create a duty on the police in negligence, where the following circumstances arise:

- There is a closeness of association between the claimant and the defendant, such as where information is communicated to the defendant;
- The information should convey to the defendant that serious harm is likely to befall the intended victim if urgent action is not taken;
- The defendant might reasonably be expected to provide protection in those circumstances; and
- The defendant should be able to provide for the intended victim's protection without unnecessary danger to himself.

Lord Kerr considered that on the present facts, there was clearly a sufficient proximity of relationship between the police and Ms Michael. The fundamental principle that legal wrongs should be remedied outweighed the complete absence of evidence to support the claims of dire consequences if liability was found.

Lady Hale also dissented, and supported the analysis of Lord Kerr. In her view the policy reasons said to preclude a duty in a case such as this are diminished by the fact that the police already owe a common law, positive duty in public law to protect members of the public from harm caused by third parties, as well as the existence of claims under the HRA.

Comment

The disappointing majority decision confirms the significant legal hurdles that victims of crime and their families face in the UK when suing police for negligence in failing to prevent harm. Victims still have the option of pursuing compensation by making a right to life claim under article 2 of the ECHR.

In Australia, negligence law in this area has generally followed the UK lead. It is very difficult to establish that police owe a duty of care in a range of situations including alleged failures to prevent harm to victims.

Claims by victims could be made against police under the Victorian Human Rights Charter and ACT Human Rights Act which both protect rights to life and to liberty and security of person. However, under both pieces of legislation, unlike the UK's Human Rights Act, courts cannot award compensation for human rights breaches.

The full text of the decision can be found online here: https://www.supremecourt.uk/decided-cases/docs/UKSC_2013_0043_Judgment.pdf

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CEDAW Committee rules sexual harassment case inadmissible

M S v Philippines, Communication No. 30/2011, UN Doc. CEDAW/C/58/D/30/2011

(16 July 2014)

Summary

A sexual harassment case was recently declared inadmissible by the Committee on the Elimination of Discrimination against Women. The complaint concerned the use of gender stereotypes by the domestic courts in the author's case, amounting to a breach of Articles 5 and 11 of CEDAW. Despite clear examples of gender stereotypes being considered by the domestic courts, the majority of the Committee held there was no evidence that those stereotypes had negatively impacted the domestic court's decision. The dissenting Committee Member found a breach of CEDAW had been substantiated but that the claim was inadmissible as the author had delayed in bringing the case to the Committee.

Facts

The author of the communication, M.S, was the Director of the Market and Communication Department at a Filipino telecommunications corporation from 16 August 1998 to 30 June 2000. She was supervised by Mr S and his superior was Mr G, the Chief Operating Officer of the company.

M.S alleges that Mr G assaulted her on various occasions between May 1999 to November 1999. All the alleged assaults took place at social events arranged by the corporations or at parties hosted by fellow employees of the corporation. The most serious alleged assault took place at a party hosted by a fellow employee in November 1999. The alleged assaults took place in view of other attendees of the party and involved Mr G:

- pinning M.S against the end of a sofa and holding her hand to massage it under the guise of looking at a ring;
- poking M.S's vagina several times whilst she was pinned against the edge of the sofa; and
- forcing M.S to dance with him and groping her breasts and buttocks.

After the incident, M.S discussed with Mr S her intention to file a complaint against Mr G. Mr S advised her against taking such action. After this conversation with Mr S, M.S. reported that Mr S' attitude towards her changed. He was hostile to her in interdepartmental meetings, stonewalled her ideas and was critical of the performance of M.S's department. M.S's performance rating, which was given by Mr S, dropped from 90% to 60%. In June 2000 M.S resigned and claimed she suffered from depression following her experience at the company. Despite this, in January 2001 M.S retracted her resignation and sought employment at the company but her request was denied by Mr G.

M.S filed criminal charges of sexual harassment and lasciviousness against Mr G and Ms S with the National Bureau of Investigation in May 2001. The charges were initially rejected in September 2002 by the Office of the City Prosecutor, but after an appeal merit was found in the allegations against Mr G in 2003. The case was ultimately dismissed in 2004 after Mr G passed away.

M.S also commenced proceedings for unlawful dismissal against Mr S, Mr G and the company in 2001 with the Labour Arbiter. The Labour Arbiter dismissed her claim in 2003 on the basis that she voluntarily resigned and that there was insufficient evidence that she was forced to resign due to sexual or professional harassment. Her appeal of Labour Arbiter's decision was rejected by the National Labour Relations Commission. An appeal to the Court of Appeal was successful. The Court of Appeal found that the Labour Arbiter and Commission had "conveniently ignored" various circumstances and that the sexual harassment had led to a form of constructive dismissal. The Court of Appeal's decision was overturned by the Supreme Court, and a motion to reconsider was rejected.

Crucial to the decision of the Supreme Court to overturn the decision of the Court of Appeal was its conclusion that the M.S's account of the events did not confirm with "common human experience" because:

- the alleged assaults occurred in crowded venues and there were no other witnesses to the alleged events;
- M.S did not slap or walk away from Mr G after he assaulted her on the sofa and instead danced with him and failed to "raise hell" after he groped her breasts and buttocks; and
- M.S failed to raise the assaults in her resignation letter.

At one point the Supreme Court stated: 'her resignation would have been an effective vehicle for her to raise it (the harassment). Instead she even thanked the petitioner "for the opportunity of working with [him]." Again this is contradictory to human nature and experience. For if indeed the petitioner [Mr S.] was her sexual harasser, she would have refrained from being cordial to him on her resignation.' This evidence was provided by way of a court transcript.

M.S filed the communication against the Philippines with the Committee on the grounds that by relying heavily on "gender myths and stereotypes" in determining that her conduct did not conform with "common human experience", the Supreme Court breached her rights under the Article 1, 2(c), 2(f), 5(a) and 11(1)(f), being the rights to protection from harmful stereotypes and the right to employment, and safe and healthy working conditions.

The State, in its brief reply, defended the use of the test of 'common human experience'. The State indicated that the test was consistently used across the Philippines and that the evidence provided by M.S lacked sufficient substance and credibility. At no point did the State's reply engage with the examples of gender stereotyping evident in the Supreme Court's transcript.

Decision

Under the Optional Protocol, a communication first has to be sufficiently substantiated before the Committee will consider the merits of the case.

A majority of the Committee gave a short judgment and dismissed the communication on the basis it was inadmissible under Article 4(2)(c) of the Optional Protocol for not being "sufficiently substantiated".

In determining that the Communication was inadmissible, the majority relied on the State's argument that the Supreme Court ruling was based upon the fact that the author's complaint lacked substance and credibility. The majority stated that it was the role of national courts to evaluate the facts and evidence in a particular case, unless it could be established that this evaluation was biased or based on gender harmful stereotypes. The majority concluded that the decision of the Supreme Court did not suffer from these defects, accepting the views of the State in their entirety. The majority held that even if the decision was imbued with gender based

discrimination, the author had not demonstrated that the gender stereotypes negatively affected the Supreme Court's assessment of the facts and the outcome of the trial.

Committee member Patricia Schulz dissented. Ms Schulz found that the communication was "sufficiently substantiated" and that there was evidence of gender stereotyping in the Supreme Court's judgment. In particular, Ms Schultz stated that to suggest that all woman would react to an assault in the same was a gender stereotype. She stated that not all women would react to an assault by slapping the assailant and "raising hell", particularly if the assailant was a superior and the assault occurred in the presence of colleagues. Further, not all women would choose to refer to an assault in their resignation letter.

Ms Schultz criticised the majority for failing to accept the evidence of the author, particularly given the fact that the State had neither discussed nor refuted those claims. As the State had failed to provide evidence or argument to the contrary, Ms Shultz held she could follow the reasoning of M.S. regarding the use of gender myths by the Supreme Court and the sexism of the reliance on the "so-called 'human experience'". Ms Shultz held that the use of these amounted to a lack of a fair trial, lack of a remedy and a failure to provide legal protection on an equal basis with men.

Ms Schultz ultimately dismissed MS's communication under Article 4(2)(d) of the Optional Protocol as an "abuse of the right to submit a communication" because it took MS 5 years from the Supreme Court's decision to commence the communication, without a reasonable excuse. Ms Shultz then called for the Committee to institute a one year limitation period for CEDAW complaints to be submitted.

Commentary

The case highlights the difficulties that still exist, even at the UN level, in obtaining legal recognition of gender based discrimination and harassment.

The case ultimately rested on whether the Supreme Court relied upon gender stereotypes in forming the view that M.S's evidence lacked substance and credibility. In evaluating a witness's evidence and credibility, judges and juries will inevitably draw upon their own assumptions and experiences as to how people 'would' and 'should' act in certain situations. Such assumptions are often coloured by gender stereotypes, myths and sexist attitudes. Seemingly neutral tests such as 'common human experience' can themselves be a form of discrimination as they assume there is a universal ungendered human experience.

The use of such stereotypes and myths were clearly present in the Supreme Court decision, as found by Ms Shultz. However, the majority accepted the assertion by the State that the Supreme Court's decision was not based on gender stereotypes, but rather was based on the lack of substantiation of her claims.

The full decision can be found online here:
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2f58%2fD%2f30%2f2011&Lang=en

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CEDAW Committee rejects application but confirms broad scope of Convention

N v The Netherlands, Comm. No. 39/2012, UN Doc. CEDAW/C/57/D/39/2012 (2014)

Summary

The author claimed that by rejecting her asylum claim and forcing her return to Mongolia, the Netherlands had exposed her to gender-based persecution and therefore breached articles 1, 2(e), 3 and 6 of Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Committee declared the complaint inadmissible on the grounds that the author was unable to substantiate her allegations.

Facts

The author of the communication, N, is a Mongolian citizen. In Mongolia she worked in a hotel and as a housekeeper for Mr L who repeatedly sexually and physically abused her. Twice she complained to police who questioned Mr L but later released him. Mr L told N that he had bribed the police and they would not protect her because of his wealth and influence. On one occasion, N escaped and sought refuge with a friend but two months later two men forcibly returned her to Mr L.

In June 2009, after escaping Mr L once again, N fled to the Netherlands. Her claim for asylum was rejected by the Immigration and Naturalisation Service on the basis that while her testimony was credible she had failed to show that Mongolia was unable or unwilling to protect her. Her appeals against the decision were rejected.

N brought a complaint to the Committee asserting that the Netherlands, in rejecting her claim for asylum, had failed to protect her from gender-based violence, sexual slavery and physical abuse by her former employer. She submitted that in doing so the state had violated articles 1, 2(e), 3 and 6 of CEDAW.

Decision

The Committee addressed the following questions in determining the admissibility of N's complaint;

- whether N had exhausted all domestic remedies in the Netherlands;
- whether the claim was admissible *ratione materiae*; and
- whether N's allegations could be substantiated.

The Committee held that N's reliance on *non-refoulement* in her domestic asylum application was sufficient to exhaust all domestic remedies in the Netherlands. Under the *non-refoulement* principle states must not expel or return asylum seekers to territories where they risk persecution. The Committee noted that persecution in this context extends to gender-related persecution even where it occurs outside the sending state's territory. Moreover, it found that gender-based violence is a form of discrimination against women. It was therefore sufficient for N to base her claim on *non-refoulement* even if, as the Netherlands asserted, she did not specifically raise gender-based discrimination.

The Committee held that it had subject matter jurisdiction (the communication was admissible *ratione materiae*) on the basis that gender-based violence constitutes discrimination against women. The Netherlands had asserted that the claim was inadmissible because N sought to broaden CEDAW to encompass *non-refoulement* and hold states responsible for extraterritorial

violations. The Committee did not accept this argument and held that it was competent to assess the claim.

The question then arose as to whether N's allegations could be substantiated. Article 4(2)(c) of the Optional Protocol to CEDAW requires that this question be answered affirmatively as a matter of admissibility. The Committee had to decide if there was sufficient information to determine whether N would face a "real, personal and foreseeable risk of serious forms of gender-based violence" upon return to Mongolia.

N had submitted that the Netherlands had violated articles 1, 2(e), 3 and 6. The Committee held that her claim under article 3, relating to the advancement of women, was not substantiated. Further, there was insufficient information to substantiate her claim under article 6 which addresses trafficking and prostitution.

Article 2(e) refers to states' responsibility to "take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise". Discrimination is broadly defined in article 1. The Committee found that N had failed to substantiate her claims of violation for the following reasons:

- N's statement that she "feared" authorities would not protect her against Mr L did not sufficiently demonstrate that she would face a "real, personal and foreseeable risk" of this occurring.
- N failed to explain why Mr L presented an ongoing danger to her despite five years having passed.
- N failed to demonstrate a "real risk" that Mongolian authorities would be unable to protect her. She also failed to explain how they had failed to do so in the past.
- N failed to explain why she had not further pursued her complaints with police or prosecuting authorities in Mongolia.
- There was no evidence that Mongolian authorities had "acted in bad faith or had failed to react promptly to the author's complaints".
- Mongolia is a party to CEDAW and its Optional Protocol.

The Committee therefore held that N had not demonstrated that her personal circumstances created a real risk of persecution, nor had she substantiated her claim that Mongolia lacked an "effective legal system … capable of establishing, prosecuting and sanctioning Mr. L" and protecting her.

Commentary

This decision is interesting as the author's primary complaint was based on the principle of *non-refoulement*, which is enshrined in other international conventions such as the Refugee Convention and the Convention Against Torture (which also has an individual complaint mechanism), but is not expressly included in CEDAW.

The Committee's declaration that the complaint was inadmissible rested on the author's failure to provide sufficient information. Importantly, the Committee confirmed its jurisdiction to determine complaints against a state even where another CEDAW state party is primarily responsible for the violations. The fact that the author could have lodged a claim against Mongolia did not remove the Committee's jurisdiction in a communication against the Netherlands.

However, the fact that Mongolia is a party to CEDAW was a factor that went against N's claim that the state was unable or unwilling to protect her. Despite evidence of corruption, low levels of prosecutions for domestic violence, the absence of effective legal recourse and an entrenched

failure to protect women in Mongolia, the Committee held that N had not substantiated her allegation. Therefore, while there is scope to bring a complaint to the Committee against a sending country for rejection of an asylum application, there is a high threshold to show that the country of origin is unable or unwilling to protect the applicant.

The full text of the decision can be found online here.

Erika Codognotto *is a Law Graduate at King & Wood Mallesons.*

Failure to provide minimum standard of maternity leave unlawful

Elisabeth de Blok et al. v. the Netherlands Communication No. 36/2012, UN Doc CEDAW/C/57/D/36/2012 (17 February 2014)

Summary

The UN Committee on the Elimination of Discrimination against Women found that the Netherlands' temporary failure to provide an adequate maternity leave scheme between 2004 and 2008 involved a breach of its obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

The case raises interesting questions about the minimum standard of maternity leave required at international law; the ability of a state to meet its human rights obligations through the private sector; and the relationship between maternity leave and gender discrimination laws.

Facts

The applicants were six self-employed women from the Netherlands, who gave birth between June 2005 and March 2006. Prior to 1 August 2004, the Netherlands had a scheme of mandatory public incapacity insurance for self-employed workers. Part of that scheme provided, at no extra cost, for a maternity allowance for at least 16 weeks around the date of delivery.

On 1 August 2004, the Netherlands passed legislation which denied self-employed persons access to that scheme, because it considered that the spirit of independent entrepreneurship entailed the acceptance of the risk of loss of income, which could be more appropriately covered by the private sector. By 2008 this reasoning had fallen out of favour in respect of maternity benefits, and the aptly-entitled *Act on Benefits in respect of Pregnancies and Delivery for Self-Employed Persons* restored them.

For those who gave birth between 1 August 2004 and 4 June 2008, only the private sector provided insurance for loss of income associated with maternity leave. Nearly all of those insurance contracts included a two year qualifying period before maternity leave benefits could be claimed.

Five of the six applicants decided not to take out private insurance, either because of the high premiums required or because of the two year qualifying period. One applicant did take out insurance but was (at least initially) denied maternity benefits on account of the qualifying period.

The applicants argued that the repeal of the mandatory public incapacity insurance scheme left them with no protection against loss of income on account of maternity leave, and that this amounted to a violation of the Netherlands' obligation in article 11(2)(b) of CEDAW to "take appropriate measures … [t]o introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances". They accordingly asked the Committee to recommend that the Netherlands compensate them for the disadvantage they had suffered.

In response, the Netherlands argued:

- that the provisions of CEDAW concerning maternity leave applied only in respect of women in paid employment, and not self-employed women;
- that when taking "appropriate measures" to introduce a maternity leave scheme, those measures may involve a public scheme or be left entirely in the hands of the private sector; and
- that the fact that the authors found the private sector conditions (including the two year qualifying period) less attractive than a public scheme did not mean that the authorities had failed to make an adequate provision of maternity leave.

Decision

The Committee affirmed that the obligations in article 11 are directly binding on states and not merely aspirational, and that a failure to provide maternity leave benefits would amount to "direct sex and gender-based discrimination against women."

After making short shrift of the Netherlands' argument that the maternity leave provisions do not apply to self-employed women, the Committee concluded that, "by abolishing the initially existing public maternity leave scheme without putting in place an adequate alternative maternity leave scheme to cover loss of income during maternity leave immediate available to the self-employed [applicants] when they gave birth, the State party failed in its duties under article 11(2)(b) of the Convention."

It accordingly recommended that the Netherlands provide the complainants with "appropriate monetary compensation", because the 2004 reforms "did negatively affect the authors' maternity leave benefits … if compared with those existing under the previous public coverage scheme."

Commentary

Unfortunately the Committee's conclusion raises more questions than it answers.

Minimum Standard of Maternity Leave & Compensation

The Committee leaves unaddressed the question of what an adequate alternative maternity leave scheme is, finding merely that as the complainants had been left with no alternative options, there had been a breach.

What then is the appropriate level of compensation? Is it fixed by reference to the previous public coverage, or to the minimum requirements of article 11(2)? The complainants sought an amount in accordance with the public scheme prior to 2004. The Netherlands had argued, however, that the private sector approach was sufficient, and received no real explanation of why it wasn't. The Committee essentially leaves the calculation of compensation to the Netherlands, with very little guidance.

Use of Private Sector

Given the Netherlands had argued that leaving the provision of maternity benefits in the hands of the private sector was an acceptable way of meeting its obligations, does the Committee's conclusion here suggest that the private sector approach is not an 'adequate alternative'? The Committee's reasoning is not entirely clear. If the Government had implemented transitory measures to move self-employed women to private insurance, or if the private sector had offered insurance without the qualifying period, would there then have been no breach?

The Committee did not directly criticise the use of the private sector, and thus it is possible that that approach can suffice. However, the words of article 11(2)(b) indicate that the obligation falls

on the state to "take appropriate measures … [t]o introduce maternity leave with pay or with comparable social benefits." If the private sector approach is appropriate, then the scope of article 11(2)(b) and the "appropriate measures" required to be taken by the state may actually be incredibly limited.

The full decision can be found online here: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2f57%2fD%2f36%2f2012&Lang=en

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NOTICEBOARD

National Close the Gap Day

The Close the Gap Campaign Steering Committee is aiming to have 1500 registered events for National Close the Gap Day (NCTGD) on 19 March 2015. In order to achieve this goal they need your help and support. By simply spreading the word and/or coming up with your own event we could have the largest NCTGD in history. Details and registration here.

Lesbian, Bisexual & Queer Women's Health Conference

Melbourne, Friday 27 March 2015

The VAC in collaboration with Rainbow Network invite you to attend the free Lesbian, Bisexual & Queer Women's Health Conference. The conference will feature special guest MC Kelly Parry along with a range of speakers from beyondblue, the Victorian Aids Council and Gay & Lesbian Health Victoria. This conference aims to build the capacity of those working to improve the health and wellbeing of lesbian, bisexual and queer women. In doing so, you'll hear from a range of speakers who will share research and practice wisdom regarding service considerations when supporting lesbian, bisexual and queer women. Details and registration here.

Baany to Warrna Ngaree: Water to Water Festival

Mornington Peninsula, Victoria, Saturday 21 March 2015

The Water to Water Festival is an Indigenous music and cultural festival on Boon Wurrung country featuring the Traditional Pitjantjatjara Man from the Australian Central Desert, Frank Yamma and Ella Hooper along with many others.

The Festival promotes cross-cultural awareness, bringing Indigenous and non-Indigenous people together in a vibrant, family-friendly outdoor event where Indigenous music, art, dance and culture will be showcased. Bring your picnic rug, your family, immerse yourself in culture and enjoy a feast of local and interstate Aboriginal and Torres Strait Islander performances and an array of children's activities in a beautiful natural outdoor amphitheatre.

Details and tickets available here.

Job: Victorian Equal Opportunity and Human Rights Commission

The VEOHRC is seeking a manager to lead the provision of its education and consultancy.

Jobs: Justice Connect

Justice Connect is looking to recruit a Legal Administrator for its Homeless Law and Seniors Law divisions.

Jobs: Asylum Seeker Resource Centre

The Asylum Seeker Resource Centre is currently looking to fill a number of legal and support positions in Melbourne.

Right Now Radio

The latest edition of Right Now Radio in now available as a pod cast here. In this edition, the crew discuss data retention with Senator **Scott Ludlam**, talk with paediatrician **Elizabeth Elliott** about children in detention, hear from Reprieve's Ed Butler about the death penalty, and chat about a social media musical.

A COFFEE WITH... SAMAH HADID

Samah Hadid *is an international human rights and social justice campaigner, as well as an advocacy specialist. Most recently she was the Australia Director for The Global Poverty Project. She has previously completed a fellowship with the UN Office of the High Commissioner for Human Rights and selected as the Australian Youth Representative to the UN in 2010. Editor at large of Right Now,* ***Andre Dao****, recently caught up for a chat.*

What motivated you to become a human rights advocate? And what keeps you going?

Growing up as part of a community and minority group that faced direct and indirect discrimination certainly opened my eyes to injustice and disadvantage in Australian society. Through advocating for the rights of my community and against racism, I was also made aware of the broader and deeper levels of human rights violations taking place nationally and internationally. I suppose it was at that moment, during my adolescence, when I started campaigning on human rights issues.

Meeting and working with human rights advocates worldwide, especially women human rights defenders gives me the inspiration I need to keep going. It isn't always easy defending human rights in certain parts of the world, particularly the Middle East where I currently work, and seeing friends detained for exercising their right to protest is tough but the determination and unwavering spirit of activist and civil society actors keeps me motivated.

What was it like to be a young person participating in a huge global organisation like the UN?

Confronting... not for me but for the diplomats I worked with! I don't think the diplomatic corps were used to seeing an assertive young Muslim Australian woman negotiating across the table, so suffice to say I was a confusing character. Interestingly, for a very long time I aspired to work in the corridors of power at the UN, and when I finally got there I quickly realised how disconnected this institution was from grassroots struggles and human rights issues. I remember negotiating a human rights resolution for the Third Committee [which focuses on social, cultural and humanitarian matters], it was at the end of a long day of debating over semantics, and I turned to look outside to see a protest near the UN building. I realised then and there that

perhaps my role was to be among the protestors and civil society pushing for stronger action from world leaders and mobilising the public which is essential to social movements.

You're quite active on social media. How do you see the relationship between social media and human rights advocacy?

Social media is a vital tool, a modern day means for advocacy but it doesn't replace the need for substantive content and smart strategy. I saw first-hand the power of social media in mobilising masses and projecting messages far and wide during the Arab uprisings, but behind that was a bold call to action and rigorous offline mobilisation – these elements are still key. Of course, the added benefit of social media in our age is that governments can no longer hide or downplay human rights violations in their countries as these abuses are shared and spotlighted worldwide thanks to this platform.

What's the greatest challenge facing global humanitarian programs?

Tough question. There are many challenges facing the humanitarian system but chief among them is the lack of resources and funding to address the intensity and number of crises currently facing parts of the world. The funding is simply not keeping up with the humanitarian need. Therefore, more than ever an emphasis on conflict prevention and tackling root causes of conflict is necessary to prevent humanitarian crises – this is where protection and promotion of human rights is key.

What are you proudest of in your professional career so far?

Working with very powerful feminists and civil society actors in Egypt and the broader Middle East and North Africa region to tackle sexual violence in fragile states has been a huge learning experience. Seeing the impact of our work in spite of the immense barriers to advocacy in the Middle East was really amazing. And so to work with dedicated campaigners and advocates on this issue, in this part of the world, has served as one of the most meaningful periods in my career and my activism as well.

You can follow both Samah and Andre on Twitter at @samahhadid & @AndreHuyDao

RECENT HRLC MEDIA HIGHLIGHTS

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- Amy, Remeikis, Queensland youth justice system breaches international law: human right lawyers, The Brisbane Times, 13 March 2015
- Brendan Foster, New WA protest laws breach human rights: lawyer, WAtoday, 12 March 2015
- Daniel Webb on PM Agenda, Australia 'breaching convention' against torture, Sky News 10 March 2015

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

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

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

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