Human Rights Law Centre

Edition 80, December 2012

RIGHTS AGENDA

Monthly bulletin of the Human Rights Law Centre

OPINION: PROPOSED ANTI-DISCRIMINATION REFORMS WILL STRENGTHEN EQUALITY

HRLC equality law expert **Rachel Ball** joins with investment banker and business leader **Simon McKeon** AO in analysing the government's proposed Human Rights and Anti-Discrimination Bill 2012.

NEWS: NAURU CAMP "CRUEL, INHUMANE AND DEGRADING"

Amnesty International has labelled the conditions at the facility as cruel, inhumane and degrading and is urging the Government to shut it down.

CASE NOTES:

The European Court of Human Rights has held that the UK's failure to protect a bus driver against unfair dismissal based on his racist political activities was unacceptable.

IF I WERE ATTORNEY-GENERAL…

Ngila Bevan from People with Disability Australia looks at the need to prioritise political participation and active involvement in the policy process.

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HUMAN RIGHTS WEEK APPEAL

When you make a donation to the Human Rights Law Centre during Human Rights Week it will be doubled!

To celebrate Human Rights Week 2012, our generous law firm partners, King & Wood Mallesons, DLA Piper and Allens, together with Oak Foundation, are matching dollar for dollar every donation made from 10 to 16 December.

So make the most of this remarkable opportunity to **double your donation** and stand with us as we work for individual justice, government accountability and systemic human rights reform.

Happy International Human Rights Day!

WELCOME TO OUR NEW EXECUTIVE DIRECTOR

Leading human rights advocate appointed to head Human Rights Law Centre

Leading human rights advocate and lawyer, Hugh de Kretser, has been appointed to head the Human Rights Law Centre. Mr de Kretser, who is currently the Executive Officer of the Federation of Community Legal Centres, will take up the appointment in February 2013.

“We are delighted that Hugh has accepted our offer to lead the Human Rights Law Centre through its next stage of development,” said Ros Grady, Chairperson of the HRLC.

“Hugh was selected from a highly competitive field of international candidates based on his outstanding track record in human rights advocacy, law reform and organisational development. His vision for the HRLC will expand the reach and impact of our work, achieving justice for individuals, strengthened government accountability and systemic human rights reform,” said Ms Grady.

Accepting the appointment, Mr de Kretser said that “I’m thrilled to be taking on this new role and building on the great work of the HRLC promoting and protecting human rights across Australia.

“I look forward to working to advance the human rights of all Australians, particularly in the HRLC’s priority areas of Indigenous rights, violence against women, detainee rights and police accountability,” said Mr de Kretser.

Mr de Kretser has been Executive Officer of the Federation of Community Legal Centres since 2007, prior to which he worked as a Manager of Brimbank Melton Community Legal Centre (2004 to 2007) and an employment lawyer with Mallesons (1999 to 2004). He served as a Board member of the Human Rights Law Centre from 2005 until 2007 and has also held statutory appointments as a Director of the Victorian Sentencing Advisory Council and a Commissioner of the Victorian Law Reform Commission.

Mr de Kretser replaces the outgoing Executive Director, Phil Lynch, who has accepted a position as Director of the International Service for Human Rights in Geneva after seven years leading the HRLC.

Welcoming Mr de Kretser’s appointment, Mr Lynch said “Hugh comes to the HRLC with a well deserved reputation as one of Australia’s leading human rights advocates and over a decade’s experience working to improve access to justice and uphold the rule of law.”

"Working alongside a highly engaged Board, supported by an exceptional staff team, and sustained by an expanding donor and supporter base, I look forward to watching Hugh catapult the HRLC to a new level of human rights impact," Mr Lynch said.

OPINION

Proposed anti- discrimination reforms will strengthen equality

The days of serious arguments against equality are over. The idea that a woman might miss out on a promotion because of her sex, or be denied access to goods and services because of her race is abhorrent to most Australians.

Unfortunately, that doesn't mean these things don't still happen, which is why effective anti-discrimination laws are a vital part of our legal framework.

Our current anti-discrimination laws were passed and amended in dribs and drabs over 30 years. There are some aspects that work well and many others that don't. There is certainly a need to reconcile the laws, remove unjustified inconsistencies and strengthen and modernise protections.

The Anti-discrimination and Human Rights Bill 2012, released by the Government on Tuesday, makes significant strides in the right direction, but also misses some important opportunities.

The Bill consolidates Commonwealth laws covering discrimination on the basis of race, sex, disability and age, and adds new protections from discrimination on the grounds of sexual orientation and gender identity. It also strengthens protections against workplace discrimination on the basis of other attributes, including religion and political opinion.

Importantly, the Bill simplifies the law and removes some of the unnecessary complexities that prevent individuals from accessing justice when they have experienced unfair discrimination. These same amendments will also make it easier for business and service-providers to understand and comply with their legal obligations. For example, clarifying the definition of discrimination, introducing a shifting burden of proof and requiring parties to pay their own legal costs constitute substantial improvements on the current regime.

These improvements are needed because all too often discrimination complaints veer away from ascertaining what happened and why and are instead consumed by unhelpful and costly legal arguments about technical, and often arbitrary, definitional and evidentiary requirements.

On the downside, the Bill maintains some of the unjustified carve-outs in existing laws, such as the extremely broad exception that allows religious bodies to discriminate on the basis of sexuality, marital status, sex and other attributes as long as the discrimination is necessary to avoid injury to religious sensitivities. It also misses the opportunity to include new protections against unfair discrimination on the basis of domestic violence and irrelevant criminal record.

Most significantly, the Anti-discrimination and Human Rights Bill maintains an essentially reactive, complaints-based system. This individualised approach needs to be supplemented by mechanisms that can respond to systemic issues and prevent discrimination from happening in the first place. For example, a stand-alone right to equality before the law could be used to address the source, rather than the symptoms, of discrimination.

Of course, laws alone can't eliminate unfair discrimination. Improved community attitudes and social and institutional structures are also required to effect real change. However, a strong law can set authoritative standards, perform an educative function and provide a mechanism for redress for victims of discrimination.

We've seen the damage that flows from discrimination and there's abundant evidence demonstrating that equality of opportunity contributes to more cohesive, prosperous and healthy societies.

From a business perspective, the prevention of discrimination and harassment can lead to improved efficiency and productivity. Clearer laws also make compliance more straightforward. From a human rights perspective, protection from discrimination and the promotion of equality is fundamental to our inherent dignity and the realisation of our full potential.

The Government's Bill recognises that we've moved beyond the time when anti-discrimination laws were perceived as an insult to liberty or a threat to the economy. Ultimately, it's in everyone's interest that we do our best to prevent discrimination from occurring in the first place and to ensure accountability and remedies for victims.

***Simon McKeon** is an investment banker, business leader and 2011 Australian of the Year. He has held roles as Executive Chairperson of Macquarie Group in Melbourne, Chairman of CSIRO and Chairman of Business for Millennium Development.*

***Rachel Ball** is the Director of Advocacy and Campaigns at the Human Rights Law Centre.*

This piece first appeared on ABC The Drum.

NEWS IN BRIEF

Nauru camp "cruel, inhumane and degrading"

Following a three day inspection of the migration detention facility on Nauru, Amnesty International has labelled the conditions at the facility as cruel, inhumane and degrading and is urging the Government to shut it down. The camp has been described as a miserable place in almost every way imaginable by a visiting journalist, while mental health professionals have raised questions about the impact of conditions, including frequent flooding, on the detainees' mental health.

Australian mainland to be excised from migration zone

The Government has introduced legislation to excise the Australian mainland from the migration zone, an idea that Labor MPs once blasted as shameful and xenophobic. Two Liberal MPs, Judi Moylan and Russell Broadbent, voted against the legislation describing it as "a blight on our national integrity". Meanwhile, Tony Abbot has announced that a Coalition government would cut Australia's humanitarian refugee intake by more than 6,000 places, contradicting an earlier statement supporting an increase to 20,000 places a year.

Refugees to be refused work rights

Immigration Minister Chris Bowen has announced asylum seekers being processed in Australia who are found to be refugees, could be given five-year bridging visas and refused the right to work. The Greens have accused Labor of trying to revive TPVs by stealth and the United Nations High Commissioner for Refugees has sharply criticised the plan. Labor Senator Doug Cameron says the government risks creating a new underclass.

Australia abstains in vote on UN Palestinian vote

Australia decided to abstain from voting on a resolution before the UN General Assembly which would elevate Palestine's status to that of a non-member observer state. The decision followed a debate sparked by the Labor backbench which forced Prime Minister Julia Gillard to abandon her plan to vote against the upgrade.

Damning findings on Taser death

The NSW Coroner has described the actions of five police officers involved in the tasering of a Brazilian student as "reckless, careless, dangerous and excessively forceful". NSW Police said it would review the use of tasers and would adopt the coroner's recommendations regarding reviews of the use of capsicum spray, handcuffing, restraint and positional asphyxia. Meanwhile a coroner has found no grounds for disciplinary action against north Queensland police officers who tasered a man 28 times.

14 year old tasered by police

The ABC's 7.30 program aired footage of a 14 year old boy being tasered by police in another case that raises questions about whether officers are adhering to operating procedures in their use of the devices.

Yothu Yindi supports constitutional recognition

Speaking before his band's induction into the ARIA Hall of Fame, songwriter and lead singer Mandawuy Yunupingu has called on Australians from all backgrounds to come together for a better tomorrow by supporting constitutional recognition of Indigenous peoples.

Study reveals racial abuse of Aboriginal Victorians

A survey of 755 Aboriginal adults in four Victorian communities, released by VicHealth found more than 70 per cent of respondents were the target of eight or more racist incidents in the past year.

INTERNATIONAL HUMAN RIGHTS DEVELOPMENTS

Commissioner urges international MPs to strengthen protections for world's seniors

The Age Discrimination Commissioner, Susan Ryan, has told the Parliamentary Friends of Seniors and Ageing that she believes there needs to be more protection of older people around the world.

Reporting on her recent presentation at the UN's Open Ended Working Group on Older People, Commissioner Ryan told MP's at parliament House in Canberra that she has been convinced by the case put forward by those UN member States calling for the drafting of a new convention.

"This is an international issue – it goes to Australia's position as a good international citizen," Commissioner Ryan said.

"While, here in Australia, older people have considerable legal and other protections, this is not the case in Africa, the Asia Pacific and South America, where older people without economic or legal protection are vulnerable to violence and neglect," Ms Ryan said.

Ms Ryan said now that Australia had secured a seat on the Security Council, our voice at the UN would be more influential.

"If Australia were to take an official position in support of an international Convention on the Rights of Older people, other currently uncommitted Members may decide to follow our example," she said.

The Parliamentary Friends of Ageing is a bipartisan group of federal MPs set up to address the challenges of Australia's ageing population.

Source: Australian Human Rights Commission

Fighting trafficking is everyone's business – corporations must strive for trafficking-free supply chains

"Trafficking in persons is a global phenomenon which crosses borders, markets and industries," said United Nations Special Rapporteur Joy Ngozi Ezeilo while urging business enterprises around the world to refrain from using trafficked labour, and prevent and monitor the use of such labour by its suppliers.

"In today's globalized world, the risks of human trafficking in supply chains are significant throughout economic sectors and affect all States, whether as source, transit or destination countries," Ms. Ezeilo warned at the end of an international expert meeting in Ankara, Turkey, which gathered over 20 specialists on human trafficking, business and human rights, from the international organizations, trade unions and NGOs, as well as business representatives from leading international corporations.

"Supply chains in the current global economy are often complex and involve multiple layers of suppliers and sub-contractors in various countries and regions, thus hampering the monitoring and reporting process," said the Special Rapporteur.

"States have the primary obligation to protect against human rights violations, such as trafficking, committed by third parties including business enterprises; but businesses must also respect human rights", reaffirmed Ms Ezeilo, recalling the UN Guiding Principles on Business and Human Rights.

The UN expert noted that there is wide international consensus that businesses are uniquely positioned to prevent or mitigate any risk of trafficking in the supply chains. "Businesses are generally aware of human trafficking and may find it morally unacceptable," she said, "yet the connection between trafficking in the supply chains and business is still not well understood".

"Businesses cannot shy away from tackling this issue not only because it amounts to human rights violations, but also because it creates reputational and financial risks to their operations," reiterated Ms. Ezeilo. "However, the solution to the problem of human trafficking in supply chains lies beyond the reach of any single stakeholder."

The international experts gathered in Ankara concurred that a multi-faceted approach and broad partnerships are needed so that every actor can play its part: Governments must take legislative and policy measures and provide for the necessary enforcement framework; businesses must refrain from using trafficked labour and prevent and monitor the use of such labour by suppliers; consumers and the media must shape corporate and Governments' behaviour.

The international expert meeting in Ankara was convened on 12 and 13 November by the UN Special Rapporteur to: (a) deepen discussion around the findings of her latest report to the UN General Assembly, (b) share information on trends, good practices and lessons learnt in addressing trafficking in supply chains among experts in this field, and (c) reach concrete proposals towards achieving real changes that would protect the human rights of trafficked persons as well as prevent and combat trafficking in persons.

Joy Ngozi Ezeilo started her mandate as Special Rapporteur on trafficking in persons, especially in women and children in August 2008. Ms Ezeilo is a human rights lawyer and professor at the University of Nigeria. She has served in various governmental capacities and consulted for various international organizations, and is currently involved in several NGOs, particularly working on women's rights. She has published extensively on a variety of topics, including human rights, women's rights, and Sharia law. Ms Ezeilo was conferred with a national honour (Officer of the Order of Nigeria) in 2006 for her work as a human right defender.

Source: United Nations Office of the High Commission for Human Rights

NATIONAL HUMAN RIGHTS DEVELOPMENTS

Government's anti-discrimination law is fairer and more accessible

A new Bill proposed by the Attorney-General, Nicola Roxon, and the Minister for Finance and Deregulation, Penny Wong, will strengthen protections against unfair treatment and make anti-discrimination laws more effective, accessible and cost-efficient.

"Discrimination harms individuals, families, businesses and communities. The *Human Rights and Anti-Discrimination Bill 2012* will ensure that the law is more effective in preventing and remedying these harms," said Rachel Ball of the Human Rights Law Centre.

The Bill consolidates Commonwealth laws covering discrimination on the basis of race, sex, disability and age. It adds new protections from discrimination on the basis of sexual orientation and gender identity. It also strengthens protections against workplace discrimination on the basis of other attributes, including religion and political opinion.

"These additional protections are welcome and fill gaps in the existing laws," Ms Ball said.

However, Ms Ball said the Bill could do more to actively promote equality.

"In addition to responding to individual cases of discrimination, anti-discrimination laws should also promote equality, especially for disadvantaged communities. More equal communities are more cohesive, productive and healthy," said Ms Ball.

The Bill simplifies the law and removes some of the unnecessary complexities that prevent individuals from accessing justice when they have experienced unfair discrimination. These same amendments will also make it easier for business and service-providers to understand and comply with their legal obligations. For example, simplifying the definition of discrimination, introducing a shifting burden of proof and requiring parties to pay their own legal costs constitute substantial improvements on the current regime.

"It has long been recognised that some of the technical aspects of proving discrimination pose significant, and often insurmountable, obstacles for victims who are, in most cases, the more vulnerable party in a discrimination complaint. It is important that the Bill recognises and addresses many of these issues," Ms Ball said.

"Although the Bill is a substantial improvement on the current laws, the proposed legislation does maintain what is essentially a reactive, complaints-based system, with only a few mechanisms to address systemic discrimination. The Bill would be significantly improved through the addition of new mechanisms to respond to systemic discrimination, such as provision for representative complaints and the inclusion of a right to equality before the law," Ms Ball said.

Systemic discrimination creates and perpetuates disadvantage for whole groups of people and is not effectively addressed through individual complaints.

"Overall, the draft Bill constitutes a long-awaited simplification and modernisation of our anti-discrimination laws, which will benefit employees and employers alike," Ms Ball said.

Parliament launches inquiry into significant human rights concerns raised by offshore processing

The Joint Parliamentary Committee on Human Rights has found that Australia's offshore processing laws raise "significant and complex issues" as to compatibility with human rights and ordered an inquiry into the legislation.

Details of the inquiry have not yet been announced, but are likely to include public hearings.

"These laws were enacted with undue haste and grossly inadequate human rights scrutiny or safeguards," said Phil Lynch, Executive Director of the Human Rights Law Centre.

"The Human Rights Law Centre looks forward to the Committee subjecting the offshore processing laws to the rigorous human rights scrutiny to which they should have been subjected from the outset."

The inquiry comes after the HRLC, together with the Australian Human Rights Commission and the Asylum Seeker Resource Centre, wrote to the Joint Committee in August calling for an inquiry into the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012.* That Act, which provides for asylum seekers arriving by boat to be taken to a third country for processing, raises serious issues as to Australia's compliance with fundamental human rights recognised and protected under the Refugee Convention, the Convention on the Rights of the Child, the Convention against Torture and the International Covenant on Civil and Political Rights.

Following the HRLC request, the Parliamentary Joint Committee on Human Rights called on the Immigration Minister to justify how offshore processing laws are compatible with Australia's international human rights obligations.

The Minister finally responded to the Joint Committee on 15 November 2012. In a letter from the Hon Chris Bowen MP, just made public by the Committee, the Minister says that "I am happy to confirm that the Act complies with Australia's human rights obligations". This is despite the fact that the legislation:

- imposes punishment or penalties on asylum seekers on account of their mode of arrival, contrary to the Refugee Convention;
- enables the government to designate any country as a regional processing country, regardless of the human rights protections afforded in that country either under international or domestic law;
- provides for the removal of unaccompanied children to a regional processing country for a range of reasons considered to be in the "national interest", contrary to the general obligation under the Convention on the Rights of the Child to ensure that the best interests of the child are given primary consideration and the specific obligation to

ensure that asylum seeker children receive all necessary human rights protections and humanitarian assistance;

- provides that the rules of natural justice do not apply to a range of Ministerial decisions, including decisions as to which countries should be designated as regional processing countries, whether an asylum seeker should be sent offshore, and which regional processing country an asylum seeker should be sent to. This directly breaches Australia's obligations under the ICCPR to ensure that, in the determination of rights and obligations, a person must have access to the courts and is entitled to a full and fair hearing; and
- does not provide for any time limit on detention or for any review of detention, in breach of the right to freedom from arbitrary detention under article 9 of the ICCPR. In accordance with the Government's so-called "no advantage" policy, this means that people are likely to be detained for periods of five years and more without any review or remedy.

New Workplace Gender Equality Act lays a strong foundation

The Australian Human Rights Commission and the Sex Discrimination Commissioner, Elizabeth Broderick, have welcomed the passing of the Equal Opportunity for Women in the Workplace Amendment Bill in Parliament.

Ms Broderick says it is a strong step toward both improving women's workforce participation and closing the gender gap in Australia's workforce.

"This is an important piece of legislation that will provide a solid foundation for improving gender equality in employment and in the workplace," Commissioner Broderick said. "It applies to both men and women in the workplace."

To reflect its expanded scope, the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) has been renamed the *Workplace Gender Equality Act 2012* (Cth) and similarly the agency has been renamed the Workplace Gender Equality Agency.

Commissioner Broderick said the principal objects of the Act have been amended to promote and improve workplace gender equality, with specific recognition that equal remuneration and support for family and caring responsibilities are central to improving the workforce participation of women.

"Recognition of equal remuneration in the Act strengthens capacity for closing the gender pay gap," said Commissioner Broderick. "Enabling greater participation of women in the workforce will also make a significant contribution to strengthening Australia's productivity."

Commissioner Broderick said other important elements in the improved legislation include: the development of gender equality indicators and related industry-based benchmarks; a new reporting framework requiring relevant employers to report against gender equality indicators; improvements to the transparency associated with compliance and the consequences of non-compliance; and an extension of the agency's advice and education function to all employers.

"These new measuring and reporting frameworks will strengthen the capacity of the Act and Agency to promote gender equality in workplaces," Commissioner Broderick said.

Source: Australian Human Rights Commission

Human Rights Watch calls on Australia to end offshore transfer of migrant children

The Australian Government should immediately stop transfers of migrant children – including unaccompanied migrant children and child asylum seekers – to offshore processing sites in Manus Island of Papua New Guinea, and Nauru.

On 21 November 2012, Australia transferred 19 people, including four children, to Manus. The asylum seekers, from Sri Lanka and Iran, were the first transfers to Manus since the Australian Government reinstated its offshore processing policy for asylum seekers in August 2012. Under the policy, asylum seekers are transferred outside Australian jurisdiction to facilities on the islands of Nauru and Manus to await processing of their claims.

Australia's policy violates its obligations to children under the Convention on the Rights of the Child, which protects all children in Australia's jurisdiction, including non-citizen children. The Convention requires assessment of "the best interests of the child" in all actions concerning children. The United Nations Committee on the Rights of the Child has interpreted this to mean a comprehensive review of a migrant child's needs for immigration status and basic services by qualified professionals in a friendly and safe atmosphere. Transfer out of Australia's territory without such a determination fails this test, Human Rights Watch said.

The facilities at Manus and Nauru are expected ultimately to have a combined capacity of 2,100 people. Migrants, including children, may have to spend up to five years in Nauru or Manus. The government has also stated that unaccompanied migrant children - who travel without parents or other caregivers - will be among those transferred.

Children's health is at risk on these isolated islands, according to the Refugee Council of Australia. Manus has one of the highest rates of malaria anywhere in the region, as well as other mosquito-borne diseases and relentless heat. Studies published in respected medical journals show that children held for prolonged periods in immigration facilities exhibit increased signs of declining mental health, including, anxiety, depression, and post-traumatic stress disorder.

Children fleeing persecution have the right to seek asylum, and Australia's offshore policies violate that right, Human Rights Watch said. Australia has ratified the 1951 Convention relating to the Status of Refugees, which prohibits parties to the convention from penalising refugees on account of their illegal entry or presence. Asylum seekers who enter Australia illegally, including children, need to be given an opportunity to have their refugee claims heard by a competent body before being forcibly returned. Neither Papua New Guinea nor Nauru yet has the capacity to provide appropriate asylum procedures for children, or legal assistance to unaccompanied migrant children.

Under the new regulations, Australia will transfer unaccompanied migrant children out of their jurisdiction without adequate guardianship procedures in place. For the previous 10 years, unaccompanied migrant children arriving in Australia had become wards of the state. Before the child could leave Australia, the minister for immigration and citizenship would have to give consent in writing. The new regulations reverse this. Teenage children without families, far from home, will be left without anyone looking out for their interests.

"Instead of taking a punitive approach to migrant children who arrive by boat, Australia should ensure that its migration policies protect children's rights," Farmer said.

Source: Human Rights Watch

Amnesty: Nauru camp a human rights catastrophe with no end in sight

Amnesty International has found a toxic mix of uncertainty, unlawful detention and inhumane conditions creating an increasingly volatile situation on Nauru, with the Australian Government spectacularly failing in its duty of care to asylum seekers.

Following a three-day inspection of the facility, Amnesty International researchers found the facility totally inappropriate and ill-equipped, with 387 men cramped into five rows of leaking tents, suffering from physical and mental ailments creating a climate of anguish as the repressively hot monsoon season begins.

“The situation on Nauru is unacceptable. The unlawful and arbitrary detention of these men in such destitute conditions is cruel, inhuman and degrading,” said Amnesty International’s Refugee Expert Dr Graham Thom.

“The climate of uncertainty was debilitating with no information being provided to asylum seekers and clear evidence that this temporary holding facility has been erected in haste, with no consideration for the individuals languishing in such squalid conditions.

“On our final day speaking with the detainees, the downpour was torrential, the site was flooded, tents were leaking – one man’s shoes drifted away as the current ran through the tent. We were also prevented from photographing conditions despite assurances we would be able to do so.”

“The news that five years could be the wait time for these men under the Government’s ‘no advantage’ policy added insult to injury, with one man attempting to take his life on Wednesday night,” said Dr Thom.

Amnesty International is calling on the Australian Government to immediately cease transfers to Nauru as the human rights organisation can see no purpose in holding asylum seekers on Nauru other than penalising them for seeking asylum.

“For those already on Nauru, processing must start immediately, with freedom of movement allowed as envisaged by the Expert Panel so that at least some uncertainty is addressed and these men can live some semblance of a normal life.

“Offshore processing on Nauru and Manus Island will only serve to break vulnerable people in these ill-conceived limbo camps, who have fled unimaginable circumstances,” said Dr Thom.

Amnesty International is also gravely concerned by the Coalition’s proposal to cut the increased humanitarian intake. The human rights organisation believes the only way of preventing asylum seekers from taking dangerous boat journeys to Australia is to provide them with viable alternatives. This includes building the capacity of Australia’s neighbouring countries to respect refugee rights as well as Australia increasing its humanitarian intake.

Once again Amnesty International reiterates that seeking asylum is a fundamental legal and human right. Any attempts to portray their arrival as illegal is grossly misleading.

The full briefing from Amnesty International Australia can be found at online here.

Taser use at crisis point in Australia

Horrifying footage of a young Aboriginal boy being repeatedly Tasered, together with damning Coronial findings into the death of a Brazilian student and a Queensland Crime and Misconduct Commission report indicating increased reliance on Tasers by police, demonstrate the urgent need for more rigorous police training and more stringent regulation of police use of force.

The Human Rights Law Centre’s Director of Advocacy and Strategic Litigation, Anna Brown, is deeply concerned about these recent developments.

"These tragic incidents once again highlight the need for caution in the use of Tasers. As well as being potentially lethal, Tasers are often misused in circumstances where no force or minimal force is appropriate," Ms Brown said. "These are not isolated incidents – multiple deaths and misuse of Tasers point to systemic failures in the regulation and training of police," Ms Brown said.

There have been at least four recorded Taser related deaths to date in Australia. In each case, there are credible allegations that the Taser use was inappropriate or excessive. In the finding handed down following the inquest into the death of Brazilian student Roberto Curti, the NSW State Coroner was highly critical of NSW police and has recommended officers face disciplinary proceedings in relation to the excessive force used against the young man.

The HRLC, which was party to a Coronial inquest into the 2008 police shooting of Victorian teenager, Tyler Cassidy, welcomes the Coroner's recommendations in relation to review of police procedures and renews its calls for a new approach to police training and greater regulation and monitoring of use of force by police.

"To avoid further tragic deaths, there is an urgent need to regulate police use of force in line with human rights law and international standards, making it clear that force is only lawful as a last resort and when strictly necessary", Ms Brown said.

The coronial findings, footage screened on ABC's 7:30, and the Crime and Misconduct Commission report, also highlight an urgent need for more effective and extensive training of police in the use of force, including Tasers, particularly when engaging with vulnerable and disadvantaged groups. An October 2012 report by the NSW Ombudsman found that almost 30 per cent of Taser use is against Aboriginal and Torres Strait Island peoples, and 41 children aged 15 or under were subject to Taser use by NSW police between 2008 and 2012. The Queensland Crime and Misconduct Commission report found that over 25 per cent of people subject to Taser use "were believed to have a mental health condition".

"Rather than arming police with more weapons, we need to invest in equipping police to de-escalate conflict through non-violent means and supporting police to better engage with vulnerable people, including young people and people with mental illness", said Ms Brown.

While jurisdictions such as Victoria have taken a cautious approach to arming their members with Tasers (stun guns that administer an electric shock of 50,000 volts) there has been a growing number of disturbing instances of misuse of Tasers in other jurisdictions such as NSW, Queensland and Western Australia, accompanied by critical reports by oversight bodies such as the Queensland Crime and Misconduct Commission and the NSW Ombudsman.

Government shouldn't sacrifice human rights for short-term political gain

The Federal Government is slashing funding for human rights education and rule of law initiatives for short-term political gain, says a leading human rights organisation.

As part of its political commitment to delivering a budgetary surplus in 2012–13, the Government has said that it will not fund any new projects under either the Human Rights Education Grants Scheme or the Grants to Australian Organisations Program this year.

"The Government is cutting crucial investment in human rights – which are essential for a healthy, participatory and productive society – for short-term political gain," said Phil Lynch, Executive Director of the Human Rights Law Centre.

"Respecting and protecting human rights is never more important than in times of uncertainty and austerity," he said.

The Human Rights Education Grants Scheme supported a range of non-profit organisations to provide education and training about human rights. The Scheme was established after a major national inquiry in 2009 found that education should be the "highest priority" in promoting respect for human rights in Australia. At the time, the Government fully endorsed this recommendation, while rejecting another key recommendation that Australia enact a Charter of Human Rights.

"According to the Government's human rights policy, called 'Australia's Human Rights Framework', education is the 'centrepiece'. The decision to cut funding for human rights education is a repudiation of the Government's own policy and promise," said Mr Lynch.

The Grants to Australian Organisations Program (GAOP), which has also been cut for 2012–13, provides funding to community organisations to strengthen access to justice and the rule of law. Both the Human Rights Education Grants Scheme and GAOP are administered by the Attorney-General's Department.

"Just weeks ago, the Federal Government was spruiking its commitment to human rights and the rule of law as part of the successful pitch for a seat on the UN Security Council," said Mr Lynch. "It is deeply disappointing that with the seat now secure, the Government is cutting funds to valuable programs designed to actually deliver on this commitment."

In recent months, a number of high ranking UN experts, including the UN High Commissioner for Human Rights, have warned that reduced investment in human rights in response to economic crises risks inflaming social tensions and impacts most adversely on the poor and vulnerable.

"While delivering a paper-thin budgetary surplus may provide a short-term bump in opinion polls, investing in human rights over the long-term promotes security, peace and prosperity," said Mr Lynch.

STATE-BASED HUMAN RIGHTS DEVELOPMENTS

Police investigation of Redfern death compromised

A shooting in Redfern has provided a sombre reminder for the need of independent investigations into police-related deaths.

The Human Rights Law Centre's Director of Advocacy and Strategic Litigation, Anna Brown, is highly critical about the current practice of police units conducting primary investigations and preparing evidence briefs for the Coroner in such cases.

"No one is questioning that police officers face very difficult and dangerous situations and of course community safety should always be their priority. What we are saying though, is that incidents like this – where a member of the public has died – should be investigated independently of the police," Ms Brown said.

Although the cause of death is yet to be confirmed, the man has died after police discharged a number of shots from firearms, as he drove a small truck through a pedestrian thoroughfare near Redfern station and reportedly ran into a pedestrian.

In this case, the homicide squad of the NSW police will be investigating the death.

"Police cannot effectively investigate themselves. Australia needs an independent body to investigate police-related deaths. This would not only be the common sense approach, but it would also be consistent with international human rights law," Ms Brown said

A notable recent example is the investigation into the shooting death of mentally ill Adam Salter by NSW police. That investigation is now the subject of a Police Integrity Commission inquiry, after findings by the NSW Coroner that the initial investigation was, at best, “deeply flawed”.

StreetCare videos: voices from the street

A new project of the Homeless Persons’ Legal Service and its consumer advisory group, StreetCare, uses video interviews as a way for StreetCare members to share their stories of homelessness.

Called *In their Words*, the project will be included in training programs for people who work with homeless clients. The videos can also be shown to policymakers and politicians to improve their understanding of individual experiences of homelessness.

HPLS will also distribute the interviews via the PIAC website, YouTube and Facebook.

StreetCare members including Veronica, Kevin, AJ, Ken, Mary and Tony talk about how they became homeless, the challenges associated with being homeless, the services that assisted them, and the importance of having government, policy makers and service providers take account of homeless peoples’ opinions.

The stories reflect the diversity of homelessness in NSW and breaks down the stereotypes that persist regarding homeless people.

Each member of StreetCare has their own story of facing homelessness. Some of them have been able to secure some form of housing, but some are still homeless, or at risk of falling back into homelessness.

These interviews also show that involving homeless consumers in advocacy, training and service design is a significant resource and a benefit for government and homeless agencies.

PIAC is grateful to the Law and Justice Foundation of NSW for its support of *In their Words.*

AUSTRALIAN HUMAN RIGHTS CASE NOTES

ACT Tribunal considers human rights interpretation

Allatt & ACT Government Health Directorate (Administrative Review) [2012] ACAT 67 (28 September 2012)

Summary

In this case, the ACT Civil and Administrative Tribunal reviewed decisions made by the ACT Health Directorate refusing applications for access to documents under the *Freedom of Information Act 1989* (ACT) and granted the applicant access to the relevant information on the basis that it was not "sensitive information" and not subject to FOI Act exemptions. The Tribunal provided a noteworthy detailed consideration of the methodology of interpretation under the *Human Rights Act 2004* (ACT).

Facts

The applicant sought access to documents of the Mental Health Clinical Review Committee which had reviewed the clinical management of his late wife. The Health Directorate refused to release a number of documents, relying on exemptions in the FOI Act relating to secrecy provisions in other enactments (section 38), documents concerning certain operations of agencies (section 40) and legal professional privilege (section 42). A key issue was the request for disclosure of the names of the members of the relevant Mental Health Clinical Review Committee.

Reasoning

The Tribunal began by considering the effect of the *Human Rights Act 2004* (ACT) on the interpretation of the FOI Act and provisions of the *Health Act 1993* (ACT), and the obligations of the Tribunal as a public authority under the Human Rights Act in reviewing the FOI decisions.

The Tribunal confirmed its previous decisions that the Tribunal is a public authority for the purposes of section 40 of the Human Rights Act when acting in an administrative capacity. The Tribunal found that it acts in such a capacity where it stands in the shoes of the respondent decision maker: "The Tribunal acts in an administrative capacity by, inter alia, exercising the scope of the respondent's functions upon an application for review being filed with the Tribunal".

As a public authority, the Tribunal noted that it must interpret the relevant legislation in accordance with section 30 of the Human Rights Act. In carrying out the interpretive exercise, the Tribunal followed the methodology adopted by Justice Penfold in *Re Application for Bail by Islam* (2010) 244 FLR 158. In that decision, her Honour held that section 30 should be applied at an early stage in the process of interpreting legislation, (rather than at the end) and only after an unsuccessful justification inquiry had been conducted under section 28 of the Human Rights Act.

The Tribunal confirmed at [71-72] that section 30 is not a special rule of interpretation:

> It is now clear from judicial comment in a number of cases in the ACT, Victoria and more recently in the High Court which have examined s 30 of the Human Rights Act and its equivalents in other jurisdictions that, although the interpretive rule in s 30 of the *Human Rights Act* involves a process of statutory construction, it is not intended to create a "special" rule of interpretation. The Victorian Court of Appeal in *R v Momcilovic* held that the words "consistently with [its] purpose", in s 32(1) of the *Charter of Human Rights and*

> *Responsibilities ACT 2006* (Vic) (i.e. the Victorian equivalent of s 30 of the *Human Rights Act*) "stamped s 32(1) with a quite different character" to s 3(1) of the UK Human Rights Act and that "the inclusion of the purpose requirement made it unambiguously clear that nothing in s 32(1) justified, let alone required, an interpretation of a statutory provision which overrode the intention of the enacting Parliament."

The Tribunal noted that this aspect of the Victorian Court of Appeal decision in *R v Momcilovic* (2010) 25 VR 436 was upheld by the majority of the High Court, and cited the statement of Chief Justice French that that provision:

> requires statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms.

The Tribunal considered Justice Penfold's methodology was still useful notwithstanding the High Court's decision in *Momcilovic.* As a result, the Tribunal adopted Penfold's methodology, which involved the following steps:

> Step 1: Identify all meanings of the provision that are available under ordinary principles of statutory interpretation and consistent with legislative purpose (the available meanings), including meanings generated by applying s 30 of the *Human Rights Act* but also meanings that would be available apart from s 30.
>
> Step 2: Temporarily set aside any available meaning that is not human rights-compatible under s 30.
>
> Step 3: Examine the remaining available meanings (that is, those that are human rights-compatible).
>
> Step 3A: If there are one or more available meanings that are human rights-compatible, then that meaning, or the one of those meanings required by s 139 of the Legislation Act to be preferred, is adopted.
>
> Step 3B: If there are no available meanings left (that is, there were no available meanings that were also human rights-compatible), re-instate the non-compatible available meanings set aside at Step 2.
>
> Step 4: Undertake an inquiry under s 28 of the Human Rights Act into whether any of those re-instated available meanings can be justified.
>
> Step 4A: If only one meaning can be justified, it is adopted.
>
> Step 4B: If two or more available meanings can be justified, then a choice must be made between them; in the ACT that choice would seem to be directed by s 139 in favour of the available meaning that best achieves the legislative purpose. In the absence of such a provision the choice would be less constrained and might, for instance, include a consideration of which meaning had the least impact on relevant human rights.
>
> Step 4C: If none of the available meanings can be justified, then the available meaning or one of the multiple available meanings (in the ACT chosen as required by s 139) is adopted, and a declaration of incompatibility may be considered.

In the *Allatt* case, the Tribunal was required to consider the application of section 38 of the FOI Act, which provides that:

> A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.

In doing so, it was required to consider the interpretation of the secrecy provision in section 125 of the Health Act, which relates to "information holders" including Quality Assurance Committees such as the Mental Health Clinical Review Committee, and creates an offence where an information holder recklessly divulges protected information. Subsection (3) provides that the section does not apply to the divulging of information if the information is not "sensitive information" and is divulged under another territory law.

The Tribunal found that restrictions on the access to documents and information engage and potentially limit the right to freedom of expression under section 16(2) of the Human Rights Act, as this right includes a freedom to seek, receive and impart information of all kinds.

In discerning the possible meanings of section 125 of the Health Act for step 1 of the "Penfold methodology", the Tribunal found an ambiguity in the definition of "health service provider", which was relevant to the scope of "sensitive information" for the purposes of section 125. The Tribunal identified an interpretation of this term which was consistent with the objects of the Health Act would have a less restrictive effect on the right to freedom of expression, as it would not apply to information identifying a member of a Quality Assurance Committee who was not providing a health service in that role (despite being a registered health practitioner).

As the Tribunal was able to identify an interpretation of the relevant provisions which was consistent with both the *Legislation Act 2001* (ACT) and the Human Rights Act, it adopted this interpretation, and was thus not required to proceed beyond step 3A of the "Penfold methodology".

Decision

The Tribunal went on to find that the secrecy provision in section 125 of the Health Act was not enlivened in these circumstances, since the information was not "sensitive information" and disclosure would not be "reckless" as it is authorised by the FOI Act. Accordingly, it concluded that the exemption in section 38 of the FOI Act did not apply to the information sought.

The Tribunal rejected the application of the exemption in the FOI Act for certain agency documents, although it did uphold some claims of legal professional privilege in relation to other documents.

The Tribunal also determined that the names of the Mental Health Clinical Review Committee were not the subject of any relevant exemption, and released this information to the applicant under the FOI Act.

Commentary

This decision provides a detailed explanation of the methodology of interpretation under the Human Rights Act in light of the uncertainty created by the High Court's decision in *Momcilovic.* This decision suggests that in the ACT, the sequential steps set out by Justice Penfold in *Re Islam* have not been displaced by the High Court decision, and will continue to be applied in the ACT.

This decision is available online at http://www.austlii.edu.au/au/cases/act/ACAT/2012/67.html

***Gabrielle McKinnon**, ACT Human Rights Commission.*

Special religious instruction at school not unlawful discrimination

Aitken & Ors v The State of Victoria – Department of Education & Early Childhood Development (Anti-Discrimination) [2012] VCAT 1547 (18 October 2012)

Summary

In the recent decision of *Aitken & Ors v The State of Victoria – Department of Education & Early Childhood Development*, the Victorian Civil & Administrative Tribunal rejected a claim of direct discrimination made by parents of children at Victorian State primary schools against the Department of Education & Early Childhood Development in relation to its Special Religious Instruction (SRI) program.

Facts

The complainants argued that the method of providing SRI in these schools, which is based on distinctive religious tenets and beliefs, is discriminatory because:

- children not participating in SRI (Non-participating Students) are identified as different, and separated from their classmates when religious instruction classes are held;
- there is no curriculum instruction during SRI classes for Non-participating Students, denying them the opportunity to be taught secular subjects; and
- SRI is timetabled during school hours.

The complainants also claimed that implementing SRI in this way meant that their children had been subject to “less favourable treatment” under section 8(1) of the former *Equal Opportunity Act 1995* (Vic), or “unfavourable treatment” under section 8(1) of the *Equal Opportunity Act 2010* (Vic). The complainants submitted that a substantial reason for this treatment was the attribute of their children's “religious belief” or “activity” within the meaning of the EO Acts.

The complainants sought that:

- the Department make religious education something parents must opt into, rather than out of;
- SRI occur after school or at lunchtime; and
- Non-participating Students be provided with proper educational alternatives.

(In 2011 following the lodgement of the complaint, the Department amended its SRI policy to shift to an "opt-in" system. The amendments to Department policy also included a commitment that Non-participating Students would be engaged in meaningful activities.)

Decision

Discrimination – differential treatment?

Judge Timothy Ginnane held that the complainants had failed to establish that the Non-participating Students had suffered any *"*differential treatment*"*, a term which Judge Ginnane used to encompass the direct discrimination provisions in both the EO Acts.

His Honour held that "the evidence did not establish that the children, who did not attend SRI at the three schools, were treated in any discriminatory manner," and accepted evidence of teachers that there was no teasing, bullying or pressure on students to attend SRI.

The complainants' argument that SRI limited Non-participating Students' access to the benefit of instruction during core school hours, as a result of schools failing to offer the core curriculum to Non-participating Students while other students attended SRI, was rejected. Judge Ginnane considered that as both groups were engaged in learning of value and neither were engaged in

learning the core curriculum, it could not be said that the Non-participating Students were subjected to any differential treatment from the students attending SRI.

Religious belief – a substantial reason for the treatment?

The Tribunal was also not satisfied that a substantial reason for the treatment of the children was their religious belief. In this regard, his Honour considered that "attendance by a child at special religious instruction does not, necessarily, indicate that the child, nor the parents, hold any particular religious beliefs."

Further, the Tribunal considered that the decision not to offer the core curriculum during periods of SRI was reasonable, and was unrelated to any person's decision to engage or not engage in SRI.

Relevance to the Victorian Charter

The complainants made submissions about the effect of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) on the interpretation of the Department's SRI policy, the *Education and Training Reform Act 2006* (Vic) and the EO Acts.

It was argued that the rights of the complainants' children under sections 14 and 8 of the Charter had been engaged. Section 14 of the Charter provides for "the right to freedom of thought, conscience, religion and belief", whilst section 8 provides, inter alia, for the right to enjoy human rights without discrimination, equal protection of the law without discrimination, and equal and effective protection against discrimination.

The complainants argued that the Charter required the Department and the Tribunal to interpret the Education Act and the EO Acts, so far as it was possible to do so, in a way that is compatible with human rights.

The Charter and the EO Acts

The Tribunal held that the ordinary meaning of the direct discrimination provisions in the EO Acts were clear and unambiguous. Therefore, there was no occasion for the application of section 32 of the Charter to alter their meaning. Noting the purposes of the EO Acts as protecting important human rights, not least the right of equality contained in section 8 of the Charter, his Honour considered that "Giving the direct discrimination provisions their ordinary meaning is compatible with human rights and, indeed, promotes them."

Judge Ginnane considered that the factual findings made in determining the complaints of direct discrimination also led to the conclusion that no infringement or limitation of the human rights of the complainants' children was established.

The Charter and the Education Act

The Tribunal also accepted that the State must act in a way that is compatible with the human rights of the complainants' children. However, it also considered that holding SRI during school time and not teaching the core curriculum during those times was a reasonable way of implementing the program and was consistent with the purpose of the Education Act.

The complainants argued that section 14 of the Charter applies to their decision not to adopt any belief or religion. On this basis, they argued that the section of the Education Act which provides for SRI should, by virtue of section 32 of the Charter, be interpreted such that SRI, as presently conducted by the Department, is inconsistent with their human rights under section 14 of the Charter.

Whilst noting that the Education Act ensured that participation in SRI was not compulsory, his Honour gave weight to Parliament's decision not to incorporate a provision like article 18(4) of the

International Covenant on Civil and Political Rights into section 14 of the Charter, so as to give parents a right to ensure that their children are educated in accordance with their own moral and religious convictions.

The Tribunal held that both the "opt-out" and "opt-in" systems for ascertaining parents' wishes regarding SRI were authorised under the Education Act, and did not limit children's human rights.

Commentary

This decision indicates that while the Tribunal sees the Charter as having an "important interpretative role" in respect of legislation, it will be reluctant to apply the Charter to displace the ordinary meaning of legislation, where that ordinary meaning promotes human rights.

The decision also highlights that the Tribunal will not read into the Charter rights those rights which exist at international law but which are not expressed in the Charter itself. Article 18(4) of the ICCPR, which requires that states "respect the liberty of parents … to ensure the religious and moral education of their children in conformity with their convictions" does not find expression in section 14 of the Charter, and the Tribunal held that article 18(4) did not expand the rights protected by the Charter.

It is clear from this decision that when the Tribunal considers that the ordinary meaning of the statutory provision in question is compatible with rights under the Charter – and where there is no ambiguity in the provision – section 32(1) of the Charter will not be afforded an expansive application.

Recent media articles have indicated that the complainants intend to appeal the decision.

The decision is available online at: http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2012/1547.html

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INTERNATIONAL HUMAN RIGHTS CASE NOTES

Failure to provide effective protection against domestic violence violated CEDAW

Isatou Jallow v Bulgaria, UN Doc CEDAW/C/52/D/32/2011 (28 August 2012)

Summary

The CEDAW Committee found that Bulgaria violated several articles of the *Convention on the Elimination of All Forms of Discrimination against Women* by failing to investigate domestic violence allegations, failing to take domestic violence into account in making court orders and failing to provide the complainant with information regarding the whereabouts of her child.

Facts

Isatou Jallow moved from the Gambia to Bulgaria after marrying AP, a Bulgarian national. Once in Bulgaria, AP allegedly became abusive toward Jallow and subjected her to physical and psychological violence, including sexual abuse, and attempted to force her to take part in pornographic films and photographs. He reportedly also abused their daughter, MAP.

In November 2008, AP called the Child Protection Department in an attempt to stop Jallow from breastfeeding MAP. Social workers learned of AP's abuse and his practice of keeping pornographic photos all around the family home during their onsite visit. They called the police

and advised Jallow to seek refuge but provided no guidance about where or how to do so. Authorities took no measures to protect Jallow and MAP from further domestic violence and sexual abuse. Jallow found refuge for several days in an NGO-run shelter, but AP later found her and forced her to return to the family home.

In March 2009, prosecutors refused to continue investigating the alleged domestic violence due to insufficient evidence. At no time did the authorities interview Jallow. Despite being called to the family home on numerous occasions and evident risks to Jallow and MAP, police only issued oral warnings to AP.

In July 2009, AP filed an application with the Sofia Regional Court alleging that he was a victim of domestic violence and requesting an emergency protection order. The Court refused the application. AP filed a second application for an order, which the Court granted, along with temporary custody of MAP. The order was granted solely on the basis of AP's statement. In granting the application, the Court did not consider the allegations of domestic violence that Jallow had made against AP. Authorities did not provide Jallow with information about MAP's whereabouts or her condition, despite repeated requests.

In December 2009, the Court dismissed AP's application for a permanent protection order due to a lack of evidence. However, the emergency order remained effective owing to an appeal filed by AP. Authorities again refused Jallow access to her daughter and did not provide her with information about MAP's whereabouts or condition.

Jallow later agreed to a divorce by mutual agreement, including to numerous unfavourable conditions, because she thought it was the only way to regain custody of her daughter.

In November 2010, Jallow submitted a communication to the Committee on the Elimination of Discrimination against Women on behalf of MAP and herself in which she alleged violations by Bulgaria of articles 1, 2, 3, 5 and 16(1)(c), 16(1)(d), 16(1)(f) and 16(1)(g) of the Convention on the Elimination of All Forms of Discrimination against Women. Jallow claimed that Bulgaria had failed to provide effective protection against domestic violence and to sanction AP for his behaviour. Jallow also claimed that the State Party did not consider domestic violence to "be a real and serious threat", had failed to adopt effective measures to address gender-based violence against women, and had discriminated against her on the basis of sex/gender. In addition, Jallow claimed *inter alia* that her ability as an illiterate migrant woman to access justice and other necessary services was limited in Bulgaria.

Bulgaria's observations on admissibility

Bulgaria contested the admissibility of the communication on two grounds.

First, it claimed that Jallow had failed to exhaust domestic remedies, as required by article 4(1) of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*. According to Bulgaria, there remained several avenues of redress available to Jallow under its Penal Code and Protection against Discrimination Act.

Secondly, Bulgaria claimed that Jallow's allegations were ill-founded and not sufficiently substantiated, contrary to article 4(2)(c) of the Optional Protocol.

CEDAW Committee's decision on admissibility

The CEDAW Committee declared the communication admissible.

It determined that Jallow had exhausted domestic remedies, for the purposes of the Optional Protocol. It explained that Bulgaria had failed to provide information about the remedies it claimed were still available to Jallow and how they would protect the rights of Jallow and MAP. It also noted that any such remedies would be unlikely to bring Jallow and her daughter effective relief

considering the State Party's failure to take steps to "address the author's concerns with regard to reported domestic violence and concerns of child protection".

The CEDAW Committee also determined that Jallow's allegations were not ill-founded and had been sufficiently substantiated. It did not, however, provide reasons for this finding.

Bulgaria's observations on the merits

Bulgaria submitted that its actions were not in violation of CEDAW. According to the State Party, it had acted within its authority in its treatment of Jallow's case and provided her with the necessary assistance. It also claimed that it had adopted numerous measures to address domestic violence and raise awareness of the issue. Bulgaria rejected Jallow's claim that it had discriminated against her on the basis of her sex/gender.

CEDAW Committee's views

The CEDAW Committee concluded that Bulgaria had violated articles 2(b)–2(f), 5(a), 16(1)(c), 16(1)(d) and 16(1)(f) of CEDAW, read in conjunction with articles 1 and 3.

Failure to investigate allegations of domestic violence

The CEDAW Committee determined that Bulgaria violated articles 2(d) and 2(e) of CEDAW, read in conjunction with articles 1 and 3, when it failed to investigate allegations that AP had committed domestic violence against Jallow and her daughter. The CEDAW Committee condemned the authorities' actions in limiting their investigation to AP's pornography collection and their failure to interview Jallow about the alleged domestic violence.

Failure to take violence allegations into account in awarding emergency protection order and temporary custody and failure to provide information about child's whereabouts and condition

The CEDAW Committee found that the Sofia Regional Court had failed to take allegations of domestic violence into account in awarding an emergency protection order and temporary custody to AP. The Court had also failed to remove the emergency order even after AP's application for a permanent order was rejected. In the Committee's view, these actions, together with the State's failure to inform Jallow properly about MAP's whereabouts and her condition, violated articles 2(b) and 2(c) of CEDAW, read in conjunction with articles 1 and 3.

Gender stereotyping and equal rights within marriage and family relations

The CEDAW Committee determined that Bulgaria had failed to protect Jallow's rights to equality within marriage and as a parent and to treat her daughter's interests as paramount, in violation of articles 5(a), 16(1)(c), 16(1)(d) and 16(1)(f) of CEDAW.

The CEDAW Committee explained that Bulgaria's actions, including issuing AP an emergency order, were based on stereotypes concerning the roles of women and men within marriage, according to which men are perceived to be superior to women. The authorities' reliance on these stereotypes caused them to base their actions on the statements and actions of AP and to disregard Jallow's allegations of violence. It also meant that they ignored Jallow's vulnerable position and disregarded evidence concerning the disproportionate impact of domestic violence on women.

Recommendations

The CEDAW Committee urged Bulgaria to compensate Jallow and MAP for violating their rights under CEDAW. It also recommended that the State Party adopt measures to ensure that women victims/survivors of domestic violence, including migrant women, have effective access to justice and other services (eg, translation services). It also called on the State Party to provide regular

training on CEDAW and the Optional Protocol and to adopt legislative and other measures to ensure that domestic violence is taken into account in the determination of custody and visitation rights of children.

The decision is available at http://www2.ohchr.org/english/law/docs/CEDAW/CEDAW-C-52-D-32-2011_en.doc http://www2.ohchr.org/english/law/docs/CEDAW/CEDAW-C-52-D-32-2011_en.doc

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This summary was first published on 6 November 2012 at http://opcedaw.wordpress.com/

Dismissal based on racist political activities unacceptably infringes freedom of association

Redfearn v the United Kingdom (Application no. 47335/06, ECHR, 6 November 2012)

Summary

The European Court of Human Rights has held that the UK's failure to protect a bus driver against unfair dismissal based on his racist political activities was an unacceptable infringement of his freedom of association.

Facts

The applicant was employed as a driver by Serco Limited, which provided transport to local authorities including Bradford City Council. The applicant was responsible for transporting children and adults with physical and/or mental disabilities in the Bradford area. The majority of his passengers were of Asian origin. He was a highly competent employee whose supervisor nominated him for an award of "first-class employee". The supervisor was also of Asian origin.

The applicant was elected as a local councillor for the British National Party, a white supremacist political party, which restricts membership to white nationals and, according to its constitution, is:

> wholly opposed to any form of integration between British and non-European peoples. It is therefore committed to stemming and reversing the tide of non-white immigration and to restoring, by legal changes, negotiation and consent, the overwhelmingly white makeup of the British population that existed in Britain prior to 1948.

Following the applicant's election, and a complaint about the applicant's political affiliation by the public sector workers' trade union, Serco summarily dismissed him. Relevantly, the union advised Serco that 70-80 percent of its customer base and 35 percent of its workforce were of Asian origin. Serco's reasons for dismissing the applicant were that his employment would give rise to considerable anxiety among passengers and their carers, and therefore pose a health and safety risk, and that his employment could jeopardise its reputation and possibly lead to the loss of its contract with the Bradford City Council.

The applicant claimed that his dismissal was racially discriminatory. However, the Court of Appeal held that the dismissal was based on political grounds, not racial grounds, and therefore fell outside of UK anti-discrimination laws.

The Applicant had no cause of action relating to a breach of Convention rights, because Serco is not a public authority.

Relevantly, the applicant was precluded from making a complaint of unfair dismissal because he had not completed one year's service with Serco – the qualifying period necessary for statutory protection from unfair dismissal.

Decision

The applicant alleged violations of his right to freedom of expression and freedom of association under the Convention for the Protection of Human Rights and Fundamental Freedoms (articles 10 and 11).

The European Court of Human Rights found that there was a violation of the applicant's freedom of association. The Court held that it is incumbent on the UK to take reasonable and appropriate measures to protect employees, including those with less than one year's service, from dismissal on grounds of political opinion or affiliation, either through the creation of an exception to the one-year qualifying period for an unfair dismissal claim or through a free-standing claim for unlawful discrimination on grounds of political opinion or affiliation.

The Court noted that the decisive factor in cases such as this is that the domestic courts or tribunals be allowed to pronounce on whether or not, in the circumstances of the particular case, the interests of the employer should prevail over the employee's right to freedom of association, regardless of the period of employment.

Given its finding that there was a violation of article 11 of the Convention, the Court did not consider it necessary to examine whether there was a violation of article 14 (equality before the law) read together with articles 10 (freedom of expression) and 11 (freedom of association).

Relevance to the Australian Context and the Victorian Charter

There is greater protection against discrimination based on political belief in Australia. The *Fair Work Act 2009* (Cth) protects employees and prospective employees against adverse action based on political opinion, regardless of the employee's length of service. State and Territory anti-discrimination legislation also provides protection against discrimination on this or similar grounds.

In Victoria, the Charter may also bolster these legal protections for employees of public authorities.

The decision is available at: http://www.bailii.org/eu/cases/ECHR/2012/1878.html

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Protection from arbitrary eviction for 700 families removed from council buildings

Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another [2012] ZACC 26 (9 October 2012)

Summary

The protection against arbitrary eviction under section 26(3) of the South African Constitution provides that a person cannot be evicted from their home without an order of court made after considering all the relevant circumstances. In a unanimous judgment, the Constitutional Court held that the High Court's order dismissing an application by residents for immediate re-occupation of their homes after their emergency removal was not a justified order for the purposes of section 26(3). The Constitutional Court set aside the High Court's orders and ordered that the residents were entitled to occupation of their homes as soon as reasonably possible.

Facts

The City of Tshwane Metropolitan Municipality (City) took control of Schubart Park, a 1970s residential complex made up of four high rise blocks, in July 1999 and since that time the

buildings had significantly deteriorated. People "not known to the City" had come to live in many of the properties.

On about 11 September 2011, the water and electricity were cut off and, 10 days later on 21 September 2011, residents started a protest about the living conditions at Schubart Park. The protest became violent and two fires broke out in one of the residential blocks. Residents from that block were removed. The fires were extinguished and the police operation in relation to the protest was over within 24 hours.

The residents who had been removed made an application to the North Gauteng High Court for immediate re-occupation of their homes. The High Court dismissed the application on 22 September 2011 (dismissal order) and ordered the City and the Minister of Police to make temporary accommodation available to the residents and the parties to negotiate the terms of a draft order to meet the needs of the applicants.

In the last week of September 2011, the remaining residents in Schubart Park were removed.

By the end of September, between 3000 – 5000 people were in temporary shelters or on the streets.

The parties were unable to reach agreement, and on 3 October 2011 the High Court made a final order requiring the City to:

- provide temporary accommodation to the residents;
- assist the residents to remove their belongings from the properties and store them;
- immediately commence refurbishment and renovation of Schubart Park to be completed within 18 months (with a provision for extension by agreement or order of the Court);
- relocate the residents to the refurbished and renovated Schubart Park (subject to applicants providing proof of their rights to occupy the property and having a right of occupancy in South Africa); and
- if, on the advice of structural engineers, Schubart Park had to be demolished and/or could not be refurbished or renovated, furnish "qualifying residents" with alternative properties.

The applicants applied to the Constitutional Court for leave to appeal the High Court's order.

Decision

Protection from arbitrary eviction

The Constitutional Court considered the right under section 26(3) of the South African Constitution, which provides that:

> No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

The Constitutional Court held that the High Court's order did not comply with the protection provided by section 26(3) because:

- relocation back to renovated Schubart Park properties was made conditional upon residents proving their right to occupancy (both of the property and in the Republic of South Africa);
- it provided for occupation of the property only for those residents who accepted the City's proposal and left those who did not accept without a remedy; and
- there was no recourse to the courts if restoration and renovation was found to be impossible and residents were to be moved to alternative properties.

The Constitutional Court held that if residents could not return to their properties, a court order was required or the dismissal of the application for re-occupation would be tantamount to an eviction order. Essentially, the Court held that if the City was going to evict the residents, they had to do so lawfully and in accordance with section 26(3) of the Constitution – the City could not use the crisis as an excuse to evict residents without complying with the law.

While the Constitutional Court acknowledged that the High Court could not immediately order re-occupation due to safety concerns for residents, it held that the High Court should have issued a declaratory order that clarified the residents' entitlement to eventual re-occupation of the properties.

The Constitutional Court held that the "lack of provision for a court order for what effectively will be an eviction order is in breach of section 26(3)" and declared that the residents were entitled to occupation of their homes as soon as reasonably possible.

Supervision and engagement orders

The Constitutional Court recognised the importance of the "substantive involvement and engagement of people in decisions that may affect their lives", in particular in relation to the rights to adequate housing and to protection from arbitrary eviction or demolition of homes under section 26 of the Constitution. Based on this recognition, the Constitutional Court relied on section 38 of the Constitution to make a supervision and engagement order. Section 38 provides that prescribed people (including anyone acting in their own interest, on behalf of another person who cannot act, in the interest of a group or class of persons or in the public interest) have:

the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

Using this relief provision, the Constitutional Court ordered the City and the applicants to meaningfully engage with each other "at every stage of the re-occupation process" with a view to ensuring that the residents could re-occupy their homes as soon as reasonably possible.

The Court ordered that the engagement would be supervised by the High Court, including through the provision of affidavits setting out the agreements reached.

Commentary

The rights of residents being removed from dilapidated publicly owned housing are relevant in a Victorian context where the Auditor-General recently reported that: "The public housing portfolio is now in a seriously deteriorating condition with the division estimating that 10 000 properties, 14 per cent of the total, will reach obsolescence over the next four years".

The key differences between the operative provisions in this case and human rights protections in Victoria are:

- South Africa's protection includes the right to have access to adequate housing and the obligation on the state take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. This right exists alongside the protection against arbitrary eviction, which contains three limbs: the need for a court order, the consideration of all relevant circumstances and a prohibition on legislation that allows arbitrary evictions. In Victoria, there is no protection of a right to adequate housing . Further, the protection from arbitrary eviction, which is set out in section 13(a) of the Victorian Charter of Human Rights, is weaker in that it provides only that a person has a right "not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with".

- Enforceability – the clear Constitutional recognition that people whose rights have been infringed (or certain people acting on their behalf or in the public interest) can commence proceedings and seek relief for failure to comply with human rights is a key aspect of South Africa's human rights protection that remains lacking in Victoria. The current limitation on a person's ability to commence legal proceedings for non-compliance with Victoria's Human Rights Charter (under section 39) creates confusion and unnecessary complexity. It undermines the ability of the Charter to provide just and timely remedies for infringements of rights.

These two aspects of South Africa's human rights protections provide the Court with the ability to make orders that aim to avoid and address homelessness. In Victoria, the ability to do this is much more limited, particularly given that eviction orders are made by the Victorian Civil and Administrative Tribunal, which was found in *Director of Housing v Sudi [2011] VSCA 266* not to have jurisdiction to consider human rights issues in eviction proceedings. Further, there is almost no ability to consider "relevant circumstances" in evictions (for example, risk of homelessness, dislocation of families and health implications) in Victoria. These weaker protections mean that arbitrary evictions into homelessness continue to occur in Victoria.

This decision is available online at: http://www.saflii.org/za/cases/ZACC/2012/26.html

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Malaysia High Court denies request to declare Sharia law prohibiting cross-dressing unconstitutional

11 October 2012

Summary

On 11 October the secular High Court in Seremban, Negeri Sembilan state, in Malaysia rejected a request to declare unconstitutional a Sharia law that prohibits "wearing women's attire" or "posing as a woman" in that State. The four applicants are Muslim transgender women who have all been arrested under this law and contend that it violates their fundamental rights enshrined in the Malaysian Constitution, namely the prohibition of discrimination based on gender, freedom of expression, freedom of movement, and the rights to live with dignity, privacy, and to livelihood.

Facts

The Malaysian system is a dual-track system where secular law applies to the entire population, while the Muslim population, constituting about two thirds of the population, is furthermore subject to Sharia law. Penalties for cross-dressing differ throughout the country but in Negeri Sembilan state, where the case was heard, convicted offenders under section 66 of the Syariah Criminal Enactment 1992 may be sentenced to up to six months in prison, fined as much as 1000 ringgits ($325) or both.

The four litigants are make-up artists who have all been arrested for dressing as women and have all suffered from deep-seated discrimination, harassment and even violence because of their gender identity. All four women have been diagnosed with "gender identity disorder", undergo hormone treatment, and go by feminine names in their daily lives. Nevertheless they have been banned from modifying their legal identification to recognise their gender identity and feminine names. This has an impact on their daily lives, as official documents are needed, for instance, in order to secure employment. It is also important to note that homosexual acts are banned not only for Muslims but for the whole population in Malaysia, punishable by caning and up to 20 years' imprisonment.

The applicants argue that they cannot conform to Section 66 by virtue of their medical condition, without suffering psychological harm and trauma. The women all complain of harassment and a constant fear of prosecution as long as the law is in place. One of the applicants obtained a job in a bank where she was asked to cut her hair and dress as a man. She refused and has turned to supplementing her pay by working as a sex worker in order to maintain her female appearance. One woman claims she was groped when stopped by religious officers while another litigant says these officers have already arrested her three times, and she was punched in the face by an officer on one occasion.

Decision

The Negeri Sembilan High Court ruled that because the litigants are Muslim and were born male, they must adhere to the law as a part of Islamic teaching. The court dismissed the claim that the law is unconstitutional, discriminatory and a breach to fundamental rights and freedoms and ruled that Muslim transsexuals cannot be exempted from Shariah legal provisions.

Commentary

This decision is deplorable as it amounts to saying that state-enacted Islamic law overrides fundamental liberties. This was the first attempt to overturn a Sharia law banning cross-dressing, and could therefore be used as precedent in other states and countries with similar regulations.

This decision follows a ruling from last year when another High Court rejected a bid by a transgender woman who had undergone a sex-change operation to change the name registered on her identity. The 25 year old former pharmaceutical assistant died weeks later, reportedly of heart problems.

These Malaysian High Court decisions are dangerous for transgender people, who are already an extremely vulnerable group in the Asia-Pacific region. With transgender people being discriminated against and finding it difficult to secure employment, many are turning to sex work, putting them at risk of violence and HIV/AIDS, for which transgender women in the region are extremely vulnerable.

This decision is currently not available online.

Candice Van Doosselaere *is a volunteer at the HRLC.*

Drawing the line between freedom of expression and hate speech

Lund v Boissoin, 2012 ABCA 300 (17 October 2012)

Summary

The Court of Appeal of Alberta distinguished between prohibited "hate speech" and speech that may be hurtful and offensive but which is protected by the freedom of expression in its recent decision of *Lund v Boissoin,* 2012 ABCA 300.

Facts

In 2002 subsection 3(1)(b) of the *Human Rights, Multiculturalism and Citizenship Act* provided that "no person shall publish … or cause to be published … any statement, publication … that is likely to expose a person or a class of persons to hatred or contempt" on the basis of listed grounds. While the listed grounds did not originally include a reference to sexual orientation, the Act was amended in 2009 to include sexual orientation as a prohibited ground of discrimination.

Subsection 3(2) of the Act relevantly protects freedom of expression by providing that "nothing in this section shall be deemed to interfere with the free expression of opinion on any subject".

Boissoin wrote a letter to the editor of the Red Deer Advocate (newspaper) which published the letter on 17 June 2002. The letter included statements such as "[w]here homosexuality flourishes, all manner of wickedness abounds" and "[h]omosexual rights activists and those that defend them, are just as immoral as the pedophiles, drug dealers and pimps that plague our communities".

On 18 July 2002 Lund, the applicant, filed a complaint against the respondents, Boissoin and the Concerned Christian Coalition, with the Alberta Human Rights and Citizenship Commission, alleging that the letter constituted discrimination on the basis of sexual orientation, it exposed people to hatred and contempt, and it fostered an atmosphere of violence. The Commission referred the case to the Human Rights Panel which found that the letter exposed homosexuals to hatred or contempt. The Panel's decision was subsequently appealed and overturned in 2009 by Justice Wilson's decision in the Court of Queen's Bench of Alberta.

Justice Wilson held that the letter was “jarring, offensive, bewildering, puerile, nonsensical, and insulting”, but that its language did not go “so far as to fall within the prohibited status of ‘hate’ or ‘contempt’” (*Boissoin v Lund,* 2009 ABQB 592 at [90]). In reaching this conclusion his Honour interpreted subsection 3(1)(b) of the Act as requiring a “causal link between publication of the message and the infringement of rights contained in the Act” in addition to “concrete evidence” linking the message to the prohibited practices listed in section 3. His Honour concluded that the letter and the evidence of its potential effects were insufficient to establish the required linkage.

Lund challenged all aspects of Justice Wilson’s decision.

Decision

The issues on appeal were whether the letter violated subsection 3(1) of the Act, and whether the subsection 3(2) exemption to subsection 3(1) applied.

The Court of Appeal unanimously dismissed Lund's appeal. Justice O'Brien delivered judgment with Justices Conrad and O'Ferrall concurring. Justice O'Brien found that while the letter was "offensive … coarse, crude and insensitive … [it] constituted an expression of opinion that did not infringe the statute – [it did] not meet the threshold of hate speech". Hence, the letter did not breach subsection 3(1)(b) of the Act (at [78]), and nonetheless, the subsection 3(2) exemption applied.

His Honour found that the implied linkages referred to by Justice Wilson were unsupported by the language of the Act on a plain and ordinary reading. Rather, the Act required only a demonstration that the publication is likely to *expose* a person or a class of persons to hatred or contempt, "no evidence of a subsequent discriminatory activity caused by such exposure is required to make the prohibition effective".

Justice O'Brien held that “hatred and contempt” were to be interpreted in accordance with the previous Supreme Court decision *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892 and the *Canadian Charter of Rights and Freedoms* values, and that the bar was to be "set high because a free and democratic society places a premium on the free expression of opinion and the free exchange of ideas". As such, the fundamental freedom could only be derogated from if the speech was of an "ardent and extreme nature" rather than merely "offensive and hurtful".

His Honour found that "it is essential to place the letter in context", a consideration which the Human Rights Panel overlooked. Evidence indicated that the newspaper decided to publish the letter because it expressed an opinion of a citizen on a matter of public interest. His Honour referred to an earlier decision of the Supreme Court in which it was held that “[t]he public debate about the inclusion in schools of educational material on homosexuality clearly engages the public interest” (*WIC Radio Ltd v Simpson*, 2008 SCC 40, at [57]). Hence, the purpose of the

publication was to further public debate. In relation to what constitutes public debate His Honour held at that

> [w]hether offensive or not, the letter was perceived to stimulate and add to an ongoing public debate on matters of public interest, as distinct from hate propaganda which serves no useful function and has no redeeming qualities. A certain amount of public debate concerning such an issue must be permitted, even if some of it is offensive, to make the general public aware that such type of thinking is present in the community and to allow for its rebuttal.

The letter was held to be an expression of Boissoin's opinion that teaching children at school that homosexuality is normal, and that same sex families are equivalent to heterosexual families, is morally wrong and should not be tolerated. The aim of the letter was to stir apathetic people, who agreed with Boissoin, to his cause. Justice O'Brien concluded that a reasonable person, aware of the context of the letter, would understand that its subjects were sexual behaviour and morality, and education about these subjects in public schools funded by taxpayers. The letter did not elicit emotions of "detestation, calumny, or vilification against homosexuals or expose homosexuals to hatred or contempt".

Justice O'Brien made some important obiter comments about the freedom of speech at [72]:

> [m]atters of morality, including the perceived morality of certain types of sexual behaviour, are topics for discussion in the public forum … freedom of speech does not just protect polite speech. Further … some latitude should be given to those who do not have the educational advantage of being able to communicate their message in more sophisticated language.

In relation to the letter being a protected expression under the Act, his Honour found that subsection 3(2) was confined to expression of opinion, as distinct from directives and calls to action of discriminatory conduct. The letter fell into the former category as a matter of fact.

Commentary

This case demonstrates the primacy given to freedom of expression and judicial hesitancy to encroach on this fundamental right. There appears to be a fine line between hateful and contemptuous statements and statements of the impugned nature. This line can be difficult to draw and tends to attribute a certain level of literary sophistication to the reasonable recipient of such a message allowing them to identify the nuances between both types of statements.

As previously reported, freedom of expression is protected under section 15 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Notably, subsection 15(3) further provides that special duties and responsibilities are attached to the right, and that the right may be subject to lawful restrictions reasonably necessary to, inter alia, respect the rights and reputations of other persons and for the protection of public morality. While Australian courts may refer to Canadian case law for guidance when interpreting section 15, subsection 15(3) also expressly requires an Australian court to consider the impact of impugned statements on the subjects of the statements and the community.

This decision is available online at:
http://canlii.ca/en/ab/abca/doc/2012/2012abca300/2012abca300.html

***Laura Myer**, Law Graduate, Allens.*

Authorities' obligations to adequately respond to domestic violence

Irene Wilson v The United Kingdom [2012] ECHR, *Application no. 10601/09* (23 October 2012)

Summary

The European Court of Human Rights found that the Northern Ireland authorities had not failed in their duty to respond to domestic violence perpetrated against the applicant, Ms Irene Wilson, and her complaint was deemed inadmissible.

Facts

On 20 October 2007 the applicant was assaulted by her husband, Scott Wilson. She suffered a severed artery on the right side of her head and multiple bruising.

Mr Wilson was arrested and charged with causing grievous bodily harm with intent to do grievous bodily harm, contrary to section 18 of the *Offences against the Person Act 1861*. After considering the available evidence, the Public Prosecution Service of Northern Ireland (PPS) decided that there was insufficient evidence of intention to do grievous bodily harm and the charge was reduced to one of grievous bodily harm contrary to section 20 of the same Act.

Mr Wilson pleaded guilty to the section 20 charge and was sentenced to eighteen months' imprisonment, which was suspended for three years.

The applicant alleged violations of her human rights under the European Convention on Human Rights and made several complaints regarding the criminal proceedings, including that the sentence was unduly lenient and was much lower than would have been delivered had the offence occurred outside marriage.

Decision

The Court reviewed its jurisprudence on the positive obligation under article 8 of the Convention (right to respect for family and private life) in relation to authorities' responses to domestic violence. Several relevant principles were restated, namely:

- While the essential object of article 8 is to protect the individual against arbitrary action by public authorities, there may also be positive obligations inherent in effective "respect" for private and family life and these obligations may involve the adoption of measures in the sphere of the relations between individuals. Children and other vulnerable individuals, in particular, are entitled to effective protection.
- The concept of private life includes a person's physical and psychological integrity. Under article 8, States have a duty to protect the physical and moral integrity of an individual from other persons. To that end they are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.
- Victims of domestic violence are of a particular vulnerability and the State should be actively involved in their protection.
- The Court's task is not to substitute itself for the competent domestic authorities in determining the most appropriate methods for protecting individuals from attacks on their personal integrity, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation.

The Court considered that, in contrast to previous cases, this was not a case where the domestic authorities did nothing in the face of repeated and credible complaints of violence. The Court found that it was a matter for the PPS to decide whether the intent element of section 18 could be proved and to reduce the charge to the next most serious offence if it could not. Further, the Court found that the sentencing judge had sufficient information to enable him to assess the seriousness of the offence and the sentence imposed was not manifestly inadequate.

Ultimately, the Court decided that the Northern Ireland authorities did not fail in their positive obligation to secure the applicant's right to private and family life and concluded that the complaint was manifestly ill-founded and therefore inadmissible.

Commentary

Australian Federal and State Governments are obliged, under the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women to protect the right to private and family life of victims of domestic and family violence, including through effective prosecution and punishment of offenders. In Victoria that obligation is further enshrined in section 13 of the *Charter of Human Rights and Responsibilities Act 2006*.

While the applicant was not successful in this case, the Court's decision provides a useful summary of legal principles and case law relevant to the adequacy of public authorities' responses to domestic and family violence (see [37]-[46]).

The decision is available online at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114397

***Rachel Ball** is Director of Advocacy and Campaigns at the HRLC.*

Pornography discovered in the workplace – Employees' rights to privacy

R v Cole 2012 SCC 53 (19 October 2012)

Summary

Nude photographs of an underage female student were discovered on a teacher's work laptop. He was charged with possession of child pornography and unauthorised use of a computer under the *Criminal Code* R.S.C. 1985, c. C-46. The actions of the police in obtaining possession of the accused's computer (and files copied from it) raised questions about the accused's rights to be free from unreasonable state search and seizure under section 8 of the *Canadian Charter of Rights and Freedoms*. While employer ownership of the computer diminished the accused's reasonable expectation of privacy, it was not eliminated. The Supreme Court of Canada held that the accused's section 8 rights had therefore been breached. However, the admission of the evidence would not bring the administration of justice into disrepute under section 24(2) of the Charter. A retrial was ordered.

Facts

A laptop was issued to the accused, a school teacher, by his employer. A technician, performing maintenance of the accused's laptop, found a folder containing nude photos of a teenage student. The technician notified the school principal. The material was duplicated by:

- the technician, who copied the photographs to a CD; and
- school board technicians, who copied temporary internet files to a second CD.

The laptop and both CDs were handed to the police, importantly, without a warrant. The police created a mirror image of the laptop's hard drive. These two discs and the image created by the police were the subject of this case (the Evidence).

The school board's Policy and Procedures Manual allowed for incidental personal use of the laptop. It stipulated that teachers' emails were subject to access by school administrators in certain circumstances. The school's Acceptable Use Policy warned users not to expect privacy in their files.

The trial judge found there was a breach of the accused's section 8 rights and excluded the Evidence. The summary conviction appeal court found there was no section 8 breach and reversed the decision. The Court of Appeal for Ontario overturned this decision and excluded all Evidence except the first-made disc. The prosecution then appealed to the Supreme Court of Canada.

Decision

Section 8 of the Charter

Section 8 of the Charter states that everyone "has the right to be secure against unreasonable search or seizure". It is enlivened where the claimant has a reasonable expectation of privacy. The Court stated the principle that privacy is "a matter of reasonable expectations. An expectation of privacy will attract *Charter* protection if reasonable and informed people in the position of the accused would expect privacy".

The accused had a subjective expectation of privacy in the laptop; he had used it to browse the internet, and had stored personal information on its hard drive. The Court therefore only had to consider whether, in the "totality of the circumstances", the accused's expectation of privacy was, objectively, reasonable.

Arguing against this, the prosecution relied on the following:

- the accused did not own the laptop, it was assigned to him by his employer for predominantly work purposes;
- the accused was aware the laptop could be accessed remotely by school board technicians; and
- the laptop's usage policy permitted others to access the laptop and assigned ownership of data generated by the laptop to the school board.

However, irrespective of ownership, computers used for personal purposes may contain intimate personal details. Laptops may store financial and medical information and the internet search history may reveal likes, interests and propensities. The Court held that it was precisely this kind of information that fell "at the very heart of the 'biographical core' protected by section 8 of the *Charter*".

The Court held that "[t]he closer the subject matter of the alleged search lies to the biographical core of personal information, the more this factor will favour a reasonable expectation of privacy. Put another way, the more personal and confidential the information, the more willing reasonable and informed Canadians will be to recognize the existence of a constitutionally protected privacy interest."

Careful not to provide a definitive list of factors, the Court concluded that while the accused's lack of ownership of the laptop and the school policies diminished his reasonable expectation of privacy, they did not extinguish it.

The Court concluded that the search and seizure of the Evidence, except the first disc (which was not in question), was improper, upholding the decision of the Court of Appeal for Ontario.

Section 24(2) of the Charter

Secondly, the Court considered whether the administration of justice would be brought into disrepute if the unconstitutionally obtained evidence was not excluded under section 24(2) of the Charter.

The Court decided that the police did not knowingly or deliberately disregard the warrant requirement and did not act in bad faith. The police officer in question had turned his mind to

whether the accused had an expectation of privacy in the laptop. As he was told that the only private material was photographs of the accused's wife, he did not consider the nature of other material. This was not an egregious or deliberate breach of the Charter, and accordingly the improperly obtained Evidence was not excluded. A retrial was ordered.

Commentary

The case highlights the importance of an individual's right to privacy and supports expectations that employee's information contained on work computers is protected, despite any workplace policies. Importantly, the Court held that the more private and personal the information is, the more likely a person to have a reasonable expectation of privacy regarding that information.

In Victoria, the equivalent right is section 13 of the *Charter of Human Rights and Responsibilities Act,* which states that "a person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with".

While the case reinforces the reasonableness of such an expectation of privacy, it also illustrates how a balance must be struck between the interests of the individual and the administration of justice. The bigger picture, involving considerations of the "truth seeking function of the criminal trial process", the fact that the evidence had not been obtained by an "egregious breach of the Charter" and the "highly reliable and probative" nature of the evidence, was not ignored.

The decision is available online at http://canlii.ca/en/ca/scc/doc/2012/2012scc53/2012scc53.html

***Alexandra Pieniazek**, Solicitor, King & Wood Mallesons Human Rights Law Group*

Supreme Court refuses to invalidate votes on basis of administrative error

Opitz v Wrzesnewskyj, 2012 SCC 55 (25 October 2012)

Summary

A majority of Canada's Supreme Court has found that in a recent election where a number of administrative errors occurred which indicated some voters did not satisfy the identification requirements under the *Canada Elections Act,* SC 2000, c 9 the election result was nonetheless valid. In reaching its conclusion, the Supreme Court majority favoured a substantive approach that upholds an entitlement to vote based on the right to vote guaranteed under Canada's Charter of Rights and Freedoms, rather than the procedural requirements under the Act.

Facts

The appellant, Ted Opitz, won a seat in the Etobicoke Centre electorate for the 41st Canadian federal election by a margin of 26 votes. The respondent, Borys Wrzesnewskyj, was an unsuccessful candidate for the same seat.

During the course of the election, a number of administrative errors were made with respect to incorrect recording of information relating to voter identity and missing registration certificates (declarations of qualification to vote).

Section 524(1) of the Act provides:

> Any elector who was eligible to vote in an electoral district, and any candidate in an electoral district, may, by application to a competent court, contest the election in that electoral district on the grounds that…
>
> (b) there were irregularities, fraud or corrupt or illegal practices that affected the result of the election.

The respondent successfully argued in the Ontario Superior Court of Justice that the election should be annulled on the basis that 79 votes in respect of which identification errors were made were "irregularities … that affected the result of the election".

The appellant appealed to the Canadian Supreme Court. The decision turned on the proper construction of the phrase "irregularities … that affected the result of the election".

Decision

The Supreme Court upheld the appeal by a 4:3 majority decision, finding that the administrative errors identified by the respondent were not "irregularities" that "affected the result of the election" as contemplated by the Act, and therefore the votes should not have been invalidated. The Supreme Court determined the final orders, rather than remit the matter back to the Ontario Superior Court of Justice, as the Act required a contested election application to proceed "without delay and in a summary way".

Discussion

The decision required the Court to determine the correct test to be applied when deciding what constitutes an "irregularity" under the Act.

In determining whether the errors made in the relevant election were irregularities under the Act, the majority was required to apply one of two tests previously applied by lower courts. The first test is a strict approach, whereby any procedural error constitutes an irregularity and should invalidate the relevant vote.

However, an alternative approach, described as a "substantive approach" was favoured by the majority.

The first step in applying this test is to determine whether an irregularity has occurred, being a "breach of a statutory provision designed to establish a person's entitlement to vote".

The second step is to demonstrate that this irregularity then "affected the result" of the election: in other words, "someone not entitled to vote, voted".

The majority stated that “[t]he right of every citizen to vote, guaranteed by section 3 of the Charter, lies at the heart of Canadian democracy”. Accordingly, this central right was paramount in determining in what circumstances a vote could be invalidated (at para 34):

> The procedural safeguards in the Act are important; however, they should not be treated as ends in themselves. Rather, they should be treated as a means of ensuring that only those who have the right to vote may do so. It is that end that must always be kept in sight.

On this basis, the substantive test was preferred by the majority because the identification pre-requisites under the Act were considered procedural safeguards that did not ultimately affect a person's inherent entitlement to vote as that right is entrenched and understood in the Charter. The majority found that the Act's procedural requirements should be interpreted in light of the Act's enfranchising objective; only irregularities that were "serious and capable of undermining the integrity of the electoral process" should invalidate a vote.

The majority concluded that in this instance, the administrative errors made by polling station volunteers during the election did not satisfy the substantive test.

With some reservation, the majority commented in obiter that the "magic number test" would have been used in this case to determine whether the election should be annulled, had the votes been invalidated. The magic number test requires that an election should be annulled where the invalidated votes equals or outnumbers the votes comprising the successful candidate's winning

margin. The Court stated that this test is flawed in that it assumes "all of the rejected votes were cast for the successful candidate", which is an unlikely proposition.

The dissenting decision also recognised that "irregularities" should not be interpreted in a trivial manner that undermined a citizen's right to vote. However, the dissenting justices determined that the identification requirements under the Act were crucial in giving rise to an entitlement to vote, and that such entitlement needed to be established before the voter was allowed to vote. The dissenting judgment commented that an approach that did otherwise would be "unfair" because it would disregard other qualified voters who were turned away from polling stations on the day of the election for failure to meet the identification requirements.

Relevance to the Victorian Charter

The Victorian Charter provides a right to vote (section 18(2)(a)), in similar terms to that provided under the Charter. Under the *Electoral Act 2002* (Vic), the Court of Disputed Returns (a jurisdiction of the Supreme Court) has "the power to declare any election void" (section 125(g)) and "may inquire whether persons who voted were entitled to do so and whether their votes were improperly admitted or rejected" (section 138).

The Electoral Act has not yet been interpreted in light of the Charter. The recent Canadian decision may therefore serve as persuasive authority to the Court of Disputed Returns on how the substantive rights that arise under section 18(2)(a) of the Victorian Charter could impact on the interpretation and application of the procedural requirements under the Electoral Act.

This decision is available online at: http://canlii.ca/en/ca/scc/doc/2012/2012scc55/2012scc55.html

***Katie Gardiner** is a Law Graduate at Allens.*

Please return my prisoner – Habeas corpus and unlawful transfer

Secretary of State for Foreign and Commonwealth Affairs v Rahmatullah [2012] UKSC 48 (31 October 2012)

Summary

The Supreme Court of the United Kingdom found that the continued detention of a civilian combatant was prima facie unlawful under the Geneva Conventions. The prisoner was initially captured by British forces before being handed over to the US, which transferred him from Iraq to Afghanistan. The habeas corpus application failed because the UK showed that it had no control over the prisoner's detention.

Facts

Yunus Rahmatullah is a Pakistani national who was captured by UK forces in Iraq in February 2004 as a member of Lashkar-e-Taiba, a terrorist organisation linked to Al-Qaeda. Mr Rahmatullah was later handed over to US forces, who transported him to a detention facility in Afghanistan. On 5 June 2010, a US Detainee Review Board hearing concluded that his continued detention was "not necessary to mitigate the threat he poses". However, Mr Rahmatullah remains in US custody pending, according to the US, "appropriate security assurances" being obtained from Pakistan.

From 2003, a Memorandum of Understanding (MoU) was in effect between the US, the UK and Australia, which stated that any internees transferred by a Detaining Power will be returned by the Accepting Power to the Detaining Power without delay upon request. The MoU was not legally binding, but was considered to be a solemn undertaking between responsible governments.

On Mr Rahmatullah's behalf, a writ of habeas corpus was sought in UK courts. After Mr Rahmatullah succeeded in the Court of Appeal, the UK Government sent a letter to the US requesting his release. The US replied by explaining why they considered his continuing detention to be lawful from a US perspective. The Secretary of State appealed the Court of Appeal decision to the UK Supreme Court, and Mr Rahmatullah cross-appealed, claiming that the UK Government should take further steps to seek his release from the US.

Decision

Lord Kerr delivered the primary judgment with which Lords Phillips, Dyson, Wilson and Reed agreed. Lord Carnwath and Lady Hale dissented on the cross-appeal.

In a habeas corpus application, the burden is on the detainer to prove that the detention is lawful. Although the Secretary of State did not contest this point, there was a clear prima facie case that Mr Rahmatullah was unlawfully detained. Section 1(1) of the UK *Geneva Conventions Act 1957* makes it an offence to commit, or aid, abet or procure a grave breach of the Geneva Conventions. Mr Rahmatullah was a protected person under article 4 of the Geneva Convention IV, as he found himself in the hands of an occupying power (the UK and then the US). As such, he was protected by article 49 of the Convention, which prohibits deportations of protected persons from occupied territory to the territory of another country (here, Afghanistan). Article 45 of the Convention provides that a state that transfers a protected person to the custody of another state must request the return of the person if the accepting state fails to apply the Convention. Article 132 provides that every interned person must be released by the detaining power as soon as the reasons which necessitated his internment no longer exist (evidenced by the Detainee Review Board findings), or, per article 133, on the conclusion of hostilities (which has passed).

Lord Kerr then considered whether, before the UK requested Mr Rahmatullah's release from the US, was there a *reasonable prospect* that the UK could exert control over his custody. If so, the UK had to either deliver the prisoner to the Court, or show why it was not possible for the UK to do so.

The obligation in the MoU that the US would return the prisoner to the UK on request provided the UK with a reasonable prospect of reacquiring custody of the prisoner as a matter of fact, given that the UK and the US were allies. The threshold of the test is low, and the inquiry factual in nature. Importantly, the Court could not order the Secretary of State to demand Mr Rahmatullah's release from the US (even though that is what the UK did), as that would intrude upon the executive power over foreign affairs. What the Court required of the Government was rather that they show, by whatever means they could, whether or not control existed in fact.

The cross-appeal concerned whether the letter from the US was insufficient to prove that the UK could not secure the prisoner's release from the US. If so, the UK had to take further steps to ascertain whether it had control over the prisoner.

Lord Kerr accepted the Government's submission that the US had, in suitably diplomatic language, effectively declined, even though neither the letter, nor the UK's initial request, mentioned the MoU. However, Lord Carnwath and Lady Hale dissented on the cross-appeal, finding that the UK and US letters had missed the point, and the Court should require the resubmission of the request specifically relying on the UK's continuing rights under the MoU.

Commentary

David Hicks found himself in a similar position to Mr Rahmatullah. Mr Hicks was a civilian combatant who was captured in Afghanistan by the US and deported to Guantanamo Bay in Cuba. Persons acting on Mr Hicks' behalf brought habeas corpus in the Federal Court of

Australia to compel the Australian Government to request his release from the US. In *Hicks v Ruddock* (2007) 156 FCR 574, the Federal Court considered an application by the Australian Government to summarily dismiss the habeas corpus suit, on the basis that it was without reasonable prospects of success. The Federal Court held that there were no clear authorities that would justify summary judgment against Mr Hicks. However, he was returned to Australia in 2007 before the case could go to trial.

Section 21(7) of the Victorian Charter provides that any person deprived of liberty is entitled to apply to a court for a declaration regarding the lawfulness of their detention. This essentially enshrines the common law writ of habeas corpus into the Victorian Charter. An application for habeas corpus in Victoria would be made under Order 57 of the *Supreme Court (General Civil Procedure) Rules 2005*.

The decision is available online at http://www.bailii.org/uk/cases/UKSC/2012/48.html

***Sylvester Urban**, Solicitor, King & Wood Mallesons Human Rights Law Group*

Scope of the obligation to protect life

Van Colle v United Kingdom [2012] ECHR, *Application No 7678/09* (13 November 2012)

Summary

This decision of the European Court of Human Rights considered the scope of a state's obligation to protect life, which is contained in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

The Court re-stated that authorities have a positive obligation to take action where they know, or ought to know, that there is a "real and immediate risk" to the life of an identified individual from the criminal acts of another. However, in this case, the Court found that the circumstances did not establish such an obligation.

Facts

The applicants' son, Giles Van Colle, was an optometrist working at Alpha Optical who had hired Mr Brougham. During his employment, Mr Van Colle queried Mr Brougham about his national insurance number, after which Mr Brougham became violent and trapped Mr Van Colle against a wall.

Mr Brougham was later arrested by Detective Constable Ridley on suspicion of theft, unrelated to his employment, and optical equipment belonging to Mr Van Colle was found in Mr Brougham's shed. As a result, Mr Brougham was charged and Mr Van Colle was going to be required to attend court as a witness in the case against Mr Brougham, along with a number of other witnesses.

In the following few months, a number of events transpired, which were not able to be unequivocally linked to Mr Brougham. In particular:

- Mr Van Colle's car was set on fire, although the fire was believed to have started accidentally so was not reported to DC Ridley;
- Mr Van Colle received a phone call (which he believed to be from Mr Brougham) where the caller said "I know where you live. I know where your businesses are and where your parents live. If you don't drop the charges you will be in danger." Mr Van Colle reported this threat to DC Ridley;
- Mr Brougham attempted to bribe another victim not to give evidence. This was also reported to DC Ridley; and

- The car of another victim's wife and that victim's business were set alight. The victim reported both fires to DC Ridley. The initial finding was that the fires were accidental, although they were later found to have been started deliberately.

Mr Brougham then phoned Mr Van Colle and said “Give Alpha Optical a call and get them to drop the charges, you motherf***er. … Do you hear me? Do you hear me?” Mr Van Colle contacted DC Ridley about this phone call and provided DC Ridley with a written account of the call. DC Ridley called Mr Van Colle on 22 November and arranged to meet him the next day so that DC Ridley could take a statement.

On 22 November 2000, Mr Van Colle was shot dead by Mr Brougham as he left work.

The matter was referred to the Police Disciplinary Panel, who found that DC Ridley had failed to perform his duties to the required standard in relation to the incident.

The applicants then brought a claim in the High Court against the police claiming damages for a breach of articles 2 and 8 of the Convention.

The High Court found that the police acted in violation of articles 2 and 8 of the Convention by failing to discharge the positive obligation on the police to protect Mr Van Colle's life. The High Court referred to the test in *Osman v the United Kingdom* (28 October 1998, *Reports of Judgements and Decisions* 1998 – VIII). This imposes a positive obligation on authorities to take action where they know, or ought to know, that there is a “real and immediate risk” to the life of an identified individual from the criminal acts of another, and that the authorities failed to take reasonable measures within the scope of their powers to avoid that risk.

However, the High Court also drew on more recent cases to find that where persons are required by a state to perform certain duties on its behalf, which may expose them to risk, the Osman threshold is too high.

The High Court found that:

- DC Ridley should have contacted or arrested Mr Brougham after the initial intimidating phone calls;
- DC Ridley failed to assess the information about the two fires in the context of the past threats and intimidation; and
- a disturbing pattern of behaviour had emerged which required immediate action.

The police appealed to the Court of Appeal which unanimously rejected the appeal. They then appealed to the House of Lords, who upheld the appeal both in relation to article 2 and article 8 of the Convention.

The applicants then applied to the Court.

Legislative Framework

Article 2 of the Convention states:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Article 8 of the Convention states:

> Everyone has the right to respect for his private and family life, his home and his correspondence.

Decision

The Court held that there had been no violation of articles 2 or 8 of the Convention.

The Court noted that article 2 may imply a positive obligation on authorities to take preventive measures to protect an individual whose life is at risk from the criminal acts of another. In doing so, the Court found that the appropriate test is to be found in *Osman*.

The Court also found that the fact that a state placed the individual in a vulnerable position is only one of the relevant circumstances of the case to be assessed, and does not lower the threshold of the *Osman* test.

The Court found that there were not sufficient circumstances to indicate that Mr Van Colle had a reason to fear for his life, and the authorities did not know, or ought to have known, of a "real and immediate risk" to Mr Van Colle's life. This was particularly due to the varied nature of the threatening behaviour displayed by Mr Brougham which, while threatening, did not indicate he would be likely to kill a witness.

The Court noted that the applicants did not complain about acts directed against them and the application did not give rise to issues relevant to Mr Van Colle's article 8 rights which were substantially distinct from the matters considered under article 2. Accordingly, the Court's finding regarding article 2 supported a finding that there was no breach of article 8.

Relevance to the Victorian Charter

This case has relevance to the Victorian *Charter of Human Rights and Responsibilities Act 2006* because the Charter also contains a right to life (section 9). The wording of article 2 of the Convention is slightly different to section 9 of the Charter, which states "Every person has the right to life and has the right not to be arbitrarily deprived of life". However, the rights set out in the Charter are rights that Parliament specifically seeks to protect and promote, and public authorities including Victoria Police must not act in a way that is incompatible with a human right (section 38(1)).

This case could therefore provide some guidance as to the scope of section 9 of the Charter and, more specifically, the correct test to be applied in determining whether public authorities such as the police have fulfilled their obligation to act consistently with the right to life.

This decision is available online at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114473

***Tamsin Webster** is a lawyer at Maddocks.*

UK refusal to reunite family is discriminatory

Case of Hode and Abdi v United Kingdom [2012] EHCR, *Application no. 22341/09* (6 November 2012)

Summary

The European Court of Human Rights has held that the United Kingdom Government's refusal to allow the family reunion of a refugee and his wife under relevant immigration rules was unlawfully discriminatory against the refugee on the basis of his immigration status.

Facts

Mr Hode claimed asylum in the UK in 2006 and was granted five years' leave to remain in the UK. In 2007 Mr Hode travelled to Djibouti and married Ms Abdi before returning to the UK. Ms Abdi applied for a visa which was rejected on the grounds that although Mr Hode was a refugee, the applicants did not qualify for "family reunion" under section 352A of the Immigration Rules HC 395 as they married after Mr Hode left his country of permanent residence. Ms Abdi applied for leave to enter the UK as a spouse of a person present and settled in the UK (section 281,

Immigration Rules). This was later refused on the grounds that Mr Hode was not a person present and settled in the UK, having only been granted five years' leave to remain. Ms Abdi appealed this decision a number of times but was refused reconsideration of the decision.

In April 2011 the Immigration Rules were amended to permit refugees to be joined in the UK by post-flight spouses during their initial period of leave to remain, provided certain other conditions were met. Ms Abdi has not re-applied for leave to enter the UK as the spouse of Mr Hode.

Decision

The European Court of Human Rights found that there had been a violation of article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms read together with article 8 at the time when the Immigration Rules precluded refugees to be joined in the UK by post-flight spouses during their initial period of leave to remain.

Article 8 provides that "everyone has the right to respect for his private and family life, his home and his correspondence". Article 14 concerns the "enjoyment of the rights and freedoms set forth in [the] Convention without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

In considering whether the applicants' complaint fell within one of the attributes protected under article 14 of the Convention, the Court stated that "other status" has been given wide meaning and is not limited to different treatment based on characteristics which are personal in the sense that they are innate or inherent. The Court relied on its decision in *Bah v United Kingdom* where it specifically held that the fact that immigration status is a status conferred by law rather than one which is inherent to the individual, does not preclude it from amounting to an "other status" for the purposes of article 14.

The Court considered, but could not find, a justification for treating refugees who married post-flight differently from those who married pre-flight.

Relevance to Australian immigration policy

The Special Humanitarian Program provides resettlement in Australia for people who are living outside their home country, are subject to substantial discrimination amounting to a gross violation of their human rights in their home country and who have family or community ties to Australia. It also provides resettlement for immediate family of persons who have been granted protection in Australia.

The Migration Amendment Regulation 2012 (No 5), introduced following the release of The Report of the Expert Panel on Asylum Seekers, prevents Irregular Maritime Arrivals from being eligible to propose family members for entry to Australia under the SHP. The decision in *Hode and Abdi v United Kingdom* calls into question the Regulations' compatibility with article 2 of the *International Covenant on Civil and Political Rights* (the equivalent of article 14 of the ECHR).

The decision can be found online at:
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114244

Emily Brott *is a lawyer from King & Wood Mallesons on secondment with the Human Rights Law Centre*

Forced sterilisation of Roma women is inhuman and degrading but not discriminatory

IG & Ors v Slovakia [2012] ECHR 1910 (13 November 2012)

Summary

The European Court of Human Rights has again declined to rule on whether the forced sterilisation of Roma women in Slovakia constitutes discrimination under article 14 of the European Human Rights Convention. This is the third such forced sterilisation case to come before the Court. The Court held that the sterilisation of two Roma women constituted inhuman and degrading treatment, and that Slovakia had violated the women's right to respect for private and family life. The Court awarded damages and costs to the applicants. The claim of a third woman was struck out due to her death. The Court denied her children's standing to continue the application on her behalf.

Facts

The three applicants were Roma women who, between the years 1999 and 2002, were sterilised without their knowledge by doctors in the Krompachy public hospital. The women were sterilised by tubal ligation immediately after giving birth by caesarean section.

While in the hospital, the women were accommodated separately from non-Roma women, in what were called "Gypsy rooms". They were not permitted to use the same bathrooms and toilets as non-Roma women, and could not enter the common dining room.

A 2003 report, *Body and soul: Forced and coercive sterilization and other assaults on Roma reproductive freedom in Slovakia*, was used as evidence before the Court. It included an interview with the Krompachy Hospital Chief Gynaecologist in which he stated, "Roma did not know the value of work, that they abused the social welfare system and that they had children simply to obtain more social welfare".

After a criminal investigation into the applicants' cases was discontinued by the Slovakian authorities, the women repeatedly applied to have the investigation reopened. The case was closed in 2008 without any criminal charges being laid. All three applicants brought individual civil proceedings against the hospital. Only second applicant's action was successful. She was awarded EUR 1,593.30 in compensation.

The women submitted an application with the Court against the Slovak Republic on 27 April 2004. They alleged breaches of their rights to be free from inhuman and degrading treatment (article 3), to respect for private and family life (article 8), to marry (article 12), and to an effective remedy (article 13). They also alleged that their forced sterilisation was a result of discrimination (article 14).

Decision

Standing of the third applicant

Under article 34, only individual victims of Convention violations can petition the Court. In the case of a deceased victim, the Court will consider whether (i) persons seeking to continue their case are close family members, (ii) the rights in question are "transferable", and (iii) the case involves an important question of general interest that the court should consider notwithstanding the applicant's death.

The Court held that the third applicant's children could not continue the action based on previous decisions that found articles 3, 8, 12 and 14 constituted rights linked to a victim's person that were non-transferable. As the third applicant's case was similar to that of the first and second, the

Court found that there was no general interest in considering her claim. Judge Bratza dissented with this decision, arguing that the "disturbing circumstances of the case" and the need to respect the third applicant's human rights warranted its continuation by her children.

Convention violations

The Court followed the reasoning applied in *VC v Slovakia* and *NB v Slovakia*, two prior cases involving the sterilisation of Roma women. It held that non-lifesaving sterilisations, conducted without the informed consent of the women or their legal guardians constituted inhumane and degrading treatment and a substantial breach of Slovakia's obligations under article 3. Regarding the applicants' claim that their sterilisations had seriously interfered with their private and family lives, the Court held that by failing to put in place effective legal safeguards to protect the reproductive health of, in particular, women of Roma origin, Slovakia was in breach of article 8.

As it had already found a violation of article 8, the Court declined to consider whether the women's right to form a family (article 12) had been violated.

The Court dismissed the applicants' claim that their article 13 right to an effective remedy had been violated. The two women had fully pursued their cases in the civil and criminal jurisdictions of the Slovakian courts. The Court highlighted that the right to a remedy is not a right to a remedy that succeeds, nor does article 13 require a remedy against the state of domestic law.

With regards to the women's claim that their sterilisation had occurred due to racial discrimination against them as Roma, and sexual discrimination against them as women, the Court declined to rule. It relied on the reasoning applied in *VC* and *NB* that, as it could not be proven that the hospital staff's conduct was intentionally racially motivated, a finding under article 14 was unnecessary. The Court felt it was sufficient to recognise, in the context of its article 8 analysis, that the shortcomings in Slovakian reproductive health practice were liable to particularly affect vulnerable communities such as the Roma.

Commentary

It is disappointing that the Court has, for the third time, refused to consider the discriminative character of forced sterilisations of Roma women. Scholars have already taken note of the Court's reluctance to make findings of discrimination in case of violence against the Roma.

It is unfortunate that Judge Mijovic's dissent in *VC v Slovakia*, arguing for a consideration of the article 14 claim on its merits, has failed to influence the court's reasoning in this case:

> Finding violations of Articles 3 and 8 alone in my opinion reduces this case to the individual level, whereas it is obvious that there was a general State policy of sterilisation of Roma women under the communist regime (governed by the 1972 Sterilisation Regulation), the effects of which continued to be felt up to the time of the facts giving rise to the present case…. The fact that there are other cases of this kind pending before the Court reinforces my personal conviction that the sterilisations performed on Roma women were not of an accidental nature, but relics of a long-standing attitude towards the Roma minority in Slovakia.

As for the Court's refusal to allow the third applicant's children to continue her case, the court relied on the authority of *Angelov and Angelova v Bulgaria* to classify the rights under consideration as personal and non-transferable. In order to bring complaints under section 34, an individual must be able to show that he or she has been directly affected by a purported breach of the Convention. In *Angelov and Angelova v Bulgaria,* the applicant's daughter wished to continue her deceased father's claim that his right to respect for his correspondence had been violated.

The present case involves the children of a women whose reproductive health was compromised, resulting in a violation of her right to respect for her private and family life. It seems unreasonable that the Court should not consider the effect that this violation has had on the applicant's children, her family, in assessing their standing to continue the action.

This decision is available online at: http://www.bailii.org/eu/cases/ECHR/2012/1910.html

Naomi Kinsella *is an Australian lawyer currently working with the American Bar Association Rule of Law Initiative.*

HRLC POLICY WORK AND CASE WORK

HRLC provides comments on Australia's Draft Report to the UN Committee against Torture

Australia is scheduled to be reviewed by the UN Committee against Torture for its compliance with the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in 2013.

The HRLC has prepared a submission on Australia's Draft Fifth Report to the UN Committee Against Torture in relation to compliance with the Convention against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment (Draft Report).

The HRLC commends the Attorney-General's Department on the substantial work undertaken to prepared the Draft Report and respond to the Committee's List of Issues Prior to Reporting. This submission identifies aspects of the Draft Report that we consider to be inaccurate or misleading. Our comments are made in relation to: asylum seekers and refugees; violence against women; and independent inspections of places of detention.

The Government's Draft Report is available here.

Implementing the UN Guiding Principles on Business and Human Rights in Australia

In 2011, the Australian Government co-sponsored the UN Human Rights Council resolution which unanimously endorsed the Guiding Principles on Business and Human Rights. These Principles seek to provide guidance on implementing and operationalising the state duty to protect people from human rights violations by business, the business duty to respect human rights in their activities, and the obligation to ensure that victims of human rights violations by business have access to effective remedies.

The upcoming inaugural Forum on Business and Human Rights in Geneva, Switzerland, provides an opportunity to galvanise the international community and further promote the business and human rights agenda.

Given our heightened profile as an incoming non-permanent member of the UN Security Council, Australia is well placed to play a lead role in the effective implementation of the Guiding Principles by supporting the Guiding Principles in international fora and setting the global benchmark in domestic implementation.

The Australian Government should lead by example and use the Forum as a platform to outline its business and human rights agenda. The HRLC's submission to the Department of Foreign

Affairs and Trade sets out several recommendations for action to secure the effective domestic implementation of the Guiding Principles.

Holding Australia to account at the UN: HRLC briefs UN Human Rights Committee on Australia

Together with a group of leading human rights and community organisations, the HRLC has provided a private briefing to the UN Human Rights Committee on the state of human rights in Australia.

On 30 October 2012, the HRLC joined with organisations including the Asylum Seeker Resource Centre, Kingsford Legal Centre, People with Disability Australia, National Aboriginal and Torres Strait Islander Legal Services, the National Association of Community Legal Centres and Women's Legal Service, to brief the Committee by video conference in Geneva ahead of their upcoming periodic review of Australia's compliance with the International Covenant on Civil and Political Rights.

After a short opening statement, NGOs answered questions from Committee members on a range of key human rights issues, including:

- Australia's failure to incorporate the ICCPR into domestic law;
- the Federal Government's "Human Rights Framework", including the operation of the Parliamentary Joint Committee on Human Rights;
- the consolidation of federal anti-discrimination laws;
- Aboriginal and Torres Strait Islander rights;
- the rights of asylum seekers and refugees;
- women's rights;
- disability and mental health;
- counter terrorism laws and practices;
- Australia's extra-territorial obligations; and
- prisons and policing.

The Committee's List of Issues will be released in the coming weeks and the Australian Government's response will be due within six months. The Committee's full review of Australia in Geneva is likely to take place in late 2013 or early 2014.

A copy of the HRLC's written submission to the Human Rights Committee is available here.

HRLC MEDIA COVERAGE

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

- Tom Clarke, Australia's evolving position on West Papua, *The Australian,* 30 November 2012
- Chris Merritt, De Kretser to lead rights centre, *The Australian,* 30 November 2012
- Alex Boxsell , de Krester joins human rights centre, *Australian Financial Review,* 30 November 2012
- Vincent Morello, Police fatally shoot truck thief, *Sydney Morning Herald,* 23 November 2012
- Simon McKeon AO and Rachel Ball, Missed opportunities in changes to anti-discrimination laws, *ABC The Drum,* 21 November 2012
- Phillip Hudson, Aged homes must open doors to people who are gay or transgender, *Herald Sun,* 20 November 2012
- Anna Brown, Police are too quick to draw their Tasers, *ABC The Drum,* 15 November 2012
- Lidia Nikon, Asylum seekers turned back on arrival, *The Wire,* 12 November 2012
- Greg Dyett, Voting for UN Human Rights Council, *SBS World News Australia,* 12 November 2012
- Justin Whealing, Government slammed for being hypocritical on rights, *Lawyers Weekly,* 8 November 2012
- Ildi Amon, Human rights 'sacrificed' for short-term gain, *SBS Radio News,* 6 November 2012
- Daniel Flitton, Asylum seeker boats on the rise since offshore policy, *The Age,* 31 October 2012
- Rachel Carbonell, Calls for inquiry into Aboriginal teen's solitary confinement, *ABC News,* 31 October 2012

SEMINARS & EVENTS

Human Rights Awards

10 December, Sydney

Winners of the Australian Human Rights Commission's Human Rights Awards will be announced at an awards ceremony hosted by television and radio comedian, the chaser's Craig Reucassel at Hilton Sydney on George Street.

Victorian Equal Opportunity and Human Rights Commission's Human Rights Oration 2012

11 December 2012, Melbourne

Ron Merkel QC, 2011 Human Rights Medallist, barrister and former Federal Court Judge will deliver this year's oration. Come and hear Ron explore how spin, polls and appearances have been used to blur the line between myths and realities in relation to human rights issues. Are we now living in an era in which everything is OK if the end justifies the means?

The Oration will be held at ZINC, Federation Square, Melbourne. It will be from 12.30pm until 1.30pm followed by a light lunch. Register at humanrightscommission.vic.gov.au/oration by Wednesday 5 December. For more information, please call 03 9032 3430.

HUMAN RIGHTS JOBS

Public Interest Law Clearing House

One of Australia's most successful and innovative public interest and pro bono law organisations is currently seeking a dynamic Director of Legal Services to play a lead role in the overall management of PILCH with responsibility for PILCH's direct legal services.

Publish What You Pay

Publish What You Pay Australia is a coalition of NGOs working to campaign for transparency and accountability in the Australian mining and oil and gas industries at home and overseas. PWYP Australia is looking for a Graphic Designer who will be responsible for designing the layout of a short booklet – a central campaign tool – to engage and educate the public about the campaign.

Federation of Community Legal Centres

The Federation of Community Legal Centres is the peak body for Victoria's 50 community legal centres – independent, community organisations that provide free public legal services focused on helping disadvantaged Victorians. The Federation is seeking a Justice Policy Officer.

BOOK REVIEW

Our greatest challenge: Aboriginal children and human rights

(Hannah McGlade, Aboriginal Studies Press, AIATSIS)

Hannah McGlade's courageous (and at times personal) work leaves readers with the uncomfortable yet undeniable knowledge that Aboriginal child sexual assault is a serious human rights dilemma in Australia – an anathema the criminal justice system has ultimately failed to prevent or remedy. A well-researched account of these failings across a number of periods and places makes this book a must-read for anybody interested in child-protection and human rights. Readers be warned, even the poignant dedication "to all the Aboriginal children who cried out in the night but who were not heard" cannot prepare you for the shocking realities that follow. Whilst

this is an issue so abhorrent that collective society has refused to publicly acknowledge its existence, this book reminds us that child sexual assault in Aboriginal and Torres Strait Islander communities is prevalent, extensive and highly damaging.

The primary contention of this work is that the abuses suffered by Aboriginal children are the product of entrenched racism, colonisation and patriarchy perpetuated by both black and white men. These abuses continue as the criminal justice system fails to see beyond race and gender, denying the Aboriginal child equality before the law. McGlade articulates an endemic inability to address child sexual assault whilst abuse remains shrouded under the cloak of privacy and widespread shame. She highlights the importance that Aboriginal self-determination plays in protecting children from sexual assault and advocates the development of a response that respects Aboriginal culture and empowers victim survivors as well as human rights.

Real-life stories, including McGlade's own experience of abuse growing up as a Noongar child, are delicately woven together to form the fabric of this work. A number of theories relating to the sexual abuse of Aboriginal children are considered, dispelling the myth that violence and sexual abuse is part of "Aboriginal culture". McGlade skillfully presents examples of white-Australian judges and academics having identified Aboriginal culture as accepting of sexual assault against children. This is a fallacy, and in the author's view, perpetuates the stereotype that Aboriginal girls and women cannot be raped. McGlade ardently contends that it is not something that is a part of Aboriginal culture, but something resulting from colonisation.

The book moves from dispelling myths to examining power differentials between men, women and children from different theoretical perspectives. A feminist perspective proves to be of most utility to the author despite feminism's grounding in the experience of non-Aboriginal women. McGlade considers that Aboriginal feminist thought utilises the critique of feminism along with anti-colonialism to show how violence and sexual abuse against Aboriginal women are linked to colonialism and patriarchy. Colonialism is often described as having had the most detrimental effect on Aboriginal males; however, in reality, according to McGlade, it is Aboriginal women and children that suffer injustices never contemplated by Aboriginal men. By using her own experience as an employee of the Aboriginal and Torres Strait Islander Commission, McGlade allows the reader a unique glimpse into the failings of a male-dominated organisation not long ago cited as a representative body for all (Indigenous) peoples and issues.

In highlighting the societal response to these alarming personal accounts of abuse, McGlade presents readers with a decade of government reports and inquiries ultimately evidencing the disturbing rates of child sexual abuse in Aboriginal and Torres Strait Islander communities and the lack of any systemic responses on the part of authorities. McGlade further notes the inadequate legislative response following these reports and inquiries, with children still victimised and disadvantaged by the legal process. Such examples of this institutional victimisation include forcing children to face perpetrators and promoting double-discrimination (as an Aboriginal or Torres Strait Islander and as a child), to the adversarial legal system's fundamental predication on undermining the child's credibility.

McGlade concludes her scathing critique of the criminal justice system by advancing a number of suggestions as to how this situation can be remedied. She focuses on models aimed to address the harm caused to victims and to enable Aboriginal people the power to break the cycle of abuse by working in partnership with governments. Again, both national and international evidence is used to strengthen the authority of McGlade's argument for Community Holistic Circle Healing as a possible solution, with a critical view of this method also provided.

McGlade's compelling work delves into issues beyond the comprehension of most readers and provides a critical and personal view as to the failings of governments (and society in general) to

protect Aboriginal children from sexual assault. She offers a unique perspective, having been the victim of sexual assault herself, and carefully evidences the ways in which some of these failings may be remedied. As a Noongar human rights lawyer, McGlade's insight into holistic solutions maintains the need for recognition of Aboriginal equality, self-determination and reconciliation, while providing readers with a candid and at times shocking lens through which Australian society as a whole has neglected its First Peoples' children. It is remedying this tragedy that she deems "our greatest challenge", an apt description for something so critical.

Emily Brott *is a lawyer from King & Wood Mallesons on secondment with the Human Rights Law Centre*

FOREIGN CORRESPONDENT

Advocacy for human rights: Lessons from successful campaigns

The human rights movement has brought down dictators, changed government policies and practices, won new international standards to address egregious abuses, and transformed public debate in order to bring human rights issues squarely onto the global agenda. Yet the human rights literature rarely examines the advocacy strategies that have been successful in protecting and promoting human rights.

In recent years, human rights victories have ranged from campaigns to bring Charles Taylor to justice and prohibit the use of child soldiers, to those to secure LGBT rights in Nepal and change sentencing practices for juvenile offenders in California. A study of these and other campaigns, including dozens of interviews with the advocates involved, provides some clues regarding the strategies that are most likely to be effective. In particular, they illuminate five key lessons.

First, broad-based and strategic alliances have been at the heart of many of the most successful human rights advocacy efforts. Coalitions, often across borders and bringing together diverse actors, bring strength, credibility, and a unified voice to critical issues. The Coalition to Stop the Use of Child Soldiers, for example, united human rights groups with humanitarian organisations working in conflict areas to help persuade governments of the necessity of protecting children from military recruitment and participation in armed conflict. The Coalition helped secure the optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, now ratified by 150 countries. The Coalition to End Impunity sought former Liberian President Charles Taylor's transfer from Nigeria, where he had sought safe haven, to the Special Court for Sierra Leone in the Hague to stand trial for war crimes. The effort brought together international groups like Human Rights Watch and Amnesty International with hundreds of African NGOs, including those from the countries most affected by Taylor's crimes: Sierra Leone, Liberia, and Nigeria. The transnational effort made clear that Africans affected by the war were deeply committed to bringing Taylor to justice, and that the effort to put him on trial was not just a "Western" agenda.

Secondly, successful campaigns often use "opportunistic" advocacy, utilising outside events or developments as opportunities to move their issue forward. A dramatic example was the organising by Libyan families of prisoners killed in the 1996 Abu Salim prison massacre. Beginning in 2004, the families began taking advantage of modest political reforms to push for accountability, filing complaints in Libyan courts and with UN special procedures, organising demonstrations, and using social media to publicise their cause and demands. They won surprising concessions from the Qaddifi regime, including an acknowledgement of the massacre,

offers of compensation, and official death certificates for the deceased. In 2011, as the Arab Spring began to sweep Middle Eastern countries, demonstrations by the families – experienced through years of organising– seized on the opportunity and sparked large-scale protests across Libya, leading to events that ultimately brought down the Qaddafi regime.

Third, human rights advocacy depends on credible research, investigation, and documentation. These are among human rights advocates' most powerful tools. For example, a California campaign to challenge laws that sentenced juvenile offenders to life sentences without any possibility of parole used careful research to show that many of the youth who had received the sentence were not the "worst of the worst." They found that 59 percent of juvenile offenders serving life without parole had received the sentence for their first-ever conviction, and that over a quarter had been convicted of felony murder, receiving a life without parole sentence despite the fact that it was a co-defendant who physically committed the murder. The research helped convince legislators to adopt a law in 2012 that provided juveniles sentenced to life without parole the possibility of eventual release. It was the first time in decades that the state had acted to reduce criminal sentences.

Fourth, many of the most dynamic and successful campaigns are led by individuals who are most directed affected by human rights abuses. In Nepal, for example, members of the LGBT community were the driving force in addressing homophobia and anti-gay violence, even when under direct threat. In just a few years, they won a Supreme Court decision affirming equal rights for all LGBT citizens, reductions in incidents of anti-gay violence, and the possibility that Nepal would become one of the first countries in the world to allow same-sex marriage. In another example, domestic workers, who are often exploited and excluded from national labor laws, mobilised first at a national level and then internationally to win the ILO Domestic Workers Convention. Adopted in 2011, the Convention finally guaranteed domestic workers equivalent rights to other workers, including the right to a minimum wage, rest days, overtime pay, and limits to their hours of work.

Finally, nearly all the successful campaigns examined utilised multiple points of leverage to create and maintain pressure for change. In many cases, advocates combined advocacy with UN entities, such as the Security Council, Human Rights Council, or UN special procedures, with court challenges, media work, engagement with influential third-party governments or individuals, and other forms of pressure. For example, in the Philippines, local and international NGOs advocated for years to expose rising numbers of extrajudicial executions, and engaged third-party governments to raise concerns directly with the Philippines government. They also worked with the UN special rapporteur on extrajudicial executions, whose visit and subsequent report prompted government action to curtail the killings, finally bringing a dramatic drop in the numbers of extrajudicial executions. Similarly, the campaign to bring Charles Taylor to justice successfully engaged a broad range of actors, including the UN Security Council, the Nigerian courts, the African Union, European Union, and individual governments such as the United States to pressure Liberia to request Taylor's transfer to the Special Court for Sierra Leone and Nigeria to comply with the request.

Human rights advocacy is by no means a science, with guaranteed formulas for success. Each individual advocacy effort must assess available opportunities and the most appropriate tools and advocacy targets. Despite the many variables at play, however, experience suggests that success is more likely when advocacy is based on broad-based alliances, strategic timing and "opportunistic" advocacy, credible research and documentation, organising by those most affected by human rights abuses, and the use of multiple points of leverage.

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IF I WERE ATTORNEY-GENERAL...

According human rights to people with disability

Australia ratified the Convention on the Rights of Persons with Disability (CRPD) over four years ago and designated the Attorney-General with responsibility for overseeing and coordinating its implementation (article 33 CRPD) – an obligation it shares with the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA). Since 2008 the Federal Government has designed the National Disability Strategy to implement the human rights embodied in the CRPD and recently initiated the National Disability Insurance Scheme to finally provide choice and control in disability services and supports for people with disability. So as AG for the day I might be tempted to take the opportunity to make a few calls to people with disability and ask them how they thought we'd been performing, to find out what we could be doing better, and to enjoy the feedback earned from a job well on its way to being done.

The day may well start slowly, however, as I flick through my contact list to realise I don't have any people with disability on my speed dial, and then frustration would set in as the representative organisations of people with disability that I called replied that they were too busy to speak to me; a sorry situation for an AG responsible for "closely consulting with and actively involving persons with disability in the development and implementation of legislation and policies" (article 4 CRPD). Perhaps then I'd begin to understand the seriousness of my obligation to effectively and meaningfully engage with people with disability, the detrimental impact on people with disability of the failure to do this well, and the obstacle that poor consultation processes become in realising the human rights of people with disability.

In Australia today it is possible for parents with disability to have their children removed at birth, for girls and women with disability to be sterilised without their informed consent, for people with intellectual disability to be imprisoned indefinitely, for people with psychosocial disability to be detained if they don't take their medication as prescribed, and there are frequent cases of children with disability being restrained by their teachers as a punishment for challenging behaviour in school. These are flagrant abuses of human rights and they happen every day. So why is it so important for government to spend time and money to consult people with disability, when it is so clear that practices such as these are wrong?

It's important because a person with disability would likely not choose to create the laws that permit such practices. It's important because the laws which permit these practices can only be created, and can only persist, when people with disability are excluded from decision-making processes. It's important because without the full and effective political participation of people with disability there will be no significant change, and it's important because the failure of government to support people with disability to speak up or to listen to their voice when they do implies contentment with the status quo.

The obligation to consult with people with disability is not a difficult one for government to discharge, but it does require planning, time and a serious intent to do it well. Luckily, Australia is a wealthy country with adequate human and financial resources to commit to such endeavours;

less impressive is the fact that nearly half of all Australians with disability live on or below the poverty line.

Task 1 then is straightforward: for engagement to be adequate it should be conducted where, when and how it is suitable for people with disability and not the other way around. The traditional style of public forum where all are invited but few can attend is not satisfactory, and reeks of tokenism. Short timeframes, ad hoc invitations to meetings in buildings which are not accessible, to comment on materials that are also inaccessible are obvious no-nos. The internet is useful but computers don't have "listening ears"; face-to-face is always better.

Task 2 is again simple: for engagement to be meaningful governments need to consult with and involve actual people with disability(!), as well as the most appropriate representative organisations for the purpose at hand. It's estimated that 20 percent of Australians either have or will at some stage in their life acquire a disability, the statistic alarmingly rising to 40 percent for Aboriginal and Torres Straight Islanders. But these 4 million people are not an homogenous group, and it's no good applying a "one size fits all" model of engagement; a person who becomes paraplegic as a consequence of a car crash at age 40 has different needs, concerns, aspirations and life experiences to a 10-year-old child who was born with a cognitive impairment as a result of foetal alcohol syndrome.

The decision as to which individuals or groups represent the views and opinions of people with disability should be re-negotiated in every instance. The process should be open and transparent, based on merit, expertise and life experience, and unrelated to any existing contractual arrangements with government. Not all people with disability need to be consulted all of the time, but the same people with disability must not be consulted every time. Relying on the voices of the loudest or most organised people and organisations dilutes the integrity of the process. Moreover, outsourcing consultation processes to the disability sector curtails their independence, and puts the onus on people with disability to achieve successful outcomes when it is the responsibility of government to gather quality, inclusive, timely and relevant input.

Task 3 requires a little more effort: in order to actively involve people with disability in the policy process government needs to build the skills and capacity of people with disability (including self-advocates, user-groups and independent disabled peoples organisations) to advocate for their human rights effectively at community, state and federal levels, to share knowledge, develop leaders, collaborate successfully with others, plan strategically, and to have the confidence to challenge exclusion, lobby the government to initiate change based on their own priorities, and to bring about systemic change.

Task 4 will only be achieved when tasks 1, 2 and 3 are executed sufficiently: for engagement to be effective people with disability must be and feel listened to, and see recognition of their concerns reflected back through policy and legislation that respects their right to political participation on an equal basis with others (article 29 CRDP). Participation must be empowering and produce ownership of ideas. Intention matters, being asked to merely authorise decisions already made will only result in apathy from people with disability and further disenfranchisement.

In conclusion, if I was AG for a day I'd renew my commitment to people with disability by prioritising their political participation and active involvement in the policy process above all other concerns. At its heart, "close consultation" is about building trust with people with disability who have a long history of social, political, economic and cultural invisibility. Silenced through exclusionary and restrictive practices, their needs have remained unaddressed and their human rights unfulfilled. Involving people with disability in the decisions that affect them is not only a necessary human rights practice, or the very least that can be done to begin to address human rights violations; it is the only way to ensure that such abuses will not continue unabated. Yet the

conversation is only just beginning, as unfortunately the implementation gap between rights on paper and rights in reality is as wide as ever for people with disability in Australia.

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

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

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

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

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