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RIGHTS AGENDA

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OPINION: AUSTRALIA SHOULD FIND ITS VOICE ON SRI LANKA'S WAR CRIMES

Kevin Rudd needs to show the same attention to human rights issues in Australia's region as he did in Libya, writes **Human Rights Watch's Elaine Pearson**, and Sri Lanka would be the perfect place to start.

NEWS: INDIGENOUS CONSTITUTIONAL RECOGNITION

A referendum to recognise Indigenous Australians and remove racially discriminatory provisions in the constitution now seems certain to proceed.

CASE NOTES:

The Office of Public Prosecutions is appealing a significant case regarding equality before the law of people with disabilities.

IF I WERE ATTORNEY-GENERAL…

Director of the National Pro Bono Resource Centre, **John Corker**, argues that a review of our laws and practices surrounding detention should be at the top of Australia's agenda for promoting and protecting human rights.

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OPINION

Australia should find its voice on Sri Lanka's war crimes

Elaine Pearson

As nations like Canada and the United Kingdom weigh in on accountability for war crimes in Sri Lanka, it's time for Australia to add its voice. After all, promoting human rights is a crucial part of Australia's foreign policy, as Foreign Minister Kevin Rudd is keen to say.

One month ago, the Sri Lankan government's Lessons Learnt and Reconciliation Commission (LLRC) issued its long-awaited report. The commission was established by President Mahinda Rajapaksa in May 2010 to deflect mounting international pressure on accountability for alleged war crimes in the final months of the conflict with the separatist Liberation Tigers of Tamil Eelam (LTTE).

As the United Nations Panel of Experts appointed by Secretary-General Ban Ki-moon reported last April, tens of thousands of civilians were killed during that period, largely from indiscriminate shelling by government forces. Government forces were also implicated in extrajudicial killings, torture, and the shelling of protected places such as hospitals, while the LTTE abuses included using civilians as human shields, shooting people who tried to escape, and forcibly conscripting child soldiers. But nearly three years after the conflict ended in May 2009, there is still no accountability for any of these war crimes.

In the end, the commission's 388-page report is disappointing. It discounts the worst government abuses, such as disturbing footage of summary executions of prisoners by uniformed soldiers shown in the British Channel 4 documentary *Sri Lanka's Killing Fields*. Though four independent experts reported to the UN that the footage was genuine, the commission cast doubts on its authenticity and recommended further forensic testing. More surprising, although the commission concluded that there were civilian casualties, it didn't call for investigations into indiscriminate attacks.

The report rehashes longstanding recommendations on accountability from previous government commissions. There's no reason to believe the government will carry them out now since it never has before. In short, the report doesn't advance accountability for victims of Sri Lanka's armed conflict. Its serious shortcomings highlight the need for an international investigative mechanism into the wartime abuses, as the UN Panel of Experts recommended.

Last year, after the *Killing Fields* aired on Australian television, Rudd called on the UN Human Rights Council, which at war's end had publicly dismissed the possibility of government wartime abuses, to reconsider its findings. "I believe their deliberation on it was inadequate," he said, "and I would call upon - as does the Australian government through its mission in Geneva - the Human Rights Council to revisit this matter." He concluded that, "No-one watching this program could emerge from that undisturbed and we don't either."

At the Commonwealth Heads of Government Meeting last October in Perth, when Sri Lanka's fitness to hold the next meeting was raised, Prime Minister Julia Gillard responded, "On the question of human rights abuses and allegations of those abuses in Sri Lanka, the government's position is we have consistently raised our concerns about human rights questions in the end stage of the conflict. These need to be addressed by Sri Lanka."

Australia's relationship with Sri Lanka has been somewhat complicated by the boatloads of ethnic Tamils heading to Australia and Australia's cooperation with the Sri Lankan government to

prevent people-smuggling. But Canada has faced similar issues, and this has not stopped Canada from speaking out strongly about accountability.

With a Human Rights Council session approaching in March, now is the time for the Australian government to publicly renew its concerns about accountability for abuses during the conflict. Australia should show leadership in calling for the issue to be re-examined and assessing the need for an independent, international investigation. Both Canada and the UK have already issued statements expressing concern that the LLRC's report does not address the serious allegations of war crimes and calling for a credible independent mechanism. The Sri Lankan government has made it abundantly clear that it is not willing to impartially investigate these war crimes. So the international community needs to step in.

In April 2010 Australia issued a Human Rights Framework, saying the government will seek to "improve the protection and promotion of human rights at home, within our region and around the world." While Rudd has spoken out strongly on Syria and Libya, he should show the same attention to human rights issues in Australia's own region, and Sri Lanka would be the perfect place to start.

Elaine Pearson *is deputy Asia director at Human Rights Watch. You can follow her on twitter @pearsonelaine*

NEWS IN BRIEF

Important steps for Indigenous constitutional recognition

A referendum to recognise indigenous Australians and remove racially discriminatory provisions in the constitution now seems certain to proceed, with bipartisan support for a recently released expert report on the topic. The news was welcomed by Indigenous representatives at the Aboriginal Tent Embassy, which has marked its 40th anniversary.

Australia Day prompts reflections on racism and tolerance

As usual, Australia Day has prompted various discussions about Australia's national identity. Renowned surgeon Dr Chalie Teo called on Australians to recognise that racism still exists and encouraged a kinder, bipartisan approach to refugees in his Australia Day speech, while Football coach and former player, Ron Barassi, has called for Australia Day to be moved to May 27 to commemorate the day Aborigines were given equal citizenship rights. A group of Catholic bishops has called for Australia's politicians to celebrate Australia Day by giving asylum seekers a fairer go.

Police pursuits in Victoria leave five dead and prompt calls for policy rethink

Five Victorians have died in car crashes relating to police pursuits in recent months prompting road safety experts to call for a change to an irrational policy that puts innocent lives at risk A police report into pursuits is due to be released soon.

Man dies in custody of NT Police

A 27-year-old man has died in police custody in Alice Springs. Witnesses allege that police officers bashed the man shortly before he died. The case highlights the problems of police investigating police, with the NT Chief Minister dismissing the family's calls for an independent investigation.

Call to end mandatory sentencing for people smugglers

Judges, legal and human rights organisations have called for an end to mandatory, five-year jail terms for convicted people smugglers. The HRLC's Phil Lynch has labeled mandatory sentences ineffective, expensive and a violation of rule of law, while the Greens propose to introduce a bill to replace mandatory sentences of five years with a three year non-parole period.

UNHCR speaks out on ASIO security assessments, Coalition refugee policy

The United Nations High Commission for Refugees has called on the federal government to introduce administrative reviews of ASIO decisions labeling refugees 'adverse security risks' which can result in indefinite detention without explanation or right of review. The UNHRC also expressed alarm at the coalition's 'turn back the boats' policy, which would put Australia in breach of international law. Meanwhile, asylum seekers at Tasmania's Pontville Detention Centre have called off their hunger-strike.

Anti-mine protesters shot dead by Indonesian police

The Indonesian Human Rights Commission has launched an inquiry into the fatal police shooting of at least two demonstrators protesting against an Australian mining operation in Eastern Indonesia. Meanwhile, Human Rights Watch's 'World Report 2012' reports of a worsening of police violence in Papua and the Asian Human Rights Commission has accused military officers of arbitrarily arresting and torturing civilians based on false claims of rebel activity.

The lingering stain of Guantanamo

President Obama's failure to keep his promise to close the Guantanamo Bay prison facility has been criticised by many, including human rights lawyer Elizabeth O'Shea who says Guantanamo represents an affront to the bedrock principles that underpin Western legal systems, including freedom from arbitrary arrest, the right to a fair trial and the presumption of innocence.

Documents reveal surveillance of protesters

Documents released to *The Saturday Age* have revealed the extent to which the government, AFP and ASIO spy on protesters and lobby groups.

Human behaviour can't be expected from the dehumanized

Greg Barns, National President of the Australian Lawyers Alliance, has made the case for a review of Victoria's corrections model – and a humanised approach to prisoners – to promote rehabilitation and reduce recidivism. The comments come in the wake of riots at Victoria's Fulham Prison.

Margaret Court's anti-gay stance prompts outcry

Tennis legend, Margaret Court, has sparked controversy by labeling homosexuality 'immoral' and a 'sin', and stating homosexuality is a choice. Court's comments highlight broader societal prejudices, according to Senthorun Raj. Court's comments were condemned by many, including tennis greats Martina Navratilova, Billie Jean King and queer commentator Doug Pollard.

INTERNATIONAL HUMAN RIGHTS DEVELOPMENTS

UN adopts new treaty protocol to enable children to have their human rights complaints heard by an expert international body

Children will be empowered to complain about violations of their human rights to an international body after the adoption by the General Assembly on Monday of a new Optional Protocol to the Convention on the Rights of the Child.

The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure allows individual children to submit complaints regarding specific violations of their rights under the Convention and its first two optional protocols, one on the sale of children, child prostitution and child pornography, and the other on the involvement of children in armed conflict.

"Children will now be able to join the ranks of other rights-holders who are empowered to bring their complaints about human rights violations before an international body," said UN High Commissioner for Human Rights Navi Pillay.

"We see every day examples of a wide range of human rights violations against children – from discrimination to child trafficking to all forms of physical or mental violence. I encourage States to sign this Optional Protocol to give child victims of such violations direct access to an international human rights complaints mechanism."

The Optional Protocol was transmitted by the Human Rights Council to the General Assembly last June. It establishes a procedure to bring complaints under the Convention on the Rights of the Child similar to those that already exist for other core human rights treaties.

Upon receiving a complaint, the Committee on the Rights of the Child will examine it to determine whether the Convention has been violated. The Committee will guarantee that child-sensitive procedures and safeguards are put in place to prevent the manipulation of the child by those acting on his or her behalf under the Protocol.

While it is examining the complaint, the Committee may request the State to adopt interim measures to prevent possible irreparable damage to the child. It may also request protection measures to prevent reprisals, including further human rights violations, ill-treatment or intimidation, for having submitted such complaints. If the Convention is found to have been violated, the Committee will make specific recommendations for action to the State responsible.

"The new Protocol takes into consideration the particular, special needs of children," Committee Chairperson Jean Zermatten said. "In fulfilling its functions under the Protocol, the Committee will be guided by the principle of the best interests of the child and will bear in mind the rights and views of the child."

The Optional Protocol also provides for the Committee's role in friendly settlement agreements and in ensuring follow-up to the recommendations made to States. It further provides that the

Committee may initiate inquiries into grave and systematic violations of the Convention and its first two optional protocols.

The Protocol opens for signature in 2012 and will enter into force upon ratification by 10 UN Member States.

(Further detail about the process and deliberation can be found in the Foreign Correspondent report below.)

Source: The UN's Office of the High Commissioner for Human Rights

Human Rights Watch releases its 22nd annual World Report

Human Rights Watch's World Report 2012 summarises human rights conditions in more than 90 countries and territories worldwide in 2011. It reflects extensive investigative work that Human Rights Watch staff has undertaken during the year, often in close partnership with domestic human rights activists.

The introductory essay examines the Arab Spring, which has created an extraordinary opportunity for change, and states the global community has a responsibility to help the long suppressed people of the region seize control of their destiny from often-brutal authoritarian rulers.

Of Australia's neighbours, the report documents the worsening police violence and human rights situation in West Papua. Whilst acknowledging democratic progress in Indonesia over the past 13 year, HRW says serious human rights concerns remain and while senior officials pay lip service to protecting human rights, they seem unwilling to take the steps necessary to ensure compliance by the security forces with international human rights and punishment for those responsible for abuses. The report also criticises the Sri Lankan government for failing to conduct credible investigations into alleged war crimes by security forces.

Source: Human Rights Watch

NATIONAL HUMAN RIGHTS DEVELOPMENTS

Human rights check for new laws

The Attorney-General's department has posted a fact sheet online about the *Human Rights (Parliamentary Scrutiny) Act 2011* that came into effect on 4 January.

Attorney-General Nicola Roxon said human rights will be bought into sharper focus in the Parliament this year with all new laws to be checked to see if they stack up against human rights obligations.

"Our focus is on ensuring that key principles of freedom, respect, equality, dignity and a fair go for all Australians are considered in everything the Commonwealth Parliament does," Ms Roxon said. "Ensuring that new laws have considered the protection and promotion of human rights is long overdue."

The Human Rights (Parliamentary Scrutiny) Act 2011 requires all new bills and disallowable legislative instruments to be accompanied by a 'Statement of compatibility with human rights'. Statements will assess compatibility against the seven main United Nations human rights treaties to which Australia is a party.

The Act also establishes a Parliamentary Joint Committee on Human Rights-the first Commonwealth Parliamentary Committee dedicated solely to human rights scrutiny - which will be established by a resolution of appointment in the Autumn 2012 Parliamentary sittings.

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

“The Federal Parliament has taken a critical step in respecting and promoting human rights,” said Ben Schokman, the HRLC’s Director of International Human Rights Advocacy, “Although it falls short of enshrining human rights in a national charter or bill of rights, it is an important step in the right direction. It will ensure the Federal Parliament will be more accountable and transparent about the human rights impacts of new legislation.”

Abolition of mandatory sentences for people smuggling essential to respect human rights and the rule of law

Proposed Greens’ amendments to the *Migration Act 1958* to abolish mandatory sentences for people smuggling offences are essential to protect human rights and the rule of law, according to the Human Rights Law Centre.

“There is no place for mandatory sentencing in a healthy democracy governed by the rule of law,” said Rachel Ball, the HRLC’s Director of Policy and Campaigns.

The Bill to be introduced by Greens Senator Sarah Hanson-Young seeks to remove the mandatory sentence of 5 years with a 3 year non-parole period that flows from the offence of aggravated people smuggling.

Ms Ball – who last November gave evidence about the laws to the Senate Legal and Constitutional Affairs Committee – said the mandatory sentencing requirements of the Act prevent judges from exercising common sense or discretion. The laws have recently been criticized by one judge as imposing “savage penalties upon the ignorant, who are simply being exploited by organisers”.

“We’re not talking here about the organisers of people smuggling operations. These are generally young men or boys recruited from small Indonesian villages with the promise of a bit of cash for jobs like cooking rice,” Ms Ball said.

Mandatory sentences for people smuggling offences contravene the prohibition on arbitrary detention and the right to a fair trial contained in the *International Covenant on Civil and Political Rights*. These principles require that the punishment fit the crime, but mandatory sentencing prevents the Court from differentiating between serious and minor offending and from considering the particular circumstances of the individual.

The HRLC is urging MPs of all parties to use Senator Hanson-Young’s Bill as an opportunity to fix flawed legislation that puts Australia out of step with other modern democracies.

“Even the Government majority on the Senate Legal and Constitutional Affairs Committee has expressed concern regarding the impacts of the application of mandatory sentencing on individuals hired as boat crew for people smuggling vessels and has recommended that the Attorney-General review the legislation,” Ms Ball said.

“This regime threatens to see hundreds of impoverished Indonesian fishermen and boys jailed for a minimum of 3 years. It violates human rights, costs taxpayers tens of millions of dollars and is likely to have no impact on people smuggling. It’s time we fixed it,” Ms Ball said.

Prison needles risk is a 'furphy'

Community based organisation, Justice Action, has launched a paper 'Pricking the Bubble Around Prison Needle and Syringes Programs' after an exhaustive consultation with prison stakeholders and researchers of national standing.

"Unfounded fears and misinformation have deliberately been used to prevent prisoners accessing fresh needles and syringes," Justice Action Coordinator Brett Collins said, "In fact, the risk of contracting hepatitis C from a needle-stick injury is only 1 in 200 - significantly less than the risk of driving and dying in a car accident at 1 in 83."

"These are some of the findings of research presented on the eve of an ACT Government decision on the Moore Report" said Mr Collins.

"This risk analysis disproves the myth that prison staff would be less safe. In fact the prison becomes healthier with greater respect given to staff. There has never been a needle-stick attack against prison guards in dozens of prisons across 10 countries with NSPs," Mr Collins said.

"Opposition to the NSP by some staff and unnamed ex-prisoners are an expression of the inhumanity in the prison culture, suggesting that prisoners are irrational and don't want to be healthy. This perpetuates the stereotype of them not being part of the community – the 'others' from whom we must be protected. It is the structural effect of building a cage for humans" said Mr Collins.

"Justice Action opposed the new ACT prison, saying that it would become a festering sore spreading its sickness by isolating people from their communities, cross fertilising their problems and increasing crime. But naïve supporters argued that the Alexander Maconachie Centre would be human rights friendly. It is time to abandon the failed experiment" said Mr Collins.

"The Moore Report found that more than 50% of prisoners have hepatitis C and a quarter had injected in the previous month. An HIV outbreak in such a environment is just a matter of time despite the clear obligations under ACT law" said Mr Collins.

Source: Justice Action

Government to enable same-sex couples to marry overseas

From 1 February 2012, same-sex couples will be able to apply to the Australian Government for a certificate that enables them to marry overseas.

When a couple wishes to marry overseas, they must usually apply to the Australian Government for a Certificate of No Impediment (CNI). The CNI confirms to the government in the country where the couple plans to get married that the Australian Government see no obstacle to the marriage.

Currently, the Australian Government refuses to issue CNIs to same-sex couples wanting to get married overseas.

"PIAC applauds Attorney-General Nicola Roxon for changing this policy. It is an important milestone towards achieving equality for same-sex couples,' said Edward Santow, chief executive of the Public Interest Advocacy Centre (PIAC).

"There is no question that this policy discriminates against same-sex couples, given that a heterosexual couple is generally able to obtain a CNI as of right.'

"Concerns have been raised about the legality of the current discriminatory policy, and PIAC has been working with Australian Marriage Equality on this issue.'

"Our work with Australian Marriage Equality has highlighted that the current policy has very damaging flow-on effects. For example, some same-sex couples have been unable to access entitlements offered by foreign governments in areas like health care and immigration because the Australian Government has obstructed them from getting married overseas," Mr Santow said.

"By refusing to issue CNIs to same-sex couples wishing to marry in a foreign country, Australia was forcing its own discriminatory approach onto other countries. The Attorney-General's decision is a step in the right direction."

Attorney-General, Nicola Roxon, said it was an important change that will allow same-sex couples to take part in overseas marriage ceremonies, and be considered married according to the laws of that country.

Primary source: Public Interest Advocacy Centre

STATE-BASED HUMAN RIGHTS DEVELOPMENTS

Victoria considers options to halt rising rates of assaults against women

The Victorian Government is set to develop a three year Action Plan to address the issue of violence against women and their children.

The plan, to be consistent with the United Nations Declaration on the Elimination of Violence Against Women, will affirm that violence against women constitutes a violation of the fundamental rights and freedoms of women.

The Minister for Women's Affairs, Mary Wooldridge, said that while family violence and sexual assault will remain a key focus for the Victorian Government, the Action Plan will also incorporate other serious forms of violence against women such as "cyber-bullying, stalking, sexting and sex trafficking".

The Victorian Government is launching a period of consultation to inform the development of the Action Plan, which will set out objectives, areas of focus and action into the future.

"After taking on board the views of experts in the field and women who have experienced violence, the Action Plan will be a comprehensive framework to address what is the world's most prevalent human rights abuse; violence against women and their children," Wooldridge said.

According to research compiled by Dr Michael Flood from the Australian Research Centre in Sex, Health and Society at La Trobe University, up to one-half of Australian women will experience physical or sexual violence by a man at some point in their lives.

Source: Pro Bono Australia

Victoria urged to look north for valuable prison policies lessons

The Executive Officer of the Victorian Federation of Community Legal Centres and spokesperson for Smart Justice, Hugh de Kretser, has urged the Victorian Government to look to New South Wales for valuable lessons in prison policies.

In a recent opinion piece Mr de Kretser highlighted the NSW Attorney-General's recognition that building more prisons is expensive and does little to make a better style and his desire for spending to shift to reducing incarceration rates.

While NSW is cutting its prison population, closing jails and investing in reoffending reduction programs, Mr de Kretser argues Victoria's tendency to criticise "hopelessly inadequate sentences" and promise longer prison terms and reduced court discretion is likely saddle the state with a prison legacy that will suck billions of much needed taxpayer funds into a populist policy sinkhole.

AUSTRALIAN HUMAN RIGHTS CASE NOTES

Charter requires consideration of 'special circumstances' of alleged infringement offenders

Taha v Broadmeadows Magistrates' Court & Ors; Brookes v Magistrates' Court of Victoria & Anor [2011] VSC 642 (16 December 2011)

Summary

The Supreme Court has held that infringements officers and courts may have a duty to inquire whether a person has 'special circumstances' – such as intellectual disability or mental illness – before imprisoning that person in lieu of payment of unpaid fines. This duty arises under section 160 of the Infringements Act when read in conjunction with the right to liberty, the right to a fair hearing and the right to equality before the law under the Victorian Charter.

Facts

On 16 December 2011, Justice Emerton overturned an order that a person with an intellectual disability who had failed to pay fines should be jailed. Mr Taha had been unable to meet repayments under an imprisonment in lieu order pursuant to section 160 of the *Infringements Act 2006* (Vic). On 12 January, the OPP filed Applications for Leave to Appeal.

Mr Taha appeared at Broadmeadows Magistrates Court in relation to $11,250.20 of unpaid fines – mostly public transport matters – in 2009. Unbeknownst to the duty lawyer or Court at the time, he had an intellectual disability and was on a Justice Plan – an order under the Sentencing Act, which is available only to persons with intellectual disability. The Magistrate made an order under section 160(1) of the Infringements Act that he pay the fines in instalments of $80 per month or face automatic imprisonment. Mr Taha, a disability support pensioner, did not pay the outstanding amount beyond $1280. The Sheriff contacted him indicating he would be imprisoned for 81 days and Mr Taha consequently sought the assistance of Victoria Legal Aid.

Victoria Legal Aid sought judicial review of the section 160 order on behalf of Mr Taha in the Supreme Court. The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) intervened in support of Mr Taha's arguments that his Charter rights under sections 8, 21 and 24 of the Charter – recognition and equality before the law, liberty and fair hearing – were infringed. The Broadmeadows Magistrates' Court took an unusually active role in proceedings, opposing the application for judicial review.

Decision

Her Honour found there to be first, a denial of procedural fairness and second, a jurisdictional error, in that the Magistrate did not consider whether sub-section 160(2) applied. Sub-section 160(2) enables Magistrates to dismiss fines if people have 'special circumstances'. 'Special Circumstances' are defined in the Act as: any mental or intellectual disability, disorder, disease or illness or a serious addiction to substances, which render a person unable to understand that

they are offending or control their conduct. Alternatively, it may be homelessness, which leads to inability to control conduct. Sub-section 160(3) allows dismissal if imprisonment would be excessive, disproportionate and unduly harsh. Mr Taha had in fact had subsequent fines revoked on the grounds of his special circumstances.

Mr Taha's counsel argued for a 'unified' approach to section 160, meaning that the possibility of dismissal under sub-sections 160(2) and (3) must be considered before an imprisonment in lieu order is made under sub-section 160(1). Her Honour held that such a unified approach was supported by the Charter rights to liberty, a fair hearing and to equal protection of the law. Invoking principles of indirect discrimination, Her Honour held that the right to equality under section 8 of the Charter meant that the Court may be required to make inquiries of the infringement offender aimed at ascertaining whether subsections 160(2) or (3) applied. She stated:

> It is in the nature of an intellectual disability or a mental illness that it may prevent the offender from . . . raising the condition with the Court. It would defeat the purpose . . . if it could only be enlivened by the actions of a person burdened by a condition that may disable them from forming and exercising the necessary judgement to do so.

In finding a duty to inquire (a duty, which is rarely applied in our adversarial system), Her Honour recognised:

- the requirement of special treatment for people with intellectual disabilities, which is 'reinforced' by section 8(3) of the Charter;
- that the relevant inquiries, such as of the type of Centrelink benefit Mr Taha received or whether he was on a Justice Plan, could easily be made; and
- that representation by duty lawyers with significant workloads does not necessarily constitute 'adversarial' justice; whereby it can be assumed that all relevant facts are before the Court.

Relevance of the Victorian Charter

In focusing on a substantially just outcome, which recognises the difficulties faced by people with disabilities in their interaction with the legal system, Her Honour's decision is most welcome and a successful appeal against it will be a retrograde step for human rights as recognised in the Charter.

Aside from the rights pertaining more specifically to persons with disabilities, the consolidated cases of Taha and Brookes highlight a more general and grave systemic problem in Victoria's legal system – the absence of an accessible avenue of merits-based appeal against orders to imprison people for non-payment of fines. Victoria Legal Aid, whose duty lawyers see an increasing number of imprisonment in lieu orders being made, is lobbying for introduction of such an appeal right.

The decision can be found online at: http://www.austlii.edu.au/au/cases/vic/VSC/2011/642.html

Sophie Delaney *is a Senior Lawyer with Victoria Legal Aid's Civil Justice Program*

INTERNATIONAL HUMAN RIGHTS CASE NOTES

Court rules that UK must act to secure release of prisoner from notorious US prison

Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs & Anor [2011] EWCA Civ 1540 (14 December 2011)

Summary

On 14 December 2011, the England and Wles Court of Appeal overturned a decision of the High Court and issued a writ of *habeas corpus* requiring the UK Secretary of State for Foreign and Commonwealth Affairs and the Secretary of State for Defence to make a request to the US Government for the release of Mr Yunus Rahmatullah from the Bagram Air Base in Afghanistan. The Court at first instance described Bagram as “a place said to be notorious for human rights abuses”. Mr Rahmatullah, a Pakistani national who had been captured by the British, had been held at Bagram since June 2004.

Facts

Mr Rahmatullah is a national of Pakistan and was captured by British forces in Iraq in February 2004. He was transferred to the custody of United States forces that moved him from Iraq to Bagram where he has remained without trial since June 2004. On 5 June 2010, a US Detainee Review Board determined that Mr Rahmatullah's continued confinement was “not necessary to mitigate the threat he poses” and held that he was “not an enduring security threat”. The Review Board concluded that he should be released to Pakistan, however he remains at Bagram.

At the time Mr Rahmatullah was captured, handed over to US forces and transferred to Bagram, an MOU for the transfer of prisoners of war, and civilian internees and detainees was in place between the United Kingdom and the US. Clause 1 of the first MOU provided that the transfer arrangement was to be implemented in accordance with Geneva Conventions III and IV and customary international law. It is also provided in clause 4 that:

> Any prisoners of war, civilian internees, and civilian detainees transferred by a Detaining Power [in this case, the UK] will be returned by the Accepting Power [the US] to the Detaining Power without delay upon request by the Detaining Power.

Both the US and the UK are parties to the Geneva Conventions. On 7 February 2002, however, the US Government announced that in its view, Geneva III and Geneva IV did not apply to the conflict with Al-Qaeda. The first MOU was therefore necessary for the UK Government to comply with its obligations under Art 12 of Geneva III and Art 45 of Geneva IV, and satisfy itself of the willingness of the US to apply the Geneva Conventions to any prisoners of war or protected persons transferred by the UK to the US.

In October 2008 a second MOU was agreed, although it was not signed by the UK until 17 March 2009. Clause 4 of the second MOU required the US Forces to treat transferred detainees 'in accordance applicable principles of international law, including humanitarian law'.

Arguments

Mr Rahmatullah argued that his detention was unlawful and although he was detained by the US, the UK Secretaries of State in fact enjoyed a sufficient degree of control over him to bring about his release or there must, at best, be doubt as to the extent, if any, of the control over Mr Rahmatullah enjoyed by the UK Secretaries of State. For these reasons, he argued the writ of *habeas corpus* should issue, as of right in the normal way, or so that the question of the control exercised by the Secretaries of State may be tested.

The UK Secretaries of State contended that the evidence established that they did not exercise control, or at any rate a sufficient degree of control, over Mr Rahmatullah to justify a writ of *habeas corpus* being issued; and that this argument was supported by the fact that the issue of

the writ would involve the UK Government making a request of the US Government, which would involve stepping into the field of foreign relations.

At first instance, Laws LJ (with whom Silber J agreed) accepted that the Secretaries of State did not exercise sufficient control to justify the exercise of the writ. Mr Rahmatullah appealed.

Decision

Mr Rahmatullah was being unlawfully detained

The Master of the Rolls (Kay and Sullivan LJ agreeing) held that Mr Rahmatullah was being unlawfully detained on the basis that it was for the detainer to show that the detention is lawful, and the Secretaries of State had not challenged the issue.

The UK Government has a sufficient degree of control

The Court of Appeal found that there was sufficient uncertainty to justify the order for *habeas corpus*. The Court held that the UK Government was – at least – strongly arguably entitled to either demand Mr Rahmatullah's release or to demand his return to UK custody under Art 45 of the Fourth Geneva Convention, and that the first MOU (if it still applied to Mr Rahmatullah) reinforced that conclusion.

In response to the Secretaries of States' contention that the MOUs were not legally enforceable, the Court of Appeal, applying *Barnardo* [1892] AC 326, held that it would be:

> …very unattractive to conclude that a writ of habeas corpus cannot issue where uncertainty as to the respondent's control over the applicant arises from the effectiveness and enforceability of certain agreements, even though such a writ can … issue where the uncertainty arises from a need to investigate the facts.

Issuing the writ will not trespass into the 'forbidden area' of diplomatic or foreign relations

The Master of the Rolls characterised the Secretaries of States' subtle argument that issuing the writ would trespass into the forbidden area of diplomatic affairs as being the main evidence supporting the UK Government not having a sufficient degree of control. Because the point was not advanced as a freestanding argument, the Court of Appeal held that it could not 'stand in the way' of Mr Rahmatullah's appeal succeeding.

Lord Justice Kay's comments were particularly forceful on this point (emphasis added):

> On the face of it, the applicant is being unlawfully detained and the Secretaries of State have procedures at their disposal, whether arising solely from the Geneva Conventions or from a combination of the Conventions and the MOUs, to enable them to take steps which could bring the unlawful detention to an end. Beyond the unamplified invocation of 'inappropriateness' and 'futility', it is not explained why use of such procedures would or might damage the foreign relations of this country. In my judgement, the Court should be studious to avoid a refusal to protect personal liberty by withholding a writ of habeas corpus on such flimsy grounds. I do not say that it will never be lawful to refuse to act by reference to state interest but I do not accept that it has been demonstrated here that inhibitions about so doing negate the element of 'control'.

Orders and update of events

The Court of Appeal ordered that the writ of *habeas corpus* be issued.

The British Government reported that on 16 December it asked the US Government for Mr Rahmatullah to be returned. The request had a return date of 21 December 2011. In the request, the British Government noted that it intended to appeal the decision of the Court of Appeal, but that such appeal would have no effect on Mr Rahmatullah's right to be discharged pursuant to the order under domestic UK law. The Court gave the British Government an extension until 18 January 2012 to secure his release. If the US fails to comply with the request, Britain risks being put in breach of the Geneva Conventions.

On 24 January, the Washington Post reported that the US Government was considering the repatriation of non-Afghan detainees held at Bagram. Mr Rahmatullah is among these detainees. The Washington Post notes that the Rahmatullah case is "another incentive to begin dealing with the non-Afghan population at the prison in Afghanistan". However, the Washington Post also stated that administration officials said that although they are "willing to transfer Rahmatullah", they "did not want the basis of such a move to be a foreign court decision".

Relevance of the Victorian Charter

Sections 21 and 22 of the *Victorian Charter of Human Rights* relate to the right to liberty and security of person, and humane treatment while deprived of liberty, respectively. In particular, section 21(7) of the Charter states that a person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must make a decision without delay, and order the release of the person if it finds that the detention is unlawful. The Charter imposes an obligation on Victorian public authorities to act in a way that is compatible with human rights and requires all statutory provisions to be interpreted so far as is possible in a way that is compatible with human rights, among other things. The Charter does not extend to the Federal Government, therefore the Charter has no effect on the actions of the Australian Department of Defence. However, if a person was held in detention or under arrest by a Victorian public authority (for example the Victorian Police), that public authority would be under an obligation to act in a way that is compatible with human rights, including sections 21 and 22 referred to above.

The decision can be found online at: http://www.bailii.org/ew/cases/EWCA/Civ/2011/1540.html

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Freedom of expression curtailed for 'unacceptable behaviour'

Naik, R (on the application of) v Secretary of State for the Home Department [2001] EWCA Civ 1546 (19 December 2011)

Summary

The England and Wales Court of Appeal has upheld a decision to refuse entry to the UK to an Indian national, finding that exclusion on the basis of his public statements constituted a justifiable interference with the right to freedom of expression under the European Convention on Human Rights.

Facts

Dr Zakir Naik is a Muslim speaker from India, reputed internationally for his views on Islam and comparative religion. In 2010, Naik made plans to visit the UK on a speaking tour, as he had done regularly since 1990.

Two days before Naik was due to arrive in the UK, the Home Secretary decided to refuse him entry. Naik was told that he was being excluded from the UK for "engaging in unacceptable behaviour by making statements that attempt to justify terrorist activity and fostering hatred".

On 9 August 2010, the Home Secretary sent a letter to Naik confirming her decision. In this letter the Home Secretary included a list of Naik's statements as evidence of his 'unacceptable behaviour', as well as purported examples of the impact of his statements on those engaged in terrorism.

After the Home Secretary's decision was upheld by the High Court, Naik took his challenge to the Court of Appeal. One ground of appeal was that the Home Secretary's decision breached the right to freedom of expression enshrined in article 10 of the ECHR, and was therefore unlawful under the *Human Rights Act 1998* (UK).

Decision

Although there was no challenge to the legality of UK immigration policy, its application in Naik's case is central to the findings regarding the ECHR. Following the London bombings in 2005, the then Home Secretary introduced an 'unacceptable behaviours' policy prescribing behaviours upon which persons may be excluded or deported from the UK. The policy was amended in 2008 to the effect that once a person is found to have engaged in one of the 'unacceptable behaviours', the presumption in favour of exclusion can only be displaced if that person proves he or she has publicly repudiated the past behaviour.

A number of Naik's past speeches fell within the 'unacceptable behaviours' policy. These included statements that "as far as a terrorist is concerned, I tell the Muslims that every Muslim should be a terrorist" and "if a Muslim becomes a non-Muslim and propagates his/her new religion then there is a 'death penalty' for such a person in Islam". The Home Secretary considered that Naik had not discharged the burden of proof in terms of publicly repudiating such views.

The Court of Appeal considered the ECHR at two levels.

First, the Court considered the territorial basis of the right to freedom of expression under article 10. As an alien not physically within the UK, there was authority for the argument that Naik could not invoke ECHR rights. The Court of Appeal shied away from limiting article 10 by this notion of strict territoriality but ultimately concluded that it was unnecessary to decide the point. Instead, it proceeded on the basis that article 10 was engaged in any case by Naik's supporters in the UK, whose right to freedom of expression includes the freedom to receive information.

Second, the Court considered whether any interference with article 10 rights was lawful and justifiable. Article 10(2) of the ECHR provides that the right to freedom of expression may be subject to such interference as is necessary to, inter alia, protect public safety and the rights of others. The Court of Appeal emphasised that in cases concerning national security, decisions of government ministers must be attributed great weight. Nevertheless and particularly given the importance of freedom of expression, it is the distinct role of the courts to strictly supervise any interference with article 10 rights. In this case, the Court of Appeal found that the interference was proportionate to the legitimate aims of the 'unacceptable behaviours' policy and that the Home Secretary gave relevant and sufficient reasons for her decision.

While the Court may not have been overly persuaded by the depth of the evidence regarding Naik, and in particular not by the link drawn between Naik's statements and the actions of those engaged in terrorism, it stressed that its task was of review rather than substituting its own views for those of the Home Secretary. In the words of Lord Justice Gross, "the decision reached by the [Home Secretary] was well within the wide margin of appreciation she enjoys".

Relevance to the Victorian Charter

The right to freedom of expression, including the freedom to seek, receive and impart information, is set out in section 15 of the Charter. Under section 15(3), the right to freedom of expression may be subject to lawful restrictions, which are similar to the interference permitted by article 10(2) of the ECHR. Naik's case may provide guidance as to the likely interpretation of section 15(3) by Victorian courts, as well as the interpretation of limitations more generally under section 7(2).

The decision can be found online at: http://www.bailii.org/ew/cases/EWCA/Civ/2011/1546.html

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Denial of access to therapeutic abortion and essential health care violated Convention on Elimination of Discrimination against Women

L.C. v. Peru, UN Doc. CEDAW/C/50/D/22/2009 (4 November 2011)

Summary

The UN Committee on the Elimination of Discrimination against Women has found that Peru, by denying a minor who had been sexually abused access to therapeutic abortion and delaying necessary spinal surgery that contributed to her paralysis, violated articles 2(c), 2(f), 3, 5 and 12 of the *Convention on the Elimination of All Forms of Discrimination against Women* in conjunction with article 1.

Facts

L.C. was 13 years of age when she learned that she pregnant – the result of being sexually abused repeatedly by a 34 year-old man. After learning that she was pregnant, L.C. became depressed and attempted suicide by jumping from a neighbourhood building. She survived the fall and was eventually taken to a public hospital, where it was determined that she was at risk of permanent disability and required emergency spinal surgery. Despite the serious risk to L.C., her doctors postponed the surgery because she was pregnant. L.C. requested a termination of pregnancy in accordance with article 119 of Peru's Penal Code, which permits abortion only in cases where it is necessary to "save the life of the mother or to avoid serious and permanent harm to her health". Hospital officials refused a request to carry out a termination because they considered that L.C.'s life was not in danger. Subsequent appeals to have the termination performed were unsuccessful. L.C. later miscarried. Doctors performed the spinal surgery on L.C. only after she miscarried and almost three and a half months after they determined that the surgery was necessary. L.C. is now paralyzed from the neck down and has regained only partial movement in her hands.

The victim's mother, T.P.F., subsequently submitted a communication to the CEDAW Committee. She alleged that the doctors' refusal to perform a therapeutic abortion and the delayed scheduling of spinal surgery violated L.C.'s rights to non-discrimination, to health, to an effective remedy and to decide on the number and spacing of her children and the freedom from wrongful gender stereotyping, in breach of articles 1, 2(c), 2(f), 3, 5, 12 and 16(1)(e) of CEDAW. T.P.F. also alleged violations of the right to life and the freedom from cruel, inhuman and degrading treatment. The alleged violations, T.P.F. submitted, were aggravated by L.C.'s status as a minor.

Decision

The Committee determined that Peru, through the actions of medical staff at a public hospital, had violated articles 2(c), 2(f), 3, 5 and 12 of CEDAW, read in conjunction with article 1. The Committee declined to rule on whether or not Peru had also violated article 16(1)(e).

Right to health **(article 12)**

The Committee determined that Peru had failed to ensure L.C. could access essential health care services, as required by article 12 of CEDAW. It explained that "owing to her condition as a pregnant woman, L.C. did not have access to an effective and accessible procedure allowing her to establish her entitlement to the medical services that her physical and mental condition required. … This is even more serious considering that she was a minor and a victim of sexual abuse, as a result of which she attempted suicide. The suicide attempt is a demonstration of the amount of mental suffering she had experienced".

Freedom from wrongful gender stereotyping **(article 5)**

The Committee found that Peru had engaged in wrongful gender stereotyping, in violation of article 5 of CEDAW. In the Committee's expert view, the decision of medical staff to delay the spinal surgery was based on the prescriptive sex-role stereotype that women should be mothers. The Committee reasoned that reliance on this stereotype had the effect of prioritising protection of the foetus over the life, health and dignity of L.C., and ultimately contributed to her becoming a paraplegic.

Right to an effective remedy and effective protection against discrimination **(article 2)**

The Committee determined that there was no legal remedy available in Peru capable of protecting L.C.'s right to appropriate medical care. It also noted the absence of a legal framework governing access to therapeutic abortion and determined that this had resulted "in a situation where each hospital determines arbitrarily, inter alia, what requirements are necessary [to establish eligibility for abortion], the procedure to be followed, the time frame for a decision and the importance to be placed on the views of the mother".

The Committee concluded that, since Peru had legalised abortion in certain circumstances, it was required under CEDAW to "establish an appropriate legal framework that allows women to exercise their right to [abortion] under conditions that guarantee the necessary legal security, both for those who have recourse to abortion and for the health professionals that must perform it". The Committee stated that the framework must: include a mechanism for rapid decision-making; ensure that the opinion of the woman or girl is a relevant factor that is taken into account in determining eligibility; require well-founded decisions; and establish a right to appeal. The Committee determined that L.C. had been denied access to an effective remedy and effective protection against discrimination, in violation of article 2(c) and 2(f) of CEDAW, because she was not able to access a procedure for requesting a therapeutic abortion that met these criteria.

The decision can be found online at: http://www2.ohchr.org/english/law/docs/CEDAW-C-50-D-22-2009_en.pdf.

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Grand Chamber considers whether testimony of absent witness violates fair trial right

Al-Khawaja and Tahery v United Kingdom – 26766/05 [2011] ECHR 2127 (15 December 2011)

Summary

The Grand Chamber of the European Court of Human Rights recently considered the admissibility of statements made by an absent witness and the application of the 'sole or decisive test' in the context of the right to a fair trial. It held by majority that convictions based solely or decisively on such statements will not *automatically* constitute a breach of the right to a fair trial contained in article 6 of the European Convention on Human Rights. The majority considered that in such cases, the appropriate inquiry is whether sufficient counterbalancing factors are in place to ensure that the overall fairness of the trial is not unacceptably prejudiced. Such factors may include whether the accused is able to test the evidence of an absent witness by means other than cross-examination and other measures, which permit a fair and proper assessment of the reliability of that evidence (such as whether the evidence is corroborated).

Facts

This decision considered two applications, which arose out of hearsay evidence admitted pursuant to legislative exceptions to the hearsay rule, in each applicant's trial in the UK Crown Court. Both applicants' convictions had been upheld on appeal to the UK Court of Appeal.

Mr Al-Khawaja had been convicted of indecently assaulting two patients while they were under hypnosis. One complainant was unable to give evidence in person because she died before trial, but her statement to police was read to the jury. Two friends whom she had told of the alleged assault also gave evidence. The Trial Judge found, and the Grand Chamber accepted, that her evidence was decisive in respect of the count alleged.

Mr Tahery had been convicted of wounding with intent following the stabbing of another man during a fight. Uncorroborated evidence of a witness (T) was given by way of statement because T was too frightened to give oral evidence. The Grand Chamber found this statement to be the decisive, if not the sole, evidence against Mr Tahery.

Decision

The Grand Chamber unanimously found a breach of article 6 in the case of Mr Tahery but, by majority, rejected Mr Al-Khawaja's application. The relationship between the right to a fair and public hearing (article 6(1)) and the principle that everyone charged with a criminal offence has, as a minimum right, the right to examine or have examined witnesses against him (article 6(3)(d)), in the European Convention was of critical importance.

In January 2009, a Chamber of the European Court of Human Rights had considered these applications and held that article 6(3)(d) was an express guarantee, which could not be considered merely as a matter to be taken into account in assessing the fairness of a trial. It therefore found a violation of article 6(1), read in conjunction with article 6(3)(d), in respect of each application. In *R v Horncastle* [2009] UKSC 14 (a later decision discussed by the Grand Chamber), the UK Supreme Court declined to follow the Chamber's approach and rejected any principle on the basis of which a conviction based solely or decisively on evidence provided by an absent or anonymous witness must *necessarily* be set aside.

The decision of the Grand Chamber explained that the guarantees in article 6(3)(d) are specific aspects of the right to a fair hearing in article 6(1), and that the primary concern under article 6(1) is to “evaluate the overall fairness of the criminal proceedings”. Although it reaffirmed the rationale of the 'sole or decisive test', the Grand Chamber considered that the admission of hearsay evidence, which is the sole or decisive evidence against a defendant does not constitute an 'automatic' breach of article 6. In determining the question of fairness, the rules of evidence of the legal system concerned must be taken into account. The Grand Chamber noted that these

legislative schemes are designed as protective mechanisms in respect of the hearsay evidence of absent witnesses. While the relevant UK legislative provisions were found to be “in principle, strong safeguards designed to ensure fairness”, the Grand Chamber looked beyond these provisions to ensure that the evidence admitted pursuant to them did not compromise the fairness of the trials. In respect of each application, the Grand Chamber considered:

- whether it was necessary to admit the witness statement;
- whether the untested evidence was the sole or decisive basis of conviction; and
- whether there were sufficient counterbalancing factors to ensure that each trial, judged as a whole, was fair.

In Al-Khawaja's case, the Trial Judge made clear that the statement was decisive evidence in respect of the relevant charge. The death of the witness made it plainly necessary to admit the statement if her evidence was to be received. The statement was recorded in proper form, corroborative evidence was given at trial by two of the complainant's friends (with only minor inconsistencies), and there were strong similarities between the accounts of the assaults on the two complainants, between whom there was no evidence of any collusion. In that context, the majority found that there was no breach of article 6.

In Tahery's case, T was the only witness who had claimed to see the stabbing, his eyewitness statement was uncorroborated and the statement had been made two days after the event. The Grand Chamber considered that the statement constituted at least the decisive, if not the sole, evidence against Tahery. No witness, when questioned at the scene, claimed to have seen Tahery stab the complainant. The Grand Chamber considered that neither the ability of Tahery to challenge the evidence by giving evidence himself or calling other witnesses, nor the warning by the Trial Judge to the jury to approach T's evidence with care, was sufficient to “counterbalance the handicap under which the defence laboured”. Even if Tahery had given evidence, he was unable to test the truthfulness and reliability of the evidence of the sole witness who was willing or able to say what he had seen. At best, the other evidence only provided indirect support for T's evidence. Examining the fairness of the proceedings as a whole, the Grand Chamber concluded that there were not sufficient counterbalancing factors to prevent a breach of article 6.

The Court ordered that the United Kingdom pay Mr Tahery EUR 6000 as compensation for distress and anxiety, and EUR 12000 for his legal costs.

Relevance to the Victorian Charter

Section 25(2)(g) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) expressly provides that the ‘minimum guarantee’ to examine or have examined witnesses against an accused is subject to contrary provision by law. On that basis, the exception to the hearsay rule in criminal proceedings where the maker of a statement is not available (provided by section 65 of the *Evidence Act 2008* (Vic) and referred to by the Grand Chamber in its comparative analysis), would appear to be clearly inconsistent with any 'automatic' application of the sole or decisive test. However, the analytical approach of the majority may provide some guidance in approaching the application of the exclusionary provisions in Pt 3.11 of the Evidence Act in the context of section 25 of the Charter.

The decision can be found online at: http://www.bailii.org/eu/cases/ECHR/2011/2127.html

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Journalistic access to prisons and the right to freedom of expression and information

British Broadcasting Corporation (BBC) & Anor, R (on the application of) v Ahmad [2012] EWHC 13 (Admin) (11 January 2012)

Summary

In early 2012, the British Broadcasting Corporation applied for permission to conduct a face-to-face interview with Babar Ahmad who is currently detained in prison without charge and whose extradition has been sought by the USA. The BBC also wished to broadcast parts of the interview in a programme looking at the treatment of detainees like Mr Ahmad and extradition arrangements with the USA. The Secretary of State refused this permission. The High Court of England subsequently held this decision was incompatible with the right to freedom of expression and as such was unlawful.

Facts

Mr Ahmad, a British citizen, was arrested in December 2003, physically abused by the arresting officers and released six days later without charge. In July 2004, the Crown Prosecution Service concluded there was insufficient evidence to provide a realistic prospect of securing a conviction against him under the *Terrorism Act 2000*.

On 5 August 2004, Mr Ahmad was arrested following a request by the US for extradition on suspicion of participating in fundraising for terrorism and obtaining classified US Navy plans. An extradition order was made in 2005. This was followed by legal proceedings in the domestic courts and in Strasbourg.

Mr Ahmad remains in detention without charge or trial. His case has reportedly attracted significant public and Parliamentary attention and sparked debate over whether the UK's extradition arrangements afford adequate human rights protection. Earlier this year, the BBC sought permission to visit Mr Ahmad and broadcast parts of the interview in a documentary it was preparing. This request was refused and the BBC challenged the decision on the basis that it constituted a breach of the right to freedom of expression.

The applicable policy, 'Prisoners' Access to the Media', provides that approval for a visit by a journalist will normally only be granted where the matter relates to an alleged miscarriage of justice and the prisoner has exhausted all appeals or there is some other sufficiently strong public interest. Also, according to the policy, the visit must be the only suitable method of communication and requests for interviews to be filmed or broadcast will normally be refused.

The BBC argued the public interest in making a programme about Mr Ahmad's case was especially strong given, amongst other things, he has been in detention for 7 years without charge or conviction, the extradition arrangements with the US are controversial, he was seriously injured when arrested in December 2003 and, while in prison, he stood for election to the House of Commons. The BBC submitted that a face-to-face interview and broadcast was required for the journalist and the public to be able to assess the personal impact on Mr Ahmad and his credibility.

The Secretary of State argued there were good reasons to deny the request, namely that it would distress victims of terrorism and risk damaging confidence in the criminal justice system.

Decision

The High Court held the Secretary's decision to refuse the BBC's request was a disproportionate interference with the right to freedom of expression. This decision was informed by the fact that

the BBC had demonstrated it required a face-to-face interview and that the Secretary's decision was premised essentially on reasons of principle rather than practicality.

The Court noted that no challenge was made to the Secretary's power to have the media policy in place, nor to his capacity to apply it to 'the great majority of cases'. However, in circumstances in which Mr Ahmad had not been convicted of any crime and ought to be presumed innocent until proved otherwise, there were no 'victims' to protect. Further, there were many wider issues the BBC wished to explore in its programme so there was no danger the BBC would let Mr Ahmad use it to profess his innocence and undermine public confidence in the criminal justice system.

In coming to its decision, the Court reminded itself of the principle of proportionality as explained by the House of Lords in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167. It concluded that the reasons advanced by the Secretary to justify his decision were a directly relevant consideration as to whether the right to freedom of expression had been proportionately limited and further whether this limitation had been pursued to achieve a legitimate objective. While the objective was accepted as a legitimate ends, the means by which the Secretary sought to achieve this was considered to be disproportionate in light of the less restrictive measures available to be taken. For example, the BBC could have stipulated that any broadcast of the interview with Mr Ahmad must not allow him to use the programme to mount a media campaign to protest his innocence or cause distress to terrorism victims.

Therefore, this was not a case where the public interest laid on only one side of the balance in applying the right to freedom of expression. The public interest in preventing distress to victims of terrorist offences was recognised as important as was the public interest in maintaining confidence in criminal justice. However, this case also recognised that there were powerful public interests on the other side, particularly the right of the public to receive information of public concern such as the treatment of long term prisoners without charge. The Court held it was not for it to pronounce on the rights and wrongs of different views which may be held in debates about such matters. Instead, the right to freedom of expression means that people should be able to engage in such debates, be as fully informed as possible and make up their own minds.

Application to the Victorian Charter

The Court stressed this case was highly exceptional and should not be regarded as setting any precedent in other cases. Nonetheless, it confirms any restrictions on the right to freedom of expression must be 'established convincingly'. Further, it reminds us the right to freedom of expression is not absolute and an assessment of proportionality will be highly fact-specific.

The decision can be found online at: http://www.bailii.org/ew/cases/EWHC/Admin/2012/13.html

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City has constitutional obligation to provide emergency accommodation to vulnerable persons evicted by private landlord

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (Lawyers for Human Rights as Amicus Curiae) Case No: CCT 37/11 [2011] ZACC 33 (1 December 2011)

Summary

The South African Constitutional Court has held that the City of Johannesburg had a constitutional obligation to provide emergency accommodation to vulnerable persons evicted by a private landlord.

Facts

This case concerned the attempt to evict 86 people from a property called Saratoga Avenue in the City of Johannesberg. The premises are an old and rundown commercial building with office space, a factory building and garages.

The facts revealed that the Occupiers lived on an extremely low income and what little money they had was earned by working in the 'informal sector' of the central business district. The group included children and people with disability. All of the Occupiers had lived in the premises for more than 6 months and some of the group had resided there for many years. Some of the group had lived at the property during the 1990s and for a period paid rent with consent of a company, which controlled the premises.

In 2004, Blue Moonlight Properties purchased the property with an intention to redevelop.

In 2005, Blue Moonlight issued a notice to vacate the premises based on the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* (PIE).

In May 2006, Blue Moonlight issued eviction proceedings in the South African High Court. The Occupiers opposed the eviction on the basis that it would leave them homeless and they applied to join the City to proceedings.

In February 2010 the High Court ordered the eviction of the Occupiers. In addition, the Court found that the City's housing policy was unconstitutional and ordered this to be rectified by providing the Occupiers with temporary accommodation.

The City appealed to the Supreme Court and successfully applied to admit new evidence on the basis of an updated housing policy. In this proceeding, the Court upheld the eviction order and found again that the City's housing policy was unconstitutional. Again, the City was required to provide the Occupiers with temporary emergency accommodation. The City appealed against this finding to the Constitutional Court of South Africa.

Issues

The Constitutional Court considered the entitlement of Blue Moonlight to evict the Occupiers.

Section 4 of PIE establishes that unlawful occupiers of land may only be evicted if it is just and equitable to do so, after consideration of all relevant circumstances. The Constitutional Court noted that relevant considerations included:

- the rights of the owner in light of the constitution and PIE obligations;
- the obligation of the City to provide accommodation;
- the sufficiency of City resources;
- the constitutionality of the City emergency housing policy; and
- the appropriateness of an order in light of previous conclusions on the issues.

The Court noted that the Occupiers had occupied the premises for more than 6 months, the occupation had once been lawful, the landlord had been aware of the Occupiers when they purchased the property and eviction would result in homelessness. It was held that Blue Moonlight would have been aware that the occupation may continue for some time and need to be 'somewhat patient' [at 40]. In light of such consideration, the Court considered the housing options of the Occupiers in the event of eviction.

The City's obligation and ability to provide emergency housing for the Occupiers was held to be relevant to the ability of Blue Moonlight to evict. In considering this issue, the Court reviewed the constitutional and legal framework governing the City's obligations.

The right to have access to adequate housing is set out in section 26 of the South African Constitution that states:

- Everyone has the right to have access to adequate housing.
- The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.
- No one maybe 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 Court also considered the obligations created by Chapter 12 of the National Housing Code which addresses emergency housing for people in emergency for reasons beyond their control (including evictions from unsafe buildings).

In responding to this legislative framework, the City relied on its Housing Report for implementation of its obligations under Chapter 12 of the Housing Code. It is worth noting that while the Housing Report provides for the provision of temporary emergency housing for people being relocated from dangerous buildings, this document does not provide an obligation on the City in respect of people relocated from premises by private property owners.

The City relied on the *Grootboom* decision and its Housing Report to argue that local government is a point of service delivery and was entirely dependent on national and provincial government for funding.

Held

The Constitutional Court rejected the argument that local government was unable to fund emergency housing and held that the City had failed to demonstrate that it lacked the resources to provide emergency housing for the Occupiers. Further, the Court found there was no justification for the distinction between people being relocated from premises owned by public authorities and those owned by private property owners. Such a distinction was held to offend section 9(1) of the Constitution which provides everyone is equal before the law.

As a result of these findings, Blue Moonlight was held to be entitled to possession and the City's housing policy was declared unconstitutional. Further, the City was obliged to provide the Occupiers with temporary accommodation.

Relevance to the Victorian Charter

The considerable legislative housing protections available in South Africa must be considered in light of the massive scale of homelessness that these provisions were designed to address. The Constitutional Court in Blue Moonlight noted that in 2001 South Africa had 1.8 million households (each consisting of approximately 3 people) without adequate housing and that the City of Johannesburg has an estimated 423,249 households in this situation.

Leaving aside issues of jurisdiction, the ability to raise Charter arguments in defense of a tenant's home depends to a significant extent on their landlord. For people at risk of eviction from social housing it is possible to rely on section 38 of the Charter, while those in private premises are excluded from access. In such circumstances it is worth repeating the comments of the Constitutional Court that for those faced with eviction, "it matters little to the evicted who the evictor is" [at 92].

On a general level, this decision demonstrates the centrality of rights in addressing homelessness and weighing government responses to this issue. In Blue Moonlight, the Constitutional Court grappled with the issues of legislative and constitutional interpretation in

order to balance resource considerations, reasonableness and hardship of vulnerable people. Such considerations gave rise to the identification of the unjustifiable discrimination in government policy and also to muddled arguments relating to the availability of resources. In order to address and prevent homelessness, such high level judicial engagement is extremely valuable.

The decision can be found online at: http://www.saflii.org/za/cases/ZACC/2011/33.html

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Investigating potential breaches of the right to life: 'Unified' investigation processes not necessary

Pearson v United Kingdom [2011] ECHR 2319 (13 December 2011)

Summary

The European Court of Human Rights has clarified the scope of a State party's obligation to investigate a death in circumstances involving a potential breach of the right to life.

In *Pearson v United Kingdom* [2011] ECHR 2319, the Court clarified that, where government employees or agents are implicated in a death, the State is bound to adequately investigate the death to establish the relevant facts and to hold persons accountable, as appropriate. Those obligations may be met by, or shared between, several different processes and authorities. There is no requirement for a single body, such as a coroner's court, to deal with all aspects of an investigation.

Facts

Circumstances leading to the death

The case was brought by Jean Pearson, the mother of Kelly Pearson. Kelly had a history of mental health problems associated with alcohol and substance abuse. She died from a self-administered drug overdose aged 30.

Shortly before her death, in November 1999, Kelly was arrested for being drunk and disorderly in West Yorkshire. The police searched their database which revealed a warrant against Kelly that was erroneously described in the database as 'outstanding' (the warrant had actually been discharged several weeks earlier). Because of this mistake, Kelly was transferred from West Yorkshire, where she lived with her mother, to London. The mistake came to light when Kelly presented at a London magistrates' court.

After realising the error, Kelly was released from custody and a probation officer gave her enough money for a bus fare back to West Yorkshire, although Kelly made the decision to remain in London.

The following day, while still in London, Kelly sought help from a mental health worker and a general practitioner, whom she knew. Kelly refused to take the prescription medication given to her by the GP and left the medical centre in an agitated state. Approximately two hours later, Kelly collapsed in the street. She died in hospital a short while later.

Investigations following the death

A coronial inquest was held in 2002. Although the coroner heard a substantial amount of evidence about Kelly's background and the events leading up to her death, the scope of the inquest was confined to matters directly causative of her death. The Coroner determined that Kelly died from 'methadone, diazepam and alcohol poisoning'.

At the inquest stage, the Applicant asked the Coroner to deal with a range of matters, such as: Who or what was responsible for the mistake in the police database? Why there were no safeguards to prevent such errors? Who was responsible for securing basic support to a vulnerable woman who had been falsely imprisoned and unlawfully transported hundreds of miles from her home? The Coroner maintained that it was not his role to apportion blame and did not allow the inquest to deal with these broad issues. (Note: Had Kelly died after the commencement of the UK's *Human Rights Act 1998* on October 2000, then the scope of the inquest would have been broader.)

In addition to the coronial inquest, a number of other agencies also investigated and reported on the death. The West Yorkshire Probation Board, for example, produced a report. The London Probation Authority also investigated and reported on the complaint insofar as it related to the London area. The Prisons and Probation Ombudsman also conducted an investigation following an appeal by the Applicant.

The Applicant also brought civil proceedings against a number of parties involved, including the Greater London Magistrates Court Authority, which settled.

Complaint to the European Court

The Applicant submitted that, because of its narrow scope, the coronial inquest did not satisfy the State's investigative obligations under article 2 (Right to life) of the European Convention. The Applicant further argued that the State was obliged to investigate the death in a unified way, rather than through a range of disparate legal process.

Decision

The Court reiterated the well-established principle that where lives are lost in circumstances that potentially engage the responsibility of the State, the State is under an obligation to adequately investigate those deaths. The obligation arises under the right to life.

Such an investigation must contain two key elements: fact-finding and accountability. Specifically, the Court said:

> The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability… The form of investigation required to achieve these purposes will vary according to the circumstances of the particular case.

The Court clarified that the State was not required to meet each of these requirements through a single, unified investigation procedure. It said:

> It cannot be said, as the applicant suggested, that there should be one unified procedure satisfying all requirements: the aims of fact-finding and accountability may be carried out by or shared between several authorities, as long as the various procedures provide for the necessary safeguards in an accessible and effective manner.

The Court found that the coronial inquest into Kelly's death – although limited in scope – was sufficient to satisfy the State's fact-finding obligation. This was because the coronial inquest involved an independent tribunal subjecting the relevant facts to a thorough review and exposing those facts to public scrutiny. Moreover, the Applicant was legally represented.

The Court considered that although the coronial inquest process did not deal with accountability, the Applicant's ability to bring a civil claim in negligence against those people who she held

responsible, when coupled with the possibility of disciplinary measures against government employees, was satisfactory to meet the State's obligations under this part of the test.

For the reasons set out above, the Court declared the Applicant's claim inadmissible.

The decision can be found online at: http://www.bailii.org/eu/cases/ECHR/2011/2319.html

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

Canadian Court says criminalisation of polygamy is a valid limitation on the right to freedom and liberty

Reference re: Section 293 of the Criminal Code of Canada 2011 BCSC 1588 (23 November 2011)

Summary

This case was referred to the Chief Justice of the Supreme Court of British Columbia, Canada to determine the constitutionality of section 293 of the Criminal Code of Canada (establishing polygamy as a criminal offence), in light of the Canadian Charter of Rights and Freedoms.

The central question to be resolved by the this case was whether, on the balance on probabilities, the criminal offence of polygamy was a reasonable limitation (per section 1 of the Charter) on the rights protected under sections 2(3) and 7 under the Charter, as can be demonstrably justified in a free and democratic society.

Facts

The parties to the reference were the Attorney General of British Columbia, the Attorney General of Canada and, as the Attorneys General submitted that section 293 was constitutionally sound, a court appointed Amicus Curiae. In addition to the parties, eleven interested organisations participated in the proceedings, representing different interests in the core issue of the reference; whether the criminal offence of polygamy is inconsistent with the Charter and therefore, constitutionally unsound.

The Reference included evidence from numerous experts and witnesses regarding whether polygamy caused harm to individuals and society. In particular, the Reference explored the impact of polygamy on women and children.

Decision

The Reference is a three-hundred and fifty page treatise, which explores the sociological history of polygamy and the development of harm-prevention based laws against polygamy. Bauman CJ's decision steps through the history of prohibitions on polygamy in Western societies, extrapolating the reasons and arguments for the prohibitions over time in order to weigh the objective of the limitation on the Charter imposed by s 293.

Polygamy as harm

The majority of the judgement pertains to the evidence before the Court relating to whether polygamy caused harm to society. Examining both expert factual and opinion evidence and a literature review, the Court accepted the evidence before it, finding that polygamy has a number of predictable effects on societies, and are not limited to particular cultures and geographic locations:

- women in polygynous (male with multiple wives) relationships are at an elevated risk of physical and psychological harm; face higher rates of domestic violence and abuse; have higher rates of depressive disorders and other mental health issues; have more

children, are more likely to die in childbirth and have shorter life expectancies; lack reproductive autonomy; fare worse economically.

- children in polygynous families face higher infant mortality, regardless of economic status; suffer more emotional, behavioural and physical problems, including lower educational achievement; are at enhanced risk of psychological and physical abuse and neglect;
- polygamy creates a pool of unmarried men with the attendant increase in crime and anti-social behaviour;
- increased competition for women creates pressure to recruit increasingly younger brides into marriage;
- polygamy institutionalises harmful gender stereotypes and commodifies women;
- patriarchal hierarchy and authoritarian control are common features of polygynous communities.

The Court concluded that the practice of polygamy constitutes a reasonable apprehension of harm to society and particular individuals.

The Court held that Canada was subject to numerous international treaty obligations to take all available measures to eliminate polygamy, namely, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Rights of the Child*, and the *Convention on the Elimination of All Forms of Discrimination Against Women*. While not expressly prohibited, the Court found that the prohibition on polygamy under these treaties arose through an interpretation of the treaties' more general provisions.

Section 1 - Reasonable limitations on rights

Section 1 of the Charter provides that substantive rights contained in the Charter may be subject to reasonable limitation, prescribed by law, as can be demonstrably justified in a free and democratic society. The Court utilised the test set out in previous section 1 cases, *R v Oakes* [1986] 1 SCR 103 and *Alberta v Hutterian Brethren of Wilson Colony* 2009 SCC 37, as the 'analytical framework' for assessing the reasonable limitation question:

- Is the purpose for which the limit is imposed pressing and substantial?
- Are the means by which that goal is furthered proportionate?
- Is the limit rationally connected to the purpose? (Does the limit minimally impair the Charter right? Is the law proportionate in its effect?)

This framework was applied by the Court in turn to each the relevant Charter rights, as set out below.

The first two elements of the above framework were considered in light of both section 2(a) and section 7.

Pressing and substantial purpose

The Court found that the objective of section 293 to prevent harm to women, children and society associated with polygamy was clearly a pressing and substantial objective. In addition, the Court found that the preservation of monogamous marriage given the Court's analysis regarding the reasons for the ascendance of monogamous marriage in Western society, was also a pressing and substantial objective.

Means of limitation - rational connection to the purpose

The Court considered the previous Supreme Court reference, *Reference re sections. 193 and 195.1(1)(c) of the Criminal Code (Man.)* 1 SCR 1123 (regarding the criminalisation of prostitution). In that reference, Lamer CJ found that regulation or prohibition of a cause is a suitable method of prohibiting its effects, and consequentially, exhibits a rational connection between the means and objective of the limitation. The means of limitation need only be reasonably supposed to further the objective, and do not necessarily require that it be demonstrated that it will actually do so. The evidence tended before the Court was sufficient to satisfy the 'reasonable supposition', and reiterated previous decisions that the "efficacy of a law, or lack thereof, is not relevant to Parliament's ability to enact it" (*Reference re Firearms Act*, [at 57]), and that "[w]hile somewhat different considerations come into play under a Charter analysis, it remains important that some deference be accorded to Parliament in assessing the utility of its chosen responses to perceived social ills". (*R v Malmo-Levine* [2003] 3 SCR 571 [at 177-8])

Section 2(a) - Freedom of religion

Means of limitation - minimal impairment of the Charter right

Bauman CJ held that section 293 minimally impaired religious freedom, and prohibited polygamy in so far as was required to prevent the reasonably apprehended harms that it may cause. Furthermore, the Court held that Parliament, rather than the Court itself, was better positioned to determine the means of limitation so that there was minimal impairment on freedom of religion.

Means of limitation - proportionate in effect

The Court found that section 293 was proportional in its effects; finding that "the salutary effects of the prohibition far outweigh the deleterious [and] seeks to protect against the many harms which are reasonably apprehended to arise out of the practice of polygamy". [at 1350] Furthermore, the Court concluded that the prohibition is consistent with Canada's international human rights obligations, adding "very significant weight to the salutary effects side of the balance". [at 1351]

Conclusion - is section 293 a permissible limitation of section 2(3) per section 1 of the Charter?

To the extent that section 293 breached the right to freedom of religion guaranteed by section 2(a) of the Charter, the Court found that section 293 was a demonstrably justified limitation in a free and democratic society.

Section 7 - Right to life, liberty and security of the person

Means of limitation - minimal impairment of the Charter right

The rights contained in section 7, life, liberty and security of the person, are "not easily overidden by competing social interests". [at 1353, citing *Charkaoui v Canada (Citizenship and Immigration)* 2007 SCC 9].

It was at this stage of the test that Bauman CJ found that section 293 failed to justify its limitation on the rights protected by section 7 of the Charter. The Court held that by criminalsiing every individual in a prohibited union, section 293 invariably applies to minors party to polygamous marriages, and is a "serious impairment of young persons' liberty". [at 1356] Accordingly, Bauman CJ found "that to the extent s 293 is contrary to the principles of fundamental justice guaranteed by section 7 of the Charter, by [criminalising] young persons between the ages of 12 and 17 who marry into polygamy or a conjugal union with more than one person at the same time, the Attorneys General have not met the burden of demonstrating that this infringement is justified in a free and democratic society". [at 1357].

Means of limitation - proportionate in effect

As section 293 failed the minimal impairment element of the reasonable limitation test, its proportionality was not discussed specifically.

Conclusion - is section 293 a permissible limitation of s 7 per s 1 of the Charter?

The Court held that section 293 is a permissible limitation to the right to life, liberty and security of the person guaranteed by the Charter, except in so far as it includes within its terms children between the ages of 12 and 17 who marry into polygamy or a conjugal union with more than one person at the same time. Whilst granting a constitutional remedy was not within the terms of the Reference, Bauman CJ indicated that if a remedy were to be granted, section 293 would be deemed substantially constitutional, and an exclusion would be read into the law to extract the peripheral problem. Alternatively, the phrase 'every one' in section 293 would be read down to exclude children from its application.

Relevance to the Victorian Charter

Bigamy (section 64, *Crimes Act 1958*) is a crime under Victorian law, and is defined as undertaking the form or ceremony of marriage with more than one person (similar wording to that in section 293).

Sections 14 and 21 of the Victorian Charter (freedom of thought, conscience, religion and belief, and right to liberty and security of person) most closely reflect the rights examined in the Reference.

Like section 1 of the Canadian Charter, the Victorian Charter also provides a reasonable limitation provision under section 7, with nearly identical wording to that of the Canadian provision. Section 7(2) provides that a "human right may be subject under law only to such reasonable limits as may be demonstrably justified in a free and democratic society". Unlike the Canadian provision, the Victorian section legislates a non-exhaustive test for assessing limitations. This test however, nearly identically replicates the test used by Bauman CJ in the Reference, derived from Canadian common law.

As a result, the process and conclusions reached by Bauman CJ in this Reference may provide a persuasive framework of how to apply the test set out in section 7(2)(a)-(e).

The case can be found online at:
http://canlii.ca/en/bc/bcsc/doc/2011/2011bcsc1588/2011bcsc1588.html

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Obligation to consider alternatives to eviction into homelessness

Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Limited and Others (CCT 25/11) [2011] ZACC 35 (7 December 2011)

Summary

In this case, if evicted, approximately 170 families would be made homeless. The South African Constitutional Court unanimously held that, before making eviction orders, the High Court should have considered whether the local authority – the City of Tshwane Metropolitan Municipality – was able to provide alternative land or accommodation to the occupiers.

The Constitutional Court found that the High Court's failure to require the City to present information about alternative land was a failure to properly assess whether the eviction was 'just and equitable'. The eviction order was therefore not in accordance with South African legislation that protects against arbitrary evictions. The Constitutional Court remitted the matter to the High

Court and ordered the City to provide information about the circumstances of the occupiers and steps it could take to provide alternative land or accommodation if the eviction were to proceed.

Facts

The applicants were approximately 170 families who had occupied land within the City since December 2009. The land is owned by Golden Thread Limited (Golden Thread). Eviction proceedings commenced on 21 January 2010, and on 2 March 2010 the North Gauteng High Court, Pretoria, ordered the occupiers' removal from the land. The occupiers subsequently sought leave to appeal to the Constitutional Court.

Under section 4 of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 1998 (PIE Act), if an unlawful occupier has occupied land for less than six months when proceedings commence, a court can grant an order for eviction – if it is 'just and equitable to do so' after considering "*all the relevant circumstances*, including the rights and needs of the elderly, children, disabled persons and households headed by women". If the land has been occupied for more than six months, the PIE Act requires the court to also investigate whether the municipality in question can reasonably make other land available for the relocation of the unlawful occupier.

The PIE Act was enacted to give effect to the South African Constitution, which protects the right to adequate housing. Section 26 of the Constitution provides that:

- Everyone has the right to have access to adequate housing.
- The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- No one may be evicted from their home, or have their home demolished, without an order from the court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Although joined as a party, the City did not take part in the High Court proceedings and did not present any information about the steps that could be taken to avoid the families being made homeless by the eviction.

Decision

The Constitutional Court granted leave to appeal because the matter raised constitutional issues and, as homelessness was at stake for a large number of families, it was in the interests of justice to do so. The Constitutional Court considered whether the High Court was correct to decide that to evict the families would be just and equitable.

The Constitutional Court found that since "[c]lose to 200 families would have been evicted and in all probability rendered homeless" the High Court should have directed the City to provide details of the applicants' housing situation and whether the City could provide emergency housing. Although not expressly required by the PIE Act (because the applicants had occupied the land for less than six months), the Constitutional Court held that this information forms part of 'the relevant circumstances' that the court is required to consider when determining whether an eviction is just and equitable.

The Constitutional Court affirmed the decision in *Blue Moonlight* (discussed above) which held that the City has the power and the responsibility to make reasonable provision for emergency housing from its own resources.

The Constitutional Court handed down its judgement upholding the appeal on 7 December 2011 and remitted the matter to the High Court for reconsideration. The Constitutional Court ordered the City to provide further information by 28 February 2012, including information about:

- the circumstances of the applicants, including the number of families that would be made homeless if the eviction proceeds, and the consequences of eviction for the applicants if no alternative land or emergency accommodation is made available;
- steps that the City could take to provide alternative land or emergency accommodation if the applicants were evicted and the timeframes in which it could do this; and
- steps that could be taken to minimise the impact on Golden Thread if the eviction of the applicants were delayed to give the City time to make available alternative land or accommodation.

Relevance to the Victorian Charter

Section 13(a) of the *Charter* protects individuals against unlawful or arbitrary interferences with their privacy, family or home. Section 17 of the Charter protects the rights of children and families.

Although the *Charter* does not expressly protect the right to adequate housing, these sections can be relied on to help prevent the unlawful eviction of people from social housing into homelessness. In negotiating alternatives to eviction, advocates can point to these sections and to section 38, which obliges public authorities (such as local councils, government departments and social landlords) to act compatibly with, and give proper consideration to, human rights in decision-making processes.

Public authorities must balance their priorities and competing objectives – including fiscal concerns, the acute shortage of public housing and the need to manage properties – with the vulnerabilities of the individual or family and the severity of the consequences of eviction for them. Under section 7(2) of the *Charter*, a limitation on rights is permissible if it is reasonable and justifiable.

This case highlights how crucial this balancing exercise is for fair, accountable decision-making. The Constitutional Court did not compel the City to provide land or housing to the applicants; it simply found that the opaque manner in which the City approached the eviction proceedings was inconsistent with South Africa's protection against arbitrary evictions. This case reminds us that the protection of economic and social rights is not an absolute protection: there is not a blanket obligation to provide housing, but the city was required to properly consider viable alternatives to rendering 170 families homeless.

Legislation that expressly requires the City to contemplate alternatives to eviction and confers on courts the power to refuse to make an eviction order unless such alternatives have been considered provides strong and necessary protection against arbitrary evictions. In this way, the case provides an example of how Victoria's *Charter* could be strengthened to encourage better decision-making by public bodies and fairer outcomes for vulnerable citizens.

The decision is available at: http://www.saflii.org/za/cases/ZACC/2011/35.html

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The use of restraints against young people in Secure Training Centres

The Children's Rights Alliance for England v Secretary of State for Justice [2012] EWHC 8 (Admin) (11 January 2012)

Summary

This decision of the England and Wales High Court held that whilst certain measures had been unlawfully perpetrated against young people in secure training centres, the Court had no jurisdiction to grant an order that the victims be identified and informed of their legal rights.

Facts

This case arises out of allegations of unlawfully executed types of restraints, used in contexts where reasonable force was not used on young persons housed in Secure Training Centres in the UK. STC's are centres used to accommodate young persons who had been sentenced to terms of imprisonment or young persons serving periods of remand.

Whilst such young persons were housed within various STC's, some were subjected to various restraint and/or compliance techniques to ensure 'good order and discipline'. Following the death of a fourteen year old detainee in 2007, the Youth Justice Board agreed that some of restraining techniques should be banned. For the purposes of this case, the period complained of covered the period of 1998 to 2008.

The Children's Rights Alliance for England ('claimant charity') alleged that young persons detained at various secure training centres in the UK had been unlawfully restrained under 'Secure Training Centre Rules'. Such rules authorised the use of certain techniques against young persons whereby 'reasonable force' was used to 'ensure good order and discipline on the part' of detainees.

The claimant charity's case relied on two limbs. Firstly, that the defendant was under a positive obligation to inform those who might have been subjected to unlawful restraint procedures to enable them to consider whether they wished to exercise a form of legal redress. Secondly, it was proposed that there was a common law and Convention obligation on the part of the defendant to inform young persons of the unlawful use of force; namely, force in breach of article 3 and article 8 of the Human Rights Convention and/or a trespass to the person and assault.

It was asserted that:

> [The claimant] submits that unless the defendant takes steps sought in this application the State will remain in flagrant breach of its obligations under the Convention and, at the very least, the defendant should enable the victims to take steps to compel the State to do so by providing them with the necessary information.

The claimant maintained that the lack of precedent could not defeat the claim and they relied on the basic tenet of access to justice being, inter alia, that an individual should be advised of his/her legal rights when and if those rights had been infringed and what rights to challenge or redress were available to them.

Decision

The Judge disagreed with the claimant charity's assertion that the Government had a positive legal obligation to identify victims and inform them of their right to seek legal redress. With respect to the argument that such an obligation was supported by common law, Foskett J reasoned,

> I have reached this conclusion both on the narrower approach of considering what the common law requires so far as access to justice is concerned and on a broader appraisal of the factual situation that underlies the claim.

Additionally, it was held that such a contention was not supported by Convention precedent and Foskett J stated that no feature of the Strasbourg jurisprudence had gone far enough to impose

such an obligation and that it was not open to domestic courts to move beyond the European Court of Human Rights in this particular area.

Relevance to the Victorian Charter

This case provides useful commentary about restraints on young persons whilst in custody and the importance of ensuring reasonable force is used at all times. It is a timely decision having regard to the fact that often the young persons housed in secure training centres (or equivalent juvenile detention centres) are often the most marginalised, socially disadvantaged and vulnerable members of the wider population. With reference to the Charter, this case is relevant by way of a person's right to humane treatment when deprived of liberty. In addition, a person's right to protection from torture and cruel, inhuman or degrading treatment or punishment may have application in a wider context.

The decision is available at http://www.bailii.org/ew/cases/EWHC/Admin/2012/8.html.

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What amounts to degrading treatment in prison?

Grant v Ministry of Justice [2011] EWHC 3379 (QB) (19 December 2011)

Summary

In *Grant v Ministry of Justice*, the High Court of England and Wales dismissed claims by two prisoners that the prison sanitation regime at HMP Albany breached their right under article 3 of the European Convention on Human Rights not to be subjected to degrading treatment or punishment. Hickinbottom J's judgement provides useful guidance on what must be established for treatment to be considered degrading in the context of imprisonment.

Facts

HMP Albany is a closed prison that accommodates male prisoners in single occupancy cells. These cells do not contain toilets or running water; instead, toilet facilities are available in a recess area located on each landing of each wing as well as in other areas such as the gym and the workshop. Each landing accommodates 24 prisoners.

The main controversy in the case concerned the night sanitation regime. HMP Albany had a computer-controlled system of electronic locks that operated overnight. This system allowed one prisoner per landing to leave his cell to use the toilet facilities. Each prisoner was allowed three nine-minute trips to the toilet facilities per night, with further trips made available at the discretion of the prison officers. As a final resort, each cell was provided with a bucket, toilet paper and other sanitary items. Prisoners were instructed on how to use and clean these items and were provided with disinfectant. If a bucket was used to urinate or defecate in, the prisoner could empty and clean it in one of the recess areas.

Both claimants contended that these night sanitation arrangements were degrading (and so infringed their rights under article 3), both in and of themselves and in the context of imprisonment. One of the claimants sought to bolster this claim by arguing that the sanitation regime had interfered with his adherence to Islam. Both prisoners also claimed that the treatment violated their right to respect for their private life under article 8 of the ECHR.

Decision

In considering the article 3 claim, Hickinbottom J took as a starting point the proposition that 'degrading treatment' meant treatment "such as to arouse in … victims feelings of fear, anguish

and inferiority capable of humiliating and debasing them and possibly breaking their physical and moral resistance." According to his Honour, this meant that, for the treatment to be found to violate article 3, it was not sufficient merely to demonstrate that it was excessive; rather, the treatment must have been shown to meet a 'high threshold' in terms of the level of suffering involved. This would generally require "evidence that a medical, psychiatric or psychological condition has resulted from the ill-treatment, or at least contemporaneous complaints about that treatment". In rare cases, the requisite suffering might "be inferred from the nature of [the] ill-treatment".

Having rejected the claim that previous Strasbourg cases established that the requirement to urinate or defecate in a bucket is in itself degrading, Hickinbottom J undertook a detailed consideration of the sanitation regime at HMP Albany. Before doing so, however, his Honour made two useful observations: first, that an intention to humiliate or degrade is an important (although not conclusive) factor in finding a violation of article 3; secondly, that the context of imprisonment might heighten the degree of humiliation and degradation caused by the treatment.

Upon consideration of the evidence, Hickinbottom J found that prisoners were rarely obliged to urinate in their buckets and were extremely rarely obliged to defecate in them. Moreover, special arrangements were made for those prisoners with mobility difficulties or with acute illness. Ultimately, his Honour was unable to find that the claimants suffered any medical, psychiatric or psychological conditions as a result of the treatment, nor was there any evidence that either of the claimants had made a contemporaneous written complaint about the regime.

His Honour also rejected the argument made by one of the prisoners that the sanitation regime interfered with his religion, finding that he was not "a serious adherent to that faith". This conclusion was reinforced by evidence provided by the prison imam to the effect that: there was no reason why the sanitation regime would interfere with the practice of Islam; there had been no previous complaints by Islamic prisoners about the regime; and, in general, the prison authorities were sensitive to the needs of practising Muslims.

In light of this evidence, Hickinbottom J concluded that, while the "sanitation regime [was] not perfect, … it [could not] be said that the Defendant [had] taken any step intended to lower the dignity of any prisoner". Accordingly, his Honour found that the conditions fell "far below the minimum level of severity needed for a violation" of article 3. For similar reasons, his Honour also dismissed the claim based on article 8.

Relevance to the Victorian Charter

Section 10(a) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) requires that a 'person must not be … treated or punished in a cruel, inhuman or degrading way'. Section 22(1) also provides that 'persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person'. These rights may, however, be subject 'to such reasonable limits as can be demonstrably justified in a free and democratic society'.

The decision in *Grant v Ministry for Justice* suggests that Victorian courts may require a high level of suffering to be demonstrated before making a finding that a person has been treated in a degrading way. In the context of imprisonment, the decision demonstrates that even treatment that is in some way unpleasant and is not a necessary incident of the deprivation of liberty may be regarded by a court as not being degrading.

The decision can be found online at: http://www.bailii.org/ew/cases/EWHC/QB/2011/3379.htm

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HRLC POLICY WORK AND CASE WORK

Briefing paper for Attorney-General on human rights initiatives

Respect for human rights is the foundation of a community that is fair, just and inclusive. In the HRLC's view, the promotion and protection of human rights should be a priority for the Australian Government and the office of the Attorney-General.

Following Nicola Roxon's appointment as Attorney-General on 15 December 2011, the Human Rights Law Centre prepared a Briefing Paper for the Attorney on Human Rights Initiatives for 2012-14.

The Briefing Paper details seven actions which the Attorney-General could take to demonstrate principled human rights leadership, promote equality and human dignity, enhance government accountability and do better in guaranteeing fairness for all.

Realising the Right to Equality – Submission on the consolidation of federal anti-discrimination laws

Australia's anti-discrimination laws must be amended to comply with international human rights standards and contribute to a fairer, healthier, more inclusive and prosperous community.

In a major submission to the Commonwealth Attorney-General, who is reviewing the laws, the Human Rights Law Centre has called for the Government to use this critical opportunity to address gaps in the laws and strengthen existing protections.

The HRLC's submission, *Realising the Right to Equality*, recommends simplifying, strengthening and updating the law to ensure that Australia fulfils its human rights obligations.

The HRLC recommends the Consolidated Act reflect the aims of promoting substantive equality and eliminating discrimination. The submission also makes a number of key recommendations for strengthening protections and making the law more accessible, including:

- making explicit the duty to promote equality and eliminate discrimination;
- guaranteeing equality before the law and prohibiting discrimination in all areas of public life;
- simplifying the test for discrimination by removing unnecessary technicalities such as the 'comparator test' and clarifying the duty to make reasonable adjustments;
- sharing the burden of proof when discrimination complaints are heard by the Courts;
- prohibiting harassment and vilification on the basis of all attributes;
- expanding protections to include gender identity; sexual orientation; intersex status; religion, criminal record, political opinion, nationality, industrial activity, family/carer responsibilities, homelessness, experiences of domestic/family violence and other relevant status
- clarifying that intersectional discrimination, which is based on two or more protected attributes, is also unlawful;
- removing arbitrary and outdated blanket exemptions for religious bodies, clubs, partnerships or voluntary work and replacing these with a broad 'general exceptions test' which requires a principled and balanced assessment on a case-by-case basis;

- relieving the burden placed on complaints, for example, by reducing the risk of being ordered to pay a respondent's legal costs; and
- strengthening the Australian Human Rights Commission's powers, for example, by enabling it to inquire and investigate broader range of issues, make binding agreements, issue compliance notices and run cases before the courts.

If adopted, the HRLC's recommendations would not only bring Australia in line with our international human rights obligations, it would also contribute to a fairer, healthier, more inclusive and prosperous Australia.

Update on Occupy Melbourne legal challenge to uphold the right to peaceful protest

As reported in previous editions of *Rights Agenda*, the HRLC is part of a legal team taking action on behalf of the Occupy Melbourne protesters. A proceeding has been commenced in the Federal Court challenging the enforcement action taken by the Council and Victoria Police against the protesters on a number of bases, including that such action is in breach of the implied freedoms of political communication and association contained in the Australian Constitution and the right to peaceful assembly and freedom of expression under the Victorian Charter.

Since our last update, the enforcement action by the City of Melbourne and Victoria Police has continued against the protesters. The matter was last before the Court on 16 December for directions and a trial date has now been set in March 2012 before a single judge of the Federal Court. The Occupy Melbourne protesters have filed their evidence in chief and a statement of facts and contentions. The City of Melbourne and Victoria Police are currently preparing their evidence and statement in reply. The Victorian Attorney-General, Robert Clark, has intervened in the proceeding.

HRLC assists Australian to take case to European Court of Human Rights

An application has been lodged with the European Court of Human Rights on behalf of Jock Palfreeman, an Australian man who was convicted of murder in Bulgaria in 2009, who faced inconsistencies throughout the court process in Bulgaria. Mr Palfreeman appealed unsuccessfully against both his conviction and sentence to the highest court in Bulgaria. Mr Palfreeman's application to the European Court is based on a violation of Article 6 of the European Convention on Human Rights which enshrines the right to a fair trial. In particular, Mr Palfreeman claims that the Bulgarian courts failed respect his right to a fair trial by:

- failing to respect his right to be presumed innocent until proven guilty in violation of Article 6(2) of the Convention;
- placing the prosecution at an unfair advantage in breach of the principle of 'equality of arms' enshrined in Article 6(1) of the Convention;
- not providing him with adequate facilities for the preparation of his defence in breach of Article 6(3)(b) of the Convention; and
- failing to provide reasoned judgments in violation of Article 6(1) of the Convention.

Mr Palfreeman is being provided with pro bono assistance by the HRLC, DLA Piper and Peter Morrissey, Julian McMahon, Ruth Shann and Phoebe Knowles of counsel.

HRLC MEDIA COVERAGE

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

- Gareth Boreham, 'People smuggler laws under fire', *SBS World News*, 19 January 2012
- Michael Gordon, 'Call to end people smugglers' 5-year terms', *The Age*, 19 January 2012
- Nikki Canning, 'Call to amend people-smuggling sentences', *SBS World News*, 19 January 2012
- Ben Lewis, 'Airlines reject 'fat tax'', *Ten News*, 12 January 2012
- Sean Berry, 'Defence cover-ups exposed', *7 News,* 12 January 2012
- Jonathan Creek, 'Prison Lawsuits', *Today Tonight*, 02 January 2012
- Phil Lynch, 'Now is Roxon's chance on human rights', *The Drum (ABC online),* 30 December 2011

SEMINARS & EVENTS

Public Seminar: The Relevance of the Convention Against Torture in Preventing and Redressing Violence Against Women

5pm Wednesday 22 February, Lander & Rogers, Melbourne

Come along to this seminar and find out how the Convention Against Torture can be used to increase transparency and accountability and improve law, policy and practice in the area of violence against women. Expert speakers include, **Claudio Grossman -** Chair, United Nations Committee Against Torture and **Fiona McCormack -** CEO, Domestic Violence Victoria.

For further information and to register a place visit: http://www.hrlc.org.au/events/upcoming/

Justice for all? The International Criminal Court – Ten Years in Review

14-15 February, Sydney

The Australian Human Rights Centre and the Faculties of Arts and Law at the University of New South Wales are convening a conference to mark the 10th anniversary of the operation of the International Criminal Court. It will examine the contribution of the ICC to the achievement of gender justice, and analyse the uneven participation of Asia Pacific states within the ICC framework.

Speakers include ICC President, Judge Sang-Hyun Song, ICC Registrar Silvana Arbia, ICC Deputy Prosecutor (now Prosecutor-elect) Fatou Bensouda, Christian Wenaweser, immediate past President of the Assembly of States Parties, and a number of leading academic, government and civil society experts on the Court.

Further details including current program and registration details at www.justiceforall.unsw.edu.au

Eve Ensler – Australian Human Rights Centre's Annual Public Lecture

To coincide with the above mentioned conference, American playwright and women's rights activist, Eve Ensler, will deliver the Australian Human Rights Centre Annual Public Lecture at the Sydney Theatre Company on 12 February 2012.

Further details at www.justiceforall.unsw.edu.au

International conference on human rights in places of detention

Implementing Human Rights in Closed Environments

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

Where liberty is restricted in closed environments, such as prisons, police cells, immigration detention, and closed psychiatric and disability settings, the potential for human rights abuses is high. The management of such environments requires a delicate balance between the rights of individuals, and the safety and security of others in the closed environment and the broader community. This conference will bring together eminent international and national speakers to examine how human rights are implemented and monitored in closed environments. Further information is available here.

HUMAN RIGHTS JOBS

North Australian Aboriginal Justice Agency

NAAJA provides legal aid for Indigenous people in the Top End of the Northern Territory, with offices in Darwin, Katherine and Nhulunbuy. NAAJA currently has a 12 month vacancy for an Advocacy Manager within our Advocacy Section at our Darwin Office. This role is to coordinate NAAJA's law reform and policy activities and oversee the delivery of community legal education and information as well as the Prisoner Support and Indigenous Throughcare Projects (pre & post prisoner release programs).

The Central Australian Aboriginal Legal Aid Service

CAALAS is seeking a Welfare Rights Legal Officer as part of its Welfare Rights Outreach Project which provides legal advice, casework, community legal education and policy input regarding welfare rights issues, in particular relating to the Northern Territory Emergency Response and related initiatives such as income management.

FOREIGN CORRESPONDENT

Closing the gap: the new international complaints mechanism for children's rights violations

On 19 December 2011, more than twenty years after the adoption of the Convention on the Rights of the Child, ratified by all United Nations (UN) Member States but three – the USA, Somalia and South Sudan – the United Nations adopted a new Optional Protocol to the Convention establishing a communications procedure for violations of children's rights (OPCRC).

Until then, the Committee on the Rights of the Child was the only UN treaty body that did not have the competence to receive and examine allegations of violations under the instruments it is tasked to monitor, namely the Convention, the Optional Protocol on the sale of children, child prostitution and child pornography (OPSC) and the Optional Protocol on the involvement of children in armed conflict (OPAC).

While children and their representatives could use existing complaints mechanisms established under other international instruments to pursue many of their rights, they were deprived from an international remedy that would hold their State accountable for the violation of their unique rights under the Convention, OPSC and OPAC. Moreover, existing complaints mechanisms, which were designed with adults in mind, lack the needed adjustments to ensure that children can access these remedies despite their special and dependent status.

To strengthen children's status as right holders and ensure that they can bring a complaint to an international committee of experts when domestic complaints mechanisms fail to provide an effective remedy for violations of their rights, or when no such remedies exist, a coalition of child rights NGOs decided to launch an international campaign for a communications procedure under the Convention in 2006.

In 2008, to strengthen the coordination of advocacy activities and raise greater awareness about this initiative, the coalition was established as a NGO Working Group for the Convention. It met with the Committee and the UN Deputy Commissioner for Human Rights to discuss the campaign and gain their support. It also launched an international petition and held a number of side events at the UN Human Rights Council.

By 2009, a core group of States supporting the initiative was formed and a resolution establishing an Open-ended Working Group to discuss the possibility of elaborating an OPCRC on a communications procedure was successfully presented and adopted by the Council. With no State objecting to the need for such an instrument, on 24 March 2010, the Council gave the Working Group the mandate to elaborate the Optional Protocol within ten working days and requested the Chairperson of the Working Group to prepare a first draft. The Working Group met in December 2010 and February 2011 and a final draft Optional Protocol was adopted by the Council on 17 June 2010.

One of the key elements advocated by the NGO Working Group was the inclusion of 'collective communications', i.e. the possibility for NGOs, child ombudspersons and national human rights institutions to submit complaints alleging any unsatisfactory application of the rights under the Convention and/or its Optional Protocols without identifying any individual victim, following the model of the Additional Protocol to the European Social Charter. This new mechanism sought to address the concerns over confidentiality, revictimization and protection of children throughout the procedure, enable the Committee to prevent violations – for example, by examining a particular law that could reasonably be expected to infringe on children's rights – and reduce the necessity to consider large numbers of communications from individual child victims or groups that give rise to the same factual and legal questions.

Ten days of negotiation were however not enough to reach a consensus allowing for such an innovation. While the Chairperson could have asked the Council to extend the mandate of the Working Group, he took the view that the Protocol had to be finalised within the Working Group's first mandate. The collective communications mechanism was deleted in the last day of the negotiations.

The rush to reach an agreement also led States to mainly use existing language and, in particular, provisions found in the latest international communications procedure, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

But the intense advocacy conducted by the NGO Working Group also led to a number of important victories. The Protocol will automatically apply to all the international child rights instruments ratified by the State party, namely the Convention and/or the OPSC and/or OPAC. Child complainants will not have to comply with national legal capacity requirements or be subject to legal representation requirements, despite insistent requests from a number of States. The OPCRC also includes some innovative provisions that will allow the Committee to interpret its provisions in a child sensitive manner.

The new Optional Protocol will be open for signature and ratification at an official ceremony, likely to take place on 28 February 2012 in Geneva, Switzerland. It will enter into force upon ratification by ten UN member states.

Anita Goh *is Advocacy Officer of the NGO Group for the CRC - Coordinator of the international campaign for a communications procedure under the Convention on the Rights of the Child*

IF I WERE ATTORNEY-GENERAL…

Reviewing detention from prison architecture to the grounds for incarceration

Director of the National Pro Bono Resource Centre, **John Corker***, argues that a review of our laws and practices surrounding detention should be at the top of Australia's agenda for promoting and protecting human rights.*

If I was AG I would initiate a review of Australia's detention laws and systems, covering everything from the design of our prisons to finding a solution for those in indefinite detention. I would ask, "Are there persons that have been detained because they are unpopular with certain parts of our society?" Is detention really necessary, what are the alternatives?

As Winston Churchill said, "Nothing can be more abhorrent to democracy than to imprison a person or keep him in prison because he is unpopular. This is really the test of civilization." The right to liberty is one of the most fundamental human rights. People should only be deprived of their liberty as an absolute last resort.

Security of the community is the key reason advanced for deprivation of an individual's liberty but to quote Anthony Burke, a lecturer in Politics at the University of Adelaide:

"Security is a simple, reassuring word, but behind its door lies a long and terrible corridor; the despair of the asylum seeker, the suicide attempts, the riots, the self-mutilation, the protest, the voicelessness, and the lack of understanding."

These issues take us to the heart of what human rights are about, a sense of fairness, of social justice. As Australia's leading law officer it would be my role to lead on this issue and I would put it on the agenda of the new Standing Council of Law and Justice.

Broadly speaking people are detained in Australia under laws dealing with crime, immigration, mental health, and contagious diseases. Australia has not codified the requirements for deprivation of a person's liberty as the UK has in Article 5 of the Human Rights Act, where the six defined exceptions to a person's right to liberty have provided a vital framework against which to test its laws. These principles provide a good starting point.

High on my priority list for attention would be those that are incarcerated because they are:

- declared unfit to stand trial due to intellectual disability. I note the case of Marlon Noble in WA who has been held in prison for almost a decade on this basis.
- detained indefinitely on the basis of a mental disorder
- asylum seekers subject to prolonged detention. I would seek to return at least to the max limit of detention being 273 days as it was prior to 1994.
- asylum seekers who are in indefinite detention because they are either considered 'stateless' or denied a fair hearing on their security risk profile due to the state's refusal to provide them with details of the facts that have led to an adverse security finding.
- children of asylum seekers
- young offenders

This does not mean that others subject to prolonged detention such as those convicted of terrorism offences, violent and sexual offenders subject to indefinite detention, or the criminally insane should not also be closely examined to see what alternatives exist for their liberty but the cases above stand out as matters that could be realistically tackled.

As Justice Michael Kirby said in the High Court case of *Al-Kateb*, that declared that the federal government can detain rejected asylum seekers indefinitely, the majority view had "grave implications for the liberty of the individual in this country which this court should not endorse".

Legislative and judicial support for indefinite detention is a recent phenomenon in Australia but is fundamentally unfair and contrary to many human rights instruments notably Article 9 of the ICCPR as being 'arbitrary' if it is unduly prolonged or not subject to periodic review.

Whilst it is difficult to judge whether a person is dangerous to the community this needs to be carefully balanced against the harms of indefinite detention – for example, loss of employment and family contact, loss of dignity and self-esteem, institutionalisation and mental illness.

In the criminal law over the past 20 years we have witnessed the winding-back of the rights of accused persons, the tightening of bail laws, the creation of unique anti-terrorism offences and orders, mandatory sentencing laws, and the parliamentary fettering of the judicial sentencing discretion, all increasing state power over the liberty of the individual and leading to greater prison populations.

The cost of running prisons has become a significant issue for the States and Territories and the cost of detention centres a significant issue for the Commonwealth. This economic paradigm provides a new opportunity for a 'roots and branch' review of our approach to detention in Australia.

As AG I would aim to work with the States to agree on best practice for Australian prisons and use this to drive reform. Best practice should address employment, health, recreation and exercise, sanitation and security.

I would seek to expand, develop and implement as many as possible alternatives to detention and support programs where the emphasis is on the long term welfare of the detainee (many of whom have mental illnesses), rehabilitation of prisoners rather than punishment. I would seek to expand custodial diversionary programs and embed restorative justice in the criminal justice system. I would insist on clear time limits for due process in all mental health legislation.

And last but not least I would engage Australian architect Glen Murcutt to design an inspired Australian prison or detention centre with adequate space, light and ambience. A well-designed modern construction can create a positive atmosphere both for detainees and staff, important not

only for those on remand but to assist detainees to leave the institution at the end of their time prepared mentally for the challenge of resuming life outside. Such a project could really help to change mindsets and culture.

Australia started as a penal colony and the culture of punishment has lived on in large parts of the community particularly in our treatment of Aboriginal people.

We have quite a way to go to develop a more tolerant society and as AG a full scale review of detention laws in an international human rights framework would be my starting point.

John Corker *is the Director of the National Pro Bono Resource Centre*

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.

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