Human Rights Law Centre

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OPINION: AUSTRALIA'S RELUCTANCE TO TAKE THE LEAD ON HUMAN RIGHTS

Secretary General of Amnesty International, **Salil Shetty**, reflects on his recent fact finding mission and argues Australia needs to improve its own act if its voice in the region is to be heard with the clarity that it deserves.

NEWS: UPHOLDING OUR RIGHTS

Eviction of 'Occupy' protesters spark debate about free speech and police use of force.

CASE NOTES:

The ACT Court of Appeal has held that the arrangements for care of children is a relevant factor in the grant of bail and sentencing.

IF I WERE ATTORNEY-GENERAL…

National Director of Australians for Native Title and Reconciliation, **Jacqueline Phillips**, looks at reducing the over-representation of Aboriginal and Torres Strait Islander people in prison.

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OPINION

Australia's reluctance to take the lead on human rights

Just before I got on the plane to leave Australia last month, I heard the news that the Australian Parliament would not be voting on the Government's proposed Migration Act amendments.

The attempt to revive the Malaysia deal had failed and the Australian Government had been forced into doing the right thing for the human rights of refugees.

Though the end result has led to onshore processing in Australia, it is clear that the path to this result has been riddled by a major moral failure over the issue of asylum seekers and refugees. The issue is still being used as an opportunistic "political football", putting the lives of some of the most vulnerable people on the planet, including children, at risk.

Seeking asylum when faced with a well founded fear of persecution is not illegal – it is a right. Yet if you were to believe the political debate in Australia, you could be forgiven for thinking that the country was being illegally invaded.

With torture, persecution and conflict creating millions of refugees around the world, the number of asylum seekers that make it to Australia's far-flung shores is tiny. Almost 48,000 people sought asylum in France last year, while in Australia the figure was just over eight thousand.

Due to the uprisings in the Middle East and North Africa, tens of thousands of asylum seekers have flooded into Europe – where there's widespread bemusement at Australia's shopping around for offshore 'solutions' for a small number of asylum seekers.

How can Australia hope to establish a regional framework to increase protections for refugees in countries like Indonesia and Malaysia if it sets such an appalling example and tries to outsource its responsibilities?

When it comes to onshore processing, asylum seekers in Australian detention centres may not be dying of diseases spread by rat urine as has happened in Malaysian centres, but the long waiting times are clearly taking their toll on asylum seekers' mental health.

I saw first-hand asylum seekers at Villawood detention centre in Sydney who had been waiting more than two years for their claims to be processed and relied on sleeping pills to calm their anxiety.

It was gut-wrenching to see refugees who had fled persecution in their own countries locked up in Australia. As I walked around the complexes with electrified fences and barbed wire, there's no doubt it felt like a prison.

There are over 130 asylum seekers being held at Villawood. The vast majority of these people can and should be processed while living in the community. They told me of their anxiety and despair while waiting years for their claims to be processed. A mother broke down in tears as she described how her children kept asking her why they lived in a jail and always had guards supervising them. I believe Australians are compassionate and would like to see refugees treated better than this.

I found it sickening to see a family locked up with no idea why. It is a flagrant breach of human rights to leave refugees languishing in this legal limbo without even revealing the evidence for the negative assessment and giving them an opportunity to challenge it.

While on my fact finding mission in Australia, I was also profoundly affected by the country's long history of mistreatment toward Aboriginal people.

An Amnesty International report, published just three months ago, shows how, starved of essential services, Aboriginal people living in traditional Indigenous communities in the Northern Territory will effectively be forced to abandon their homelands. In short, they are being illegally evicted.

Statistics tell a clear story: with proper services like healthcare, education, water and shelter, people can be healthier and live longer on homelands. Uprooted from their lands, they suffer.

Making choices is an absolute right. The government has repeatedly failed to listen to those who are most affected by the decisions which it takes. It needs to do so.

I have been to many places in bad shape in Africa, Asia and Latin America. But during my visit to one of the wealthiest countries in the world, I was devastated by what I saw in a remote community in the heart of central Australia.

In the Utopia homelands, I was astounded to find families living in overcrowded, dilapidated homes, some little more than tin sheds, without basics such as running water, electricity or working toilets and washing machines.

In essence, government is abandoning one third of the Northern Territory's Aboriginal population, and leaving 500 communities to wither.

Over twenty years of research confirm Aboriginal people living on homelands are healthier and live longer. With basic services like health, education, water and housing, people can lead more fulfilling lives on homelands. Aboriginal people have a right to live on their traditional lands. Yet years of underinvestment by successive governments have forced these people to choose which of their rights they will forfeit: the right to live on their traditional lands or the right to basic and essential services like housing, health and education.

These moves are part of a chain of policy and legal changes that have undermined Indigenous rights. The Aboriginal peoples' strong desire to sustain communities on their traditional lands must be supported by the federal and Northern Territory governments.

With the Northern Territory Emergency Response legislation expiring next June, Amnesty International is calling for the Government to commit to the future of traditional Aboriginal homelands, to ensure there is a dedicated plan and budget and to ensure the full and active participation in any policy decisions of those directly affected.

As I finished my fact finding mission with key ministerial meetings at Parliament House in Canberra, a world away from the ironically-named Utopia community, I hope that the Australian Government will lift its game on human rights. Sadly, I received no commitments that Australia will improve its human rights record on refugees and stop treating vulnerable people as political footballs.

Australia can be an important voice in this region – but it will of course need to improve its own act, if its voice is to be heard with the clarity that it deserves. On Indigenous rights and the rights of asylum seekers especially, it is sad to see that Australia is currently failing.

Salil Shetty *is the Secretary General of Amnesty International.*

NEWS IN BRIEF

Parliament scuttles 'Malaysia Solution'…

Following motions from an ALP state branch calling on asylum seekers be processed in Australia in keeping with the party's platform, the Gillard Government failed to steer its 'Malaysia Solution' through parliament. The resulting return to on-shore processing has been welcomed by the Greens, while a Senate committee has heard $5 million had already been spent on the plan. Despite all this, both the Australian and Malaysian prime ministers have reaffirmed their commitment to the plan.

…But passes retrospective legislation to block court appeal

In anticipation of a court case to be heard in the Victorian Court of Appeal, the Gillard Government has hurriedly introduced a Bill that retrospectively changes the law to ensure smugglers cannot claim their actions are lawful if passengers are later found to be refugees. This coincided with the death of at least eight asylum seekers when their boat sank in heavy seas off the coast of Java, which has prompted some Labor Ministers to urge the Coalition to reconsider its opposition to the 'Malaysia Solution'.

Illegal detention and suicide at Villawood

An Indian student who paid to study in Australia was illegally detained for 18 months at the Villawood Detention Centre as a result of mistakes of immigration officers. The Australian Human Rights Commissioner has found that the student should be paid $597,000 in compensation. More recently, a Sri Lankan man has committed suicide after spending two years in Australian detention centres. He had been accepted as a refugee but was waiting on security clearance. There are 462 such people accepted as refugees but awaiting the results of security assessments.

Forcible eviction of peaceful protesters highlights need for police reform

Melbourne Lord Mayor called in the police to forcibly remove protestors camping in the city square as a part of the global Occupy Wall Street protests. The heavy-handed police tactics that followed have been criticised as excessive and renewed calls for a fully independent, adequately resourced body to investigate police misconduct. Similar scenes were repeated two days later in Sydney as various commentators lamented how impoverished democratic debate has become.

High Court rules in transgender case

Two female to male transsexuals took their case to the High Court after the WA Court of Appeal upheld an earlier decision rejecting their application to have their gender reassigned. The pair successfully argued they should not have to go through dangerous genital construction surgery to be considered male.

Herald Sun to publish corrective notices for Bolt articles

The Herald and Weekly Times and columnist Andrew Bolt will not appeal the Federal Court's finding that Mr Bolt breached the Racial Discrimination Act and the Herald Sun is to run a prominent corrective notice. Meanwhile much debate about the case continues, with

commentators such as David Marr arguing that Bolt's 'freedom of speech' crusade won't right his wrongs and others eager to highlight that the articles in question were full of factual errors.

Rio Tinto to be prosecuted in US over war crimes allegations

A US court has ruled that Rio Tinto can be sued in the United States in a complaint that alleges that Rio Tinto purposely engaged in conduct that assisted in the commission of violence, injury and death in PNG.

Tensions flare in West Papua

Indonesian security forces have been accused of shooting participants of the Third Papuan Peoples Congress prompting calls for Australia to scrap aid to Indonesia's military and police. This was hot on the heels of violent clashes between security forces and striking workers at the Freeport mine which has been a flash point for decades.

Momentum builds for marriage equality

Queensland's Deputy Premier has introduced into parliament legislation to allow civil unions for same-sex couples. In related news, the Victorian ALP conference has joined other state branches in pressuring the Gillard Government to legalise gay marriage saying it is "about choice, about fairness and about rights".

Snapshot highlights Indigenous youth detention rates

An annual snapshot of the juvenile justice system has found Indigenous Australians are more than 15 times more likely to be in detention or community supervision than non-Indigenous youths.

INTERNATIONAL HUMAN RIGHTS DEVELOPMENTS

UN Special Rapporteur on Torture calls for the prohibition of solitary confinement

"Segregation, isolation, separation, cellular, lockdown, Supermax, the hole, Secure Housing Unit… whatever the name, solitary confinement should be banned by States as a punishment or extortion technique," the United Nations Special Rapporteur on torture, Juan E Méndez, has told the UN General Assembly.

"Solitary confinement is a harsh measure which is contrary to rehabilitation, the aim of the penitentiary system," the rights expert stressed presenting his first interim report to the General Assembly. In it, he examines the practice of solitary confinement "which is global in nature and subject to widespread abuse."

There is no universal definition for solitary confinement because the degree of social isolation varies with different practices. However, for the Special Rapporteur, it is "any regime where an inmate is held in isolation from others (except guards) for at least twenty-two hours a day."

"Social isolation is one of the harmful elements of solitary confinement and its main objective. It reduces meaningful social contact to an absolute minimum," Mr Méndez said. "A significant

number of individuals will experience serious health problems regardless of the specific conditions of time, place, and pre-existing personal factors".

"Indefinite and prolonged solitary confinement, in excess of fifteen days, should also be subject to an absolute prohibition," the expert said, noting that scientific studies have established that some lasting mental damage is caused after a few days of social isolation.

The Special Rapporteur also called for an end to the practice of solitary confinement in pre-trial detention based solely on the seriousness of the offense alleged, as well as a complete ban on its use for juveniles and persons with mental illness.

"Considering the severe mental pain or suffering solitary confinement may cause," Mr Méndez warned, "it can amount to torture or cruel, inhuman or degrading treatment or punishment when used as a punishment, during pretrial detention, indefinitely or for a prolonged period, for persons with mental disabilities or juveniles."

Solitary confinement for shorter terms or for legitimate disciplinary reasons can also amount to cruel, inhuman or degrading treatment or punishment where the physical conditions of prison regime (sanitation, access to food and water) fail to respect the inherent dignity of the human person and cause severe mental and physical pain or suffering.

"Solitary confinement should be used only in very exceptional circumstances, for as short a time as possible," the independent expert emphasized. "In the exceptional circumstances in which its use is legitimate, procedural safeguards must be followed. I urge States to apply a set of guiding principles when using solitary confinement."

In his view, "States should also follow internal and external safeguards in order to provide the greatest possible protection of the rights of detained individuals when solitary confinement is used."

Mr Méndez (Argentina) was appointed by the UN Human Rights Council as the Special Rapporteur on Torture on 1 November 2010. He is independent from any government and serves in his individual capacity. Mr Méndez has dedicated his legal career to the defense of human rights, and has a long and distinguished record of advocacy throughout the Americas. He is currently a Professor of Law at the American University – Washington College of Law and Co-Chair of the Human Rights Institute of the International Bar Association.

Learn more about the mandate and work of the Special Rapporteur and check the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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

Leading international law experts adopt new guidelines on States' extra-territorial human rights obligations

A group of leading international law experts, coordinated by the International Commission of Jurists and the Maastricht Centre for Human Rights, have adopted a comprehensive set of Principles on the Extra-Territorial Obligations of States in the area of Economic, Social and Cultural Rights.

The Principles set out the legal obligations of States in relation to acts or omissions by a State which have impacts on the realisation of human rights outside of that State's territory. The Principles affirm that States may be held responsible for the adverse effects of their conduct on the enjoyment of rights beyond their own borders. They also make clear that States are obliged to cooperate and assist other states in realising economic, social and cultural rights of all people.

The Principles also set out the obligations of states to conduct human rights impact assessments of the "risks and potential extraterritorial impacts of their laws, policies and practices" and to "regulate…transnational corporations and other business enterprises" to ensure they do not "nullify or impair the enjoyment of economic, social and cultural rights".

The Maastricht Principles were developed by 40 international law experts, including members of UN human rights treaty bodies, UN Human Rights Council Special Rapporteurs and leading academic and civil society legal experts.

Australia fails to protect the rights of all its children

Representatives from the Australian Child Rights Taskforce briefed the United Nations on 10 October on Australia's failure to protect the rights of its most vulnerable children.

The delegation spoke about the child rights issues raised in the *Listen to Children Report* to the UN which highlights the principal challenges making the Convention on the Rights of the Child a reality for those living in Australia. The HRLC was a member of the Steering Committee responsible for overseeing the report.

The delegation made recommendations in relation to the range of human rights violations affecting Australia's children, including:

- the Northern Territory Intervention;
- the systemic disadvantages of Aboriginal and Torres Strait Islander children;
- juvenile justice;
- children in out-of-home care;
- asylum seekers and children in immigration detention; and
- children with a disability.

The delegation also stressed to the Committee that Australia has still not established an independent National Children's Commissioner which could go some way to addressing the current shortfalls in oversight of policy, accountability, monitoring and youth participation.

The reporting process allows the UN to periodically monitor Australia's commitment to promoting and protecting children's rights, as well as providing an opportunity for the development of better policies and planning for the promotion and realisation of children's rights in Australia.

The UN Committee thanked the delegation for the in-depth insight into the situation of child rights in Australia.

The delegation also took part in an NGO forum in Geneva, which was hosted by the NGO Group for the Committee on the Rights of the Child, and convened its own side event on children's rights issues in Australia.

Matthew Keeley, the Chair of the Child Rights Taskforce and Director of the National Children's and Youth Law Centre said, "although there is still a great deal of advocacy work to be done, I am extremely proud of the work we have done so far. The Committee praised the delegation's knowledge and professionalism and asked that we extend its greetings to all the children of Australia."

Representatives from the Child Rights Taskforce will revisit the UN in May next year when the Australian Government presents their report to the Committee.

Source: National Children's and Youth Law Centre

NATIONAL HUMAN RIGHTS DEVELOPMENTS

Processing asylum seekers on the mainland is welcomed

The Australian Human Rights Commission has welcomed the government's move to process claims for asylum on the Australian mainland. The Commission also welcomed the government's decision to make greater use of bridging visas and community detention.

"For a long time we have said that asylum seekers should be able to live in the community while their refugee claims are processed," Commission President Catherine Branson QC said.

"This is an effective and humane alternative to indefinite detention, which is extremely expensive and causes people serious mental harm."

Ms Branson said the use of community-based alternatives such as bridging visas and community detention is in line with existing government policy. It is also in line with Australia's international obligations.

"The community detention system was created by the former government in 2005 and has been significantly expanded for unaccompanied minors and family groups over the past year," Ms Branson said.

"Many asylum seekers who arrive in Australia by air already live in the community on bridging visas."

"The Commission is pleased that the use of bridging visas will be extended to asylum seekers who arrive by boat and we hope to see that happen as quickly as possible," Ms Branson said.

Ms Branson said that by international standards, Australia receives a very small number of asylum seekers. Asylum seekers who arrive by boat are a small percentage of Australia's annual migration intake. "The Commission is concerned however, that the government has stated that it remains committed to offshore processing," she said.

"In addition to onshore processing, the Commission would like to see the government pursue genuine and sustainable regional efforts. Such efforts should be aimed at increasing opportunities for safe, regular migration and enhancing the ability of refugees to access protection across the region."

Source: The Australian Human Rights Commission

Campaign for Australia's ratification of the International Migrant Workers Convention

The Human Rights Council of Australia is leading a coalition of Australian and international NGOs to campaign for Australia's ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).

The Migrant Workers Convention sets out the human rights of people who are working outside their country of nationality, together with members of their immediate family and dependents. It seeks to secure access to humane conditions of work and an adequate standard of living by protecting such rights as freedom from slavery and slave-like conditions, the right to equal pay for equal work, the right to leave the country of migration and return to their home country, and the right to equal treatment with respect to access to education and vocational training.

Australia has not ratified the Migrant Workers Convention and recently rejected a recommendation made by a number of States during the Universal Periodic Review to become a

party. This is despite the fact that there are an estimated 1.5 million people in Australia who would be covered by the Convention, that Australia has ratified all of the other core international human rights treaties, and that Australian ratification could contribute to regional protection of labour rights.

To join the campaign and support the recognition and protection of the fundamental human rights of migrant workers and their families, see: http://hrca.org.au/activities/migrant-workers-convention/

Government announces EITI Pilot

The HRLC welcomes the Federal Government's announcement that Australia will trial the Extractive Industries Transparency Initiative (EITI).

The EITI is an international initiative that requires governments to publish what they receive in payments from mining, oil and gas companies and for companies to publish what they pay governments. This process is overseen by a multi-stakeholder group comprising equal representation of government, industry and civil society.

The Australian EITI pilot is an important step towards increasing transparency and accountability in the management of our natural resources.

Increased legal recognition for sex and/or gender diverse Australians

Recent developments have seen the right of transgender people to have their preferred gender recognised protected by the High Court and recognised by the Australian Government.

AB v Western Australia

The High Court recently delivered its most high profile decision on the rights of transgender people to have their gender affirmed in a unanimous judgment in the case of *AB v Western Australia*. The Court adopted a "fair, large and liberal" interpretation of the purpose of the *Gender Reassignment Act* to find that transgender people are entitled to have a recognition certificate issued if they are socially "identified" as their preferred gender, irrespective of whether they have undergone every available surgery to remove their reproductive organs. There was a glimmer of hope in the closely-worded judgment, which supported the Act's purpose (and parliamentary intention) in acknowledging that sex and gender are not necessarily unequivocal, and may be ambiguous. The door was left open to transgender people who have undergone "medical procedures" (such as hormone therapy) but have not undergone surgery to have a recognition certificate issued affirming their gender. The key test is whether their personal characteristics (including lifestyle, appearance and behaviour) mean they are identified as their preferred gender. The High Court was very clear that not having undergone every available surgery, prevailing community standards and expectations or "potential adverse social consequences" are not relevant in this determination. See the case note below for further details about the case.

Passport reforms

A few weeks earlier, in the same week as the inaugural gathering of the Parliamentary Friends Group for LGBTI Australians, the Australian Department of Foreign Affairs and Trade revised its policy to allow sex and/or gender diverse Australians to affirm their preferred gender on their passport. Previously, a person would need to undergo sex reassignment surgery to have a passport issued in their preferred gender. Phalloplasty is unavailable in Australia, and any surgery carries a level of risk. The revised policy allows a person to affirm their gender, provided that they have a medical practitioner's letter of support. The letter must certify that they have had,

or are receiving, appropriate clinical treatment for gender transition to a new gender, *or* that they are intersex and do not identify with the sex assigned to them at birth. Passports are now available in M (male), F (female) or X (indeterminate/unspecified/intersex). This inclusion of X as a "third sex" embraces the experiences of many transgender and intersex Australians who do not identify as either male or female, in recognition of sex and gender diversity.

The new policy removes unnecessary obstacles in recording a person's preferred gender on official documents. The change is a step closer to eradicating discrimination on the grounds of sex and/or gender identity and expression. The policy was developed in close consultation with transgender and intersex organisations and implements recommendations from the Australian Human Rights Commission's *Sex Files* Report. Community advocates have hailed the changes as the most significant reform announced by any jurisdiction in Australia regarding sex and gender diverse issues for at least 5 years and a significant step towards greater equality.

Lee Carnie *is a volunteer at the Human Rights Law Centre.*

Anti-Racism Partnership Strategy to reach out to all Australians

Race Discrimination Commissioner, Dr Helen Szoke, believes the new National Anti-Racism Partnership Strategy will reach out to the entire Australian community. The Partnership was announced by the Government in February 2011 as a key initiative of Australia's new multicultural policy, *The People of Australia.*

"To make multiculturalism work, we have to confront racist attitudes. The creation of this partnership of key government agencies and community organisations will form a powerful opportunity to build preventative strategies to reduce racism" said Dr Szoke.

Dr Szoke said the Partnership will design, develop and implement the Strategy. It will focus on five key areas of effort" research and consultation, education resources, public awareness, youth engagement and ongoing evaluation.

The National Anti-Racism Partnership and Strategy includes government representatives from the Attorney-General's Department, the Department of Immigration and Citizenship, the Department of Families, Housing Community Services and Indigenous Affairs as well as the Australian Multicultural Council. From the community, the Partnership includes the Federation of Ethnic Community Councils Australia and the National Congress of Australia's First Peoples.

Dr Szoke said the combination of Government, independent bodies and representative NGOs means that all areas of racism can be identified and coalitions built to address them.

The Partnership will be launching a process of community consultations early in the new year.

Source: Australian Human Rights Commission

STATE-BASED HUMAN RIGHTS DEVELOPMENTS

Calls to streamline and strengthen the Victorian Charter of Human Rights

The Government position in response to the review of Victoria's Charter of Human Rights and Responsibilities Act, is being coordinated by the Office of the Premier and the Department of Premier and Cabinet. It is likely that a decision on the future of the Charter will be made within Government by December 2011, with a formal Government position announced in March 2012.

The HRLC strongly encourages individuals and organisations to write to the Premier calling for the Victorian Charter to be retained and strengthened.

The HRLC has added a page to its website providing an overview of:

- the Scrutiny of Acts and Regulations Committee's report on the operation of the Charter;
- the Premier's initial response;
- why and how the HRLC believes the Charter should be streamlined and strengthened; and
- what you can do.

Earlier this year the Scrutiny of Acts and Regulations Committee was tasked by the Attorney-General to review and report on the Charter's operation and impact. While the Committee recommended against repeal of the Charter in its entirety, the suggested amendments are tantamount to repeal.

In response to SARC's report, the Premier announced that the Government response will be prepared and co-ordinated by the Department of Premier and Cabinet and noted that the SARC report and many of the public submissions indicate that the Charter of Human Rights has delivered benefits to Victoria, and should not be repealed.

The HRLC considers that the Victorian Charter should be maintained and strengthened because the evidence clearly demonstrates that Charter is delivering benefits for Victorians and promotes transparency and accountability in government. The HRLC also notes that the predicted adverse consequences of the Charter have been proven unfounded and that there is very strong community support for the Charter. The HRLC's position is explained in further detail in a Briefing Paper to the Office of the Premier.

While the evidence shows that, overall, the Charter is working effectively and efficiently, there are a few modest reforms that the HRLC considers could streamline and strengthen the operation of the Charter. For example:

- The Charter could be amended to include all of the human rights contained in the *International Covenant on Civil and Political Rights.*
- Human rights enshrined in the *International Covenant on Economic, Social and Cultural Rights*, could be included while perhaps limiting the application of those rights to areas related to the scrutiny of new legislation.
- Clarification could be made about not limiting absolute human rights;
- the section relating to legal proceedings could be simplified or, better still, the section could be replaced with a provision that establishes a free-standing cause of action for breaches and empowers the courts to grant such relief or remedy as is just and appropriate.
- The requirement that the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission be notified of proceedings brought under the Charter could be repealed or amended to provide courts with discretion to relieve a party from giving notice.
- Amendments could be made to enable the Victorian Equal Opportunity and Human Rights Commission to inquire into and audit the compliance of a public authority's policies, programs and practices with human rights.
- Amendments could be made to ensure that laws relating to abortion are subject to pre-enactment human rights scrutiny.

The HRLC encourages interested organisations and individuals to support the Premier to do the right thing and retain and strengthen the Victorian Charter. Those wishing to do so should write to the Premier and their local MP. Contact details for Premier Baillieu are available here.

AUSTRALIAN HUMAN RIGHTS CASE NOTES

High Court affirms right to gender identity and expression

AB v Western Australia [2011] HCA 42 (6 October 2011)

Summary

The High Court delivered a unanimous judgment affirming the right of transgender people to have their gender officially recognised after undergoing medical or surgical procedures, even if not all of their reproductive organs have been altered. The Court emphasised the purpose of the *Gender Reassignment Act 2000* (WA) to alleviate suffering and discrimination transgender people face in society by providing legal recognition of their self-identification and perception of gender.

Facts

AB and AH were born as female but identified as male from an early age, and were diagnosed with gender identity disorder. At the time of hearing, AB was aged 31 and AH was 26. AB and AH had altered their gender characteristics through undergoing bilateral mastectomies and ongoing testosterone therapy. Both have the physical appearance of males and live their lives as men. However, they retain some female sexual organs as neither has undergone a hysterectomy or phalloplasty. Neither AB nor AH wish to undertake any further surgical procedures because they do not consider them necessary to their sense of male identity, and because of the risks involved.

The West Australian Gender Reassignment Board is empowered to issue a recognition certificate as conclusive evidence that a person has undergone a reassignment procedure and "is of the sex stated in the certificate". The Board refused to issue AB and AH a recognition certificate affirming them as men because of their remaining female reproductive organs and the "adverse social and legal consequences" of issuing a recognition certificate given their capacity to bear children.

AB and AH successful appealed the Board's decision before the State Administrative Tribunal, before the Tribunal's decision was overturned by the Court of Appeal.

Decision

The majority in the Court of Appeal assessed "gender characteristics" against "accepted community standards and expectations", to find that AB and AH would not be "identified" as male while they retained female reproductive organs. The term "identified" was taken as the extent to which a person has assumed the physical characteristics of the opposite sex through surgery, under the assumption that there is a point at which surgery fully renders a person's transition to male or female.

The High Court held that reliance on "potential adverse social consequences" or "community standard and expectations" were deliberately not included in the Act as a matter of policy and cannot be artificially inserted to deny a recognition certificate. The Court found that the language of the Act revealed the parliamentary intention to use "social recognition" (influenced by physical characteristics being *altered*) as the relevant test, not the extent to which a person's body is *changed*. Broadly speaking, the test is not whether a person has undertaken every surgical procedure available, but whether they have altered their gender characteristics "sufficiently" to be

"identified" as the opposite sex. This requires consideration of a person's physical characteristics (including appearance, behaviour and lifestyle) both in private and public, but does not require knowledge of a person's bodily state or "remnant sexual organs". This broader interpretation gives appropriate weight to the Act's guiding principle; that a person's sex and gender characteristics are not always unequivocally male or female, but may be ambiguous.

The Court emphasised that the purpose of legislation which protects of enforces human rights must be given particular significance and a "fair, large and liberal" interpretation. In this case, the Act sought to facilitate acceptance and participation of transgender people to live as their reassigned gender within society. The definition of "reassignment procedure" as a "medical *or* surgical procedure" supports the Court's interpretation, suggesting that a medical procedure such as hormone therapy may be sufficient to issue a recognition certificate without surgery.

Relevance to the Victorian Charter

The High Court's decision in *AB v Western Australia* arguably lifts the bar for interpretation and application of similar laws around Australia and may also be relevant to future applications of the Victorian Charter. Importantly, the decision stands as firm precedent of the acknowledgement that sex and gender may be ambiguous. Thus, flexible understandings are required to grapple with the way that sex and gender are often assumed as unequivocal, in order to adequately respect the rights of transgender people. The decision also stands as authority for "beneficial" legislation which promotes or empowers human rights to be given a broad, fair and liberal interpretation to achieve its human rights objectives, of particular relevance to section 32 of the Victorian Charter.

The decision can be found online at:
http://www.gaylawnet.com/laws/cases/ABvStateofWesternAustrlia.pdf

Note: The HRLC recognises that the term "transgender" is contested, and that appropriate language is important when discussing a person's strongly felt sense of gender. "Transgender" is used in a broad sense inclusive of "transsexual" people, in recognition that a number of people undergoing medical procedures may be affected by the High Court decision but may not identify as "transsexual", and vice versa.

Lee Carnie *is a volunteer at the Human Rights Law Centre.*

Care and protection of children a relevant consideration in granting bail or sentencing a parent

Aldridge v R [2011] ACTCA 20 (22 September 2011)

Summary

The ACT Court of Appeal has held that, by operation of s 11(2) of the *Human Rights Act 2004* (ACT), the arrangements for care of children is a relevant factor to be taken into account in the grant of bail, sentencing, and the grant of bail pending appeal against sentence.

Facts

Edward Aldridge was sentenced on seven counts involving burglary and aggravated burglary to a term of imprisonment of three years and six months, with a non-parole period of two years. He lodged an appeal against sentence and applied for bail pending determination of that appeal. Due to a range of delays attributable to the prosecution, the court and Mr Aldridge, the appeal against sentence was scheduled to be heard just two months before expiration of the non-parole period.

In applying for bail pending appeal, Mr Aldridge relied, among other matters, on the fact that his partner had recently given birth to their second child, was suffering from post natal depression and that Mr Aldridge needed to support them.

Decision

The application was allowed and Mr Aldridge was granted bail.

Justice Refshauge reiterated that bail pending appeal against sentence should only be granted in special or exceptional circumstances (see also *Sherd v The Queen* [2011] ACTCA 17), but stated that there were a range of matters in the present case which, together, amounted to such circumstances. In particular, the Court noted that:

> Mr Aldridge's partner…has been sentenced to three months periodic detention. That leaves her new born and their other child, a two-year old, without proper care over the time she must be in detention. His partner has no close family to assist.
>
> The proper arrangements for care of children is a relevant factor where, as here, the *Human Rights Act 2004* (ACT) in s 11(2) mandates that "every child has the right to the protection needed by the child". This right has been construed by the Constitutional Court of South Africa to be a relevant matter to be taken into account in sentencing. See *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18, as refined by *S v The State* [2011] ZACC 7.

The decision can be found online at: http://www.austlii.edu.au/au/cases/act/ACTCA/2011/20.html

***Phil Lynch** is Executive Director of the Human Rights Law Centre*

Federal Court upholds the right to be free from racial discrimination

Eatock v Bolt [2011] FCA 1103 (28 September 2011)

Summary

Federal Court judge Bromberg J recently held that Herald Sun opinion columnist Andrew Bolt and the Herald & Weekly Times had contravened the racial vilification provisions of the *Racial Discrimination Act 1975* (Cth) in two articles published in 2009. Bromberg J highlighted that "[a]t the heart of any attempt to secure freedom from racial prejudice and intolerance is the protection of equality and the inherent dignity of all human beings."

Facts

In 2009, Bolt published two articles – "It's so hip to be black" and "White fellas in the black" – targeting a group of highly successful Aboriginal people as exemplifying the 'trend' of so-called 'fair-skinned Aboriginal people' choosing to identify as Aboriginal to gain access to personal and career-based benefits and entitlements, ahead of more deserving darker-skinned Aboriginal people. The articles emphasised the physical characteristics and biological descent of the named Aboriginal people, undermining their legitimacy to call themselves Aboriginal, instead referring to them as 'political Aborigines'. In response, Aboriginal activist Pat Eatock and eight of the other Aboriginal people named in the articles commenced proceedings in the Federal Court, seeking an apology and injunction on re-publication.

Decision

On 28 September 2011, Bromberg J determined that the articles were reasonably like to offend, insult, humiliate and intimidate 'fair-skinned' Aboriginal people under section 18C of the Act. They implied that the fair-skinned Aboriginal people named were not genuinely Aboriginal, had chosen

to falsely identify as Aboriginal, and that skin colour is an accurate indication of Aboriginal identity. Bromberg J emphasised that each of the Aboriginal people targeted by Bolt genuinely identifies as an Aboriginal person, and is entitled to do so. They did not 'choose' to be Aboriginal, and did not illegitimately or opportunistically use their Aboriginal identity for material gain. This was assessed according to the standards of a reasonable and objective fair-skinned Aboriginal person, without importing general community standards, because to do so would run the risk of reinforcing prevailing prejudice antithetical to the promotional purposes of the Act. Bromberg J also considered how the articles may affect younger and vulnerable Aboriginal people feeling as if they cannot fully identify as Aboriginal for fear of pressure, public disdain or loss of esteem.

Section 18D provides that reasonable and good faith public comments made in the public interest from being unlawful. Bromberg J found that the style, language, manner and errors within the articles prevented Bolt and HWT from claiming this exemption. While it is lawful to publish articles dealing with racial identification, including challenging the genuineness of the identification of a group of people, it is not lawful to do so in the manner in which Bolt wrote the articles in question. The articles contained multiple errors of material fact, distortions of the truth and inflammatory and provocative language. In this sense, the finding of unlawfulness was the same as would have been available under defamation law by virtue of the errors in research and reporting, contrary to journalistic guidelines.

On 19 October 2011, Bromberg J ordered the Herald Sun to publish a 500-word corrective notice next to Bolt's column twice over the following 14 days. Re-publication of the articles was restricted to 'historical or archival purposes', and only where accompanied by the corrective notice. The orders were meant to redress the hurt of the Aboriginal people affected, restore the esteem and social standing lost because of the Articles, inform people about the wrongdoing of the articles and negate the dissemination of racial prejudice.

Relevance to the Victorian Charter

Whilst the decision does not involve application of the Victorian Charter, the case raises interesting questions around balancing the right to be free from racial discrimination against the right to freedom of expression. Issues of censorship, free speech, political correctness and the scope and constitutionality of Part IIA of the Act have also been canvassed in the extensive commentary on the decision.

Given the nature of much of the media reporting on the decision, an observer might be forgiven for concluding that the decision was somehow unprecedented or a departure from accepted legal principles. Arguably the judgment itself is not a radical or unexpected application of the Act. Also of note is the fact that the strategy employed by Bolt and HWT appears to have put him at a significant tactical disadvantage in regards to establishing a defence under s 18D (see para 367), which no doubt contributed to his ultimate failure. One hopes that the Federal Government will be able to bear this in mind and disregard the media hyperbole when grappling with these policy issues in the context of current reforms, namely, the review of federal anti-discrimination laws currently underway and the constitutional recognition of Aboriginal and Torres Strait Islander peoples.

Read a news item and summary of the judgment prepared by the Equal Rights Trust, an international NGO working to combat discrimination and promote equality as a fundamental human right.

The original decision can be found online at:
http://www.austlii.edu.au/au/cases/cth/FCA/2011/1103.html

The orders can be found online at: http://www.austlii.edu.au/au/cases/cth/FCA/2011/1180.html

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INTERNATIONAL HUMAN RIGHTS CASE NOTES

Solicitor-client privilege: sacred principle or conduit for crime?

Federation of Law Societies of Canada v Canada (Attorney General), 2011 BCSC 1270 (27 September 2011)

Summary

In the context of international pressure on states to combat anti-money laundering and terrorism financing, the Supreme Court of British Columbia has held that limitations on solicitor-client privilege imposed by anti-money laundering legislation violate principles of fundamental justice in contravention of the *Canadian Charter of Rights and Freedoms*. The decision will remove the legal profession from the operation of two pieces of anti-money laundering and terrorist financing legislation in Canada.

Facts

The case was brought by the Federation of Law Societies of Canada (FLSC). The FLSC's petition challenged the constitutionality of Canadian anti-money laundering and terrorism financing legislation, namely, the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184.

The impugned legislation provided that members of the legal profession must comply with stringent client identification, verification, recording and reporting obligations for the purpose of combating money-laundering activities in Canada and, in its most extreme, permitted warrantless searches of lawyers' offices. The maximum punishment specified for non-compliance with these provisions was imprisonment.

The FLSC argued that such requirements, in so far as they apply to the legal profession, breach both sections 7 and 8 of the Canadian Charter, because they (a) impinge upon solicitor-client confidentiality, which is a principle of fundamental justice; and (b) cannot be demonstrably justified in a free and democratic society.

Decision

Was there an infringement of s 7 of the Canadian Charter?

The Court concluded that the impugned provisions infringed s 7 of the Canadian Charter. That section states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The Court held that the test for determining whether there has been a breach of s 7 is two-fold. First, there must be a deprivation of life, liberty or security of the person. Secondly, it must be shown that the deprivation does not accord with the principles of fundamental justice.

The risk that lawyers could be imprisoned as a penalty for non-compliance with the impugned legislation appeared sufficient to engage the first limb of the test. In addition, the Court considered that the underlying purpose of the legislation, being the advancement of the "criminal law interest of deterring, investigating and prosecuting crimes committed by lawyers' clients", put the liberty of lawyers' clients at risk.

The Court held that to satisfy the second limb of the test, it must be established that:

- there is a legal principle;
- there is a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate; and
- the principle is capable of being identified with sufficient precision so as to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

The FLSC submitted that the fundamental legal principle of solicitor-client confidentiality and privilege was violated by the anti-money laundering and terrorism financing legislation. The Court agreed, citing authority that "the solicitor-client privilege is a principle of fundamental justice and civil right of supreme importance in Canadian law".

In reaching this conclusion the Court focused on the purpose underlying the impugned legislative requirements. The Court considered it apparent that the legislation required lawyers to collect client information for the purpose of creating a paper trail for the benefit of law enforcement agencies. This infringed solicitor-client privilege to an unacceptable degree.

Was the infringement reasonable under s 1 of the Canadian Charter?

The Court held that the infringement could not be justified under sectio 1 of the Canadian Charter, which provides that Charter rights may be subject only to such reasonable limits "as can be demonstrably justified in a free and democratic society". Although the Court recognised that the objectives of combating money laundering and terrorist financing in Canada are pressing and substantial, it did not consider the impugned legislation was proportionate to those objectives.

The Court considered that the extent of self-regulation already practised by the legal profession provides sufficient protection against money laundering and terrorism financing, and that the profession is better suited to provide this protection than a state entity. Moreover, the protective measures monitored by the law societies were considered to satisfy Canada's international obligations to address money laundering and terrorism financing issues within the legal profession. In concluding that the impugned provisions would disproportionately impair the human right to liberty under section 7 of the Canadian Charter, the Court also noted the public interest in a self-regulated, independent bar, free from state interference.

Relevance to the Victorian Charter

Section 21(3) of the Victorian Charter provides:

> A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.

The right to liberty is the essence of both s 21(3) of the Victorian Charter and s 7 of the Canadian Charter. The Victorian provision, which requires a deprivation of liberty to accord with grounds and procedures established by law, is however narrower than its Canadian counterpart, which requires any deprivation of liberty to accord with "principles of fundamental justice".

In the Canadian case, it was the failure to accord with a principle of fundamental justice, not simply procedures established by law, which the Court found objectionable. Certainly the case

supports the special nature of solicitor-client confidentiality and the lengths to which courts will go to preserve the trust imbued in that relationship. However, unless principles of fundamental justice are considered to fall within the definition of a "procedure, established by law", this case is unlikely to be directly relevant to the application of section 21(3) of the Victorian Charter.

The decision can be found online at:
http://canlii.ca/en/bc/bcsc/doc/2011/2011bcsc1270/2011bcsc1270.html

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Treatment of young rape survivor violated ICCPR

L.N.P. v Argentine Republic, Comm. No. 1610/2007, UN Doc. CCPR/C/102/D/1610/2007 (2011)

The Human Rights Committee recently found that Argentina's treatment of a 15 year-old rape survivor violated articles 2(3), 3, 7, 14(1), 17, 24 and 26 of the *International Covenant of Civil and Political Rights*.

Facts

L.N.P., an Argentinian of indigenous origin, claimed three young men raped her soon after she turned 15 years of age. She reported the rape to local police immediately and was subsequently sent to the local medical centre. L.N.P. claimed that staff at the police station and medical centre kept her waiting for hours, and that police failed to record a complaint of rape, despite her being in tears and covered in blood. The author also claimed that the medical staff subjected her to painful and unnecessary tests, including to ascertain her virginity.

The three accused were eventually arrested and put on trial. A social worker was appointed as part of the judicial investigation to "enquire into lifestyles, habits and any other factors of interest for the investigation." The author alleged, however, that the social worker only investigated her, ignoring the three accused. The author further alleged that she was never informed of her right to appear as a plaintiff and proceedings were conducted without an interpreter.

The accused were eventually acquitted of raping L.N.P. Although the trial court found that the alleged sexual acts had been proven, it concluded that it had not been established that they occurred without the author's consent. The fact that the author was not a virgin was a decisive factor in the court's finding. The court also made repeated enquiries as to whether the author had a boyfriend and was a sex worker.

After learning of the acquittal almost two year later, L.N.P. submitted a communication to the Human Rights Committee, alleging violations of articles 3, 7, 14(1), 17, 24 and 26 of the ICCPR.

Decision

Right to non-discrimination (ICCPR, art 26)

The Committee concluded that Argentina had discriminated against L.N.P. on the basis of her sex and ethnicity, in violation of article 26 of the Covenant. It noted that the Court based its assessment of whether or not the author consented to the sexual conduct on her sex life, including whether or not she was virgin and a prostitute. It explained that "[t]he court … invoked discriminatory and offensive criteria, such as 'the presence of long-standing defloration' of the author to conclude that a lack of consent to the sexual act had not been demonstrated." Her treatment by the police and medical staff, which included subjecting her to painful and unnecessary treatment, *inter alia*, to ascertain whether or not she was a virgin, constituted discriminatory treatment aimed at casting doubt on the morality of the victim.

The Committee hinted that the decision of the trial court was based on gender stereotypes, though it stopped short of naming the specific stereotypes in operation. The HRC's decision in this regard, stands in juxtaposition to the recent decision of the Committee on the Elimination of Discrimination against Women in *Karen Tayag Vertido v. The Philippines*, which expressly names the gender stereotypes that the trial judge relied upon in acquitting the accused of rape.

Right to such measures of protection as are required by status as minor (ICCPR, art 24)

The HRC determined that the court, police and medical staff failed to adopt measures of protection as required by the author's status as a minor, in violation of article 24 of the ICCPR.

Equality before the law (ICCPR, art 14(1))

According to the Committee, the failure to inform the author of her right to act as a plaintiff, which prevented her from participating as a party to the proceedings and being notified of the acquittal, as well as irregularities with the court's procedures, such as the failure to provide an interpreter, constituted a violation of the right to equality before the law.

Freedom from cruel, inhuman or degrading treatment (ICCPR, art 7)

The HRC determined that the physical and mental suffering the author experienced because of how she was treated by police and medical staff after being raped, as well as by the court, amounted to a violation of the freedom from cruel, inhuman or degrading treatment.

Freedom from arbitrary interference in private life (ICCPR, art 17)

The HRC concluded that repeated enquiries made by the social worker, medical staff and the court about the author's sex life and morality constituted a violation of freedom from arbitrary interference in private life. Recalling its *General Comment No. 28* on equality, the HRC reiterated that "interference, in the sense in which the term is used in article 17, arises when the sexual life of a woman is taken into consideration in deciding the extent of her legal rights and protections, including protection against rape."

Right to an effective remedy (ICCPR, art 3(2) read in conjunction with arts 3, 7, 14(1), 17, 24, 26)

Finally, the HRC determined that Argentina had failed to provide access to an effective remedy, as there was no remedy available to the author that would have enabled her to address the violations of her rights by the trial court.

Relevance to the Victorian Charter

The Victorian Charter does not contain an express prohibition against gender-based violence against women. It does, however, protect almost all of the rights implicated in the *L.N.P.* decision. Criminal investigations and legal proceedings, including in relation to rape, must be conducted in accordance with the rights protected under the Charter, including the rights to non-discrimination (s 8(2)) and equality before the law (s 8(3)) and the freedoms from cruel, inhuman or degrading treatment (s 10) and from arbitrary interference in private life (s 13). Public authorities are also under an obligation to ensure that victims / survivors of rape, who are minors, receive such protection as is in his or her best interests and is needed by him or her by reason of being their status as minors (s 17(2)).

The decision can be found online at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/454/32/PDF/G1145432.pdf?OpenElement

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Combating drug use while respecting Charter rights

Canada (Attorney-General) v PHS Community Services Society, 2011 SCC 44 (30 September 2011)

Summary

The Supreme Court of Canada has held that the failure of the Minister of Health to grant an exemption to allow a safe injecting facility to operate notwithstanding federal anti-drug laws violated the right to life, liberty and security of the person under the Canadian Charter of Rights and Freedoms. This was because the evidence clearly demonstrated that the safe injecting facility was effective in saving lives and reducing drug-related harm.

The Court did, however, uphold the constitutionality of the anti-drug laws themselves.

Prohibitions on possession and trafficking controlled substances are contained in the *Controlled Drugs and Substances Act* S.C. 1996 and exemptions are permissible at the discretion of the federal Minister of Health.

The Supreme Court of Canada determined that the Act engages some rights contained in the Canadian Charter of Rights and Freedoms but is not in violation of those rights because of the discretion conferred on the Minister.

Facts

The opening of North America's first government-sanctioned, safe injecting facility, Insite, was approved as a pilot research project in September 2003. The *Controlled Drugs and Substances Act* S.C. 1996, empowers the Minister of Health to issue exemptions for medical or scientific reasons, or for any purpose the Minister deems to be in the public interest. The Minister of Health granted Insite a conditional exemption from possession and trafficking laws. Temporary exemptions were thereafter granted until 2008 when the Minister effectively refused Insite's formal application for a continued exemption on the basis that the site "represents a failure of public policy".

The claimants comprised two public health bodies and two individual clients of Insite. They sought declarations that the Act is inapplicable to Insite and that its application to Insite resulted in a violation of the claimants' section 7 rights under the Canadian Charter or, in the alternative, that the federal Minister of Health, in refusing to grant an extension of Insite's exemption, had violated the claimants' section 7 rights.

One question for the Supreme Court was whether the prohibitions in the Act infringed the rights to life, liberty and security of the person guaranteed by section 7 of the Canadian Charter, which can only be limited in accordance with principles of fundamental justice, and, if so, whether the infringement could be justified under section 1, which provides that such rights are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

Decision

The Supreme Court held that the prohibition on possession in the Act engages the section 7 rights of the claimants but does not violate section 7 because of the discretion conferred on the Minister to grant exemptions for, among other things, health.

The Court further concluded that, while the scheme of the Act conforms to the Canadian Charter, the "arbitrary and unsustainable" actions of the federal Minister of Health in refusing to extend Insite's exemption were in violation of section 7, and could not be justified under section 1. The Court determined that the exemption provided for in the Act "*acts as a safety valve that prevents the Act from applying where it would be arbitrary, overbroad or grossly disproportionate in its effects*".

The conclusion that the Minister had not exercised his discretion in accordance with fundamental principles of justice rested on the trial judge's conclusions that Insite had, during its eight years of operation, been effective in reducing the risk of death and disease and had not impacted negatively on the legitimate criminal law objectives of the federal government. As such, the Minister's actions were seen to undermine the very purposes of the CDSA — namely, the protection of health and public safety.

Relevance to Victorian Charter

Supervised injection facilities do not presently operate in Victoria. Earlier this year, Melbourne's Yarra City Council voted 6-1 in favour of establishing a trial supervised injection facility in Victoria Street, Richmond, which was subsequently dismissed by the state government. A safe injecting site operates in Sydney and health authorities are increasingly recognising that health care for injection drug users is not simply a matter of abstinence or non-treatment.

Sections 1 and 7 of the Canadian Charter correspond to sections 7, 9 and 21 of the Victorian Charter. The rights to life, liberty and security of the person, and the ways in which they may be limited, are in fact outlined more thoroughly in the Victorian Charter, particularly in relation to arrest and detention.

Drawing on this comparative jurisdiction, we see that a law prohibiting possession or trafficking of drugs has the potential both to engage directly the rights to life, liberty and security of the person of clients using supervised injecting facilities and to engage the liberty interests of health professionals providing the supervised services (where the law provides a penalty of imprisonment).

The decision can be found online at: http://scc.lexum.org/en/2011/2011scc44/2011scc44.html

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United Kingdom justified in differentiating between social housing applicants based on conditional immigration status

Bah v United Kingdom [2011] ECHR 1448 (27 September 2011)

Summary

The European Court of Human Rights has held that a person's immigration status is a relevant ground of discrimination under Article 14 of the European Convention of Human Rights. However, as a person's immigration status involves an element of choice, the ECHR held that the justification needed for differential treatment on this basis need not be as weighty as where differential treatment is based on an inherent characteristic such as sex or nationality.

The ECHR also held that the *Housing Act 1996* (UK) pursued the legitimate aim of allocating limited social housing resources fairly between applicants, and that the UK was justified in differentiating between persons seeking priority need of social housing based on whether or not a person's immigration status prevented them from having recourse to public funds.

Facts

The applicant, Husenatu Bah, was a Sierra Leonean national who sought asylum in the UK. Although her asylum claim was rejected, she was granted indefinite leave to remain in the country. Her son later arrived in the UK subject to immigration control, on the condition that he must not have recourse to public funds. As the applicant's landlord was unwilling to accommodate her son, she applied to Southwark Council for housing assistance in February 2007 on the basis that she had become unintentionally homeless.

Under section 189 of the *Housing Act 1996* (UK), an unintentionally homeless person with a minor would typically qualify for priority need of social housing. However, pursuant to section 185(4) of the Act, because the applicant's son was subject to immigration control, he was to be disregarded for the purposes of determining whether the applicant was in priority need. As such, the Council decided that the applicant did not qualify for priority need. This decision was upheld on review.

In September 2007, the Council helped the applicant to secure a private tenancy outside of Southwark. She remained on the waiting list for a social tenancy, and moved back to Southwark when one became available in May 2009. The applicant complained to the ECHH, alleging a violation of Article 14 of the Convention, taken in conjunction with Article 8.

Decision

Article 8 of the Convention relevantly provides that everyone has a right to respect for his or her home, and that a public authority shall not unlawfully or unnecessarily interfere with this right. Although Article 8 does not expressly provide a right to housing, the ECHR has previously held that where a State elects to provide housing benefits, it must do so in a manner that complies with Article 14. As such, the Court held that the applicant's complaint was within the ambit of Article 8.

Article 14 relevantly provides that the rights and freedoms set out in the Convention shall be secured without discrimination on any ground such as “national or social origin” or “other status”. Here, the applicant argued that she had been discriminated against based on her son's nationality. However, the Court held that the ground of distinction was actually her son's immigration status. While the UK argued that this was not a relevant ground of distinction, the Court considered that it could be brought within the reference in Article 14 to discrimination based on a person's “other status”.

In considering whether the applicant had been discriminated against on the basis of her son's immigration status, the ECHR stated that differential treatment will be discriminatory if there is no reasonable justification for it, i.e. if the treatment does not pursue a legitimate aim, or if the means employed to achieve this aim are not proportionate to the aim. The Court stated that as a general rule, where differential treatment is based on an inherent characteristic like nationality or sex, a State will have to present “very weighty reasons” to justify the treatment. However, given that the immigration status of the applicant's son involved an element of choice (the applicant elected to remain in the UK and chose to have her son join her), the Court held that the required justification need not be as weighty. The Court also noted that States enjoy a wide discretion on socio-economic matters such as the provision of social housing.

Applying these principles, the ECHR held that the imposition of criteria for allocating social housing is a legitimate aim, so long as these criteria are not arbitrary or discriminatory. The Court considered that there was nothing arbitrary about denying priority need status to the applicant based on the fact that her son's presence in the UK was conditional on him not having recourse

to public funds, especially given that the applicant was fully aware of and accepted this condition of her son's entry into the UK.

The ECHR also held that the means used to realise this aim were not disproportionate. On this point, the Court was particularly influenced by the fact that even if the applicant had been determined to be in priority need of social housing, it would have made little difference because she would likely still have been temporarily housed in the private sector for several months until a social tenancy became available. Accordingly, the Court held that the differential treatment of the applicant was reasonably justified and that there was no violation of the Convention.

Relevance to the Victorian Charter

The ECHR's finding that a person's immigration status is a relevant ground of discrimination under the Convention is unlikely to be relevant to cases brought under the Victorian Charter. “Discrimination” is defined in the Charter to mean discrimination on the basis of an attribute set out in section 6 of the *Equal Opportunity Act 2010* (Vic). Unlike the Convention, however, this list of attributes does not include “other status” or any other attribute that is likely to encompass a person's immigration status. However, the ECHR's comments that the weight of the reasons required to justify discriminatory treatment will vary according to whether the characteristic on which the treatment is based is inherent or involves an element of choice may offer some guidance when Victorian courts are required to consider the scope and application of the right to non-discrimination set out in section 8 of the Charter, and the circumstances in which this right may be limited under section 7(2).

The decision can be found online at: http://www.bailii.org/eu/cases/ECHR/2011/1448.html

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UK’s detention of individual suffering mental illness amounted to torture and ill-treatment

The Queen (on the application of S) v The Secretary of State for the Home Department [2011] EWCH 2120 (Admin) (5 August 2011)

Summary

The Claimant, S, sought judicial review of the decision to detain him pending deportation. Owing to circumstances relating to his mental illness, the High Court of England and Wales held that S's detention amounted to false imprisonment and a violation of Articles 3 and 5 of the European Convention of Human Rights, which prohibit inhuman or degrading treatment and protect an individual's right to liberty and security of the person, respectively.

Facts

When S, an Indian national, was 14 years old, four masked gunmen murdered his parents and violently sexually assaulted him. He left India in 1994 and travelled to Germany via Moscow where he was subjected to further sexual abuse, raped and forced into prostitution. S entered the UK illegally in 1995. In January 2009, he was convicted of unlawful wounding and assault occasioning actual bodily harm, for which he received a 16 month prison sentence.

Whilst in the UK, S became engaged to a Polish woman who, as a national of an EU member state, had the right to remain in the UK. In February 2009, S claimed asylum and made a human rights claim for leave to remain, submitting evidence of his relationship with his fiancée and her children.

At the conclusion of S's prison sentence, the UK Border Agency (the ***UKBA***) detained him under the *UK Borders Act 2007*, pending deportation. It was noted at the first review of his detention on 9 May 2009 that he was in good health and that there were "no compelling or compassionate circumstances" in relation to his case. Whilst in detention, however, S suffered from visual and auditory hallucinations and frequently self-harmed. At detention reviews conducted by the UKBA in June and July 2009, no mention was made of S's apparent mental illness, despite reports from mental health professionals indicating cause for concern. In December 2009, S was transferred to a low security mental health unit under the *Mental Health Act 1983*. There, he continued to engage in self-harm.

A deportation order was issued for S on 1 February 2010, which rejected his asylum and human rights claims. This order was not served on S until 30 April. On 6 May, S filed a notice of appeal against the decision to deport him. He continued to experience auditory hallucinations during this period and engaged in numerous further acts of self-harm. On 4 August 2010, S was finally transferred to a hospital under the *Mental Health Act 1983.* A final detention review was held on 8 September which again authorised his ongoing detention. S instigated judicial review proceedings on 21 September 2010 and was subsequently released on conditional bail.

Decision

The Court considered the following issues:

- whether the initial detention of S was unlawful since it had begun before he was served with a deportation order;
- whether the UKBA had failed to apply its own policy relating to the detention of individuals suffering from mental illness adequately, and whether this rendered S's subsequent detention unlawful; and
- whether S's treatment by the UKBA breached Articles 3, 5 and 8 of the European Convention.

With respect to the UKBA's initial decision to detain S, the Court considered that the failure of the UKBA to notify S of its deportation order until some months after the deportation order was made rendered S's initial period of detention unlawful. The Court stated that "a decision which gives rise to the power to deprive an individual of liberty must *a fortiori* be subject to the principle of notification." The Court correspondingly held that this conduct breached Article 5 of the European Convention, which protects the right to liberty and security of the person.

The Court then considered whether, in the context of S's ongoing detention, the UKBA had adequately applied its policy relating to the detention of persons suffering from mental illness. The policy requires an exceptional justification for the detention of the mentally ill and seeks to balance the need for detention with other considerations, such as the potential deleterious effects of detention on an individual's mental health. The Court noted that S's mental health problems were exacerbated by detention and that the "[detention] reviews failed to grapple with the need to understand and apply the policy requirement of exceptional circumstances, to recognise properly S's mental condition and to consider properly objective evidence as to the effect of detention on it." The Court therefore concluded that even if the initial detention had not been unlawful, the UKBA's policy breaches, including its failure to consider the deterioration of S's mental health, would nevertheless have rendered his detention unlawful.

The Court engaged in a lengthy analysis of European human rights case law and concluded that S's unlawful detention amounted to a breach of Article 3 of the European Convention. The Court noted that the exacerbation of S's mental health whilst in detention amounted to "both a debasement and humiliation of S since it showed a serious lack of respect for his human dignity."

The Court highlighted the “negative” duty of States to refrain from inflicting serious harm and the corresponding “positive” duty of States to take measures designed to ensure individuals are not subjected to torture or inhuman and degrading treatment or punishment, which together form the basis of Article 3 protections. In this case, the Court held that both of these obligations had been breached.

Given its findings in relation to articles 3 and 5, the Court considered it unnecessary to consider whether there was also a breach of Article 8 (which protects an individual's right to respect for private and family life) of the European Convention. The Court did state, however, that it would have found there to have been a breach, had it been necessary to decide this issue.

The Court requested further submissions on the form of relief and the issue of damages.

Relevance to the Victorian Charter

Sections 10 and 21 of the *Charter* are analogous to Articles 3 and 5 of the ECHR. In light of the relative lack of Victorian jurisprudence with respect to interpretation of the *Charter*, the Court’s analysis in *S v Secretary of State* may help to inform the construction and define the breadth of application of *Charter* provisions, particularly in the context of administrative decision-making and the application of government policy.

The decision can be found online at: http://www.bailii.org/ew/cases/EWHC/Admin/2011/2120.html

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People detained pending deportation have the right to timely and adequate reasons for arrest in a language they can understand

Mahajna v Secretary of State for the Home Department [2011] EWHC 2481 (Admin) (30 September 2011)

Summary

The High Court of England and Wales has upheld the right of people under arrest to be given adequate factual and legal reasons for arrest in a timely manner and in a language they understand, in line with article 5(2) of the European Convention on Human Rights. Justice Nicol of the High Court emphasised that “[r]ights under the common law and the Convention are intended to be real rights and confer real benefits. The Claimant was entitled to know, at least in the broadest terms, why he was being arrested.”

Facts

The UK Secretary of State made a decision excluding Mr Mahajna, a pro-Palestine political activist, from entering the UK on public interest grounds. Mr Mahajna was not notified of this decision before being granted leave to enter the UK on 25 June 2011.

On 28 June 2011, Mr Mahajna was arrested by five Immigration Officers at his hotel in London. One of the officers stated in English that Mr Mahajna was being arrested for detention under the *Immigration Act 1971* (UK). Mr Mahajna does not speak or understand English. Mr Mahajna’s interpreter was prevented from communicating with Mr Mahajna at the time of arrest and from accompanying Mr Mahajna to the police station. In the car to the police station, one of the officers incorrectly informed Mr Mahajna that he was being arrested for immigration offences (using an iPhone translation application). The form on which the grounds for arrest were listed contained errors as to the reasons for Mr Mahajna’s arrest, but Mr Mahajna was not able to understand these errors as they were written in English. Mr Mahajna was not provided with the correct

reasons for his arrest – namely that the Secretary of State considered his deportation to be imminent and in the public interest – in Arabic until 30 June 2011.

Mr Mahajna remained in detention until he was released subject to stringent bail conditions on 18 July 2011. Mr Mahajna is currently appealing the Secretary of State's decision that his presence in the UK is inimical to the public good in a separate case.

Decision

Justice Nicol held that the Secretary of State's statutory power to detain a person pending deportation under the *Immigration Act 1971* (UK) is qualified by the right to adequate reasons for arrest. Article 5(2) of the European Convention on Human Rights provides that "[e]veryone who is arrested shall be informed promptly in a language which he understands, of the reasons for his arrest and any charge against him".

Justice Nicol applied the objective test of "whether, having regard to all the circumstances of the particular case, the person arrested was told in simple, non-technical language that he could understand, the essential legal and factual grounds for his arrest", originally formulated in Lord Justice Clarke's leading judgment in the European Court of Human Rights decision of *Fox, Campbell and Hartley v UK* (1990).

Mr Mahajna's arrest was held to be unlawful following two separate principles.

First, a person under arrest must be told the factual and legal reasons for their arrest at the time the arrest is made. While Mr Mahajna did not have to be informed of all the details, he had a right to be informed that he was being arrested because he was about to be deported. The officers' failure to state this reason was of itself sufficient to establish that Mr Mahajna's right to adequate reasons for arrest had been violated, rendering the arrest unlawful.

Secondly, the reasons given to a person under arrest must be in a language which the person can understand. Whether the officers knew Mr Mahajna could not speak or understand English was considered immaterial to determining the objective test that the arresting officers do "all that was reasonable in the circumstances" to provide adequate reasons. On the facts, there was a lack of evidence explaining why the officers had failed to ensure the reasons were available in Arabic, such as allowing Mr Mahajna's interpreter to communicate with him or ensuring an Arabic speaking officer was present at the time of arrest. Thus, the failure to provide Mr Mahajna with reasons for his arrest in a language he could understand constituted a separate ground on which his arrest was unlawful.

Although the form on which the reasons for arrest and detention were listed contained errors, Nicol J found that these did not prejudice Mr Mahajna as he was unable to understand them at the relevant time. By the time the errors on the form were translated to Mr Mahajna, the accurate reasons for arrest and detention had been provided.

Further, the fact that Mr Mahajna did not ask for further information about his detention does not prejudice his case. Justice Nicol clarified that the onus is on the arresting officers to provide reasons irrespective of whether the person under arrest or detention asks for them.

Relevance to the Victorian Charter

Section 21(4) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) recognises a right to adequate reasons for arrest or detention similar to article 5(2) of the Convention. It explicitly states that "[a] person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against him or her."

Although it is unclear whether Australian courts will adopt the approach taken by the English and Wales High Court, this case indicates that the right to adequate reasons for arrest or detention under the Victorian Charter should be qualified by two key principles. First, the reasons provided should contain both the factual and legal grounds for arrest or detention. Secondly, the reasons should be in a language which the person under arrest is able to understand.

The decision can be found online at: www.bailii.org/ew/cases/EWHC/Admin/2011/2481.html

Lee Carnie *is a volunteer with the Human Rights Law Centre.*

State bears responsibility for deaths in custody

Zhumbaeva v Kyrgyzstan, UN Doc CCPR/C/102/D/1756/2008 (19 July 2011)

Summary

In this case, the United Nations Human Rights Committee held that Kyrgyzstan was responsible for injuries to, and the death of, a man held in police custody. The Committee based its decision on the principles that a State assumes responsibility for a person that it takes into custody, and that, where that person's rights are violated, the State must properly investigate and prosecute those responsible to remedy the violation. The Committee's decision is relevant in a Victorian context because deaths in custody have been and remain an important issue in the Australian political landscape.

Facts

On 24 October 2004, Kyrgyzstani police took Tashkenbaj Moidunov and his wife to a local police station after they were observed arguing in the street. The pair were questioned separately. The victim's wife was pressured to write a complaint against her husband, but was soon released. The victim died in police custody.

The police officers on duty, Mr Abdukaimov and Mr Mantybaev, gave several contradictory accounts of the victim's death. On the day of the death:

- The officers told the victim's wife that her husband suffered a heart attack.
- The officers gave a confused account to the ambulance doctor on the scene. Having been told by the ambulance dispatcher that the victim had hanged himself, the doctor observed red finger marks (but not rope marks) on the victim's neck. She asked the officers whether the victim had been strangled. They replied that he had suffered a heart attack, and that they had lied to the dispatcher because they had panicked.
- The officers said in their official statements that the victim had suffered a heart attack.
- Mr Mantybaev recorded in the official deaths register that the officers had found the victim's body in the street.

In the course of a subsequent official investigation into whether the officers had “negligently performed their duty”, Mr Mantybaev told the prosecutor that the victim hanged himself while unsupervised.

On 21 September 2005, the Suzak District Court found that Mr Mantybaev had negligently performed his duties by failing to take measures to prevent a suicide, and that his negligence resulted inadvertently in the death of the victim. The Court then exempted Mr Mantybaev from criminal liability on the ground that he had reached a reconciliation with the victim's family.

The victim's mother appealed the decision to the Zhalabad Regional Court. The Court found that the District Court's analysis was deficient and ordered a retrial. However, Mr Mantybaev appealed that decision to the Supreme Court of Kyrgyzstan, which quashed the decision of the

Regional Court and upheld the decision of the District Court. The victim's mother, the applicant, then lodged a complaint with the UN Human Rights Committee.

Arguments

The applicant alleged that Kyrgyzstan violated the *International Covenant on Civil and Political Rights* in three ways:

- It infringed the victim's right under article 6(1) not to be arbitrarily deprived of his life because he "died in police custody as a result of the use of force by police officers which was excessive and unnecessary".
- It infringed the victim's right under article 7 not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, because the officers used unlawful force on him.
- It failed to investigate properly whether the officers were responsible for the victim's death in contravention of article 2(3).

Decision

The Committee found that all three allegations were sustained.

In relation to the claim under article 6(1), it held that a State assumes responsibility for a person that it takes into custody and that, when a person dies in police custody, the State must properly investigate and prosecute those responsible for the death. The Committee observed that neither Kyrgyzstan nor its judicial authorities had satisfactorily explained the basis upon which it was concluded that the victim committed suicide. This was particularly so because relevant forensic evidence established that the death could have resulted from either hanging or strangulation, and because the officers had given contradictory accounts of the death. In the absence of a satisfactory explanation to the contrary, the Committee held Kyrgyzstan responsible for arbitrarily depriving the victim of his life.

In relation to the claim under article 7, the Committee held that, when a person is injured in police custody, the State must produce evidence to refute any allegation that it was responsible for those injuries. The Committee observed that Kyrgyzstan provided no evidence that its authorities had inquired into – let alone explained – the victim's injuries.

In relation to the claim under article 2(3), the Committee highlighted that there were several deficiencies in the Kyrgyzstani authorities' investigation of the victim's death. Most glaringly, the investigator failed to follow basic forensic procedures, the prosecutor presumed that the victim hanged himself despite substantial evidence to the contrary, the State exempted Mr Mantybaev from criminal responsibility, and the State did not charge Mr Abdukaimov at all.

The Committee determined that Kyrgyzstan was under an obligation to provide an effective remedy; namely, to investigate the victim's death impartially, effectively and thoroughly, to prosecute those responsible, and to give full reparation.

Relevance to the Victorian Charter

Deaths in custody have been and continue to be an issue of concern in the Australian criminal justice system and political landscape. Section 9 of the *Victorian Charter*, which establishes a right not to be arbitrarily deprived of life, and section 10, which establishes a right not to be subjected to torture or cruel, inhuman or degrading punishment or treatment, very closely resemble articles 6(1) and 7 of the *International Covenant on Civil and Political Rights*.

The Committee's decision in this case could provide interpretative assistance for Victorian courts and tribunals applying these *Charter* provisions in the context of a death in custody. More

specifically, as the Victorian Coroner has an obligation to investigate the death of most persons in custody, the decision highlights one way in which the *Coroners Act 2008* (Vic) can be read in light of the *Charter*.

The decision can be found online at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/450/02/PDF/G1145002.pdf?OpenElement

***Andrew Wilcock** is a Graduate and **Duncan Travis** is a Partner at Allens Arthur Robinson.*

Government guidance for intelligent officers should recognise that 'hooding' will normally constitute torture or ill-treatment

Equality and Human Rights Commission v Prime Minister & Ors [2011] EWHC 2401 (Admin) (3 October 2011)

Summary

The High Court of England and Wales has partially upheld claims by the Equality & Human Rights Commision and Mr Al Bazzouni (a former detainee) that Government guidance regarding what British intelligence officers should do if they suspect detainees being interviewed overseas are at risk of torture or cruel, inhuman or degrading treatment is unlawful. The High Court held that although the proposed difference between "serious" and "real" risk of torture or ill-treatment was merely academic (both requiring the officer to make a judgment call) and hooding may in some circumstances fail to constitute torture or ill-treatment, the reference to hooding as potentially excepted from the definition of ill-treatment in an Annex to the Guidance should be removed.

Facts

On 6 July 2010, the UK Prime Minister announced in Parliament his intention to establish an independent inquiry about the degree to which British intelligence officers working with foreign security services may have been implicated in the improper treatment of detainees held by other countries in the aftermath of the events of 11 September 2001.

At the same time, the Government published a document entitled *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees* ('the Guidance').

The Guidance "sets out the principles, consistent with UK domestic law and international law obligations, which govern the interviewing of detainees overseas" and states that "personnel whose actions are consistent with this guidance have good reason to be confident that they will not risk personal liability in the future." [6]

The EHRC and Mr Al Bazzouni as claimants each contended that the Guidance may cause those acting in compliance with its instructions to act unlawfully.

Decision

The court addressed the following legal questions:

(a) Did the claims raise academic questions which the court should not entertain?

The guidance requires intelligence officers to consider whether the detainee or individual faces "a serious risk of torture at the hands of a third party" [11] before interviewing them or soliciting their detention and, if so, not to proceed.

The EHCR asserted that a "serious risk" constituted a lower legal threshold than a "real risk", the proper legal test for secondary criminal liability, exposing officers to potential criminal liability for

their actions when interviewing detainees. However, the court held that in this context there is no material distinction between a "serious risk" and "real risk" of torture or ill-treatmebt taking place, stating:

The context is that the document is intended to give practical guidance to intelligence officers on the ground. It is not a treatise on English criminal law. What matters is how the document would be read and applied by individual intelligence officers, not how it would fare at the Law Commission or in a University Graduate Law School. The document makes clear that, in all relevant instances other than where there is no serious risk of CIDT (section 2 of the table), the officer must not proceed at all (section 1) or the matter must be referred to senior personnel or Ministers. [61]

An Annexe to the guidance provides a non-exhaustive list of types of treatment that could constitute ill-treatment, including at section d(iii):

> methods of obscuring vision or hooding (except where these do not pose a risk to the detainee's physical or mental health and is necessary for security reasons during arrest or transit). [28]

Mr Al Bazzouni challenged the lawfulness of the exception stated in section d(iii), arguing that hooding of detainees will always constitute torture or ill-treatment and thus be unlawful. In relation to this, the court held that -

The extended debate about whether hooding would be an assault, battery, infringement of Article 3 of the Convention or other illegality is largely beside the point. It may possibly be that, in certain factual circumstances, hooding might conceivably be none of these, although the nature of hooding and its prohibition must mean that it very often would be. [91]

However, the court held that because the "series of difficult and confusing judgments which the exception in d(iii) of the Annex requires for its conceivably lawful operation is too great to expect officers on the ground to give effect to it without risking personal liability… d(iii) of the Annex should be changed to omit hooding from the ambit of the exception."

In sum, although the court did not make a declaration or grant other substantive belief, its call for removal of the reference to hooding in section d(iii) of the Annex to the guidance is a minor victory, despite the fact that the court agreed that circumstances may exist in which hooding could be legal.

(b) Did the ECHR have standing to appear in the matter?

The court determined that the ECHR has standing to appear in the matter as, by section 3 of the *Equality Act 2006*, it must exercise its functions with a view to encouraging and supporting the development of a society in which there is, among other things, respect for and protection of each individual's human rights and, by section 30, it has capacity to institute judicial review proceedings relevant to a matter in connection with which it has a function. [5]

Relevance to the Victorian Charter

Although this decision does not have direct application to the Victorian Charter, it may be regarded by local courts as instructive when interpreting section 10 of the *Charter of Human Rights and Responsibilities Act 2006*, which recognises a right to protection from torture and cruel, inhuman or degrading treatment, and section 22, which recognises a right to humane treatment when deprived of liberty.

The High Court dismissed both the Claimants' and Defendants' lengthy appeals to domestic criminal law, deciding the matter on the basis of practical rather than academic concerns.

The decision can be found online at: http://www.bailii.org/ew/cases/EWHC/Admin/2011/2401.html

Bethany King *is a volunteer with the Human Rights Law Centre.*

HRLC POLICY WORK AND CASE WORK

Strengthening access to remedies for violations of international human rights

A coalition of leading human rights NGOs – coordinated by the Human Rights Law Centre, the Mental Disability Advocacy Center and the Open Society Justice Initiative – has prepared a major statement for the UN Office of the High Commissioner for Human Rights on strengthening access to remedies for violations of international human rights.

The Joint NGO Statement sets out a range of concrete recommendations to strengthen the individual complaints mechanisms of UN human rights bodies so as to:

- enhance the promotion, protection and fulfilment of human rights;
- assist States to properly understand and discharge their human rights obligations;
- contribute to the accountability of perpetrators of human rights violations; and
- secure access to effective remedies for victims of human rights violations.

The Joint NGO Statement has been prepared as a key input to the process of reform to strengthen the UN human rights treaty bodies initiated by the UN High Commissioner for Human Rights in 2009. The strengthening process is intended to make the work of treaty bodies more coordinated and effective and to enhance the fulfilment of human rights on the ground. The High Commissioner has invited inputs and proposals from states, NGOs, human rights experts and NHRIs in this regard.

The HRLC's work coordinating the Joint NGO Statement on Strengthening Individual Communication Procedures builds on our work contributing to the Pretoria Statement of June 2011, another joint NGO paper which contains over 60 concrete and practical recommendations to improve the work of human rights bodies at the international level and the fulfilment of human rights on the ground.

Australia and the Commonwealth must take action on Sri Lanka

On 20 October 2011, a coalition of leading human rights NGOs, including the Human Rights Law Centre, Human Rights Watch and the Commonwealth Human Rights Initiative, sent an Open Letter to the Commonwealth Heads of Government regarding the need to take urgent action on human rights in Sri Lanka at the forthcoming meeting of the Commonwealth Heads of Government in Perth.

The letter was written as further evidence emerges of serious violations of human rights and international humanitarian law against Tamil civilians by Sri Lanka's military, including systemic rape, murder and the targeting of hospitals and health care clinics.

Reform of Australia's counter-terrorism laws necessary to ensure they are effective and compatible with human rights

A HRLC submission to the Independent National Security Legislation Monitor has called for comprehensive reform of Australia's counter-terrorism laws and measures to enhance their effectiveness and to better respect and protect fundamental human rights.

The Monitor was appointed under the *Independent National Security Legislation Monitor Act 2010* (Cth) and is empowered to review and report on Australia's counter-terrorism and national security legislation, including its compliance with Australia's international human rights obligations.

The HRLC submission identifies a range of provisions which require reform to ensure compatibility with human rights, including those relating to:

- the definition of "terrorist act";
- control orders;
- preventative detention;
- ASIO detention powers;
- the listing of "terrorist organisations"; and
- offences relating to association with a terrorist organisation.

The HRLC submission also identifies that the onus is on the government to keep Australia's counter-terrorism laws and measures under continual review so as to ensure that any infringement of human rights is demonstrably justified, remains strictly necessary, and is reasonable and proportionate.

Towards constitutional recognition for Aboriginal and Torres Strait Islander peoples

The HRLC has made a submission to the Expert Panel on the recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution. A national conversation about possible constitutional recognition presents an opportunity to strengthen the recognition, protection and promotion of the human rights of Aboriginal and Torres Strait Islander peoples in Australia.

In its submission to the Expert Panel, the HRLC:

- outlines Australia's international human rights obligations and highlights recommendations made by United Nations human rights bodies regarding the need for constitutional reform in Australia; and
- provides an overview of relevant human rights obligations and principles that should guide the meaningful participation of, and consultation with, Aboriginal and Torres Strait Islander peoples in the process of considering constitutional recognition.

Further information about the process to consider recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution is available at www.youmeunity.org.au

A year of impact – HRLC 2011 Annual Report

Over the last six years, the HRLC has worked to advance human rights in Australia and beyond through strategic advocacy, research, litigation and education. Acting in coalition with key partners and supporters, our work has contributed to the protection of human dignity, the

alleviation of disadvantage and the realisation of equality. We are pleased to present our 2011 Annual Report which details and highlights some of the impacts of the work of our dedicated staff, partners, and donors.

As the Annual Report documents, over the last year alone, our work together with key partners has:

- led to the development of legislation which will require all new Commonwealth laws to be assessed for compatibility with Australia's human rights obligations;
- restored the right to vote to 100,000 Australians – mainly young people, the homeless and Aboriginal and Torres Strait Islander peoples;
- improved access to healthcare for prisoners and removed some vulnerable children from immigration detention; and
- held Australia to account for its human rights obligations on the international stage.

Thank you for supporting and standing with us in this work.

As the Annual Report sets out, the coming years will present great challenges and opportunities for human rights and the HRLC, including financial challenges. With a number of our funding sources sunsetting in 2012, we need to expand our funding base if we are to continue our record of human rights impact and influence. We strongly believe that now is the time to donate and invest in principled, strategic human rights leadership.

Thank you for your continued and generous support for the Human Rights Law Centre – it is a critical investment in confronting the human rights challenges and opportunities ahead.

Equality Law Reform guest blogs

Be sure to check out the October guest blogs featured on the HRLC's Equality Law Reform Project website. Sydney Uni's Dr Belinda Smith and Deakin's Dr Dominique Allen have written about moving towards a capacity-based approach to promoting equality, while Australia's recently appointed Age Discrimination Commissioner, Susan Ryan, took a look at the discriminatory impact tax and superannuation policy issues have on older people.

National Human Rights Action Plan guest blog

A new blog by Liz Snell from the Australian Communications Consumer Action Network (ACCAN) advocates for information, communication and technology (ICT) issues in the social inclusion context to be incorporated into the National Human Rights Action Plan. Access to ICT is critical to social inclusion and the realisation of human rights. For example, a recent report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression identifies the importance of the internet as an enabler of human rights, including to exercise the right to freedom of opinion and expression as well as a range of other rights. These issues are particularly acute for many people with disabilities, people in regional Australia, Culturally and Linguistically Diverse communities and many others who experience barriers accessing information and basic services and for whom technology often plays a critical role in enabling participation in society.

Discussion of Information Communication and Technology (ICT) issues in the context of social inclusion was a significant omission from the Government's draft Baseline Study. The Baseline Study is the first step in the Government's National Human Rights Action Plan process designed to assess the current strengths and weaknesses in human rights protection in Australia. The final version of the Baseline Study and the draft National Human Rights Action Plan are due for

release in December and will hopefully deal more comprehensively with these issues as outlined by ACCAN in its submission.

A particular focus of the blog is ACCAN's Fair Calls for All campaign which calls for 1800 (freephone) and 1300/13 (local rate) numbers to be charged the same rate from mobiles as they are when called from landlines, given these numbers are required to be used to access essential services and the growing shift towards people using mobile phones as their primary communication device. The high charge rates also have a disproportionately high impact on low income consumers, people experiencing homelessness and other vulnerable communities. For more information on this campaign please read the blog or contact the Australian Communications Consumer Action Network (ACCAN).

HRLC MEDIA COVERAGE

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

- Tom Allard, Daniel Flitton and Kirsty Needham, 'Asylum tragedy: dozens die', *The Age*, 2 November 2011
- Anna Brown, 'Civil Rights and crossing the line', *The Age*, 26 October 2011
- Shaun Turton, 'Jailbirds to be tagged in Manningham', *Manningham Leader,* 26 October 2011
- Michelle Slater, 'The Baillieu Dump: prisons fail legal obligations, says Ombudsman', *Crikey*, 25 October 2011
- Jessica Craven, 'Indonesia ignores UN convention', *Herald Sun*, 8 October 2011

SEMINARS & EVENTS

Information Session: Postgraduate Human Rights at Monash

6pm, 8 November, Monash Law Chambers (555 Lonsdale St) Melbourne

Are you considering studying a postgraduate degree in human rights next year? If so, Monash University is holding its next postgraduate information session.

Specialist human rights masters and graduate diploma courses are available for both law and non-law graduates and all teaching takes place in the CBD. Subjects on offer in 2012 include:

- Overview of international human rights law
- Indigenous rights and international law
- International law and economic, social and cultural rights
- Human rights advocacy: Australian law and practice
- International refugee law and human rights
- Human rights in the global economy
- International humanitarian law
- International criminal law: procedural and practical aspects

For details of the registration session click here.

‘Dirt Cheap’ 30 years on… The story of uranium mining in Kakadu

7pm, 9 November, State Library of Victoria (Theatrette), Melbourne.

The Gundjeihmi Aboriginal Corporation and the Environment Centre NT are hosting a special premiere screening of a reworked edition of the 1980 film *Dirt Cheap*, that provides a unique insight into a story that continues to generate heartache and headlines today. It includes rare footage of Mirrar Senior Traditional Owner Toby Gangale stating clear opposition to mining on his country and documents how the Federal Government overrode the human rights of Kakadu's Traditional Owners in order to impose a toxic industry in a World Heritage Area.

Federation of Ethnic Communities’ Councils of Australia 2011 Conference

17- 18 November, Adelaide

The 2011 FECCA Conference, Advancing Multiculturalism, will be held in Adelaide and jointly hosted by the Federation of Ethnic Communities' Councils of Australia and the Multicultural Communities Council of SA. The FECCA Biennial Conference is Australia’s pre-eminent multicultural conference, drawing together leading decision makers, thinkers and practitioners to discuss and debate key issues that relate to Australia’s cultural and linguistic diversity. These are explored through a series of plenary addresses, panel discussions and presentations. This year, the Conference will explore the theme of Advancing Multiculturalism and promises to be a vibrant and exciting program.

2011 Castan Centre Annual Lecture

1pm, Monday 28 November, State Library of Victoria, Melbourne

This year’s Castan Centre’s Annual Lecture will be given by Ms Joy Ezeilo, United Nations Special Rapporteur on trafficking in persons, especially in women and children.

See law.monash.edu.au/castancentre for further details soon

International aid: contemporary issues and approaches to assistance

6-7.30pm , 30 November, Melbourne.

Australian Lawyers for Human Rights is hosting a seminar on international aid and human rights. Come along and hear the experienced panel members - Rev Tim Costello AO (CEO of World Vision Australia), Mr Andrew Hewett (Executive Director of Oxfam) and Dr Susan Harris Rimmer (Manager of Advocacy and Development Practice at ACFID) speak about current issues in relation to international aid, the relationship between aid and human rights protection and how you can get involved! Further details are available here.

Human Rights and Comparative Disability Law

1-2, 5-7 December 2011

This subject is part of Latrobe University’s Public Interest Law program. In this subject students examine recent developments in international and comparative disability law. They begin with an overview of international human rights law and consider the developing relationship between disability discrimination law and international human rights. Using a comparative law approach

students examine issues arising in a range of areas such as mental health; education; employment; housing and health. Further information can be found online here.

International Conference on 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 - an outcome of an Australian Research Council Linkage Grant entitled Applying Human Rights Legislation in Closed Environments: A Strategic Framework for Managing Compliance (2008-12) - will bring together eminent international and national speakers to examine how human rights are implemented and monitored in closed environments. It will provide an analysis of the comparative experiences of practical implementation of human rights in closed environments, as well as canvas current approaches to the national implementation of the Optional Protocol to the Convention Against Torture, and the role of regulatory frameworks more broadly in facilitating human rights implementation. The merits and challenges of applying a human rights approach to closed settings will be explored, and the challenges to effecting culture change within such institutions will be discussed. Further information is available here.

RESOURCES

Win free movie tickets to 'The Tall Man'

Based on the award-winning book by Age journalist Chloe Hooper, 'The Tall Man' tells the tragic story of Aboriginal Cameron Doomadgee and how his death in police custody and the subsequent coronial inquest rocked the nation. This gripping and provocative film exposes the inescapable complexities of Australia's racial politics, and presents a balanced view of a haunting moral puzzle that no viewer will forget.

For your chance to win one of 10 complimentary double passes valid in cinemas from 17 November, be quick to rsvp by clicking here.

Book Review: *Criminal Process and Human Rights* by Jeremy Gans, Terese Henning, Jill Hunter & Kate Warner

The practice of criminal law has at its heart the protection of the rights and liberties of individuals, although many criminal lawyers probably don't think of themselves as "human rights lawyers" as such. Many of these rights have developed over centuries and most are now enshrined in the statutes governing criminal investigation and procedure. The enactment of human rights legislation in Victoria and ACT has led to considerations of the scope of rights identified by statute as being fundamental and the limits of the legitimate curtailment of those rights by other statutes. Australia has seen in recent years the development of a growing and increasingly significant body of jurisprudence around the application of human rights instruments to the practice of criminal law. Indeed, the impact of human rights on the practice of criminal law has been given significant consideration by the High Court in the long-awaited decision of *Momcilovic v The Queen* [2011]

HCA 34 (8 September 2011), which unfortunately post-dated the publication of this very scholarly and comprehensive book. As a criminal lawyer without a formal background in broader human rights law, I learned a great deal about the application of human rights jurisprudence from this text, which will be a very valuable addition to the library of anyone involved in the practice of criminal law in Australia.

Criminal Process and Human Rights sets out to conduct a rights based analysis of criminal justice procedure in Australia. As acknowledged by the authors, this is no easy task, given the "patchwork" approach to human rights principles across most Australian jurisdictions. However, the book sets out not just to analyse but to scrutinise Australian law for its compliance with human rights principles, with the hope that it may "bring some unity of approach; that it may encourage greater understanding of the relevance and potential of human rights reasoning and that it may help promote greater consistency and less tentativeness in resort to and application of human rights principles." In my view, the authors have gone a very long way towards realising these ends.

The human rights considered in the book are those specifically relevant to the practice of criminal law – in particular, the International Covenant on Civil and Political Rights, as given expression in the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities 2006* (Vic), but it also incorporates a significant comparative analysis with overseas jurisdictions, including the UK, New Zealand and Canada.

The structure of the book goes a long way towards breaking down quite broad and diverse areas of law and considering them in a context which makes sense to criminal law lawyers. The first two chapters consider the application of human rights and "rights based reasoning" in a general sense and the way in which they are relevant to the criminal process. The third chapter specifically considers the ACT *Human Rights Act* and the Victorian *Charter* and their relevance to the law of criminal procedure. The remaining eight chapters are dedicated the application of human rights jurisprudence to particular facets of the criminal process. The chapters follow a logical sequence, considering the right to liberty – arrest and detention in police custody and ancillary rights of those deprived of liberty; the right to silence; the right to security of the person; and the right to privacy. The last three chapters consider what are described as the "bundle of rights within a right" – the right to a fair trial.

Throughout the book, the practical application of human rights based reasoning to the criminal process is illustrated by interesting and considered summaries and analysis of Australian and international cases. However, the work is unashamedly academic and the analysis is not merely neutral commentary: the authors engage in *critical* analysis of judicial consideration of human rights, which is at times quite acerbic. For example, in considering delay in the context of an application for bail, the approach of Bongiorno J in *Gray v Director of Public Prosecutions* [2008] VSC 4 is criticised as assuming that the Victorian Charter creates an "independently operative right of bail where trial within a reasonable time cannot be guaranteed", while the approach to the Charter of Lasry J in *Re Dickson* [2008] VSC 516 is described as a "*countervailing but equally flawed approach*". Thus, as noted by Justice Refshauge in his Foreward, the text not only describes the law but thoughtfully evaluates it.

The real value of this book to practitioners of criminal law will be its rigorous and thorough examination of the application of human rights principles to criminal procedure in Australian jurisdictions. Particular rights are defined and the limits to them in their practical application are then considered. The content is detailed, well structured and very readable. This book will no doubt stimulate further analysis of the criminal process from a rights perspective and inform

further litigation in this emerging area of jurisprudence. It will no doubt be a very valuable resource to both scholars and practitioners of criminal law in Australia.

***Jarrod Williams** is a Senior Public Defender at Victoria Legal Aid.*

HUMAN RIGHTS JOBS

North Australian Aboriginal Justice Agency

NAAJA, one of Australia's most dynamic, diverse and challenging legal practices, provides legal aid for Indigenous people in the Top End of the Northern Territory, with offices in Darwin, Katherine and Nhulunbuy. They are currently seeking a Welfare Rights Officer in Darwin and a Criminal Solicitor in Katherine.

Australians for Native Title and Reconciliation

ANTaR, a national advocacy organisation dedicated specifically to the rights - and overcoming the disadvantage - of Aboriginal and Torres Strait Islander peoples, is currently looking to recruit a National Campaigns Manager based in Syndey.

Community legal sector jobs

There are a number of positions currently advertised in the community legal sector, including as Manager of Brimbank Melton Community Legal Centre and Director of West Heidelberg Community Legal Service.

FOREIGN CORRESPONDENT

Human Rights Council must fulfil its potential and guard against regression

After the Human Rights Council's strong showing through the first half of this year, it was perhaps inevitable that its 18th session, held in Geneva from 12 to 30 September 2011, would see a loss of momentum. A combination of weak or non-existent responses to country situations, and a worrying institutional initiative from Cuba, contributed to a frustrating session.

Cuba has a history of targeting the independence of the Office of the High Commissioner for Human Rights, attempting to insert the Council as the appropriate body to oversee OHCHR's operations and programme of work. At this session its attempted means of doing this was to introduce a resolution on transparency of staffing and budget at OHCHR. While transparency is desirable it is not the Council's role to hold OHCHR accountable on this score. In the event this resolution was deferred, and instead a presidential statement was issued, requesting the High Commissioner to include information about staffing and budget in the informal activity report produced annually by OHCHR. This will not satisfy the sponsors of the initiative, who will probably revisit this issue at the next session.

One of the most dramatic failures of this session was the aborted attempt to take action on Sri Lanka. At the beginning of the session the UN Secretary-General had forwarded the report of his

Panel of Experts on Sri Lanka to the Council. The forwarding of the report represented an invaluable opportunity for the Council to take action and follow-up on its own special session on Sri Lanka, held in May 2009. NGOs made a strong call to this effect, and Canada announced that it would lead negotiations on a draft resolution to set up an interactive dialogue with the High Commissioner on the findings of Sri Lanka's Lessons Learnt and Reconciliation Commission. Disappointingly, after just one open informal consultation, Canada withdrew its resolution. This effectively made it impossible for any other State to pursue action at this session.

The Council's response to country situations in general at this session was marked by an emphasis on seeking the cooperation of the country concerned. While this approach works well when that cooperation is genuine, in other cases it leads to weak responses. The prime example at this session was the case of Yemen. At its last session the Council had requested the High Commissioner to report on her visit to Yemen. One of the recommendations the High Commissioner made was to establish an independent, international investigation into the situation in Yemen. During this session's interactive dialogue with the High Commissioner, Yemen explicitly rejected this recommendation, arguing that it contradicted another recommendation to establish dialogue between Yemeni political parties as a means to resolve political differences. Instead Yemen assured the Council that it would set up its own domestic investigation.

The attempt to work cooperatively with Yemen resulted in a resolution that acknowledges this response by Yemen and calls upon all parties to cooperate with the announced domestic investigations. The High Commissioner is requested to present a progress report on the situation in Yemen at the 19th session of the Council, a weak result that does not satisfy the Council's protection mandate.

Reflecting the emphasis on cooperation, this resolution was tabled under item 10, 'technical assistance and capacity building', an item under which the good will of the State is assumed, and technical assistance pledged to enable action that will to achieve results. In fact at this session no country resolutions were presented under item 4, an item which allows the Council to turn its attention to situations and take appropriate action regardless of the degree of cooperation shown by the country concerned. The result was that all these resolutions were adopted without a vote, but, as in the case of Yemen, many were weaker than could have been wished for.

In another example, the mandate of the Independent Expert on Sudan, which had been established under item 4, was renewed at this session under item 10. This was disappointing in light of the violence in Blue Nile and South Kordofan, and calls from NGOs for a strong mandate renewal. The resolution limits the Independent Expert to assessing Sudan's technical assistance needs and effectively removes his monitoring role. A resolution on South Sudan similarly requests OHCHR to assess the technical assistance needs of the new State and report back to the 20th session of the Council.

There were some positive developments however, not least the adoption by consensus of a resolution establishing a one-off panel debate on reprisals faced by those who cooperate with the UN human rights system. The creation of this panel, which will take place at the 21st session of the Council, is an important step in the direction of increasing the attention that the Council pays to this neglected and critical issue.

Also noteworthy was the creation of a Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence. This mandate will give the Council an important additional tool to address serious cases of human rights violations. The mandate holder will be appointed at the 19th session of the Council in March 2012.

These positive developments mean that the session was not entirely a loss, but it is essential, if old divisions are not once again to become habit, that the next session see the Council urgently regroup and rediscover the more constructive dynamic that was beginning to emerge.

Heather Collister *is Human Rights Officer with the International Human Rights Defenders Programme at the International Service for Human Rights in Geneva*.

IF I WERE ATTORNEY-GENERAL...

Sparing the next generation from a life behind bars

I have to admit that on hearing that I had been appointed Federal Attorney-General, I expect that I would panic; partly at the idea of having to spend so much time in Canberra(!), but mainly at the terrifying weight of expectation on me, both my own and others.

After years as an advocate for social justice, I would now be measured against my aspirations and expected to deliver on the policy solutions I have proposed from outside government.

The fear of failure would grip me. What if I compromise on my principles and lose my moral compass? What if the solutions I have advocated from the outside turn out not to be solutions at all? What if I am seen as betraying the very people I have worked with for so many years? What if I fail?

Having thought deeply about these questions, I hope that I would emerge with some clarity about my purpose and ask a different question; what if I succeed? I would remind myself that change is possible and that my new position gives me a unique capacity to effect it. I would ask for a chance to make change and extend the hand of partnership both to my allies but also to those with different views and agendas.

Then, I would get to work.

First, I would set as my highest priority reducing the over-representation of Aboriginal and Torres Strait Islander people in prison. Twenty years after the Royal Commission into Aboriginal Deaths in Custody reported, Aboriginal people are imprisoned at higher rates than ever before. Although only about 3 per cent of the population nationally, Aboriginal and Torres Strait Islander people make up 2 per cent of the prison population. In juvenile detention, that figure is a staggering 60 cent.

I would issue this mandate to my Department and seek to influence my Cabinet colleagues and Attorneys-General around the country to adopt this as an objective and commit to meaningful action to achieve it.

I would adopt the principle of free, prior and informed consent as my overriding framework, as required by the United Nations Declaration on the Rights of Indigenous Peoples. This provides a process through which Government and Aboriginal communities can have a conversation on an equal footing and ensures that Aboriginal people are partners in the design, development, implementation, monitoring and evaluation of all programs, policies and legislation which affect their communities. I would ensure this conversation was ongoing and informed all of my actions.

To focus whole-of-government activity, I would lobby the Prime Minister and, through the Attorneys-General, all Premiers and Chief Ministers, to ensure that targets to reduce Aboriginal and Torres Strait Islander imprisonment are adopted at the next COAG meeting. Put simply, the achievement of the Government's existing Closing the Gap targets depends to no small degree on reducing the over-representation of Aboriginal and Torres Strait Islander people in prison. I

would make a compelling case for the adoption of a justice target, highlighting the negative effects of imprisonment on health, employment and economic development outcomes. I would seek advice from Aboriginal and Torres Strait Islander organizations, as well as key academics and researchers to inform the development of these targets. In doing so, I would seek to set an ambitious yet achievable goal for government action. At all times, I would be guided by the advice of Aboriginal leaders and communities and the question: would the achievement of this target result in the transformation of lives and communities? I would demand nothing less.

Having set a common national goal, I would seek to generate effective action from the Federal, State and Territory Governments. Aware of the key role of State and Territory Governments in setting criminal justice laws and policies in their jurisdictions, and the politics around law and order issues, I would need to be creative and strategic. I would seek to use all Federal funding, legal and policy levers available to me to influence action at the State and Territory level. This might include offering incentives in different forms to State and Territory Governments who achieve reductions in their Aboriginal and Torres Strait Islander prison population and substantially increasing Commonwealth Government funding for crime prevention, early intervention and non-custodial diversionary programs.

As an overarching policy framework for these investments, I would develop a national Justice Reinvestment strategy. Justice Reinvestment provides a mechanism for the redirection of resources over time from prisons to programs and services in communities which are shown to reduce offending and imprisonment rates.

I would make a robust economic case for this radical shift in policy. Prisons are expensive and have negative social and community impacts. Diverting funds over time from prisons to communities by reducing the prison population will therefore generate a far greater social and economic dividend. I would work closely with Treasury and the Productivity Commission to model the economic impacts of a Justice Reinvestment strategy and use this modeling to lobby other Federal Ministers and State and Territory treasurers.

I would work with my Ministerial colleagues to secure buy-in across a range of portfolios: justice, Indigenous affairs, health, employment and housing. I would present this as a necessary complement to, and extension of, the Government's Social Inclusion and Closing the Gap agendas. Like the Social Inclusion agenda, Justice Reinvestment is a place-based model, designed to address the causes of over-representation at the community level. I would work with my Ministerial colleagues to build justice mapping into the Social Inclusion agenda and then identify and address service and infrastructure gaps in highly disadvantaged communities.

Then I would turn to addressing the structural deficits in the current system which contribute to over-imprisonment and to the mistreatment and abuse of Aboriginal and Torres Strait Islander people in prison. I'd remind my colleagues of the 270 Aboriginal people who have died in custody since the Royal Commission's report in 1992. I'd then act to ensure the Australian Government signed the Optional Protocol against Torture to establish an independent national prison oversight body and to mandate the UN Sub-Committee on the Prevention of Torture to inspect Australian custodial facilities and to hold us to account. I would then pressure my state and territory counterparts (again using a range of funding and other incentives and sanctions) to establish independent inspectors for custodial facilities (currently WA is the only state with such an office) and a mechanism for independent investigations into police misconduct and police-related deaths.

Finally, recognising that the lack of access to legal advice remains one of the many causes of Aboriginal over-imprisonment and is profoundly inequitable, I would address the chronic under-funding of the Aboriginal and Torres Strait Islander legal services across the country.

I am hopeful that these actions would have an effect, ultimately sparing the next generation from a life behind bars and building safer and happier communities.

If not, I would be the first to acknowledge my failure and would hold myself and my Government to account. This would mean looking Aboriginal and Torres Strait Islander people squarely in the eye and asking where I went wrong and what I needed to do next to achieve the change they want to see. I would hope that I would make their response my mandate and continue, in partnership and with renewed energy, with this vital work until Aboriginal and Torres Strait Islander people are genuinely equal before the law.

Jacqueline Phillips *is the National Director of Australians for Native Title and Reconciliation.*

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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