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Rights Agenda

Monthly Bulletin of the Human Rights Law Centre

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OPINION

Ms Dhu's death in custody: The shocking footage that Australia needs to see

26 September 2016

This piece was first published by *The Sydney Morning Herald*

Dragged from her cell. Handcuffed and paralysed. Hauled, dying, into the back of a police truck. This week Australia may be confronted, yet again, with images and footage of the justice system failing Aboriginal people, with devastating results.

Ms Dhu, whose first name is not used for cultural reasons, died slowly and alone on the concrete floor of a regional police cell at South Hedland police station in August 2014. She was 22 years old, had never been in custody before and was locked up for three days because she couldn't pay her fines.

The Western Australian Coroner presiding over the inquest into Ms Dhu's death in police custody will decide whether to publicly release harrowing footage of Ms Dhu, a young Yamatji woman, dying a cruel, unnecessary death.

We've witnessed the capacity of shocking footage to propel action and accountability after *Four Corners* aired footage from the Don Dale youth detention centre. Sometimes we have to see in order to believe.

I sat with Ms Dhu's family when the footage of her death was played in the Coroner's Court. They held their breath, watching their beloved daughter, sister, cousin and granddaughter crying out in pain, being dismissed and ignored by those who owed her a duty of care.

Ms Dhu's family wants the world to see this footage. They have tirelessly advocated for the past two years for us to see what they can never un-see. They want us to know what now haunts them and many other Aboriginal families every day: that prejudice and intolerance live and breathe in the very bones of the criminal justice system. And that accountability for this is rare.

As a teenager, Ms Dhu should have been cautioned and diverted for her low-level offending, rather than arrested by police and fined by a magistrate. As a young adult – poor and in a domestic violence situation – she should have never been taken into police custody and locked up for being unable to pay her fines. And in custody, she should have never been treated inhumanely and with such contempt for her wellbeing. Ms Dhu should never have died in custody.

Western Australia has the highest Aboriginal imprisonment rates in Australia; and Aboriginal women are the fastest-growing prisoner demographic in the country. Mick Gooda, the former Social Justice Commissioner, has called Aboriginal peoples' over-imprisonment a human rights crisis. The United Nations repeatedly hauls Australia over the coals for this injustice.

As a society, we have known these stark facts for some time, but we tend to live in a state of collective denial when it comes to racial prejudice and the criminal justice system.

Non-Indigenous people, like me, can largely choose the privilege of turning a blind eye. It is rarely our fathers, aunties, children or siblings who are punished by a justice system septic with discrimination. Australia now locks up more people than ever before, and it is marginalised people who suffer the brunt of this hyper-imprisonment culture.

So in truth, we should not be shocked by the brutality of Ms Dhu's death when for so long we, and our elected representatives, have ignored the evidence.

Twenty-five years ago the Royal Commission into Aboriginal Deaths in Custody provided a road map for reducing imprisonment rates. Numerous national and state and territory reports have rehashed the importance of the royal commission's recommendations. But successive governments around Australia have chosen to ignore these recommendations. One was to use cautions and diversion wherever possible. Another was to avoid locking people up for unpaid fines. Another was to properly fund and consult with Aboriginal organisations.

The Western Australian Premier, Colin Barnett, made a personal promise to Ms Dhu's family that he would take meaningful action. But Aboriginal women in Western Australia continue to be locked up at unprecedented rates because they cannot pay their fines. The Aboriginal Legal Service is still not adequately funded. And punitive, "lock-em-up" policies and practices prevail.

Victoria is perhaps the only jurisdiction to have made a genuine, long-term effort to begin to turn things around. An Aboriginal Justice Agreement; Koori Courts; justice targets; recently improved fines laws; diversionary practices; and a Charter of Human Rights are all critical steps in the right direction. While still more can be done, this progress has required commitment and ongoing consultation.

If the Western Australian Coroner releases the footage to the public this week, it is incumbent upon us all to watch, to be outraged and then to demand change. It is well and truly time for us to insist that our elected representatives – and the laws and policies they enact – value the lives and liberty of Aboriginal people.

It has now been more than two years since Ms Dhu died. Her family is still awaiting answers. They will never stop grieving. They will never again celebrate Christmas in the same way because Ms Dhu's birthday is on Boxing Day. They are forever marred by an unimaginable suffering; compounded by an Australia that implicitly but repeatedly says that Aboriginal peoples' lives matter less.

We owe it to Ms Dhu and her family to stand by their side and demand accountability and change. Equality and justice should be hallmarks of our society, rather than reserved for those of us with the privilege to pretend they already are.

Ruth Barson *is director of legal advocacy at the Human Rights Law Centre*.

HUMAN RIGHTS LAW CENTRE – NEW SYDNEY OFFICE

Principled human rights leadership – exciting expansion to Sydney

14 October 2016

After 10 years of impact working as a national human rights organisation out of Melbourne, the Human Rights Law Centre has opened a Sydney office.

Emily Howie, our Director of Advocacy and Research, will be continuing her great work out of Sydney, sharing office space with our friends at the Public Interest Advocacy Centre and Justice Connect, for an initial 12 month pilot. Thanks to the generous pro bono support of Ashurst, she'll be joined by a secondee lawyer from early December.

The HRLC works at the state, territory, national and international level for an Australia where human rights are universally understood, upheld and enforced. Being in Sydney will strengthen

our work and deepen our partnerships with NSW-based organisations to advance shared human rights goals. We also look forward to strengthening our NSW-specific work, including on LGBTI rights, democratic freedoms and abortion law reform.

This next step for the HRLC after 10 incredible years is an important opportunity to lend our voice to Sydney's passionate human rights advocacy.

For those in Sydney, we look forward to working more closely with you.

LGBTI RIGHTS – MARRIAGE EQUALITY

LGBTI groups and leaders call for parliament to block the plebiscite and provide a parliamentary pathway

19 October 2016

A network of almost 90 LGBTI organisations and leaders have again come together releasing a statement calling for parliament to block the plebiscite legislation.

Director of Advocacy at the Human Rights Law Centre and Australians for Equality (A4E) Co-Chair, Anna Brown said we want to see an end to the proposed plebiscite so that we can move forward towards a parliamentary process to achieve marriage equality in this term of parliament.

"This network of LGBTI leaders and organisations wishes to reinforce that the most efficient and effective way of achieving marriage equality is a vote in the parliament.

"This joint statement is about ensuring that a wide and diverse range of LGBTI groups across the nation have their voices heard by our parliamentarians," Ms Brown said.

"The continuing campaign for marriage equality has galvanised the LGBTI and the wider Australian community. As we move forward it is great to see so many organisations from across the nation engaged and coming together for equality," Australian Marriage Equality, Co-Chair, Alex Greenwich said.

"We want our elected representatives to come together to block the plebiscite and then find a way forward towards marriage equality.

"Marriage equality has majority support both in the public and in Parliament, therefore it is entirely reasonable to hope and ask for this reform to be delivered this term, as soon as possible," Mr Greenwich concluded.

The full statement can be found here.

OPINION

Guarding against law and order excess

This piece was first published in edition 41(3) of *The Alternative Law Journal*

24 October 2016

Last year, Kumanjayi Langdon, a proud and respected 59-year-old Warlpiri man from a large family, died in police custody in Darwin.

His crime? Police suspected he was drinking in a local park. He wasn't causing any disruption and was polite and cooperative at all times.

Despite the drinking offence carrying a maximum penalty of a $74 fine, he was handcuffed in public and put in the cage on the back of the police van. Police issued him with an infringement notice but still detained him, searching him and placing him in a concrete cell in the watch house with strangers. He died around three hours later of heart failure.

The Coroner who investigated his death strongly criticised the legislation that allowed his treatment — the Northern Territory's so-called paperless arrest laws.

The Coroner emphasised that Kumanjayi Langdon, who had serious health concerns, was entitled to die in peace, as a free man in the company of family and friends. Instead, he was treated like a criminal and died in a cell. The Coroner recommended the repeal of the paperless arrest legislation as it 'perpetuates and entrenches Indigenous disadvantage'.

Why am I writing about his death now?

First, because we must remember the human cost of systemic racial discrimination in our criminal justice system. (The Coroner remarked that a street away from where Kumanjayi Langdon was arrested for quietly drinking, are a host of bars and pubs where non-Indigenous people consume large amounts of alcohol and where dress codes prevent Aboriginal drinkers from entering.)

Secondly, because the paperless arrest laws are a case study highlighting the challenges in addressing harsh law and order politics. A case study with lessons to heed as the new Royal Commission investigates abuse in the Territory's youth jails.

The now-ousted Country Liberal Government introduced the paperless arrest laws in late 2014. The laws purportedly allow police to lock up a person for up to four hours if an officer reasonably believes they have committed or are about to commit, a string of minor offences including making undue noise, swearing in public or failing to keep their front yard clean.

Introducing the laws in Parliament, then Attorney-General John Elferink said they were a form of 'catch and release' to address social disorder that meant police would no longer be 'arrest averse' and could take people 'out of circulation' for four hours.

He specifically said police could arrest people, write out an infringement notice, put it in their property bag, hold them for four hours and then release them. Police policies were amended accordingly.

In their first three months, the new laws were used more than 700 times. Over 80 per cent of the people arrested were Indigenous.

With a pro bono team, on behalf of the North Australian Aboriginal Justice Agency and an Aboriginal woman arrested under the laws, Miranda Bowden, we challenged the laws in the High Court.

Incredibly, the Northern Territory Government argued that the laws didn't mean what its Attorney-General said they did when he introduced them.

Instead, to try and prop up their constitutional validity, the government argued that the laws were introduced for an extremely narrow purpose — clarifying that an infringement notice can be issued where a person is released after an arrest — despite the fact that Territory police were readily locking people up on the basis that the laws did much more than that.

And so proceeded a strange exercise where the Court ultimately rejected our case, with an order to pay legal costs, by accepting the government's argument that the laws meant something

radically different from the purpose for which it introduced them. A loss, but still a win of sorts because on paper at least, the decision significantly reined in the laws' operation.

The Court had ample opportunity, relying on existing law, to declare the laws invalid (as the lone dissenting judge, Justice Gageler, did). The Court could have set a precedent that made future governments across Australia far more wary of introducing harsh law enforcement policies.

Instead, the Court delivered a technical, conservative and deeply impractical decision, divorced from the reality on the ground of police officers being encouraged by their government to go forth and lock people up for trivial offences.

The Court noted the possibility of false imprisonment claims if arrest powers were misused. Based on the Court's decision, they routinely have been — whenever police unnecessarily arrested people for trivial offences or when they issued people with an infringement notice on reception at the watch house and still detained them merely for a 'catch and release' purpose.

This is small comfort for those affected - likely more than 2000 people arrested by the time the High Court made its decision, plus the tragic death in custody.

The Court put the onus on an over-policed, highly disadvantaged minority to complain about mistreatment to under-funded, over-worked Aboriginal legal services which are expected to enforce its technical decision. Compounding the issue is the fact that legal action against police in the Territory must be started within two months of the alleged wrongdoing (it's three years elsewhere). Finding justice in these circumstances is incredibly difficult.

Sadly, the Court's conservatism when considering the law and order excesses of Australian governments is nothing new. Whether it's mandatory sentencing, Queensland's extraordinary anti-bikie laws or the indefinite detention of people seeking asylum, the Court has opted for narrow, deferential approaches.

Part of the problem is the context for the Court's decisions. With threadbare constitutional human rights protections, no statutory human rights charters outside of Victoria and the ACT, and common law protections that can be easily set aside by willing Parliaments, there's often little to protect against legislative overreach.

As the new Royal Commission dissects the rotten culture and multiple failures that led to the shocking abuse in the Territory's youth jails, we need to look broadly and examine the role of the courts and the lack of human rights protections.

The incoming Territory Labor Government has promised to repeal the paperless arrest laws — a welcome commitment. An even better one would be to enact a strong Northern Territory Human Rights Charter to help prevent against future abuse.

Hugh de Kretser *is the Executive Director of the Human Rights Law Centre.*

DEFENDING THE RIGHTS OF PEOPLE SEEKING ASYLUM

Stories of children on Nauru show it's well and truly time to bring them here

17 October 2016

The *Four Corners* episode, *The Forgotten Children: The young refugees stranded on Nauru*, is further evidence that all people currently warehoused by the Australian government on Nauru and Manus must immediately be brought to safety in Australia.

Daniel Webb, the Director of Legal Advocacy at the Human Rights Law Centre, said that the interviews screened on *Four Corners* were further evidence that the government's offshore arrangements were causing serious harm to innocent people, including children.

"There are clearly some incredible kids on Nauru – so smart and resilient. These kids just want what every child in the world wants – a chance at a decent life somewhere safe. Our government can't continue to knowingly cause them harm," said Mr Webb.

The *Four Corners* episode was screened as Amnesty International released the full report from its visit to Nauru – *Island of despair: Australia's "processing" of refugees on Nauru* – which further details the dangers facing refugees and people seeking asylum on the island.

Mr Webb, who recently returned from his third visit to Manus Island, said there were clear parallels between the situations on the ground on both Nauru and Manus.

"There are some truly remarkable people on both islands. On Nauru, a young girl who speaks five languages. On Manus, a man who speaks seven, two of which he taught himself while in detention and whose friends tease him for always practising his Spanish into his pillow," said Mr Webb.

"These are people from different parts of the world, of different ages, with different histories and different hopes and dreams for the future. But what they have in common is that they are tired. After three years on a painful road to nowhere they are absolutely exhausted," said Mr Webb.

"Nauru and Manus are both dead ends. Whatever the policy challenge, continuing to harm innocent people is never the solution. After three years of fear, violence and limbo, it's well and truly time for the government to bring these men, women and children here to Australia and allow them to begin rebuilding their lives in safety," said Mr Webb.

SAFEGUARDING DEMOCRACY - SPECIAL RAPPORTEUR ON HUMAN RIGHTS DEFENDERS

UN warns of diminishing democratic freedoms in Australia

18 October 2016

Australia is failing to provide a safe and free environment for civil society and to ensure that people are free to speak out and peacefully protest on issues that they care about, said a UN Human Rights expert. Michel Forst, the UN Special Rapporteur on Human Rights Defenders, has been in Australia for a two-week official visit, meeting with government, MPs and civil society organisations.

Emily Howie, Director of Advocacy and Research at the Human Rights Law Centre, said that the Special Rapporteur's statement highlights what many Australians already know – that there is a real and worrying trend in Australia of governments chipping away at our basic democratic rights.

"This a wake-up call to Australia: despite our strong track record as a vibrant and diverse democracy, the reality is that more and more people here feel silenced by government and fearful of speaking out. This trend has widespread impact, including on environmental organisations, journalists, trade unions, landholders, community lawyers, doctors working with refugees, philanthropists and more," said Ms Howie.

The Special Rapporteur was "astonished" by reports during his visit of the cumulative government measures that are damaging to civil society, and cited gag clauses in government funding agreements, secrecy laws, the stifling effect of the *Border Force Act*, attacks on the President of

the Australian Human Rights Commission and the vilification of people, such as environmental activists. He also cited the criminalisation of peaceful protest in Tasmania's anti-protest laws.

In February 2016, the Human Rights Law Centre published *Safeguarding Democracy*, a report that addressed many of the concerns now raised by the UN, including the disconnection between Australia's strong action and reputation internationally as a defender of civil society.

"When you look at it globally, Australia is simply incoherent. At the international level Australia defends the rights of people in China, Burma and elsewhere to political freedom and free speech. Yet at home, the Government can be seen as silencing its own people through measures such as the aggressive pursuit of whistleblowers, a suffocating culture of secrecy in government and the public vilification of people who speak out, such as Professor Gillian Triggs," said Ms Howie.

"It is vital that Australia use the Special Rapporteur's statement and recommendations as a blueprint for reversing the damaging trend and ensures a safe and free environment for free speech, peaceful protest and political engagement,' added Ms Howie.

LGBTI RIGHTS – MARRIAGE AMENDMENT BILL

First government marriage equality bill released with discriminatory exemptions

11 October 2016

The Government has released the Marriage Amendment (Same-Sex Marriage) Bill, which proposes marriage equality but contains concerning exemptions that would allow discrimination against same-sex couples. The bill is intended to form the basis for consultation should the proposed plebiscite bill pass both houses of parliament. This looks unlikely following the Australian Labor Party announcement that the party will oppose in the Senate.

Anna Brown, Director of Advocacy at the Human Rights Law Centre said the release of the bill is a step forward but is undercut by carve outs that would allow discrimination against same-sex couples if marriage equality became a reality.

"This is the first time an Australian Government has released a bill to achieve marriage equality but the introduction of unprecedented and unnecessary exemptions to allow civil celebrants and religious organisations to discriminate is deeply concerning. It is also disappointing that this bill to achieve marriage equality is linked to the proposed plebiscite bill," said Ms Brown.

The HRLC welcomes the proposed change to the definition of marriage from a union between "a man and a woman" to a union between "two people". This is clearly inclusive of all LGBTI people and relationships. If passed, the bill would also recognise marriages of same-sex couples married overseas, including couples already married overseas. Included in the bill however are a number of exemptions for civil celebrants, ministers of religion and marriage related goods and services provided by religious organisations.

"Marriage celebrants conduct around 80% of marriages in Australia. Unlike ministers of religion, civil celebrants are appointed to perform a secular function on behalf of the state, and there is no place for discrimination in these ceremonies," said Ms Brown.

The Bill provides that religious ministers would be able to refuse to solemnise a marriage between anyone other than "a man and a woman" if this accords with religious beliefs or is not allowed by their conscience.

Religious bodies or organisations would be allowed to refuse to make facilities available or to provide goods or services for same-sex couples for a wedding ceremony, reception or incidental purposes.

“Religious organisations already benefit from extremely broad exemptions from discrimination laws that allow them to provide services in accordance with their beliefs. This new, undefined reference to ‘religious bodies and organisations’ broadens the type of organisations to which the exemption might apply,” added Ms Brown.

Under both the bill, and existing anti-discrimination laws, private non-religious companies could not refuse the use of facilities, goods or services. For example, a florist could not refuse to provide flowers because they personally don’t support marriage equality.

The plebiscite bill will be debated and voted on in the House of Representatives, where it is likely to pass with Coalition and some crossbench support. The plebiscite bill is unlikely to pass the Senate, with the ALP, the Greens, Nick Xenophon Team and Derryn Hinch stating they will oppose it.

Marriage equality advocates welcomed the ALP’s announced position on the plebiscite and urged the Senate to vote on the plebiscite bill so a path forward for marriage equality can be achieved this term.

“We’re glad the ALP, the Greens and others have listened to the concerns of the LGBTI community and will vote against the plebiscite bill. It’s time for the Parliament to move on and achieve marriage equality through a parliamentary vote,” said Ms Brown.

For the media release from Australian Marriage Equality and Australians 4 Equality on the plebiscite bill click here.

#BRINGTHEMHERE

Continuing attacks against refugees on Manus Island show the Australian government must #BringThemHere

10 October 2016

Continuing violent attacks against refugees on Manus Island are further evidence that Australia’s offshore detention centres must close and that the innocent people held there for the last three years must be brought to safety in Australia.

Once again a man sent to Manus by the Australian government has been violently attacked. The man, Masoud Ali Shiekhi, was set upon by a group of locals with rocks in an unprovoked attack as he walked a friend to the bus stop near the transit centre at East Lorengau on Saturday. He suffered head injuries in the incident.

Daniel Webb, the Director of Legal Advocacy at the Human Rights Law Centre, recently returned from Manus Island where he met Masoud – who used to work for the United Nations in Yemen before being forced to flee – and saw first-hand the confronting reality facing him and the other men left languishing on the island by the Australian government.

“Masoud really tried. He volunteered with a local organisation supporting people with disabilities. He studied the local language. He tried to make local friends. Despite three years of fear, violence and limbo he stayed incredibly strong and did everything he could to make the best of a

truly horrible situation. But even for Masoud, Manus has proven to be a harmful and dangerous dead end," said Mr Webb.

Mr Webb went to Manus recently to investigate conditions on the ground and to hear stories of the men the Australian government has warehoused there for the last three years. Mr Webb spent two full days hearing story after story about violence and attacks against refugees, both inside the detention centre and out.

"When I was on Manus I also saw the aftermath of a similar attack in which two refugees – Afghan Hazaras who had fled the Taliban – were attacked by a group of seven locals. They were beaten with an iron bar, robbed and insulted. One of them collapsed and was taken to hospital unconscious."

Mr Webb continued, "The refugees who saw these events unfold were afraid and really worried for their seriously injured friends. But they weren't surprised. Sadly, they'd seen it all before."

"Our government can't leave these men on a dangerous road to nowhere any longer. These are innocent people in our care and they are not safe. The only viable and humane way forward is for the government to bring them here and allow them to start rebuilding their lives in safety," said Mr Webb.

WOMEN'S RIGHTS

Queensland should seize historic moment to reform abortion laws

6 October 2016

Queensland has an historic opportunity to bring its abortion laws into line with clinical practice and common sense, the Human Rights Law Centre told Queensland parliament.

In a submission to the Queensland parliament's inquiry on the Health (Abortion Law Reform) Amendment Bill 2016, the HRLC urged Queensland to get behind Rob Pyne MP's two private members bills that together would decriminalise abortion and ensure that abortion is both safe and accessible.

The Human Rights Law Centre's Director of Advocacy and Research, Emily Howie, said, "It is unacceptable that women and their doctors still run the risk of prosecution for procuring or providing a safe medical procedure; a procedure that is provided every week in Queensland and across Australia. The law is hopelessly out of step with clinical practice and community standards."

Queensland and NSW remain the only two states in which abortion has not been decriminalised, either in whole or in part.

"Whilst other states and territories have sought to modernise their laws, Queensland is now lagging well behind on providing women access to safe and legal abortion services," said Ms Howie.

Queensland's Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee is currently inquiring into the Health (Abortion Law Reform) Amendment Bill, the second abortion-related bill introduced by independent MP Rob Pyne. Mr Pyne's first bill, the Abortion Law Reform (Women's Right to Choose) Amendment Bill 2016 decriminalises abortion. The HRLC previously expressed its support for that bill.

The Health (Abortion Law Reform) Amendment Bill allows for the creation of safe access zones around clinics to prevent the harassment of staff and patients by anti-abortionists.

“Women should not walk the gauntlet of harassment and intimidation in order to see their doctor. Anti-abortionists have a right to hold and express their views, but it must be done in a manner that respects women’s rights to privacy, dignity and safety when seeing their doctor,” said Ms Howie.

The bill also allows doctors to conscientiously object to providing abortion services. Ms Howie said that conscientious objection provisions are important, but they ought to balance the right of doctors to their views with women’s rights to access the medical treatment they need. Doctors should therefore be required to refer women seeking an abortion to doctors who do not have a conscientious objection.

Ms Howie added, “The bill currently goes too far in favouring doctor’s objections over women’s medical needs. Whilst we support doctor’s rights to object to providing abortion services, patients should not be disadvantaged by the individual ethical, religious or moral objections that some medical practitioners may have to abortions.”

INDIGENOUS RIGHTS

WA Coroner reserves decision on application to release footage of Ms Dhu’s death in custody

28 September 2016

The Western Australian Coroner conducting the inquest into Ms Dhu’s death in custody reserved the decision to publicly release harrowing footage of Ms Dhu’s death. The Coroner will deliver the decision at a date in the future.

Carol and Della Roe, grandmother and mother of Ms Dhu, who are represented by the Aboriginal Legal Service of Western Australia, said that they want the world to see the footage.

“Our child died a cruel and painful death. The world should see how she was treated. For the last two years, we have been suffering alone – everyone should understand our grief and make sure this never happens again,” said Ms Carol and Della Roe.

Dennis Eggington, CEO of the Aboriginal Legal Service of Western Australia, said that the family has made it clear that their wish is to have the footage released.

“The Aboriginal Legal Service is here to support the family. I hope the Coroner gives the utmost consideration to the family’s wish, which is to have this footage released”, said Mr Eggington.

Ms Dhu, a 22 year old Yamatji Aboriginal woman, died in 2014 from septicaemia and pneumonia three days after she was locked up in a South Hedland police station for failing to pay her fines.

Western Australia has the highest Aboriginal imprisonment rate in the country and Aboriginal women in particular are locked up for fine default in alarmingly high numbers.

Ruth Barson, Director of Legal Advocacy at the Human Rights Law Centre, which is providing legal support to Carol Roe, said that Aboriginal peoples’ over-imprisonment is a human rights crisis requiring a whole of government strategy.

“The family want to make sure that what happened to Ms Dhu never happens again. WA desperately needs a fair and a flexible fines system, which differentiates between those who will

not and those who cannot pay their fines. Victoria and NSW have such a system and WA should follow suit," said Ms Barson.

"Release of the footage is profoundly important for the family's sense of justice. Transparency is central to accountability. There is no doubt that this footage is confronting and disturbing – but Australia cannot ignore how this young Aboriginal woman was treated. It shouldn't just be the family and the lawyers who see this footage. Australia should know how Ms Dhu was treated."

AT THE UNITED NATIONS

Australia must bring youth justice in line with international standards

23 September 2016

Australia's youth justice practices breach international human rights law, Amnesty International and the Human Rights Law Centre told the United Nations in a statement read before the Human Rights Council in Geneva.

The Human Rights Law Centre's Director of Legal Advocacy, Ruth Barson, said, "The world was shocked by images of children being hooded, restrained and tear gassed. We have since seen further evidence of abuse and mistreatment in Queensland.

"Children around the country continue to be held in conditions amounting to solitary confinement. The use of solitary confinement on children, for any duration, is not permitted under international human rights law. Exposing vulnerable children to harmful practices should not be tolerated. Australia must protect the rights of children in detention," said Ms Barson.

Amnesty International's Indigenous Rights Campaigner, Julian Cleary, said that Australia has no excuse for maintaining sub-standard youth justice practices, like allowing for the imprisonment of 10-year-old children, which is below the internationally accepted minimum age of 12 years.

"Our national government should work with all Australian jurisdictions to review their youth justice systems to ensure they are human rights compliant. Australia should be a leader in youth justice practices, rather than being shamed on the world stage for our treatment of children," said Mr Cleary.

Australia signed the Optional Protocol to the Convention against Torture (OPCAT) in 2009, but has yet to ratify it, which is the additional step required for the treaty to be legally binding. Ratification of OPCAT would help protect children from torture and ill treatment by requiring Australia to establish an independent monitoring and oversight system for all places of detention. The UN High Commissioner for Human Rights recently urged Australia to ratify OPCAT.

"Independent inspections and oversight of detention facilities are critical to protecting the human rights of people in detention. Everyone deserves to be treated with dignity and respect. There is no reason to delay ratification any longer," said Ms Barson.

At the recent UN review of Australia's human rights record, a number of countries recommended that Australia urgently address the over-imprisonment of Aboriginal and Torres Strait Islander people.

"Aboriginal and Torres Strait Islander children are 24 times more likely than non-Indigenous children to be sent to youth prisons. It's time for the federal and all state and territory governments to prioritise action to close the justice gap and to ensure that imprisonment of children is a last resort," said Mr Cleary.

OPINION

A modest pledge won't erase the stain of Manus and Nauru

22 September 2016

This piece was first published by *The Age*

Our Prime Minister, Immigration Minister and Foreign Minister have spent this week in New York attending high-profile global summits on refugees. They arrived insisting that the Australian government's policies were the "best in the world", but they'll leave having offered little more than self-congratulations.

The summits were an important opportunity for Malcolm Turnbull to show leadership on both global and local challenges – globally to the unprecedented number of people fleeing danger and locally to the festering sores that are the offshore camps on Nauru and Manus.

But Turnbull comprehensively shirked both.

He pledged a modest funding increase for global relief efforts – spread over the next three years – and to do no more than maintain our current planned refugee intake. He also failed to offer any way forward from the Nauru and Manus dead ends.

While the government, on the world stage, tried to pretend otherwise, the situation in its offshore centres is becoming more and more untenable by the day.

The legal framework is crumbling, with the highest court in PNG ruling the Manus facility is illegal. The companies operating the centres are walking away, first Broadspectrum, then Wilson Security, now Connect Settlement Services. Most importantly, every day the government refuses to act, innocent people continue to suffer.

In recent months I've sat face to face with women who have been sexually assaulted on Nauru. I've seen a man collapse unconscious after being robbed and beaten with an iron bar on Manus. I've spoken with families desperate to begin rebuilding their lives in safety but who languish on a painful road to nowhere after three years.

Turnbull's announcements in New York won't end their suffering and his self-congratulations rub salt into their wounds.

Deliberate cruelty to innocent people is fundamentally wrong. And there are alternatives – innovative and humane.

The underlying issue is there are people in our region who have fled danger who need protection and a chance to rebuild their lives. Our policy objective should be to make sure they can access these things in a safe and orderly way.

Deterrence doesn't help. Rather than using costly and cruel measures to close unsafe pathways we need to look at innovative ways of opening up new ones. Measures which improve conditions in transit countries and re-allocate some of our huge skilled migration intake to skilled people who are also seeking asylum should be considered.

The bottom line is that whatever the policy challenge, deliberate cruelty to innocent people is never the solution. Turnbull's modest pledge on the world stage to welcome one group of people seeking safety doesn't justify his continued mistreatment of another.

The men, women and children on Nauru and Manus must be brought to Australia to begin rebuilding their lives. After three years of fear, violence and limbo, it is well and truly time.

***Daniel Webb** is the director of legal advocacy at the Human Rights Law Centre.*

UNITED NATIONS

Ban Ki-moon appoints high-ranking official to combat reprisals against human rights defenders

4 October 2016

This piece was first published by International Service for Human Rights

The Secretary General of the United Nations, Ban Ki-moon, unveiled a much-needed initiative to help combat the growing problem of governments preventing human rights defenders from engaging with the UN or punishing and even imprisoning them when they do so.

Assistant Secretary General, Andrew Gilmour, will be given a special mandate to receive, consider and respond to allegations of intimidation and reprisals against human rights defenders and other civil society actors engaging with the UN.

ISHR's legal counsel, Madeleine Sinclair, praised the announcement.

"This is an extremely welcome development. The ability of people or organisations to provide evidence or submit information or complaints to the UN is not a privilege - it is a fundamental right enshrined in the UN Declaration on Human Rights Defenders and it must be protected," said Ms Sinclair.

In announcing the appointment during what is likely to be his last visit to Geneva as Secretary-General, Mr Ban said he was deeply alarmed about the growing number of reprisals and hoped the initiative will help put a stop to all intimidation and reprisals against those cooperating with the United Nations on human rights.

"These courageous individuals are often our only eyes and ears in extremely tough environments – and we owe them our best possible support," said Mr Ban.

"I have decided, in consultation with the High Commissioner for Human Rights, to designate my new Assistant Secretary-General for Human Rights, Mr. Andrew Gilmour, to lead our efforts within the UN system to put a stop to all intimidation and reprisals against those cooperating with the United Nations on human rights," said Mr Ban.

ISHR and other organisations have been advocating for years for the UN to do more to address the issue of reprisals against those who cooperate with the UN. The high-level appointment is part of the Secretary-General's recent pledge to up the ante throughout the UN when it comes to responding to non-cooperation with the UN.

Ms Sinclair said having the Secretary-General designate someone this senior within the UN with this brief is an important move.

"We hope this means governments will feel compelled to respond when confronted with allegations of reprisals. We know from the very fact that reprisals occur, that the UN human rights system has an impact – otherwise regressive states wouldn't be seeking to prevent access or stymie cooperation with the UN. That being said, its effectiveness and credibility is severely hampered when those who engage with it are threatened and attacked. The UN simply cannot function properly without direct engagement from human rights defenders as the UN system relies heavily on evidence and advice from the ground," said Ms Sinclair.

A recent report by the SG shows that reprisals take many forms, including travel bans, the issuance of arrest warrants on terrorism charges, detention and torture, surveillance, death threats, attempts to frame activists for criminal acts, defamation, and intimidation.

In several cases defenders are tarnished as 'terrorists' or 'traitors', contributing to perceptions that engagement with the UN is an act of betrayal. In some cases reprisals have led to individuals fleeing their country, in others, to death.

Mr Gilmour has been designated to lead the UN's efforts to put a stop to all intimidation and reprisals against those cooperating with the United Nations on human rights.

"This should include reviewing the UN's current practices and identifying how institutionally it can have a more impactful response to reprisals," said Ms Sinclair.

ISHR Board member and Co-Director of the Gulf Center for Human Rights, Maryam Alkhawaja, said a lack of investigation or accountability for reprisals licenses further and worsening acts of reprisal.

"It is imperative that the UN acts early and acts effectively in response to reprisals against defenders, ensuring that people who have already put themselves, and at times their families, at risk to cooperate with the UN can continue to do so. Reporting to the UN should never come at the price of personal freedoms" said Ms Alkhawaja.

Omar Faruk Osman, Secretary General of the National Union of Somali Journalists said the appointment of a high-level official with a commitment to combating reprisals will increase the political risk and cost of perpetrating reprisals.

"I know from first-hand experience that when senior officials such as UN Special Rapporteurs speak out against the harassment of a defender, a country will think twice about continuing such harassment."

Earlier this year, a group of Special Rapporteurs spoke out against the harassment of Osman after he submitted a complaint about violations of freedom of association in Somalia to the ILO.

HRLC STAFF NEWS

Introducing Anna Fordyce

Anna Fordyce has joined the Human Rights Law Centre team. She commenced in October 2016 to provide the growing Centre with operational and administrative support as Operations Coordinator. Her background includes over six years' experience in the higher education sector.

Anna is completing a Master of Laws (Juris Doctor) at Monash University. She holds a Bachelor of Arts with Honours (First Class) in Philosophy from Victoria University of Wellington, New Zealand.

AUSTRALIAN HUMAN RIGHTS CASE NOTES

Victorian Supreme Court grants indefinite litigation restraint order against vexatious litigant Julian Knight

Attorney-General for the State of Victoria v Knight **[2016] VSC 488 (30 August 2016)**

Summary

An order restraining Julian Knight from commencing legal proceedings without leave of the Court has been extended indefinitely under the *Vexatious Proceedings Act 2014* (Vic) ("Act"). Justice J Forrest described Mr Knight as a "persistent and undeterred litigant who will continue to litigate any cause regardless of its merits" (at paragraph [37]).

The Act expands on the former regime and aims to reform and consolidate the law relating to vexatious proceedings in a way that "balances individual rights of access to the courts with the public interest in an efficient and effective justice system".

Under the Act, various types of "litigation restraint orders" ("LRO") can be made by Victorian courts and tribunals. The most serious is a "general litigation restraint order" ("GLRO"). A GLRO can only be made by the Supreme Court, which must be satisfied that the person has "persistently and without reasonable grounds commenced or conducted vexatious proceedings".

Facts

Julian Knight is currently serving a life sentence for mass murder. Since incarcerated, he has instituted numerous legal proceedings, many of which have been described as "baseless", "foredoomed to fail" or "an abuse of process."

On 19 October 2004, Mr Knight was declared to be a "vexatious litigant" pursuant to section 21(2) of the *Supreme Court Act 1968* (Vic) ("SCA"), and Justice Smith made an order preventing him from commencing – without leave of the Court – any legal proceedings, for a period of ten years.

On 16 October 2014, Justice T Forrest extended that order pending final determination of this application.

The Act commenced on 31 October 2014, following an inquiry by the Victorian Parliamentary Law Reform Committee ("Committee") into vexatious litigants. The Act repealed section 21 of the SCA, and had the effect of converting the existing order into a GLRO under the new regime.

The question for Justice J Forrest in this application, was whether to extend the order indefinitely.

Relevant provisions

Section 29 of the Act allows the Supreme Court to make a GLRO if satisfied that the person has "persistently and without reasonable grounds commenced or conducted vexatious proceedings." "Vexatious proceeding" is defined to include a proceeding that is an abuse of process, commenced without reasonable grounds, or commenced (or conducted in a way so as) to harass or annoy, to cause delay or detriment, or for (or to achieve) any other wrongful purpose.

The Court may take into account any matter it considers relevant, including but not limited to:

- any proceeding commenced or conducted by the person in any Australian court or tribunal;
- any existing orders against the person; or
- any other matter relating to the way in which the person conducts or has conducted litigation.

Importantly, section 33 allows the Court to specify that a GLRO remain in force indefinitely, and to extend an order if it is "in the interests of justice to do so".

Further, section 30 allows an order to be crafted such that future leave applications need not always be made to the Supreme Court. Rather, they can be made to the court or tribunal in which the proposed proceeding will be heard.

Decision

Against this legislative background, Justice J Forrest considered three questions:

1. whether it was in the interests of justice to extend the duration of the GLRO;
2. if an order was to be made, then for what duration should it apply; and
3. what the form of the order should be.

Evidence

The Attorney General tendered affidavits detailing over 40 applications made by Mr Knight to issue proceedings since 2004, mostly relating to the conditions of his incarceration. Of these, leave was refused in 30. In the six in which leave was granted, he was successful in just three.

Mr Knight called Professor Paul Mullen, a forensic psychiatrist and an expert on "querulous complainants" – people who relentlessly pursue litigation without proper bases due to a psychiatric disorder or personality trait. Professor Mullen said that Mr Knight was not a "querulous litigant" and his behaviour could not be explained by any mental abnormality. However, he found that Mr Knight has "obsessional traits" and his personality is such that he will continue to complain about his conditions of incarceration for as long as he is incarcerated.

The interests of justice

Justice J Forrest found a continuation of the conduct which had led to the initial order being made. His Honour said (at paragraph [37]), "it is not to the point, as Professor Mullen explained, that Mr Knight is not a querulous litigant. The fact is that he is a persistent and undeterred litigant who will continue to litigate any cause regardless of its merits."

Mr Knight emphasised his success in some applications. However, the "proportion" of success will not bear on the "threshold question" of whether somebody is a vexatious litigation (although it might bear on the exercise of the Court's discretion to make an order). His Honour said (at paragraph [46]):

> the existence of a number of successful applications for leave or judgments does not paint the whole picture. Each application places a strain on the administration of the justice system. Whether under the SCA or the Act, Mr Knight's applications, frequently baseless, take up scarce judicial resources and mean that other non-vexatious litigants are delayed in accessing justice.

His Honour noted that a number of Mr Knight's successful applications had involved "relatively inconsequential grievances" unworthy of agitation, and was ultimately undeterred by his limited success.

Duration and form of order

Justice J Forrest found that Mr Knight's behaviour was likely to persist indefinitely, and crafted the order accordingly. To reflect the goals of effectiveness and proportionality, his Honour ordered that any future applications be made to the court or tribunal in which Mr Knight seeks to litigate.

Commentary

Restraining a person's ability to seek redress in the courts is an extreme measure. However, as the Committee noted, public funding for courts and tribunals is limited, and vexatious litigants consume a disproportionate amount of their resources. In doing so, they "affect access to justice for the community as a whole." This "unnecessary strain on the administration of justice" was an "overwhelming" factor in Justice J Forrest's decision to extend the order (see paragraph [54]). The new regime seeks to balance these competing goals.

The benefit of the new Act is a tiered system of LROs which increase in severity. Only the most extreme cases will warrant a GLRO. For this reason, they rightly remain the exclusive domain of the state's highest court.

Finally, as Justice J Forrest noted (at paragraph [57]), "such an order does not prevent Mr Knight from seeking leave to commence a proceeding". Rather it creates an additional guard against any further unmeritorious claims.

The full text of the decision can be found here.

Sarah Werner *is a Law Graduate at King & Wood Mallesons.*

Public preaching: Federal Court finds local council's decision to refuse to issue a permit to preach in a public mall was beyond power

Corneloup v Launceston City Council **[2016] FCA 974 (19 August 2016)**

Summary

The Federal Court of Australia has upheld a challenge to a decision by the Launceston City Council to refuse to grant a permit to preach Christian ideology in a public pedestrian mall on administrative law grounds.

Facts

Caleb Courneloup, a committed evangelical Christian, has sought for many years to preach in public places regarding Christian ideology and its application to various political issues such as abortion and homosexuality. In 2013, Mr Corneloup's challenge to the validity of a council by-law banning public preaching in Adelaide's Rundle Mall gave rise to Attorney-General (SA) v Adelaide City Corporation (2013) 249 CLR 1 – one of the most significant High Court decisions addressing the scope of the implied freedom of political communication under the Australian Constitution. In that case, the High Court held that the by-law prohibiting preaching in Rundle Mall was validly made under the Local Government Act 1934 (SA). While the by-law did burden political communication, it was a reasonable and proportionate limitation made in the interests of securing the safe and convenient use of roads.

In February 2015, Mr Corneloup applied to Launceston City Council (the Council) for a permit to preach in the Brisbane Street Mall and other public pedestrian malls in Launceston. The application was made pursuant to By-Law No 1 of 2010 under the Local Government Act 1993 (Tas). While the By-Law provides that the Council may permit the "use" of a mall under "appropriate circumstances", Mr Corneloup's application was refused on the basis that the Council's "Booking and Usage Guidelines for the Brisbane Street and Quadrant Mall" (the Guidelines) provide that religious and political spruiking are "non-permitted uses" of a mall.

Mr Corneloup commenced proceedings challenging the decision on a number of grounds, including:

- That the decision made was beyond power because the Guidelines were inconsistent with the By-Law and therefore invalid; the Council employee who refused the permit had inflexibly applied the policy she discerned from the Guidelines and had regard to an irrelevant consideration; and the Council employee was not an "authorised officer" for the purposes of the By-Law (administrative law grounds).
- That the Guidelines were inconsistent with the implied freedom of political communication under the Australian Constitution.
- That the Guidelines prevented Mr Corneloup from obtaining the "benefit" of section 46 of the Constitution Act 1934 (Tas), which provides that "[f]reedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen".

Decision

Tracey J upheld Mr Corneloup's challenge on administrative law grounds. His Honour found that the Guidelines did not apply to the By-Law under which the Council employee's decision to refuse a permit was made (clause 12). In errantly applying the Guidelines, the employee misunderstood the Guidelines as requiring that any application for a permit to preach or make political statements in the malls be refused. This led to an inflexible application of what she discerned to be the Council's policy by failing to consider the particular circumstances raised by the application. Reliance on the Guidelines also led to the employee having regard to an irrelevant consideration — that preaching and public speaking were not permissible in the malls. In fact, the By-Law contemplated that preaching and political addresses may take place subject to a permit being issued. Thus, even if the Guidelines had applied to the exercise of power under cl 12, they would have been inconsistent with the By-Law.

Tracey J also found that the Council employee who made the decision was not an "authorised officer" for the purposes of the By-Law and was therefore not empowered to make the decision.

Commentary

The Court's finding of an inflexible application of policy and the reference to *Elias v Commissioner of Taxation* (2002) 123 FCR 499 indicates that where a discretionary power exists, administrative decision makers must consider the merits of each application and consider waiving the general policy if it is appropriate in the circumstances — even in the case of prohibitive policies, such as those contained in the Guidelines.

The case also demonstrates the importance of ensuring that reliance on policy in administrative decision making is consistent with the law empowering the decision maker to exercise discretion and that decision-makers are properly empowered to make the relevant decision.

As the Council's decision was found to have been beyond power on administrative law grounds, Tracey J did not address the question of whether the By-Law was compatible with implied freedom of political communication in the Constitution. In obiter, however, His Honour suggested that the availability of a nearby "speakers' corner" subsequently established by the Council may be relevant. In Adelaide City Council, the existence of a designated speakers' corner was relevant in the High Court's consideration of whether the by-law prohibiting preaching in Rundle Mall law was reasonably appropriate and adapted to serve a legitimate end. The scope of the implied constitutional freedom in the context of public preaching therefore remains to be seen.

In relation to s 46 of the Tasmanian Constitution, Tracey J briefly observed that it does 'not confer any personal rights or freedoms on citizens'. His Honour noted that a similar provision in the Irish Constitution 'has been held to prevent coercion in relation to the practise of religion and to guarantee a freedom to profess and practise a person's religion of choice', however no authority could be pointed to that demonstrated its practical effect. In any event, because the Tasmanian Constitution is an ordinary Act of Parliament, its effect (if any) upon other Acts of the Tasmanian Parliament remains an open question.

Elizabeth Brumby *and* ***Leopold Bailey*** *are Assistant Editors of the Melbourne University Law Review and Research Assistants at Melbourne Law School.*

INTERNATIONAL HUMAN RIGHTS CASE NOTES

European Court of Human Rights holds that the immigration detention of LGBTI refugee contravened Article 5(1) of the Convention

Case of O.M. v. Hungary **(Application number 9912/15) [2016] ECHR (5 July 2016)**

Summary

The European Court of Human Rights (***ECHR***) has held that immigration detention of an LGBTI Iranian person seeking asylum (the ***Applicant***) in Hungary contravened article 5(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (the ***Convention***). In particular, the Court found that detention was not justified under Article 5(1)(b) of the Convention, as it was not done to secure fulfilment of an obligation. It further found that the Hungarian authorities had failed to take into the individual circumstances of the person seeking asylum and his vulnerability in detention as a consequence of his sexual orientation. The ECHR emphasised the need for authorities to take particular care in detaining vulnerable individuals, including LGBTI people, to ensure their safety in custody.

Facts

The Applicant was a same sex attracted Iranian national who arrived in Hungary on 24 June 2014 with the assistance of a human trafficker and without documentary evidence of his identity. When apprehended by border guard patrol, the Applicant applied for recognition as a refugee on the basis that he had been persecuted in Iran due to his sexuality.

Under the Hungarian 'Act no. LXXX of 2007 on Asylum' (the ***Asylum Act***), the Asylum Authority is authorised to detain people seeking asylum in certain circumstances, including, relevantly where the person seeking asylum's identity is not clear, where there are grounds for presuming that the person seeking asylum presents a risk of absconding, or where there a grounds for presuming that the person seeking asylum may delay or frustrate the asylum procedure (Section 31/A (1) (a)&(c)). Section 31/A(2) provides that such detention may only be ordered on the basis of individual deliberation, and only where the purpose of ordering detention cannot be achieved by other measures to secure availability of the person seeking asylum to authorities.

Furthermore, detention under the Asylum Act will only be lawful where it complies with International Law. Specifically, Article 5(1)(b) of the Convention provides that:

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law … (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law.

Exercising its powers under the Asylum Act, the Asylum Authority detained the Applicant for 72 hours, then applied to the Debrecen District Court for a 60 day extension of the asylum detention. The Court granted the Authority's application to detain the Applicant under the Asylum Act on the basis there was a risk the Applicant would abscond or frustrate proceedings because he had arrived in Hungary unlawfully and had no connections in the country or resources on which to subsist.

The decision to detain the Applicant was made without consideration of the Applicant's sexual orientation.

The Applicant was ultimately recognised as a refugee on 31 October 2014. He subsequently brought proceedings challenging the legality of his detention under Article 5 (1) of the Convention and sought non-pecuniary damages.

Decision

The Hungarian Government submitted that the Applicant's detention was justified under Article 5(1)(b), as it was done to secure fulfilment of an obligation, namely the Applicant's obligation in section 5(2) of the Asylum Act to collaborate with the Asylum Authority, to disclose the circumstances of his flight and to communicate personal information. It further submitted that the detention otherwise complied with the procedures contained in the Asylum Act, including the requirement in section 31/A(2) that "detention may only be ordered on the basis of individual deliberation."

The ECHR held that Article 5(1)(b) did not justify the Applicant's detention, as section 5(2) of the Asylum Act does not*oblige* a person seeking asylum to provide documentary evidence of identity and nationality. There is only an obligation to *collaborate* with the relevant Authority and other provisions of the Asylum Act even contemplated scenarios where the person seeking asylum did not possess official identity documents. Furthermore, the ECHR noted that the proceedings were not assessed in a sufficiently individualised manner, as was required by section 31/A(2) of the Asylum Act, and therefore, Article 5 of the Convention.

The ECHR considered that the requirement to assess a case in an individualised manner meant that authorities should take particular care in detaining vulnerable individuals, such as LGBTI people, to "avoid situations which may reproduce the plight that the forced [them] to flee in the first place"‘ and ensure their safety in custody. It held that the authorities failed to do this in the Applicant's case. They never considered whether the Applicant would be unsafe in custody with other detained persons, many of whom were from countries with "widespread cultural and religious prejudice against such persons." The ECHR held that this requirement existed, notwithstanding that the Applicant had reported no instances of abuse. Notably, though all parties presented arguments on the relevance of the Guidelines of the United National High Commissioner for Refugees (the ***Guidelines***) which, in Guideline 9.7, provide specific directions regarding placement of LGBTI people seeking asylum, the ECHR did not expressly attribute this reasoning to the Guidelines. It made no comment as to the role of the Guidelines in regulating the Hungarian Government's conduct.

In light of these findings, the ECHR held the Applicant's detention was in breach of Article 5 of the Convention, and ordered the Hungarian Government to pay the Applicant €7,500 in damages and his legal costs of the proceedings.

Commentary

The ECHR decided this case by applying well settled principles on Article 5 of the Convention. The ECHR attributed the authorities' obligation to exercise care towards LGBTI people seeking asylum to the broader obligation to consider the Applicant's individual circumstances. This obligation is contained in the domestic Asylum Act which, relevantly, is rooted in European Union legislation and thus will, to some degree, reflect other regimes in EU Member States. Consequently, it may be that other EU Member States will now be required to consider the safety of detaining LGBTI people seeking asylum when considering the means of securing their availability. This will be particularly important where other detained persons are from cultures that are prejudiced towards the LGBTI or other vulnerable groups. Furthermore, this case indicates

that the authorities will need to consider this regardless of whether there is evidence of harassment towards the individual.

As the ECHR attributed the need to consider the safety of LGBTI people seeking asylum to domestic law requirements, the ECHR did not clarify the role of Guideline 9.7 of the Guidelines. Thus, the case does not seem to have great significance for non-EU States, such as Australia. Despite this, the decision is nonetheless a reminder to Australia that other countries with human rights protections are emphasising the need to protect LGBTI and other vulnerable groups of people seeking asylum in the refugee-determination process. This is particularly important where those people seeking asylum are likely to be detained with persons from cultures that are also prejudiced against them (as was the case in this decision), or resettled in countries where there are some grounds to indicate that they will encounter prejudice.

The full text of the decision can be found here.

Lisette Stevens *is a Lawyer at Allens.*

Italian court upholds freedom from discrimination on basis of sexual orientation

Rovereto Court Order of 21 June 2016 (Sacred Heart Case)

Summary

This appeal was brought in the Rovereto Court (**Court**) by a teacher employed by the Institute of the Daughters of the Sacred Heart of Jesus (**Institute**) in Rovereto, located in Northern Italy. The Institute had demanded that the applicant confirm her sexual orientation, and when she failed to do so they did not renew her employment contract. Further, the Institute and its legal representatives publicly made comments in relation the applicant's alleged homosexuality.

The applicant argued that this conduct was discriminatory and defamatory, and violated the principle of equal treatment set out in Article 2, paragraph 1 of Legislative Decree 216/03. The Court upheld the appeal and found that the Institute had discriminated against the applicant on the basis of her sexual orientation. The Court rejected the Institute's submission that its conduct fell under an exception on the basis of religious beliefs.

In doing so, the Court upheld the freedom from discrimination on the basis of sexual orientation. The applicant was awarded a significant amount of compensation.

Facts

In July 2014, one of the Sisters at the Institute requested a meeting with the applicant who was employed as a teacher at the time. The applicant had been employed on a series of fixed term contracts. During this meeting the Sister alleged that there were rumours going around that the applicant was in a romantic relationship with another woman. The Sister asked the applicant to deny these rumours, or at least agree to 'address the problem' of her homosexuality.

The Sister continued to ask questions about the sexual orientation of the applicant, however the applicant refused to discuss the details of her private life. The Sister became very angry and said that she ran a religious institution in which there were children which she needed to protect. At this point the applicant ended the meeting.

The applicant's fixed term contract had just ended at this time, and was not subsequently renewed by the Institute (despite having been renewed in the past). The applicant brought an action for discrimination based on the comments made by the Sister, the Institute and its legal representatives both privately and publicly. Furthermore, the applicant argued that her

employment contract was not renewed on the basis of her sexual orientation. The defendant denied any discrimination, but rather argued that their assessment of the teacher was in adherence to the religious principles and ethics of the school.

Decision

The Court held that the Institute had clearly violated the principle of equal treatment under Article 2, paragraph 1 of Legislative Decree. The Institute had made discriminatory statements publicly and privately that they do not want to employ teachers who are homosexual or thought to be homosexual. Furthermore, this conduct defamed the applicant. However, the Court did note that there is no presumption of continuing employment where an employee is employed on a fixed term contract.

It was ordered that an extract of the decision be published in at least one national newspaper in a format which ensures adequate visibility. The Institute was ordered to make an offer of permanent employment to the applicant or alternatively pay an amount equal to fifteen monthly instalments calculated on the amounts of the last employment contract amounting to €25,344.00, plus compensation for financial loss and non-pecuniary damages in the sum of €16,000 for discriminatory conduct and €72,000 for making defamatory allegations.

The Institute was also ordered to pay €12,000 to CGIL Trentino and the Radical Association Certain Rights. Costs were awarded against the Institute.

Commentary

This decision is significant as it confirms the existence of the right to freedom from discrimination on the basis of sexual orientation. Further, it makes clear that religious organisations cannot rely on their particular beliefs to protect them from discrimination actions. It is discriminatory conduct to base professional evaluation of an employee on their sexual orientation.

This decision marks an important development in the international protection of rights in relation to sexual orientation and sexual identity.

The full text of *Rovereto Court Order of 21 June 2016 (Sacred Heart Case)* can be found here (note the decision is in Italian).

Loren Giles is a *Graduate at King & Wood Mallesons.*

Judicial misunderstanding of bisexuality leads to dangerous ruling on protection claim for Jamaican man seeking asylum

Ray Fuller v. Loretta Lynch, No. 15-3487, in the U.S. Court of Appeals for the Seventh Circuit

Summary

The United States Court of Appeals for the Seventh Circuit has refused to review the case of a person seeking asylum, despite the man's fear of persecution should he be returned to Jamaica. Ray Fuller testified that he identified as bisexual and there was evidence he was at risk of harassment and torture.

United States Circuit Judge Richard Posner, in dissent, was critical of the majority decision.

Facts

Ray Fuller is a Jamaican citizen. He had been living in the United States since 1999 and was married to an American woman. He had been granted conditional permanent resident status but

this was terminated in 2004 when Mr Fuller and his wife failed to attend a required interview and the couple subsequently divorced.

Around the same time, Mr Fuller pleaded guilty to attempted criminal sexual assault and was sentenced to probation. He later violated the conditions of his probation and was resentenced to a period of imprisonment. Upon his release, Mr Fuller was detained. He applied for asylum but an immigration judge found he was 'removable' from the United States on three separate grounds. The Board of Immigration Appeals confirmed he was 'removable' (but only addressed one of the three grounds).

Mr Fuller then petitioned the Seventh Circuit for judicial review of his case.

Mr Fuller's evidence of bisexuality

The evidence that Mr Fuller submitted included US State Department Human Rights Reports from 2012 and 2013, which documented the severe abuse and discrimination suffered by lesbian, gay, bisexual and transgender people in Jamaica. He also detailed the harm and harassment he had endured in Jamaica as a bisexual man, including being:

- attacked and stoned at college;
- taunted over his sexuality and having his face sliced by a knife on his way home from work;
- robbed at gunpoint and described as a 'batty man' (a Jamaican slur for a gay man);
- shot in the back and buttock by someone in an 'anti-gay mob' at Ocho Rios; and
- rejected by his family.

The immigration judge found, inter alia, Mr Fuller's credibility to be 'seriously lacking' based on his 'substantially inconsistent testimony and documentary evidence about many matters which go to the heart of his claims'. Ultimately the judge did not believe his assertion that he was bisexual. The reasons for this included that Mr Fuller had been married to a woman; fathered children to two different women; and had been convicted of a sexual crime against a woman. The immigration judge also found 'glaring discrepancies' in Fuller's written statement and testimony about the shooting incident at Ocho Rios and other inconsistencies with his evidence regarding his family.

The Board of Immigration Appeals upheld the immigration judge's decision.

Decision

The majority found they had 'no reason to doubt' the 'general account of conditions' in Jamaica in regards to bisexuality and that a number of reasons provided by the immigration judge in rejecting Mr Fuller's evidence were 'questionable'. However, they found she relied on 'much more than a mistaken assumption' about a bisexual man's behaviour. In a 2:1 decision, the Seventh Circuit panel found the various 'discrepancies, and Fuller's unconvincing efforts to explain them, were all fair matters for the [immigration judge's] credibility determination'.

The majority found the central question in Mr Fuller's petition for judicial review was whether the immigration judge (and the Board of Immigration Appeals) 'permissibly determined that Fuller is not bisexual' and that, as this was a factual question, the petition could only be granted if it was concluded that 'substantial evidence' did not support the adverse credibility determination.

The Dissenting Judgement

Judge Posner dissented. He found the merit of Fuller's claim rested on two issues:

(1) whether Fuller was bisexual; and

(2) whether bisexuals are persecuted in Jamaica.

Justice Posner found the immigration judge's opinion was 'oblivious' to the facts surrounding LGBT people in Jamaica and that the immigration judge had 'fastened on what are unquestionable, but trivial and indeed irrelevant, mistakes or falsehoods in Fuller's testimony'. Justice Posner found:

> .. an obvious thing for the judge to have done in an attempt to sort truth from falsity in Fuller's testimony and the other evidence would have been to ask a psychologist to testify about the credibility of Fuller's claim to be bisexual.

Justice Posner also found no reason was given either by the immigration judge or the majority as to why Fuller would claim to be bisexual (if he was not) when being returned to Jamaica in those circumstances would place him in danger of persecution.

Ultimately, he found the weakest part of the immigration judge's opinion was the 'conclusion that Fuller is not bisexual', which was 'premised on the fact that he's had sexual relations with women', stating that:

> Apparently the immigration judge does not know the meaning of bisexual. The fact that she refused to even believe there is hostility to bisexuals in Jamaica suggests a closed mind and gravely undermines her critical finding that Fuller is not bisexual.

Commentary

The decision has been described as 'offensive' and betraying 'a profound scepticism toward the legitimacy of bisexuality' by the LGBTIQ+ community. Questions have also been raised as to how a person can prove their sexuality – particularly in the absence of testimony from former sexual partners. In a separate asylum seeker case in the United Kingdom, a bisexual man, who was also at risk of being deported to Jamaica, resorted to providing photographic evidence of his same-sex relationship, in an attempt to establish his sexuality.

There are also naturally concerns for Mr Fuller's safety. The majority noted that while it was thin comfort, should Mr Fuller be 'able to gather new evidence showing that the [immigration judge] was mistaken about his sexual orientation' there was a possibility for his case to be reopened.

The full text of the decision can be found here.

***Rebecca Nardi** is a Lawyer at Allens.*

NOTICEBOARD

Event: Making Change Happen - happening as part of the Feast Festival

54 Hyde St, Adelaide

Saturday 29 October, 2016

Making Change Happen will inspire you to do just that. Hear from HRLC's Anna Brown along with other expert presenters for a panel discussion, and attend your choice of practical skills workshops.

Details here.

Event: Breakthrough: The Future is Gender Equality

Melbourne Town Hall

25 & 26 November, 2016

Breakthrough is a new gender equality event bringing big ideas, leading thinkers and passionate change-makers to the fore. Breakthrough is an inclusive event. Whether you're new to the gender equality issue, or an expert in the matter, Breakthrough explores the realities facing us all, and steers us towards a brighter, fairer future.

Featuring 100 speakers and a spread of thought-provoking sessions, you'll be rubbing shoulders with sharp thinkers and like-minded individuals ready to create real and lasting change.

Details here.

Event: RightsTalk: Reflecting on 30 years of human rights in Australia

Level 3, 175 Pitt Street, Sydney

2 November, 2016

Join Commission President Professor Gillian Triggs at the 30 Year Anniversary RightsTalk**.** Featuring keynote address from Dr Elizabeth Evatt and guest panellists Chris Sidoti and Rosemary Kayess, this RightsTalk event will reflect on key achievements and lessons learned from 30 years of human rights in Australia.

Details here.

Jobs: SNAICC – National Voice for our Children

SNAICC – National Voice for our Children is seeking an Acting Deputy CEO, who will work to strengthen and promote SNAICC's role as a national voice for Aboriginal and Torres Strait Islander children.
The closing date for this position is Wednesday 26 October 2016. Click here for more details.

Jobs: RightsInfo

RightsInfo is seeking a Chief Executive. RightsInfo is a UK based digital human rights project that aims to build support for human rights in the by producing engaging and accessible online human rights content.

The closing date for this position is Friday 4 November 2016. Click here for more details.

Jobs: Justice Connect

The Referrals team at Justice Connect is seeking a Senior Lawyer to play a vital role in delivering pro bono services to people experiencing disadvantage through facilitating referrals to Justice Connect member firms and barristers.

The closing date for this position is Thursday 27 October 2016. Click here for more details.

Jobs: Public Interest Advocacy Centre

The Public Interest Advocacy Centre is seeking a Fundraising Manager. The Fundraising Manager will work with PIAC's executive leadership to develop and implement a successful fundraising program, including appeals, regular giving and events.

The closing date for this position is Monday 31 October. Click here for more details.

Jobs: Tasmanian Aboriginal Community Legal Service

The Tasmanian Aboriginal Community Legal Service is seeking a Community Service officer for the Hobart office. The Service is an organisation committed to protecting and enhancing the rights of the Aboriginal and Torres Strait Islander communities in Tasmania.

Click here for more details.

RECENT HRLC MEDIA HIGHLIGHTS

Get me off Manus Island: Assaulted Somali refugee and aid worker's plea for medical treatment

A refugee who has been helping disabled people on Manus Island has pleaded to be flown off the island for medical treatment after being the victim of a vicious, unprovoked attack over the weekend. Daniel Webb spoke to The Age about condition on Manus Island.

Read here.

Manus assault underlines need for resettlement

Daniel Webb spoke the Radio New Zealand about the assault of a Somali refugee on Manus Island. About 900 men have been detained on the Papua New Guinea island for three years where they say violent conflict with local people happens on a daily basis.

Read here.

Marriage equality activists respond to plebiscite's demise

Ann Brown spoke with Same Same about the marriage equality plebiscite and the Marriage Amendment (Same-Sex Marriage) Bill.

Read here.

Decision due on whether to release footage of Miss Dhu's final hours

On the morning of the decision of the WA Coroner whether to publicly release CCTV footage of Miss Dhu, who died in police custody in 2014, Ruth Barson spoke to Fran Kelly on RN Breakfast.

Listen here.

Ms Dhu footage: coroner reserves decision on releasing video of lead-up to death

The WA state coroner on Wednesday reserved her decision on whether to release the video footage of Ms Dhu's death. The Guardian spoke with Ruth Barson.

Read here.

Dhu family fights for police footage to be made public

The WA coroner has reserved her decision as to whether CCTV footage can be released of the police treatment of a young Aboriginal woman who died in custody in a WA lock-up. Ruth Barson spoke to the West Australian.

Read here.

Turnbull government rules out US refugee swap following UN Costa Rica announcement

Daniel Webb spoke with the Illawarra Mercury about the "Costa Rica solution" following the Prime Ministers speech at the Obama Summit on Refugees.

Read here.

UN Rapporteur blasts Australia over civil rights

The UN Special Rapporteur on Human Rights has condemned Australia for failing to provide a safe and civil society that ensures people are free to speak out and peacefully protest on issues of importance. Emily Howie spoke to the Gay News Network.

Read here.

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

The Human Rights Law Centre protects and promotes human rights in Australia and in Australian activities abroad. We do this through a strategic combination of legal action, advocacy, research and capacity building.

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

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