



RIGHTS AGENDA

Monthly bulletin of the Human Rights Law Centre

OPINION: RHETORIC ON FREEDOM MASKS OPPOSITION TO STRONGER HUMAN RIGHTS PROTECTIONS

HRLC Executive Director **Hugh de Kretser** examines the growing trend of those opposed to stronger human rights protections selectively adopting the language of rights.

NEWS: ABORIGINAL AND TORRES STRAIGHT ISLANDERS RECOGNISED AS FIRST INHABITANTS BY LOWER HOUSE

Recent poll says 77% of Australians support constitutionally recognising indigenous peoples as the nation's first inhabitants

CASE NOTES:

Facebook has been requested to remove a page infringing on a user's right to privacy and right to be free from cruel or degrading treatment, while extraordinary rendition has been found to violate the right to freedom and the prohibition of torture.

IF I WERE ATTORNEY-GENERAL...

Professor **Simon Rice** examines the necessity for adequate legal aid funding to ensure social equity.

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OPINION

Rhetoric on freedom masks opposition to stronger human rights protections

There is a growing trend of the selective use of human rights language by those who are opposed to stronger human rights protections.

The current debate around the Human Rights and Anti-Discrimination Bill is emblematic of this trend and the credibility of those invoking rights should be judged on their actions. The Bill, which aims to consolidate and strengthen five separate Federal anti-discrimination laws, has been described as “an attack on our fundamental freedoms” by the Institute of Public Affairs. Cardinal George Pell said it would undermine “cherished foundations of the Australian way of life... freedom of speech and presumption of innocence.” Coalition members of the Senate Committee which reviewed the Bill quoted from key international human rights instruments and colourfully argued that the effect of the Bill would be “a nightmarish dystopia which only Kafka could have imagined.”

Most of the criticism focused on a poorly drafted sub-clause which provided that discrimination included conduct that offended or insulted someone because of their race, sex or other prohibited attribute. Along with many others, the Human Rights Law Centre recommended that the clause be substantially amended or removed and the Government has announced its intention to do so. This is exactly what the enhanced consultation and review process for this Bill was intended to do – identify problems with draft legislation and address them.

Having addressed the concerns, the Government should now press ahead with the legislation which will simplify Australia’s anti-discrimination laws and make them more accessible, helping to ensure that ordinary Australians are not unfairly excluded from education, employment, goods and services and other areas due to prejudice. The broader issue highlighted by these criticisms is the selective co-opting of the language of human rights. The IPA’s Senate testimony on the Bill revealed their peculiar views on discrimination laws. It seems the IPA believes discrimination laws shouldn’t apply to the private sector and consequently it should be perfectly lawful for a private sector employer to refuse to employ someone because of a disability or for a pub to refuse service to someone because of their race. The IPA’s concerns for freedom of speech and personal liberty mask an ideology which undermines the protection of freedom from discrimination. Rights are rarely absolute and need to be carefully balanced against one another. This important balance is absent from the IPA’s approach. Cardinal Pell’s concerns about free speech and the presumption of innocence are difficult to reconcile with his strong opposition to an Australian Human Rights Charter that would have strengthened the protection of these rights. His opposition to a Charter was founded on his belief that rights questions should be “decided politically” and not in “the courts”. Yet, in another example of selectivity, he was quick to invoke the protection of freedom of religion in the Australian Constitution to argue against proposals for legislation to compel priests to report child sexual abuse revealed to them in confession.

The Coalition’s position is thankfully more nuanced. At the Senate inquiry into the Bill, Shadow Attorney-General George Brandis reaffirmed his strong support for anti-discrimination laws and the Coalition report on the Bill called for better protection against discrimination on the grounds of sexuality. Nevertheless, the Coalition disappointingly maintains that the Bill should be scrapped. Aside from the freedom of speech issue, the Coalition said (incorrectly) that the presumption of

innocence is “arguably inconsistent” with the shared burden of proof in the Bill, which requires that when an initial allegation of discrimination is established against a person, they have the onus of proving they did not engage in the conduct for a discriminatory reason. The presumption of innocence applies in the criminal law, not in a civil context like discrimination law. The Bill’s approach on proof of discrimination is consistent with international best practice and has been an unremarkable feature of Australia’s workplace laws, including laws introduced by the Coalition, for over 100 years. On one hand, it’s encouraging to see an Australian policy debate drawing on the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. On the other, it would be more credible if those drawing on these rights had a consistent, principled approach to rights protection. The Coalition report on the Bill says “if freedom of speech means anything, then that freedom cannot depend upon the popularity of those views. Indeed, it is the unpopular, unfashionable or eccentric view which is in most need of protection.” We agree. It was concerns about excessive restrictions on freedom of expression that motivated the Human Rights Law Centre to recently intervene in support of a High Court case brought by two Adelaide street preachers. We don’t support the homophobic and offensive content of the Corneloup brothers’ street sermons, but we recognised the problems with the particular by-laws in question and the broader implications the case would have on the ability of all Australians to express their view in public spaces.

True human rights protection requires a principled, universal approach to rights that focuses on those issues most in need of protection. Those who use the language of human rights should walk the talk. A good start would be supporting stronger constitutional and legislative protection of rights.

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



NEWS IN BRIEF

Bill recognising Aboriginal and Torres Strait Islanders as first inhabitants passes through lower house

On the fifth anniversary of the apology to the stolen generations (and as a landmark stolen generations trial commenced in Western Australia), a bill recognising the "unique and special place" of Aborigines and Torres Strait Islanders has passed through the lower house of Parliament. A recent poll revealed 77 percent of Australians support changing the Constitution to recognise indigenous peoples as the nation's first inhabitants.

Tough sentencing practices behind soaring Aboriginal and Torres Strait Islander juvenile incarceration

The imprisonment of Aboriginal and Torres Strait Islander juveniles is soaring. Recent reports reveal that the incarceration rate of Aboriginal and Torres Strait Islander children is now 31 times higher than the rate for non-indigenous children. In WA, there have been calls to overhaul tough mandatory sentencing laws which are impacting disproportionately on Aboriginal youth. Mandatory sentencing laws have also been introduced in the Northern Territory, with one MP commenting that imprisonment could be a good thing for Aboriginal peoples. In NSW, despite evidence that legislation aimed at youth diversion has had some positive impact, concerns have been raised that there is a culture of imprisonment entrenched in NSW towns with large Aboriginal communities.

Condition in Manus detention centre "adequate" says Minister

Immigration Minister Brendan O'Connor has visited the Manus Island processing centre and believes the conditions are "adequate". Earlier this month, representatives of the UNHCR also visited the centre and labeled the indefinite detention of asylum seekers there "a very serious violation of international law", urging the Government to halt any further transfers. The Minister's comments came after a month in which reports emerged of children harming themselves in immigration detention and revelations of multiple suicide attempts and episodes of self-harm on Nauru.

Senate Committee give green light to excising Australian mainland

A bill excising the Australian mainland from the migration zone has been approved by a Senate Legal and Constitutional Affairs Committee, subject to amendments being made requiring the government to provide both houses of Parliament with comprehensive annual reports on aspects of the processing of asylum seekers.

PNG court rejects injunction application but orders access to Manus detention centre

The PNG opposition leader has filed proceedings in the PNG Supreme Court challenging the legality of the Manus Island processing centre. The court refused an interim injunction application to prevent any further transfer of asylum seekers, but ordered that lawyers for the opposition leader be given access to the processing centre. Despite the court's order, access has so far

been denied, with lawyers for the opposition leader now indicating that they will file contempt proceedings.

New Zealand agrees to take asylum seekers from Australia

New Zealand will accept 150 asylum seekers per year from Australian immigration detention facilities, including those on Nauru and Manus islands. New Zealand Prime Minister John Key also indicated that his government may look to transfer future boat arrivals to the facilities set up by Australia in Nauru and PNG. The deal has been heavily criticized.

Opposition would focus “single-mindedly” on deterrence of asylum seekers

If elected, “a Coalition government will focus single-mindedly on deterrence” of refugees coming to Australia by boat, says shadow immigration Minister Scott Morrison. The Coalition’s policy would include using the Australian Navy to turn all back all boats carrying asylum seekers from Sri Lanka, despite recent UN and NGO reports expressing concerns of ongoing human rights violations in the country. The UNHCR and legal experts have also raised doubts as to the compatibility of the Coalition’s plans with international law.

Legal Aid cuts compromise fair trial rights

There have been calls to urgently increase funding to Victoria Legal Aid, with the organisation’s decision to cut the funding available for instructing solicitors in criminal trials jeopardising defendants’ right to a fair trial. The funding cuts have been criticised by Judges and have led to several serious criminal trials being stayed. Meanwhile, underfunding of the Northern Territory Legal Aid Commission is also creating access to justice issues in the Northern Territory.

VCAT fees set to rise

Changes to VCAT fees are expected to enable the Tribunal to recover an extra \$22 million over the next three years, but will limit the ability of some to access the so called “people’s court”. Designed to improve cost recovery, the fee hikes risk pricing some Victorians out of justice.

Alarm at rise in coercive psychiatric orders

A recent study has reported a sharp rise in orders requiring people to receive psychiatric treatment involuntarily while in the community, prompting criticism from mental health advocates. Victoria’s forensic mental health service, Forensicare, has also announced that cuts in Commonwealth funding are forcing it to close hospital beds and suspend court assessments for people with mental illness caught up in the criminal justice system.

Consensual gay sex records remain an issue for men today

For an unknown number of older gay men in Victoria, historical convictions for consensual sex continue to affect their lives, as their criminal records still reveal convictions for a crime that was taken off the statute book over 30 years ago. Liberal MP Clem Newton-Brown has approached Attorney-General Robert Clark about possible legislation to erase such convictions and Labor has promised to expunge these records if they return to power.



HRLC POLICY WORK AND CASE WORK

Australia is ready for new and improved discrimination laws

After years of discussion and consultation, the Federal Government has all it needs to strengthen protections against unfair treatment and make anti-discrimination laws more effective, accessible and cost-efficient.

The Senate Legal and Constitutional Affairs Committee recently [released its report](#) on the exposure draft of the Human Rights and Anti-Discrimination Bill 2012. The Senate Committee's majority report includes 12 common sense recommendations that would iron out the problems with the draft Bill and improve its effectiveness and its reach.

"Australia is on the cusp of having a law capable of more effectively and efficiently addressing and eliminating unfair discrimination," said Ms Ball the HRLC's Director of Advocacy and Campaigns. "The Government should adopt the Senate Committee's recommendations and pass the Human Rights and Anti-Discrimination Bill 2012 as soon as possible".

Amongst the Committee recommendations is the removal of section 19(2)(b) which incorporated behaviour which "offends or insults" another in the definition of discrimination.

"This provision gave rise to considerable confusion and concern about protection of free speech under the Bill. It is sensible and appropriate that it be removed," said Ms Ball.

The Committee also recommends that exceptions allowing religious organisations to discriminate be narrowed and their use be made more transparent.

"Religious groups, particularly those receiving public funds, should not be given a free licence to discriminate against gay and lesbian Australians, women and de facto couples," said Ms Ball.

"The passage of this Bill will improve protections for the gay, lesbian, transgender and intersex community along with women, seniors and many others. It will also make the law easier to understand and comply with for business. It should be warmly welcomed by all Australians" Ms Ball said.

The HRLC gave [evidence to the Committee](#) in January, following its submission, [A Fairer, Simpler Law for All](#), in December. The Committee's report can be [found online here](#).

High Court decision highlights lack of protections for free speech

A major High Court decision has highlighted the lack of protections that freedom of speech has in Australian law.

The High Court's decision in the case of *Attorney-General for South Australia v Corporation of the City of Adelaide and Ors* failed to uphold the rights to free speech, freedom of assembly and freedom of religion.

The Human Rights Law Centre's Director of Strategic Litigation, Anna Brown, said whilst the HRLC does not agree with the content of what the Corneloup brothers were preaching – which is homophobic and offensive – it does support free speech and had sought to defend that right by intervening in the case.

"Whilst the right to free speech should not be viewed as a trump card that overrides all other responsibilities, in this particular case the council's By-laws overstep the mark and excessively stifle the ability of all Australians to express their views in a public space," said Ms Brown.

The decision is the outcome of an appeal by the South Australian Attorney General against the decision of the Full Court of the South Australian Supreme Court that found a City of Adelaide By-Law prohibiting “preaching, canvassing or haranguing” without a permit was invalid under the Australian Constitution. This law was relied on by the City of Adelaide to restrict the right of two street preachers, brothers Caleb and Samuel Corneloup, to preach in Rundle Mall.

Ms Brown said the permission scheme in Adelaide as it was structured was an unacceptable limitation on the right to free speech.

“Freedom of speech and freedom of assembly are fundamental to Australia’s representative democracy, so it is a disappointing decision. But we hope this will spark debate about how Australia could better protect fundamental rights in law, ideally through a Charter of Rights or Constitutional recognition,” Ms Brown said.

The High Court found the By-Laws were appropriate to ensure reasonable use by others of roads and thoroughfares. The HRLC disagrees and points to other legal mechanisms that the City of Adelaide has at its disposal to deal with concerns in a way that would not disproportionately limit freedom of speech. For example, offensive conduct is prohibited under criminal law in South Australia and safety concerns can be dealt with under road and traffic regulations.

“There are plenty of examples of legal systems that manage to regulate the use of public spaces without excessively curbing freedom of expression. Town squares and other public places, such as malls, have a historic role in facilitating public debate and Australians should be able to express their beliefs publically,” said Ms Brown.

The HRLC’s intervention in the Corneloup case follows involvement in the legal challenge brought against the City of Melbourne and Victoria Police on behalf of the Occupy Melbourne protesters. That case, heard by Justice North in the Federal Court, is currently awaiting judgment.

Both the Occupy Melbourne proceeding and the Corneloup High Court case raise similar and significant issues about the scope of protections of fundamental rights under the Australian Constitution.

The HRLC was represented on a pro bono basis by Ron Merkel QC, Emrys Nekvapil and Nick Wood of Counsel and law firm DLA Piper.

Children given an important national voice on human rights

The appointment of a National Children’s Commissioner will help to promote and protect the human rights of children and young people and ensure that the best interests of children are taken into account in the development of national law and policy.

Welcoming the Attorney-General’s appointment of Megan Mitchell to the newly established position to sit within the Australian Human Rights Commission, the Human Rights Law Centre’s Ben Schokman said that the position will assist to safeguard the rights of children and young people who are vulnerable and disadvantaged.

“There is a clear need for a stronger national voice advocating for the rights and interests of children who experience disadvantage or discrimination, particularly Aboriginal and Torres Strait Islander children and children in immigration detention who face daily threats to their human rights,” said Mr Schokman.

With previous roles as the NSW Commissioner for Children and Young People and with the ACT Office for Children, Ms Mitchell brings a wealth of experience working with and advocating for children and young people.

“The Convention on the Rights of the Child requires that the best interests of children be considered paramount, that children are treated with dignity and respect, and that they be able to participate in decision-making processes. For the first time, Australia will now have an institutional mechanism at the national level to ensure that these international human rights obligations are implemented at home,” said Mr Schokman.

The creation of a national Children’s Commissioner has been consistently advocated by non-government organisations and was also a key recommendation of the UN Committee on the Rights of the Child when it reviewed Australia and the UN Human Rights Council during Australia’s Universal Periodic Review in 2011.

“Comparable jurisdictions such as New Zealand, the United Kingdom and Norway all have full-time children’s rights commissioners. The experience from those jurisdictions shows that an adequately resourced and mandated commissioner can play a valuable role in advocating for the rights of children and young people, ensuring that their voices are heard by governments and decision makers,” said Mr Schokman.

The Human Rights Law Centre has strongly advocated for the establishment of the office of a National Children’s Commissioner. A copy of the Centre’s submission to the Senate Legal and Constitutional Affairs Committee inquiry which recommended the Commissioner’s establishment [is available online here](#).

Act of Recognition an important step towards Constitutional recognition

Proposed legislation passed by Federal Parliament to recognise Aboriginal and Torres Strait Islander peoples as Australia’s first inhabitants is an important stepping stone on the path to recognition of and equality for Aboriginal and Torres Strait Islander peoples in the Australian Constitution.

In a submission to a parliamentary committee, the HRLC has welcomed the proposed legislation but cautioned that it should not be seen as an alternative to Constitutional recognition.

“Formal recognition in an Act of Parliament is an important step to garner multi-partisan and broad public support for a referendum,” says the Human Rights Law Centre’s Director of International Human Rights Advocacy, Ben Schokman.

“However, this must be seen as being only one step on the road towards modernising the Australian Constitution to recognise Aboriginal and Torres Strait Islander peoples as Australia’s first inhabitants.”

In addition to enhancing the rights of Aboriginal and Torres Strait Islander peoples in the Australian Constitution, the process for considering potential Constitutional reform must also respect and give effect to Australia’s human rights obligations. “It is essential that Aboriginal and Torres Strait Islander peoples are able to participate meaningfully in any process that considers whether and how they are to be recognised in our Constitution.”

“It is also essential that the national conversation about Constitutional reform build on the important work already undertaken by the Expert Panel,” says Mr Schokman.

A copy of the Human Rights Law Centre’s submission to the Joint Select Committee is [available here](#).

Tribunal fee increases risk locking out the poor

The Victorian Government's proposal to increase application fees and other charges for particular cases heard at the Victorian Civil and Administrative Tribunal may compromise the ability of ordinary Victorians to access the efficient and inexpensive justice the Tribunal seeks to provide.

Senior Lawyer at the Human Rights Law Centre, Daniel Webb, said many Victorians rely on VCAT to resolve inherently personal disputes directly impacting on their lives and the increases to fees may prevent or discourage disadvantaged Victorians from pursuing claims.

"It's important that ordinary Victorians are not shut out from our legal systems. The ability to seek justice should not depend on the size of your wallet," Mr Webb said.

In its submission to the Department of Justice, the Human Rights Law Centre highlights that any fees that impede access to such a tribunal may also engage the fair hearing right under Victoria's *Charter of Human Rights and Responsibilities* as well as article 14 of the International Covenant on Civil and Political Rights.

Mr Webb said that it was essential that fee structures be carefully designed to ensure they do not disproportionately and unjustifiably compromise access to justice.

"It is vital that any changes to VCAT fees are carefully tailored, on the basis of robust evidence, to minimise adverse impacts on the ability of disadvantaged people to access the legal system," Mr Webb said.

The Government has acknowledged that the current proposals have been developed without such evidence.

A copy of the submission can be found [online here](#).

Australia must uphold human rights obligations to asylum seekers it transfers offshore

Australia's human rights obligations apply extraterritorially to asylum seekers transferred offshore to Nauru and Manus islands, the HRLC has told the federal Parliamentary Joint Committee on Human Rights.

The Committee is conducting an [inquiry](#) into the offshore processing regime following requests from the HRLC, together with the Asylum Seeker Resource Centre and the Australian Human Rights Commission.

In a [supplementary submission](#), the HRLC said that Australia's human rights obligations extend to people within its effective power or control.

"Australia's human rights obligations do not end at our borders," said HRLC Senior Lawyer Daniel Webb.

"Australia is responsible for those who are within its effective jurisdiction or control even if those people have been transferred abroad."

Transferees are initially detained by Australian authorities. The decision to transfer them offshore is taken by the Minister under Australian law and to give effect to Australian Federal Government policy. Once transferred to Nauru or Manus, transferees are detained at Centres funded by the Australian Government and receive services from providers contracted by the Australian Government.

"From the moment they arrive, transferees are effectively subject to Australia's control. Consequently, Australia retains human rights obligations to asylum seekers it transfers offshore," said Mr Webb.

The HRLC previously [appeared](#) before the Committee on 19 December 2012, giving evidence that Australia's offshore processing laws and policy are fundamentally incompatible with Australia's obligations under international law.



AUSTRALIAN HUMAN RIGHTS CASE NOTES

The Charter and the child's right to a fair hearing

A & B v Children's Court of Victoria & Ors [2012] VSC 589 (5 December 2012)

Summary

The plaintiffs were two sisters aged nine and 11 who made an application to the Supreme Court of Victoria seeking to quash orders of the Children's Court that they lacked maturity to provide instructions to lawyers and denying them leave to be represented by the same legal practitioner. The main issue was the meaning of the expression "maturity to give instructions" under the *Children, Youth and Families Act 2005* (Vic).

Facts

The plaintiffs were the subject of protection applications under the Act. An Interim Accommodation Order permitted them to live with their maternal aunt until the applications could be heard. Over a period of five months, the plaintiffs were represented by lawyers who considered them as having the capacity to give instructions. There was no evidence that either of the plaintiffs had developmental issues, and a report provided to the Court by an officer of the Department of Human Services described the plaintiffs as being "mature for their years in terms of the language they use and their insight into their childhoods". Separately and on several occasions, the plaintiffs expressed that they wanted to continue living with their aunt, that they did not want any contact with their mother and that they wanted to be able to see their maternal uncle, against whom their mother had made sexual abuse allegations.

At the interim hearing, the magistrate ruled that the plaintiffs were not of an age where they could give instructions and were not mature enough to give instructions, particularly in relation to the serious allegations about their maternal uncle. The magistrate also did not grant leave under the Act for the plaintiffs to be represented by the same lawyer.

Decision

Issue on appeal

The issue was the proper construction of the phrase "mature enough to give instructions" in section 524(4) of the Act, which provides:

If, in exceptional circumstances, the Court determines that it is in the best interests of a child who, in the opinion of the Court is not mature enough to give instructions, for the child to be legally represented in a proceeding in the Family Division, the Court must adjourn the hearing of the proceeding to enable that legal representation to be obtained.

Justice Gardo of the Supreme Court of Victoria considered that the scheme of representation contemplated by this provision for a child who is mature enough to give instructions is direct legal representation. However, the provision also contemplates that where a child is not mature enough to give instructions, the child should be represented by a lawyer who must act in

accordance with what he or she believes to be in the child's best interests. The question then becomes, when would a child be mature enough to give instructions?

The plaintiffs argued that the expression "maturity to give instructions" required an individual assessment of each child's capacity to give instructions and that chronological age was not the sole factor. The plaintiffs also argued that there is a presumption of statutory interpretation that the provision should be determined consistently with international law.

Section 32 of the Charter

The Victorian Equal Opportunity and Human Rights Commission intervened in the proceedings arguing that section 32 of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* required section 524(4) to be interpreted compatibly with human rights and consistently with the purpose of the provision. The applicable Charter provisions were the right to equality before the law (section 8(3)), the right of a child to protection as in his or her best interests (section 17(2)) and the right to a fair hearing (section 24(1)). Justice Garde considered the Commission's submissions concerning international law in construing statutory provisions, and particularly article 12 of the Convention on the Rights of the Child, which provides, inter alia, that a child has a right to have an opinion and to have that opinion heard.

On the effect of section 32 of the Charter on statutory interpretation, Justice Garde followed the High Court's decision in *Momcilovic v R* (2011) 245 CLR 1, which required statutes to be construed against the background of human rights and freedoms set out in the Charter. If the wording of a statute is clear, the court must give them that meaning. However, if the words are capable of more than one meaning, the court should give them the meaning which best accords with human rights.

Approaching the construction of "mature enough to give instructions" in accordance with its ordinary meaning, Justice Garde held that the phrase requires a court to have regard to factors other than the child's age and that it is sufficient that the child be mature enough to give instructions on one or more issues that may arise. Such a construction would be consistent with international law and with the Charter.

On this basis, the magistrate made an error of law appearing on the face of the record, amounting to a jurisdictional error, in interpreting "maturity to give instructions" solely by reference to chronological age. In so misconstruing the phrase, the finding about "maturity to give instructions" was made in the absence of relevant evidence. The plaintiffs also succeeded in their arguments of denial of procedural fairness. Justice Garde held that the plaintiffs were denied procedural fairness, given that they had been directly represented at court on several occasions and it was never suggested at these previous hearings that their legal representation was an issue. When the issue arose at the hearing, the plaintiffs were not given an opportunity to give evidence about their maturity. In addition, the order refusing leave to allow the plaintiffs to be represented by the same lawyer received almost no consideration at the hearing.

Commentary

The case provides a useful analysis of domestic and international jurisprudence on the right to legal representation of children. It is also a good example of the interplay between the principles of statutory interpretation, international human rights law and the Charter.

This decision can be found online at: <http://www.austlii.edu.au/au/cases/vic/VSC/2012/589.html>.

Diana Nestorovska is a solicitor at King & Wood Mallesons.

A blog post by Paula Gerber and Melissa Castan on the decision and mooted law reform can be found at:

<http://castancentre.com/2012/12/13/one-size-does-not-fit-all-when-children-come-to-court/>

Drunken brawl appeal prompts clarification of the new community correction orders regime

DPP v Leys & Leys [2012] VSCA 304 (12 December 2012)

Summary

On 16 January 2012, community correction orders (CCO) were introduced as a sentencing option under the *Sentencing Act 1991* (Vic). CCOs replaced a number of separate sentencing orders such as intensive correction orders and community-based orders.

CCOs are provided for under the new section 37 of the Act, enabling a court to make such an order if:

- the offender has been convicted or found guilty of an offence punishable by more than five penalty units;
- the court has had regard to any pre-sentence report (if required) and its recommendations; and
- the offender consents to such an order.

When a court imposes a CCO, basic conditions are included and must be abided by offenders (i.e. not reoffending and not leaving Victoria without permission). However, other optional conditions can then be implemented. This enables court discretion to impose the types of conditions depending on the purpose of sentencing. The Act provides that CCOs can only be combined with an imprisonment sentence, if imprisonment (or the aggregate of terms of imprisonment) is less than three months (section 44).

In the recent case of *DPP v Leys & Leys* [2012] VSCA 304, the Director of Public Prosecutions (DPP) appealed a decision of the County Court, which had ordered CCOs in addition to suspended imprisonment sentences of two years and 18 months. Between the appeal hearing and the decision recently handed down on 12 December 2012, the Victorian Parliament clarified that CCOs can be combined with a term of imprisonment sentence of three months or less; however, this can only be done if the imprisonment sentence is not suspended.

Facts

On 21 February 2010, the respondent brothers were drinking heavily at the McCartin Hotel in South Gippsland. After leaving the venue, the respondents began a “punching and wrestling contest” with another intoxicated patron who suffered multiple injuries and was ultimately rendered unconscious. A bystander also suffered multiple fractures and a detached retina after attempting to intervene.

On 13 February 2012, the Latrobe Valley County Court found both respondents guilty of:

- recklessly causing serious injury under section 17 of the *Crimes Act 1958* (Vic);
- intentionally causing injury under section 18 of the *Crimes Act 1958* (Vic); and
- affray at common law.

The respondents received total effective sentences of two years and 18 months imprisonment respectively. The durations of each individual charge that the respondents were found guilty of

were between nine months and two years. Both respondents had their imprisonment sentences wholly suspended for two years and were given a two year CCO under section 37 of the Act. The DPP appealed to the Victorian Supreme Court of Appeal against the sentencing judge's decision on the grounds that the sentences were:

- unlawful, as section 44 of the Act did not permit the combination of the sentences imposed; and
- manifestly inadequate.

Decision

Commencement of the new CCO regime

Their Honours Redlich and Tate JJA and Forrest AJA first considered when sections 37 and 44 of the Act commenced and whether these sections applied to the respondents' offending conduct which occurred in February 2010.

The court noted that, on a "literal" construction of the Act's transitional provisions, section 37 only applies to sentences for offences committed on or after the commencement of the whole Amending Act (a date no later than 30 June 2013). However, the court held that a 'purposive' construction was necessary to ensure that courts were not prevented from imposing CCOs on or after 16 January 2012, when the repeal of the previous regime took effect. Accordingly, the court held that the Act applied to sentences imposed on or after 16 January 2012.

Ground 1 – construction of section 44

The DPP and the respondents each submitted alternative constructions of section 44. The DPP submitted that the sentencing judge contravened:

- section 44(1) by imposing suspended sentences on the respondents; or alternatively
- section 44(2) by combining an aggregated term of imprisonment exceeding three months with a CCO, contrary to the plain meaning of the sub-section.

The court upheld the DPP's second alternate contention that the sentencing judge had erred in construing section 44(2) of the Act. On the correct interpretation of section 44(2), the sentencing judge was not entitled to make a CCO on any of the charges in question as the aggregate term of imprisonment on the other charges exceeded three months. It did not matter whether the sentences were to be served immediately or were wholly or partly suspended.

Ground 2 – adequacy of the sentences

The court noted that there was considerable weight in the DPP's contention that the sentences imposed in respect of each respondent were manifestly inadequate. However, the court held that as the first ground was made out, it was unnecessary for it to determine this second ground.

Re-sentencing the respondents

The court re-iterated that when an appellant court must re-sentence a respondent, it must deal with the offender in light of the circumstances which exist at the time of the appeal.

The judges noted the "violent" and "frightening" nature of the respondents' conduct and that had they been involved in the initial sentencing of the respondents, they would have had little hesitation imposing immediate and significant terms of imprisonment. However, as the respondents had completed a large proportion of the community work components of their CCOs, these circumstances had to be taken into consideration when re-sentencing. Accordingly, the appellant court imposed imprisonment sentences of two years and three months and one year and eight months respectively. However, both sentences were wholly suspended for 2 years from 13 February 2012, to enable the rehabilitative process already underway, to continue.

Commentary

In response to the oral submissions made in the appeal, the Victorian Parliament introduced further amendments to the Act (including a substituted section 44), via the *Road Safety and Sentencing Acts Amendment Act 2012*. These amendments came into operation on 18 August 2012 and clarify that:

- Courts have the ability to impose CCOs from 16 January 2012.
- All CCOs imposed since 16 January 2012 are valid.
- A court can combine a CCO with a maximum term of imprisonment of three months, but cannot combine a CCO with a suspended sentence.
- If a court makes a CCO, in addition to imposing a sentence of imprisonment (under three months), the CCO commences on the release of the offender from imprisonment.

Editor's note

A key issue on appeal was the construction of the transitional provisions. A literal interpretation would have precluded courts from making CCOs until June 2013. The court ultimately relied on ordinary principles of statutory interpretation to depart from such a literal interpretation, adopting a purposive construction to give effect to the “unmistakable legislative intent”. Although the decision turned on these ordinary principles, both the Attorney-General and the Commission intervened in proceedings and made submissions on the relevance of the Victorian Equal Opportunity and Human Rights *Charter* to these questions of construction.

The Solicitor-General submitted that reliance on ordinary principles of statutory interpretation was sufficient in this case but also urged the court to conclude that, properly construed, the transitional provisions were compatible with the right in section 27(2) of the *Charter* not to have a greater penalty imposed than that which applied at the time the offence was committed. In considering the scope of the right in section 27(2), the court opined that “[t]he penalty to which s 27(2) refers as ‘the penalty that applied to the offence’ is the maximum penalty prescribed for the offence. A penalty imposed within that prescribed limit does not offend that requirement.” (emphasis added) In their Honours’ view, removing CCOs as a sentencing option would thus not engage the right in section 27(2). Consequently, section 27(2) has no role to play in interpreting the transitional provisions.

The Commission submitted that a literal interpretation of the transitional provisions would engage the protection against arbitrary detention in section 21(2) of the *Charter*. A literal interpretation would have the effect that a CCO was not an available sentencing option for the respondents, who would thus likely go to prison. Because the unavailability of a CCO would be the result of an accidental drafting error, rather than a deliberate change in policy, the imprisonment that would likely result would be arbitrary. The meaning of the transitional provisions thus engaged the section 21(2) right and, the Commission submitted, the interpretive mandate in section 32(1) of the *Charter* required a departure from the literal meaning in preference of a more purposive, rights compatible construction.

As the court had already decided to depart from a literal construction of the transitional provisions, their Honours did not consider it necessary to determine the *Charter* questions raised by the Commission.

This decision is available online at: <http://www.austlii.edu.au/au/cases/vic/VSCA/2012/304.html>

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INTERNATIONAL HUMAN RIGHTS CASE NOTES

Facebook, unlawful harassment and the right to privacy

XY v Facebook Ireland Ltd [2012] NIQB 96 (30 November 2012)

Summary

The High Court of Justice in Northern Ireland, Queen's Bench Division, recently considered and granted a sex offender's application for an interim injunction to force Facebook to remove a page that prima facie constituted unlawful harassment of him.

Facts

The plaintiff had, since 1980, been convicted of a total of 15 different child sex offences. In August 2012, a Facebook site was created called "Keeping Our Kids Safe from Predators", and it included various details of the plaintiff such as his identity and photograph, upon which users would comment. The Facebook page was open and publically accessible, and any member was able to post material and comments, contributing to the ongoing growth of the page. The judge described the comments relating to the plaintiff on the page as "threatening, intimidatory, inflammatory, provocative, reckless and irresponsible."

The plaintiff sought a final injunction and damages against Facebook Ireland Limited, and pending final relief, sought an interim injunction either requiring Facebook to remove the page or monitor its site to ensure that no other material relating to him would appear.

The plaintiff deposed that he had ill health and was frightened, anxious and distressed as a result of the publication of the material, which he believed would lead to an attack on him or his home. He particularly mentioned a threat that he would be "burned out" of his rented accommodation.

Article 3 of the European Convention on Human Rights provides:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 8 of the European Convention on Human Rights provides:

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

By virtue of section 6 of the *Human Rights Act 1998* (UK), the Court, as a public authority, is required to avoid acting incompatibly with the plaintiff's rights under articles 3 and 8.

Decision

Justice McCloskey made strong references to the fact that "we live in a society governed by the rule of law" and "non-discrimination... is one of the towering principles of the common law". Given that the sanctions imposed by the penal law on offenders are "presumptively" adequate and exhaustive, His Honour endorsed the principle that criminals are punished by due process of law, and not otherwise, "in a society which treats anarchy as repugnant".

On that basis, his Honour recognised that, despite his offences, the plaintiff, "as a member of society governed by the rule of law", was entitled to seek the protection of the law, including those articles of the Convention set out above and the legislative protection afforded by the *Protection From Harassment Order 1997* (NI).

In determining the plaintiff's application for interim relief, the Court applied the well-known tests set out in *American Cyanamid v Ethicon Ltd* [1975] UKHL 1 – namely, whether there was an

arguable case for final relief and whether the balance of convenience favoured the granting of the injunction.

Furthermore, in a case where freedom of expression was also involved, the Court was also obliged to consider section 12(3) of the *Human Rights Act 1998* (UK), which precludes the grant of relief "unless the Court is satisfied that the applicant is likely to establish [at trial] that publication should not be allowed". While that standard generally requires an applicant to satisfy the Court it would "probably" succeed at trial, the Court recognised that the standard was not to be rigidly and inflexibly construed in circumstances where there was a risk of personal injury, following *Cream Holdings v Bannerjee* [2005] 1 AC 253.

Justice McCloskey easily resolved the balance of convenience test in favour of the plaintiff. His Honour held that the granting of the injunctive relief would give only minimal inconvenience to Facebook and no evident financial loss, while the plaintiff would be protected against unlawful conduct, the consequences of which could be serious.

Moreover, his Honour was satisfied that:

- the contents of the Facebook page constituted prima facie unlawful harassment of the plaintiff;
- the perpetuation of the webpage created a "real risk" that the plaintiff's article 3 and article 8 rights would be infringed; and
- the section 12 (3) threshold was comfortably surpassed, given that plaintiff's case had "compelling" prospects of success at trial.

On that basis, the Court granted the plaintiff's application for an interim injunction requiring Facebook to remove the offending page, commenting that it was "the only potentially efficacious remedy open to the Court in the present circumstances." However, the wider order sought by the plaintiff, that Facebook monitor its website for republication of the offending material, was refused on the grounds that the order would lack precision, impose a disproportionate burden and require potentially excessive supervision by the Court.

Justice McCloskey recognised that the information about the plaintiff that was published on Facebook, including his name, physical appearance, criminal record and whereabouts was, and would remain, in the public domain. The injunction was not designed to suppress that information, but rather it was directed to ensuring that plaintiff would not be exposed to unlawful conduct constituting harassment through the medium of the Facebook page.

An ancillary issue in the proceedings was whether it was appropriate to grant anonymity to the plaintiff. Justice McCloskey recognised that the nature of the proceedings, if the plaintiff's identity were made public, would expose the plaintiff to a risk of treatment proscribed by articles 3 and 8 of the Convention, and as such the application for anonymity was granted.

Commentary

Article 8 and article 10 of the European Convention are broadly similar to article 10 and article 13 of the Victorian Charter, although article 13 goes further in protecting the right of a person not to have his or her reputation unlawfully attacked. As such, the case provides useful potential guidance on the relevant principles to be applied by the Court, as a public authority, in a similar fact scenario, although noting Justice McCloskey's comment that "cases of this nature will, inevitably, be intensely fact-sensitive". However, as there was no party in the case asserting the competing Convention right to freedom of expression, it is possible that an Australian Court could take a different approach.

The decision is available online at: <http://www.bailii.org/nie/cases/NIHC/QB/2012/96.html>

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State failure to provide special education is discriminatory

Moore v British Columbia (Education), 2012 SCC 61 (9 November 2012)

Summary

The Supreme Court of Canada has held that the *School Act* creates a statutory commitment to the education of all children in British Columbia, making the provision of special education a statutory commitment and not a dispensable luxury.

Facts

Jeffrey Moore (the plaintiff) suffered from severe dyslexia and required special education at his public school. In Grade 2, the local school District psychologist recommended that he attend the local Diagnostic Centre instead of public school, as he needed additional remedial support.

When the Diagnostic Centre was closed by the District due to financial constraints, the plaintiff's parents enrolled the plaintiff in a private school which was able to provide him with the learning support he required to reach his full potential. The plaintiff then attended the private school until Grade 12.

The plaintiff's father filed a complaint on his son's behalf with the BC Human Rights Tribunal (the Tribunal) against the school District and the Province on the grounds that his son had been denied "a service customarily available to the public" under section 8 of the British Columbia *Human Rights Code*.

History of Proceedings

BC Human Rights Tribunal

The BC Human Rights Tribunal found that the District and Province's closure of the Diagnostic Centre amounted to discrimination against the plaintiff and ordered a range of systemic remedies for the District and Province to implement. The Tribunal also awarded the plaintiff's family:

- the amount of tuition paid for the plaintiff to attend a private school;
- half of the transportation costs involved in attending the private school; and
- \$10,000 for injury to the plaintiff's dignity, feelings and self respect.

Reviewing Judge (first instance appeal)

The reviewing Judge set aside the Tribunal's decision, finding no discrimination.

Court of Appeal

The Court of Appeal dismissed an appeal against the reviewing Judge's decision.

Decision

The Supreme Court of Canada allowed an appeal overturning the Court of Appeal's decision and reinstated aspects of the Tribunal's decision in favour of the plaintiff on the basis of unjustifiable discrimination. However, the Supreme Court overturned the Tribunal's orders for systemic legislative change. In reaching its decision, the Supreme Court held that the *School Act* created a statutory commitment to education made to all children in British Columbia, making the provision for special education a statutory commitment and not a dispensable luxury.

The Supreme Court had to consider two key issues:

- Question 1: Whether the Plaintiff had, without reasonable justification, been denied meaningful access to the general education available to all children in British Columbia based on his disability?
- Question 2: Whether the District's conduct (in closing the Diagnostic Centre) was justified?

In answer to Question 1, the Supreme Court found that there was prima facie discrimination on the basis of insufficiently intensive remedial assistance provided by the District for the plaintiff's learning disability such that he could not get access to the education that he and all children of British Columbia are entitled to. The following considerations heavily influenced that finding:

- The District, its employees and its experts had identified that the plaintiff required intensive remediation in order to have meaningful access to education;
- The closing of the Diagnostic Centre took place without knowing how the needs of its students would be addressed; and
- The plaintiff's family was told that these disability services could not otherwise be provided by the District.

In answer to Question 2, the Supreme Court found that the discrimination was not justified, despite the budgetary crisis, because there were options other than closing the Diagnostic Centre to address the budgetary crisis. That finding was on the basis of the following facts:

- The District's funding cuts were disproportionately made to special needs programs.
- Some discretionary school programs (such as an outdoor learning school) were retained.
- There had been no assessment, financial or otherwise undertaken by the District to consider alternatives or accommodate students' special needs if the Diagnostic Centre was closed.
- The District's failure to consider financial alternatives undermined its main argument that the closure was justified as the District in financial difficulty had no other options – in order to decide that it had no other options, the District would have had to at least consider what other alternatives were available.

Commentary

Although possibly an interpretive approach limited to the Canadian jurisdiction, this decision provides scope for interpreting the purpose of an Act (in this case the *School Act*) as the basis for an enforceable "statutory commitment". In this case, the purpose of the *School Act* that "all learners ... develop their individual potential and ... acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy" was found to be a statutory commitment.

The decision is available online at: <http://canlii.ca/en/ca/scc/doc/2012/2012scc61/2012scc61.html>

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South African Constitutional Court affirms prisoner health rights

Dudley Lee v Minister of Correctional Services [2012] ZACC 30 (11 December 2012)

Summary

The Constitutional Court of South Africa affirms that domestic law must provide an effective remedy for breach of rights contained in the South African Bill of Rights and that failure to

minimise the risk of contracting a tuberculosis infection in prison breaches the right to humane conditions in detention.

Facts

Mr Lee contracted tuberculosis (TB) while incarcerated in a crowded, maximum security prison with poor hygiene standards in South Africa. The responsible authorities acknowledged that they relied on a system of self reporting of symptoms upon admission and during incarceration, even though TB is an airborne disease requiring isolation, medication and constant vigilance to contain the spread of infection.

Mr Lee sued the Minister for Correctional Services in tort alleging the Department of Correctional Services, controlled by the Minister, had negligently failed to assure Mr Lee's rights to life, freedom and security of person and the right to humane conditions of detention consistent with human dignity contained in the South African Constitutional Bill of Rights.

Lower court decisions

At first instance the Western Cape High Court (Cape Town) held that the acts and omissions of prison authorities amounted to a dereliction of statutory and constitutional duty to protect human rights as there were a number of steps that a reasonable person in the Minister's position would have taken to manage and mitigate the spread of TB.

The Supreme Court of Appeal accepted the lower court's findings that the Minister and the responsible authorities had failed to adequately protect inmates from contagion, and the Court affirmed the obligation on state authorities to assume responsibility for prisoner welfare when a person is delivered into the absolute power of the state.

However, the Court of Appeal held that under the operative "but for" test for causation the applicant could not establish the state's actions had caused his injury since it was possible that, regardless of how many measures were adopted to reduce the risk of TB infection it could not be eliminated and it was possible that Mr Lee could have been infected by someone who the prison authorities could not reasonably have known was infected.

Decision

On final appeal, a 5:4 majority of the Constitutional Court of South Africa reversed the Court of Appeal's decision holding that the principle of probable causation, which was a settled aspect of the common law test of causation, applied to deal with situations where "common sense may have to prevail over strict logic". The practical impossibility of eliminating TB, the Court said, did not lessen the state's duty to try to reduce the risk.

Notably, both the Court of Appeal and the Constitutional Court determined that to give practical effect to constitutionally protected rights, which the state has an obligation to uphold under section 7(2), the law must provide a mechanism for compensation for breach of those rights; and if the Court of Appeal's formulation of legal causation had been adopted, it would be practically impossible for a prisoner to establish their cause of action since they could not prove the authority's omissions were the direct cause of infection.

The dissenting judges accepted the Court of Appeal's "stricter" formulation of the but-for test represented current South African law but that it "is an over-blunt and inadequate tool for securing constitutionally tailored justice" (citing developments in other common law jurisdictions to achieve more just outcomes). Nevertheless, the minority considered the matter should be remitted to the trial court to receive additional evidence and to consider how the common law could be developed to remedy the injustice.

Commentary

This case highlights the limitations of archaic common law causes of action to respond to and redress human rights abuses and the need for redress to protect and advance the status of rights.

Section 7 of the South African Constitution states that authorities have an obligation to protect and enhance rights but does not go as far as the UK Human Rights Act, the European Convention on Human Rights and the ACT Human Rights Act, which positively state that remedies shall be available for breach of rights (but only certain rights in the ACT). Nevertheless, the Court (without examining international jurisprudence) determined that compensation in the form of damages was a necessary corollary of the rights contained in the Constitution and to uphold other constitutional principles of government accountability.

By comparison, under the Victorian Charter of Human Rights damages are specifically excluded as compensation for breach of protected human rights (section 39(3)) and breach of a right contained in the Charter can only be raised as an adjunct to another statutory or common law cause of action (like this case, these causes of action are often not adapted to a rights-based framework).

While damages were the focus of this proceeding, it is also important to note that in international law, the obligation to provide an effective remedy may, depending on the facts of the case and the rights engaged, encompass reparation, rehabilitation, a public apology, independent investigation of the breach and measures to prevent future breaches.

This case also adds weight to the existing body of international case law that confirms that the right to humane treatment in detention in article 10 of the ICCPR encompasses proper standards of health care, hygiene and nutrition to prevent and respond to known health concerns.

This decision is available online at: <http://www.saflii.org/za/cases/ZACC/2012/30.html>

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Extraordinary rendition violates right to liberty and prohibition of torture

El-Masri v the former Yugoslav Republic of Macedonia [2012] ECHR 2067 (13 December 2012)

Summary

The European Court of Human Rights held the former Yugoslav Republic of Macedonia responsible for the "extraordinary rendition" of a German citizen, which involved his transfer into the custody of United States authorities, unlawful detention and ill-treatment amounting to torture.

Facts

On 31 December 2003, the applicant travelled from Germany to the town of Skopje. He was questioned at the Serbian/Macedonian border, when suspicion arose as to the validity of his German passport. He was then detained for 23 days in a Skopje hotel, during which he was interrogated regarding possible links with Islamic organisations including Al-Qaeda, threatened with a gun and refused contact with the German embassy. On 23 January 2004, he was taken to Skopje Airport. There, he was beaten, stripped naked and sodomised with an object. He was later made to wear a nappy and, while shackled and hooded, taken to a waiting aircraft. During the flight, he was restrained and forcibly anaesthetised.

The applicant was transported to a facility operated by the United States CIA in Afghanistan. During a four month detention, he was interrogated and confined to a concrete cell. In protest, the

applicant commenced a hunger strike in March 2004. On 28 May 2004, he was flown to Albania and subsequently deported to Germany.

Following his return, a Committee of Inquiry appointed by the German Federal Parliament investigated the applicant's account of his extraordinary rendition. In a report published in 2009, the Committee concluded that the core facts of his account were supported by convincing evidence.

In December 2005, the American Civil Liberties Union filed a claim on the applicant's behalf against unknown CIA agents and a former Director of Central Intelligence. It alleged that his detention and treatment contravened the Fifth Amendment right to due process and international legal norms. Before a United States District Court and the Court of Appeals for the Fourth Circuit, the United States succeeded in having the claim dismissed, based on the State secrets privilege. The Supreme Court refused to review the case in October 2007.

In 2008, the applicant lodged a complaint with the public prosecutor in Skopje against unidentified State officials. That complaint was ultimately rejected as unsubstantiated. Apart from seeking information from the Ministry of the Interior, the public prosecutor did not take any other investigative measures, such as interviewing the applicant or employees working at the Skopje hotel at the relevant time.

In the European Court of Human Rights, the respondent Government denied the applicant's account. It submitted that the applicant's only contact with State agents occurred on the date of his entry into the country. It also submitted that the applicant had remained in the country by his own choice between 31 December 2003 and 23 January 2004, after which he had freely departed.

Decision

The Court accepted that a large amount of indirect evidence supported the applicant's account, including aviation logs, scientific testing of the applicant's hair follicles which confirmed a period of food deprivation, witness statements and published reports. As the respondent Government failed to demonstrate why that evidence could not corroborate the applicant's case, his account was held to be established beyond reasonable doubt.

The Court held that the respondent Government violated the European Convention for the Protection of Human Rights and Fundamental Freedoms:

Prohibition of torture and inhuman or degrading treatment (article 3)

The applicant's prolonged ill-treatment in the Skopje hotel, while not involving physical force, caused emotional and psychological stress which was inhuman and degrading. His ill-treatment at Skopje Airport amounted to torture, for which the respondent Government was directly responsible. The respondent Government was also responsible for transferring the applicant into the custody of US authorities despite a real risk of him being treated contrary to article 3. It knew the destination of the applicant's flight, was not provided with a legitimate extradition request or arrest warrant and, despite media articles and reports in the public domain, failed to seek assurances that the applicant would not be ill-treated. Additionally, the respondent Government failed to effectively investigate the complaint brought to the public prosecutor's attention. Without an obligation to effectively investigate, the Court noted that the general prohibition would be practically ineffective.

Right to liberty and security (article 5)

The Court observed that although the prevention of terrorist offences presents authorities with particular problems, that does not mean the authorities have *carte blanche* to arrest and detain

suspects. Detaining the applicant in the Skopje hotel without access to legal or consular assistance, and without any court authorisation, was unlawful and arbitrary. By actively facilitating his transfer to Afghanistan, the respondent Government was also responsible for his detention between 23 January and 28 May 2004. Further, it failed to effectively investigate the applicant's complaint of arbitrary detention.

Right to respect for private and family life (article 8)

The notion of "private life" was noted to be a broad one which may cover "the moral and physical integrity of the person". Article 8 also protects a right to personal development, to develop relationships with other human beings and the outside world. The Court held that deprivation of liberty may contravene these aspects of article 8 and that, given the violations of articles 3 and 5, the respondent Government had also unlawfully interfered with the applicant's right to respect for his private and family life.

Additionally, by failing to undertake an effective criminal investigation, the respondent Government denied the applicant an effective remedy (in violation of article 13 of the Convention). The Court awarded the applicant EUR 60,000 in non-pecuniary damages.

Commentary

This decision reflects a growing body of international case law, recommendations and reports concerning extraordinary rendition. Most recently, the Open Society Foundations published a [report](#) identifying 54 national governments (including Australia) alleged to have participated or been complicit in the CIA's extraordinary rendition operations. It is notable that, in the view of the Court, States that transfer persons into the custody of US authorities without appropriate safeguards and assurances may be found to have knowingly exposed those persons to a real risk of ill-treatment and unlawful detention.

The human rights articulated in articles 3, 5 and 8 of the Convention are reflected in, respectively, sections 10, 21 and 13 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The Charter expressly provides that courts may have regard to international law and the jurisprudence of foreign courts when considering the compatibility of a statutory provision with human rights. Accordingly, the approach adopted in the Court's consideration of the respondent Government's obligations under articles 3, 5 and 8 of the Convention may provide guidance to courts and tribunals considering the scope, operation and application of relevant provisions of the Charter.

The decision is available online at: <http://www.bailii.org/eu/cases/ECHR/2012/2067.html>.

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Unauthorised police surveillance in public place does not violate right to privacy

Kinloch (Appellant) v Her Majesty's Advocate (Respondent) (Scotland) [2012] UKSC 62 (19 December 2012)

Summary

The UK Supreme Court held that an unauthorised police surveillance operation did not breach an individual's right to respect for their private life under article 8 of the European Convention on Human Rights. This was because the surveillance occurred in public places and the subject of the surveillance had no reasonable expectation of privacy.

Facts

The appellant, Mr Kinloch, was observed by police as part of a planned surveillance operation. He was seen leaving his flat with a bag, entering and leaving other cars and locations and

entering a taxi with what appeared to be a heavy bag. The police approached the taxi and detained the appellant. The police carried out various searches and large sums of money were recovered. However, the police had not sought authorisation for the surveillance operation under the *Regulation of Investigatory Powers (Scotland) Act 2000*. The 2000 Act provides that surveillance carried out under a valid authorisation is lawful.

The appellant was found guilty of money-laundering offences. The appellant appealed against his conviction and after a somewhat atypical procedural route, a discussion of which is beyond the scope of this case note, the matter came before the UK Supreme Court. Here the appellant argued that:

- the observations by the police, not having been authorised under the 2000 Act, breached the appellant's right to privacy under article 8; and, consequently
- leading the evidence derived from that surveillance at trial was incompatible with the appellant's right to a fair trial protected by article 6 of the European Convention on Human Rights.

Decision

The Court noted at the outset that:

- evidence obtained through unauthorised surveillance was not of itself inadmissible at common law (*Lawrie v Muir* 1950 JC 19); and
- even if the evidence was obtained in a manner which breached article 8, it did not automatically follow that using the evidence at trial would breach the appellant's article 6 rights (*Khan v United Kingdom* (2000) 31 EHRR 1016).

Nevertheless, because the appellant argued it was the use of evidence acquired in breach of article 8 which caused the breach of his right to a fair trial under article 6, the starting point was to consider whether there had in fact been a breach of article 8.

The Court noted that the situation whereby police had recorded movements of a person suspected of criminal activity as part of their investigations had not yet been considered by the European Court of Human Rights. Nevertheless, the ECHR regards "private life" as a broad term that has no exhaustive definition. As such, the question of whether a person's article 8 rights have been interfered with will always depend upon the particular circumstances in which the interference is said to have taken place.

The Court acknowledged that in the present case the alleged interference occurred while the appellant was in various public spaces. It found (at [19]) that although there is a "zone" of interactions in a public context which may fall within the scope of private life, without more, measures effected in a public place outside private premises will not interfere with one's rights under article 8.

The Court held that the answer in the present case was "to be found by considering whether the appellant had a reasonable expectation of privacy while he was in public view" (at [21]). The Court stated this was the unarticulated basis of the decision in *Gilchrist v HM Advocate* 2005 (1) JC 34, which was the current leading authority in the area. As such, the Court held *Gilchrist* was rightly decided.

The Court found that the appellant "engaged in his activities in places where he was open to public view by neighbours, by persons in the street or by anyone else who happened to be watching" (at [21]). Indeed, the appellant took the risk of being seen and of his movements being recorded. It was held that the appellant had no reasonable expectation of privacy and any

criminal aspect of his public actions were not a part of his private life that he was entitled to keep private.

In relation to the first issue in the appeal, the Court found that police's actions had not interfered with the appellant's article 8 right to respect for his private life. Consequently, in relation to the second issue in the appeal, the Court found there had been no breach of article 6. This is because the only ground for arguing a breach of article 6 was that there had been a breach of article 8.

Commentary

Section 13 of the Victorian Charter on Human Rights establishes a right to privacy, which states that "a person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with". The *Information Privacy Act 2000* (Vic) also contains privacy protections. The *Information Privacy Act 2000* (Vic) protects information privacy by requiring specified organisations to handle personal information in compliance with the ten Information Privacy Principles.

It is interesting to compare *Kinloch* to the recent case of *Caripis v Victoria Police (Health and Privacy)* [2012] VCAT 1472 (27 September 2012) which addressed how material obtained through police surveillance is to be treated in light of Victorian privacy laws. In both *Kinloch* and *Caripis* a critical question for the Court was whether the surveilled party had a reasonable expectation of privacy. In *Caripis* the Victorian Civil and Administrative Tribunal held that the police's retention of photographs and video footage taken during a protest did not infringe a protestor's right to privacy. In determining whether the protestor's right to privacy was violated the Tribunal considered whether the protestor had a reasonable expectation of privacy, as well as the seriousness of the intrusion. Relevant to the Tribunal's decision was the fact that the protestor took part in the public protest knowing that protest organisers intended to take and publish images from the event, that multiple photographs of the event were taken and uploaded on social media and that the material retained by the police contained limited personal information that would allow the protestor to be identified.

Kate Siopis is a lawyer and **Jessica Ham** a Senior Associate at Allens in Perth.

Criminal record checks breach the right to privacy

R (on the application of T) v Greater Manchester Chief Constable & Ors [2013] EWCA Civ 25 (29 January 2013)

Summary

The UK Court of Appeal recently held that disclosure of a person's convictions or police cautions can breach their right to privacy under the European Convention on Human Rights.

Facts

Three applicants sought declarations that information provided on enhanced criminal record certificates ("ECRCs") breached their right to privacy under article 8 of the European Convention on Human Rights, and that the laws regulating the ECRCs were incompatible with the Convention.

Applicant 1: T

When T was 11 years of age, he received two warnings from police in connection with two stolen bicycles. When he was 17, he applied for a part-time job and requested an ECRC, which disclosed these warnings. He requested that police "step down" these warnings, which would

prevent disclosure to third parties, and the police agreed. A [later case](#) found that the practice of “stepping down” records was *ultra vires*, so the warnings remained on T’s record without his knowledge, until he requested another ECRC at the age of 19 as part of his application to a sports science degree. He sought judicial review, but at first instance his application was unsuccessful. He appealed to the Court of Appeal.

Applicant 2: JB

In 2001, JB left a drugstore without paying for a set of false nails – she said that it was an honest mistake, but the attending police issued a caution. In 2009, JB sought employment in the aged care sector. She applied for an ECRC, which revealed the caution, and she was told that she would not be offered employment “as her criminal record rendered her inappropriate for work with vulnerable people” (at [22]). She sought judicial review, and at first instance the Court held that article 8 was engaged, but that the interference with her rights was justified as it protected people with whom JB might be working. She appealed to the Court of Appeal.

Applicant 3: AW

In 2003, AW and her boyfriend attempted a carjacking, and her boyfriend stabbed the driver. When arrested, AW pleaded guilty to manslaughter and robbery, and was sentenced to five years’ imprisonment. At the time of this appeal, AW wanted to serve in the Army, but her criminal record prevented her enlistment. She sought judicial review; at first instance, it was held that her article 8 rights were not engaged or, alternatively, if they were engaged, the interference was proportionate and justified. She appealed to the Court of Appeal.

Decision

The Court considered that disclosure of contact with the justice system on ECRCs interferes with the right to privacy in two ways:

- It involved the disclosure of sensitive information, which the subjects wished to keep to themselves.
- Disclosure was liable to affect the subject’s ability to obtain employment and to form relationships with others.

The Court then considered the justification under article 8(2), which prohibits interference “except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The Court accepted that the interference with article 8 rights pursued both “(i) the *general* aim of protecting employers and, in particular, children and vulnerable adults who are in their care and (ii) the *particular* aim of enabling employers to make an assessment as to whether an individual is suitable for a particular kind of work” (at [37]). But the Court found that the statutory regime requiring the disclosure of *all* convictions and cautions relating to recordable offences “is disproportionate to that legitimate aim” (at [37]).

The Court’s “fundamental objection” to the current scheme was that it failed to control the disclosure of information by reference to whether it is “relevant to the purpose of enabling employers to assess the suitability of an individual for a particular kind of work” (at [38]). The Court rejected the suggestion that employers could be left to assess the relevance of any disclosed convictions or cautions, given the difficulty in interpreting the information on an ECRC and a lack of resources and training to understand the information, or use it correctly and fairly (at [44]-[46]).

The Court concluded that the relevant law was incompatible with article 8, and that earlier cases (such as *R(X)* and *R(L)*) which considered the recording of police intelligence had not set a binding precedent which prevented a declaration of incompatibility.

The Court also rejected the respondents' submission that declaring the regulations incompatible would require the state to take positive action to intervene in the relationships between employers and employees to permit employees to conceal information or prevent employers from refusing to employ people on the basis of disclosures. The Court identified that the state has intervened in employer/employee relationships through several regulatory schemes, and the proper question to be asked here is whether the interference seeks a fair balance between the interests of employers (and children and vulnerable people) and the rights of people seeking employment. Balancing those interests, the appeals of T and JB were allowed, and AW was refused. The law and the regulation were declared incompatible.

Commentary

In Australia, criminal record checks have become a standard part of the recruitment process. Individuals with a criminal record will often self-exclude from applying for positions that require a criminal record check, as they believe that the existence of a criminal record – no matter how irrelevant, minor or old – will prevent them from being fairly considered for the position.

Employers will often not consider applicants with a criminal record. This may be appropriate in some circumstances, where a criminal record will be relevant to a job a person is seeking or the service they are trying to access. However, it is inappropriate and unfair, and contrary to aims of rehabilitation and reintegration, to allow people to be discriminated against on the basis of their irrelevant criminal record.

Spent convictions schemes are set out in legislation and provide that after a qualifying period, convictions are permanently removed from a person's criminal record. In most circumstances, these regimes operate such that no obligation is imposed on job applicants or employees to disclose the existence of a spent criminal record. Spent convictions also do not appear on a criminal record check. All states and territories, except Victoria and South Australia, have a spent convictions scheme.

In some Australian states, there is legislation that prohibits discrimination on the ground of "irrelevant criminal record". However, Victoria's *equal opportunity laws* do not contain this protection, and while *Commonwealth legislation* prohibits discrimination on a number of grounds, including criminal record, there is no enforcement power to remedy a breach and no power to award compensation.

Hence, there is little protection in Victoria against criminal record discrimination.

However, the UK Court of Appeal's interpretation of the right to privacy, also contained in *section 13* of the *Charter on Human Rights and Responsibilities Act 2006* (Vic), means that the Charter right may extend to improper disclosures on police record checks. Read this way, the Charter may provide a useful protection to prevent discrimination and ensure that a criminal record does not punish a wrongdoer indefinitely.

The decision is available online at <http://www.bailii.org/ew/cases/EWCA/Civ/2013/25.html>.

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Publication of personal photographs: Weighing freedom of expression against privacy

Verlagsgruppe News Gmbh and Bobi v Austria [2012] ECHR, Application no 59631/09 (4 December 2012)

Summary

The European Court of Human Rights was asked to weigh the right to freedom of expression against the right of individuals to privacy. The Court found that the decision of a domestic Austrian court to restrain publication of a photograph involving a Catholic priest embroiled in a controversy, but not to grant damages for defamation, was a fair balance between articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Facts

In July 2004, three issues of the applicant's weekly news magazine *Profil* published claims that police had searched a Roman Catholic seminary at St Pölten, Austria, investigating potential possession of child pornography. The articles also claimed that unwanted advances had been made towards seminaries and alleged other "sexual antics between priests and their students".

A photo of the principal of the seminary, Mr Küchl, accompanied two articles. The photo showed Mr Küchl with his left arm around one seminarian's wrist, and his right hand on the seminarian's groin.

Mr Küchl pleaded, unsuccessfully at trial and on appeal before domestic courts, that the photograph was personal and therefore compensation should be awarded for its publication. The Courts found that given the prominent role of the Catholic Church in public life, there was public interest in the conduct of its officials and the freedom of expression prevailed.

On appeal in 2005, the Supreme Court granted an injunction to prevent publication of the image on the basis the protection of Mr Küchl's private life was to be given greater weight than the public interest in being informed of the image. However, the Court permitted the publication of statements that the photographs existed.

Decision

The European Court of Human Rights followed a recent decision in *Von Hannover v Germany (no 2)* [2012] ECHR 228 (7 February 2012), which sets out the principles the Court will consider in balancing the right to freedom of expression with the right to respect for private life. The criteria a Court will consider include: whether there was a contribution to a debate of general interest, the subject of the image, the conduct of the person involved, whether the individual concerned was a public figure, how the photograph was obtained, the content and consequences of publication and the severity of the injunction.

The Court accepted that there is public interest in the actions of officials of the Catholic Church, particularly when the conduct of those officials is inconsistent with Church teaching. The Court also noted that the publication of photographs fell within the accepted understanding of freedom of expression. The public interest in the role of the press disseminating information was also noted by the Court. A significant distinction in the Court's view was the difference between reporting about a public figure, which can contribute to debate in a democracy, and reporting about a person who does not exercise public functions. Although Mr Küchl occupied a senior role, the Court found this did not qualify him as a public figure.

The Court held that control of a person's image is central to their privacy, and individuals have a right to control use of their own image, including by preventing its publication. That the photo was

taken at a private birthday party was also relevant and supported the view the photograph was not intended for a wider audience. The photograph was clearly obtained without Mr Küchl's consent.

The European Court of Human Rights agreed with the view of the Austrian Supreme Court, holding that the photograph contained information that was private, that sexual relationships fall within the sphere of protection of article 8, and that such protection applies to dignitaries of the Church whatever that organisation's view was on personal relationships. The right to privacy should prevail because, in the Court's view, it was possible to inform the public without providing the photograph. Accordingly, the Court found that there had been no breach of article 10 of the Convention in preventing the publication of the image.

The Court also agreed that refusing to allow damages was proportionate in light of the fact the publisher was genuinely uncertain whether publishing the image would breach the law.

Commentary

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) protects both privacy and freedom of expression. There can be a tension between the two rights as illustrated by this case. The conflict between the two principles is particularly prominent in situations involving issues that are clearly within the private sphere but also have a public interest element.

This decision can be found online at:

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115013>.

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Law beyond borders: ECHR considers European Convention's extra-territorial application

Chagos Islanders v United Kingdom [2012] ECHR, Application no. 35622/04 (11 December 2012)

Summary

The European Court of Human Rights rejected, on admissibility grounds, claims by former Chagos Islands inhabitants against the UK. The Court considered the extra-territorial application of the European Convention on Human Rights.

Facts

The history of the treatment of inhabitants of the Chagos Islands, which were colonised by the United Kingdom, is long and unfortunate. In short, inhabitants were required to move from the archipelago between 1967 and 1973 as a consequence of an agreement between the United States and the United Kingdom to establish defence facilities on Diego Garcia, the largest of the islands. The inhabitants were moved to nearby islands including Mauritius and the Seychelles, which were also then under UK control. Prior to this in 1965, the British Indian Ocean Territory ("BIOT") was established as a UK colony encompassing the Chagos Islands. Mauritius was not included in the BIOT and subsequently became an independent state.

Some islanders who settled in Mauritius (but not those who settled elsewhere) received compensation from the UK via the Mauritian government following the resettlement and also in a subsequent settlement deal reached between Mauritius and the UK government in 1982. For a limited period, former inhabitants were also offered the opportunity to resettle on the Chagos Islands (aspects of this arrangement are contested by the applicants).

The inhabitants brought a number of proceedings in the UK, however in general terms the claims were dismissed for diverse reasons including that the courts considered the inhabitants had no

proprietary interests that could form the basis of a claim, they had entered into binding settlements with the UK government extinguishing their right to bring further claims and had brought their claims outside the relevant limitation periods.

The claim

A group of former Chagos Islands inhabitants submitted a claim to the ECHR under the Convention on the basis that the UK had breached the prohibition on inhuman or degrading treatment (article 3), the rights to private life and home (article 8), the right to the benefit of their possessions (article 1 of the Optional Protocol) and they had not received an effective remedy (article 13).

Decision

The ECHR rejected the claims on three preliminary admissibility grounds:

- It did not have jurisdiction to determine a claim arising in a territory that did not fall within the United Kingdom's "jurisdiction" under article 56(1) of the Convention; and
- The claimants had received compensation exhausting their claims; or
- The claimants had not exhausted all domestic remedies (a pre-condition to bringing a claim before the court).

While the case largely turned on the specific litigation history, the key aspect of this case as a development in international jurisprudence is the court's approach to the question of jurisdiction.

Jurisdiction

Article 1 of the Convention requires contracting parties to secure rights and freedoms to everyone within their "jurisdiction". However, article 56 – a relic of colonial era Europe – provides that a contracting party can elect to extend the application of the convention to "all or any of the territories for whose international relations it is responsible" by formal notification and, for the right of individual petition, by an additional declaration.

In a series of cases in 2011 concerning the UK's treatment of detainees during the occupation in Iraq, the ECHR confirmed that a state's "jurisdiction" for the purpose of article 1 will extend beyond the state's territory where the state exercises "effective control" over the territory or area where the act or omission occurs. The UK was required to secure rights and freedoms under the ECHR to those persons detained in UK-operated detention facilities when the UK was acting as an administrative authority (see for example most recently *Al-Skeini and ors. v UK and Al-Jedda v UK*) since a state should not be able to do abroad what it cannot do at home.

Despite this, the ECHR ruled that the principles of extra-territorial application developed under article 1 did not trump the plain reading of article 56 which placed the power in the state's hand to elect to exclude a particular territory from the scope of the ECHR.

Relying on the case of *Quark Fishing Ltd v UK* (15305/06) concerning decisions to issue fishing licenses in the UK's South Georgian territory, the ECHR distinguished a situation where a state occupies a territory and exercises effective control in exceptional circumstances such as during the Iraqi war, and a territory such as the BIOT and South Georgia over which the state is responsible for international relations on a more permanent basis, but which is administered on a day to day basis by a largely autonomous local authority (an article 56 territory). In the latter case, decisions about that territory are generally taken locally or taken in respect of that location only and thus fall within the class of territories contemplated in article 56.

The fact that UK politicians or officials may have ultimate decision-making power in BIOT and other territories did not, in the ECHR's opinion, cause a territory to come within the state's jurisdiction absent a formal notification under article 56.

Other admissibility grounds

The Court rejected the applicants' arguments that because only some inhabitants had received compensation they were not barred from bringing a further claim since, based on domestic judgments, all inhabitants had had the opportunity to receive compensation by participating in the settlement scheme or bringing a claim in domestic courts within the limitation period. Consequently, the applicants had failed to exhaust the domestic remedies available to them.

Having decided the matter on the above grounds, the ECHR did not deal with arguments raised by interveners Human Rights Watch and Minority Rights Group International that the inhabitants had collective proprietary and cultural rights as an indigenous group in line with the definition of indigenous groups in international law. The ECHR deferred to domestic judgments rejecting these claims.

As an aside, the ECHR also rejected arguments that the fact many former inhabitants now reside in the UK brings the claim within the court's jurisdiction, and arguments that they had not received access to a fair trial in domestic courts.

Commentary

The court acknowledged the potential injustice the historic anomaly in article 56 can cause for persons residing in non-notified territories and the irony that governments could unwillingly be exposed to liability during temporary occupation of an area such as in Iraq yet elect to limit their exposure in colonised territories where the same breaches of human rights standards may occur.

However, the ECHR left the key question to be determined for another day – could a territory that has not been brought within the scope of the convention under the plain reading of article 56, nevertheless come within a state's jurisdiction under article 1 because the state exercises effective control in that territory? There are currently two additional cases before the ECHR concerning the UK's occupation in Iraq. It is unlikely, however, the ECHR will be required to address this question head on in these cases.

The Court made particular reference to the *Al-Skeini* judgment emphasising that the extra-territorial application of the ECHR only arises where a state exercises effective control over an area in "exceptional circumstances", suggesting that if a state exercises control over a non-notified territory on a permanent, ongoing and therefore "unexceptional" basis, the ECHR is unlikely to find jurisdiction exists.

The extra-territorial application of the European Convention on Human Rights to territories of contracting states and the scope of the concept of "effective control" thus remains uncertain. However, based on the Court's comments about the exceptional nature of extra-territorial application of the Convention, it could be inferred that it will take a case of significant human rights abuse for the Court to revisit the approach it has taken so far to the relationship between articles 1 and 56.

This decision is available online at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115714>

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Forcing journalists to reveal sources would have “chilling effect” on freedom of expression

Telegraaf Media Nederland Landelijke Media BV and Others v The Netherlands [2012] ECHR, Application no. 39315/06 (22 November 2012)

Summary

The European Court of Human Rights upheld journalists’ right to protect their sources based on the freedom of expression in the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court stressed the importance of weighing up the national interest against the need to protect journalistic sources, finding that an independent review process is of paramount importance in maintaining the right to freedom of expression under the Convention.

Facts

Two Dutch citizens, along with a publishing company, brought an action against The Netherlands in the European Court of Human Rights alleging breaches of two rights found in the Convention: the right to respect for private and family life, home and correspondence (article 8) and the right to freedom of expression (article 10).

The citizen-applicants were journalists employed by a large daily newspaper. The newspaper published a series of the journalists’ articles relating to a leak of classified information from within the Netherlands secret service (AIVD) to an Amsterdam-based criminal group. The journalists referred to two informants by code name, allegedly recruited by the AIVD to eliminate corruption in the Amsterdam police force and the Public Prosecution Service. In another article, the journalists alleged that secret information concerning AIVD’s investigations had been made available to other criminals.

Dutch police issued the newspaper with an order to surrender the documents containing State secrets concerning the operational activities of AIVD. The proceedings which followed concerned various questions of law.

Proceedings

The publishing company lodged an objection with the Regional Court of The Hague, alleging that the request to surrender the leaked documents was in breach of the Convention right to freedom of expression (article 10) which encompasses the journalistic privilege against disclosure of sources. The Regional Court dismissed the objections, stressing that the journalists were not required to identify the source (despite AIVD stating it would test the documents for fingerprints). The Supreme Court upheld this decision.

The publishing-applicant brought civil proceedings against the State, alleging that the journalists had been subject to telephone tapping and observation, presumably by AIVD agents. The applicants contended that such measures lacked legal basis. The Provisional Measures Judge found that AIVD had made use of its surveillance powers under the *Intelligence and Security Services Act 2002*, and that such use was contrary to article 10 of the Convention.

The State appealed to the Court of Appeal of The Hague, arguing that the tension between the protection of journalistic sources and the protection of State secrets should be resolved in favour of the latter. The Court found that the use of powers of surveillance against the journalists was not per se impermissible, even though the journalists might not be targets themselves. Both parties appealed the Court of Appeal’s decision, with the Supreme Court dismissing both actions.

At the same time, the journalists were questioned as witnesses in criminal proceedings against individuals accused of divulging the State secrets in issue. Further proceedings resulted, concerning the journalists' refusal to divulge their source.

The applicants later lodged complaints with the Public Prosecution Service, National Ombudsman and relevant Minister.

Decision

The Court considered a number of cases and domestic legislative instruments before turning its attention to relevant international materials, specifically Recommendation No R (2000) 7 on the right of journalists not to disclose their sources (as adopted in 2000 by the Committee of Ministers of the Council of Europe).

The Court asked whether AIVD's invocation of "special powers" under section 6 of the *Intelligence and Security Services Act 2002* was in accordance with the law as required by articles 8 and 10 of the Convention. In order for AIVD's actions to be in accordance with the law, it needed a basis in domestic law and the domestic law needed to be compatible with the rule of law (it must provide a measure of legal protection against arbitrary interference by public authorities with the rights safeguarded by articles 8 and 10 of the Convention).

The Court accepted that AIVD's purpose in seeking to identify the person who supplied the secret documents to the journalists was subordinate to its main aim, to discover and seal the leak. The Court was further prepared to accept that the possibility of being placed under surveillance was foreseeable, in the sense that the journalists must have known that the information which had fallen into their hands was classified information and that publishing such information would likely provoke an action aimed at discovering the source.

The Court, however, agreed with the applicants, finding that the law did not provide adequate protection required by journalistic sources as review *after the fact* could not restore the confidentiality of journalistic sources once destroyed. Essentially, the Court found it problematic that there was no independent review process by which the proposed breach of confidentiality could be assessed. Therefore, AIVD's use of special powers (that is, its surveillance of the journalists) was contrary to articles 8 and 10 of the Convention.

Finally, the Court considered whether the order against the applicants, to surrender the original documents, was intended to identify the journalistic source. It was not disputed that the aims pursued by the interference were, at the very least, "national security" and "the prevention of crime". The issue was whether the order was "necessary in a democratic society ... [and] in the interests of national security", as per articles 8 and 10 of the Convention. Accordingly, having regard to the importance of the protection of journalistic sources for press freedom and the "chilling effect" such an order could have on that freedom, the Court was reluctant to justify the surrender order. As withdrawal of the documents from circulation could no longer prevent the relevant information falling into the wrong hands, the Court took the view that the actual handover of the documents was not necessary and therefore any such order was a violation of article 10 of the Convention.

Commentary

The right to privacy expressed in article 8 of the Convention is reflected in section 13 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) which relevantly states that a person "has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with".

The wording of the Convention offers stronger protection than section 13, as the Charter does not expand on the meaning of “arbitrary interference”. A General Comment of the UN Human Rights Committee has interpreted the term “arbitrary” to mean unreasonable in the circumstances. It is unclear whether a Victorian court would interpret surveillance laws which lack appropriate safeguards as “arbitrary” or “unreasonable” as did the European Court of Human Rights. This case nonetheless offers a timely restatement of international privacy and surveillance standards. Similarly, the right to freedom of expression expounded in article 10 of the Convention is reflected in section 15 of the Charter which provides that “every person has the right to freedom of expression ... [which] may be subject to lawful restrictions reasonably necessary to respect the rights and reputation of other persons or for the protection of national security, public order, public health or public morality”. Again, the Convention goes further than the Charter in protecting the freedom of expression, however the Charter does pick up on the Convention’s salient themes, namely national security, order, health, morality and reputation.

This decision can be found online at:

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114439>.

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Right to wear a niqab vs right to a fair trial

R v NS, 2012 SCC 72 (20 December 2012)

Summary

The Supreme Court of Canada dismissed an appeal from an alleged sexual assault victim who wished to testify whilst wearing the niqab (an Islamic face veil). By majority, the Court held that the matter be remitted to the preliminary inquiry judge who was to balance freedom of religion (for the victim) and trial fairness (for the accused). A witness testifying in niqab would be required to remove it only if this was necessary to prevent a serious risk to trial fairness and because the benefits of requiring her to do so would outweigh any harm befalling her by this practice.

Facts

NS, a Canadian Muslim, alleged that she had been sexually assaulted by her cousin and uncle. At the preliminary inquiry, the co-accused sought an order that NS remove her niqab while testifying. NS argued that her religious belief required her to wear a niqab in public. The preliminary inquiry judge held that NS’s removal of the niqab for her driver’s licence photograph and the fact that she would do so again for a security check meant that her beliefs were not sufficiently strong so as to require her to wear it. NS appealed.

The Canadian Court of Appeal held that, if the competing rights of witness and accused could not be reconciled, in the interests of a fair trial the witness may be ordered to remove her niqab. This would depend, however, on whether (or to what extent) her credibility was in issue, how much the niqab interfered with “demeanour assessment” and whether the evidence to be given was contested or central to the proceedings. NS appealed.

Decision

The reasoning of the Supreme Court of Canada split three ways.

Chief Justice McLaughlin (with whom Justices Deschamps, Fish and Cromwell agreed) held that the answer lay in a balance between competing rights of religion and trial fairness, each upheld as part of the *Canadian Charter of Rights and Freedoms* (sections 2(a), 7 and 11(d) respectively).

Their Honours applied the approach taken to resolving “rights conflicts” in *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835 and *R v Mentuck* 2001 SCC76.

Four questions were to be answered.

First, would requiring NS to remove her niqab interfere with her religious freedom? Chief Justice McLaughlin rejected the preliminary inquiry judge’s view that her religious beliefs were “not sufficiently strong”. The question was one of sincerity, rather than strength of belief.

Second, would permitting the witness to wear the niqab while testifying create a serious risk to trial fairness? The co-accused argued that to allow NS to cover her face prevented effective cross-examination and interfered with the ability of the judge or jury to assess her credibility. Chief Justice McLaughlin held that Canadian common law, as well as the *Criminal Code*, supported the view that the ability to see a witness’ face is an important aspect of a fair trial. Nonetheless, its importance was not absolute; it varied with the level to which the evidence was contested and/or central to the proceedings.

Third, was there any way to accommodate the rights of both NS and the co-accused, thus achieving the “just and proportionate balance” referred to in *Dagenais v Canadian Broadcasting Corporation*? Chief Justice McLaughlin doubted that such a balance was possible on the facts of the case.

Finally, given the unlikelihood of any compromise, the majority considered whether the “salutary effects of requiring [NS] to remove the niqab outweigh[ed] the deleterious effects of doing so”. The effect of limiting NS’s religious practice was to be balanced not only against the rights of the co-accused as individuals to a fair trial. The Court also considered “the broader societal harms” of niqab removal, noting that it could discourage niqab wearers from reporting offences and otherwise “participating in the justice system”.

Justices LeBel and Rothstein agreed that the matter should be remitted to the preliminary inquiry judge. Their Honours, however, rejected Chief Justice McLaughlin’s “proportionality inquiry” approach with assessment of competing considerations. Instead, they argued for a “clear rule”. The niqab’s impact on a fair trial, as well as its opposition to “the underlying values of the Canadian justice system” (that is, the openness of the trial process), meant that their Honours found no place for the niqab in court.

Justice Abella (dissenting) would have allowed the appeal. Her Honour argued that NS should not have to “choose between her religious rights and her ability to bear witness against an alleged aggressor”, noting that “trial fairness cannot reasonably expect ideal testimony from an ideal witness in every case”. In many cases, courts accepted the testimony of witnesses whose demeanour “can only be partially observed”, and Justice Abella found that niqab wearers were part of this category. Of course, where questions of witness identity arose, Justice Abella conceded that the niqab would need to be removed.

Commentary

The *Charter of Human Rights and Responsibilities 2006* (Vic), like its Canadian counterpart, contains both a right to freedom of religion (section 14) and to a fair trial (section 24). Although the wearing of the niqab is not widespread among Australian Muslims, the question as to its presence in courtrooms, as well as in other public places, has been considered previously.

In the unreported judgment of *R v Anwar Sayed* (August 2010), the District Court of Western Australia held that a witness in a fraud trial would be required to remove her niqab before giving evidence. Judge Deanne focussed not only on the rights of the witness and of the accused but also on “community expectations”. It should be noted that Western Australia does not have an

equivalent to the Charter and that the nature of the trial in *R v Anwar Sayed* was different to the instant case.

Pursuant to section 7, the Charter requires a similar “proportionality inquiry” and balancing of various conflicting rights as that undertaken by Chief Justice McLaughlin in *R v NS*. The range of views observed in that case highlights the plurality of opinions when it comes to striking the appropriate balance between religious belief and the need for a fair trial.

This decision can be found online at:

<http://www.canlii.org/en/ca/scc/doc/2012/2012scc72/2012scc72.html>.

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Balancing the freedom of religious expression with the protection against discrimination

Case of Eweida and Others v The United Kingdom [2013] ECHR, *Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10* (15 January 2013)

Summary

In four different applications, the European Court of Human Rights considered the balance the state party had purported to strike between religious freedom and the protection against discrimination. In so doing, the Court afforded a significant “margin of appreciation” to the state party.

Facts

The *Eweida* case involved four applications brought against the United Kingdom to the European Court of Human Rights. Ms Eweida complained that British Airways (BA) discriminated against her by refusing to allow her to wear a Christian cross around her neck as part of the BA uniform. Similarly, Ms Chaplin, an aged-care nurse, complained that she was not allowed to wear a cross on a necklace as part of her uniform.

Ms Ladele was a Registrar of Births, Deaths and Marriages who was dismissed after she refused to perform civil ceremonies for same-sex couples, saying this conflicted with her Christian religious beliefs. Mr McFarlane was a counsellor who worked for a company called Relate, which had a non-discriminatory policy. He was dismissed after he refused to provide counselling services to same-sex couples on the grounds that to do so would effectively condone homosexuality, and contravene his Christian religious beliefs.

All four applicants complained that UK law had failed adequately to protect their right to manifest their religion. Ms Eweida, Ms Chaplin and Mr McFarlane relied on article 9 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Convention) (freedom of religion and belief), taken alone and in conjunction with article 14 (prohibition of discrimination), while Ms Ladele complained under article 14 taken in conjunction with article 9.

Orders

By a majority of 5:2, the Court held that there had been a violation of Ms Eweida’s right to manifest her religious belief (article 9), but found no violation of either article 9 or article 14 in relation to the three other applicants.

Judgment

Ms Eweida and Chaplin

Ms Eweida worked for a private company and so could not attribute any direct State interference with her right to manifest her religious belief. Rather, she submitted that her right to manifest her religion had not been adequately protected by legislation.

The Court noted that the UK courts had carefully examined the BA's uniform code and the proportionality of its response to Ms Eweida's action (to continue to wear a cross after being asked to remove it). The Court noted that domestic courts of Convention countries operate within "a margin of appreciation" in determining the correct balance between competing rights and interests.

However, the Court concluded that the UK Court of Appeal had not struck the right balance in this instance. In so finding, the Court took into account that:

- the cross was discreet and did not detract from Ms Eweida's professional appearance;
- other employees had been allowed to wear items of religious clothing (such as turbans and hijabs) and there was no evidence that this had any negative impact on BA's brand; and
- BA had amended its uniform code to allow symbolic jewellery to be worn, and this demonstrated that the prohibition applied to Ms Eweida was "not crucial" for its image.

The Court considered that there had been an interference with Ms Chaplin's article 9 right to manifest her religion. However, the Court considered that the reason for asking Ms Chaplin to remove her cross, namely the protection of health and safety on a hospital ward, was of much greater importance than the maintenance of corporate image. Therefore, the Court held that there had not been a disproportionate interference with Ms Chaplin's right to manifest her belief, and so no violation of article 9.

Ladele and McFarlane

The Court agreed with the UK Court of Appeal that the policies of the third and fourth applicants' employers – to promote non-discriminatory service provision – had the legitimate aim of securing the protected rights of others, such as same-sex couples, and this outweighed the right of the applicants' to manifest their religious beliefs by refusing to offer services.

Rather than undertaking a proportionality assessment of the rights and interests engaged, the Court applied the margin of appreciation doctrine and found that the local authority and the UK Courts had not 'exceeded the margin of appreciation available to them' in striking the balance between rights in favour of non-discriminatory service provision.

Commentary

The decision indicates that there is a clear right to manifest an individual religious belief by wearing religious symbols and jewellery, but that this right can be limited by legitimate policy aims such as the promotion of public health and safety.

The Court's decision in relation to Ladele and McFarlane could be read as indicating that there is no right (under the Convention) to manifest individual faith by objecting to practices that are overtly protected by anti-discrimination law. However, the Court's reliance on the margin of appreciation doctrine means that the Court's finding could also be limited to the proposition that the UK authorities and courts had acted within the margin of appreciation available to them when balancing these rights in these circumstances.

There has been [criticism](#) of the majority's reliance on the margin of appreciation doctrine. The Court relied on the doctrine in two ways:

- to determine the extent of the Court's authority to intervene as a court operating under the principle of subsidiarity (at [99]); and

- as an interpretative device to weigh the substantive issues involved in terms of the rights engaged (at [106]).

The application of the doctrine to the task of weighing rights effectively replaced a proportionality analysis of the rights and interests of the parties. As a result, the judgment does not provide clear guidance about the balance between the (often) competing rights of freedom of religion and freedom from discrimination. The lack of proportionality reasoning in the majority judgment has also been criticised as not providing sufficient guidance in terms of how different European countries should interpret articles 9 and 14.

Dissenting judgments

By comparison, the dissenting judgments undertake a close analysis of the rights and interests engaged in two of the applications. The judgment of Justices De Gaetano and Vučini is particularly provocative, as their Honours made controversial arguments about the balance between the rights of freedom of conscience and religion and “other rights” such as freedom from discrimination.

Their Honours De Gaetano and Vučinic held that there was a violation of Ms Ladele’s right under article 9. Their Honours considered that Ms Ladele’s application concerned freedom of conscience rather than freedom of religion. Their Honours considered that the right to ‘conscientious objection’ is a fundamental right that in many circumstances should be accorded higher protection than freedom of religion, and certainly higher protection than the right to freedom from discrimination. Their Honours held that the State’s margin of appreciation does not enter into the equation in matters where a “genuine and serious” conscientious objection is made to conduct or policy.

Their Honours held that, while the aim of the UK policy (to provide services in a non-discriminatory way to all people) was a legitimate aim, the means of enforcing this policy (dismissing Ms Ladele from her employment) were “totally disproportionate”, taking into account the rights engaged.

The decision is available online at: <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-115881>

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INTERNATIONAL HUMAN RIGHTS DEVELOPMENTS

UN Human Rights Committee recognises extraterritorial obligations regarding business activity

The UN Human Rights Committee has recognised extraterritorial obligations under the International Covenant on Civil and Political Rights. On 31 October 2012, in its Concluding Observations on Germany's sixth periodic review under the ICCPR, the UN Human Rights Committee expressed concern regarding steps taken by Germany to protect against the human rights impacts of German companies operating abroad. Importantly, it stated:

The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.

The UN Human Rights Committee's observations follow its request that Germany comment on allegations that families forcibly evicted at gunpoint from their homes and lands in the Mubedne District of Uganda, to make way for a coffee plantation owned by a subsidiary of German company Neumann Kaffee Gruppe Hamburg, continue to live in extreme poverty. These allegations have also been the subject of an investigation by the German National Contact Point for the OECD Guidelines for Multinational Enterprises.

This clear recognition by the UN Human Rights Committee that States have extraterritorial obligations under the ICCPR with respect to business' human rights impacts reinforces the global authoritative standard articulated in the UN Guiding Principles on Business and Human Rights.

Catie Shavin is a lawyer at Allens.

UN Human Rights Council urged to be more assertive in its upcoming review of Sri Lanka

The UN Human Rights Council will be reviewing the human rights situation of Sri Lanka during its upcoming session in March. There have been calls by both states and human rights groups – including the United States and Human Rights Watch – for the Council to adopt a stronger, more action-based resolution on Sri Lanka, following what many considered to be a weak approach in the Council's previous resolution, passed in 2012. Since that resolution, the Government of Sri Lanka has made little effort to implement the recommendations and there continue to be reports of oppression, including enforced disappearances of ethnic minority groups, in particular the Tamil people and Muslim population.

The Lessons Learnt and Reconciliation Commission ("LLRC") was appointed by President Rajapaksa in May 2010 to look into the civil conflict that occurred between the ceasefire signed in 2002 and the defeat of the Liberation Tigers of Tamil Eelam ("LTTE") in 2009. Some of the Commission's recommendations released in December 2011 were well received; however, the LLRC has been widely criticised for its lack of independence, and there have been widespread calls to launch an independent international accountability process and full investigation into the last stages of the civil conflict where an estimated 40,000 Tamil civilians were killed. Furthermore,

the Sri Lankan Government has refused to reply to eight different UN Special Procedures who have requested entrance into the country over the past several years.

In a recent report prepared by the Office of the High Commissioner for Human Rights, the High Commissioner echoes the requests of civil society and human rights groups urging the Human Rights Council to build on the momentum of the LLRC and the previous HRC resolution towards establishing an independent and meaningful investigation into possible violations of international human rights and humanitarian law. This should include looking into allegations of war crimes, enforced disappearances and missing persons, and holding public trials in due time for Tamils and other individuals currently in detention as a result of the conflict. These and other measures are seen as essential to establishing the truth and ensuring accountability and justice, helping to pave the path towards reconciliation and a peaceful and inclusive future.

Adding to the international pressure, the International Crisis Group has also just issued a report on Sri Lanka urging international action after President Rajapaksa's government recently impeached the Chief Justice and replaced her with one of the president's advisors. According to the ICG report, this interference with the judiciary is the latest of a series of moves the government has made to consolidate the power of the executive and weaken the opposition, including revoking presidential term limits. The ICG fears that these measures, added to the lack of power-sharing with minorities and the immobility in implementing LLRC and previous HRC recommendations, are creating a dangerous situation that could reach boiling point if the international community does not act fast.

Alongside this special country review, the UN Human Rights Council is due to consider and adopt the final outcome document of the Universal Periodic Review Working Group's report on Sri Lanka during the upcoming March session.

Candice Van Doosselaere is a volunteer at the Human Rights Law Centre.

Release of the United Nations High Commissioner for Human Rights' Annual Report for 2012

As Australia focuses on the passage of the Human Rights and Anti-Discrimination Bill 2012, the United Nations High Commissioner for Human Rights, Navanethem Pillay, has released her Annual Report for 2012, which reflects on worldwide progress towards eliminating discrimination and the Office of the High Commissioner for Human Rights's activities in 2012.

2012 is the 20th anniversary of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The OHCHR reports that racial discrimination, particularly "racist hate speech", remains a matter of ongoing concern in many parts of the world.

Thanks to a "whole of UN approach" to addressing violence against women, gender equality and women's rights projects made positive ground in 2012. Bolivia ratified the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, a significant step towards accountability and equal access to services that Australia has failed to take to date.

Both the OHCHR and the Committee on the Rights of the Child directed their efforts in 2012 towards increasing government and community awareness of the International Convention on the Protection of the Rights of All Migrant Workers. So far Australia has been reluctant to sign up to this convention, a matter that's likely to receive greater scrutiny in 2013 with Australia's membership of the UN Security Council. The UN General Assembly will also conduct a High-Level Dialogue on International Migration and Development in 2013.

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment called on states in 2012 to minimise and abolish the use of solitary confinement.

Australia's use of solitary confinement should be examined in light of principles developed by the Special Rapporteur, particularly ahead of Australia's interim report on its implementation of the recommendations it received during its Universal Periodic Review in 2011.

Close to home, in November 2012 the UN Secretary-General released a report reflecting on the UN's response to civilian deaths and human rights abuses in the final months of the war in Sri Lanka in 2009. The report concluded that the UN failed to meet its responsibilities towards civilians and required greater transparency and accountability. In 2012, the UN Human Rights Council also asked the OHCHR to report on the current potential human rights in Sri Lanka.

Looking ahead, of particular note for the Asia-Pacific region in 2013 will be a renewed focus on sustainable development projects for the OHCHR and other UN bodies. Access to drinking water and sanitation as human rights concepts will guide both the United Nations Conference on Sustainable Development (Rio +20) and the post-2015 agenda setting, a question affecting many Asia-Pacific nations.



NATIONAL HUMAN RIGHTS DEVELOPMENTS

Joint parliamentary committee reports on Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012

The Joint Parliamentary Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples has endorsed the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012 without any recommended changes. The Committee, made up of representatives from all major political parties and independent MP Rob Oakeshott, [released its report on the Bill on 30 January 2013](#).

In 2011 an Expert Panel on Constitutional Recognition appointed by the Federal Government undertook an extensive national consultation and made a number of [key recommendations for potential Constitutional reform](#). Instead of proceeding directly to a referendum due to limited community awareness of and lack of multi-party support for the recommendations, as a compromise and interim step the Government introduced the current Bill to recognise Aboriginal and Torres Strait Islander peoples as Australia's First Peoples.

While the Bill is a welcome step towards Constitutional recognition of Aboriginal and Torres Strait Islander peoples, the HRLC and other community bodies [raised concerns during the Select Committee's consultation](#) that the Bill didn't adequately ensure that Aboriginal and Torres Strait Islander peoples would be included in the process of developing a referendum proposal, consistent with the right of self determination and rights contained in the UN Declaration on the Rights of Indigenous Peoples.

The HRLC and other organisations also raised concerns that insufficient weight was given in the Bill to the recommendations of the Expert Panel. The Panel's recommendations included the removal of discriminatory race powers and inserting a prohibition against racial discrimination. The Bill and Explanatory Memorandum, however, focus almost exclusively on Constitutional recognition only, creating a risk that future debate and direction from government would be confined to this recommendation.

The Select Committee emphasised in its report that the Bill is intended as a stepping stone towards Constitutional reform and is not intended to limit matters that could be put to the Australian public in a referendum.

On that basis the Committee recommended that the Bill be passed without amendments. The Bill was passed in the House of Representatives on 13 February 2013 with unanimous support and will now be introduced into the Senate.

ASIO's detention and questioning powers offend international human rights principles

Australia's counter terrorism laws unnecessarily restrict fundamental human rights and undermine the rule of law, a research article entitled "The Extraordinary Questioning and Detention Powers of the Australian Security Intelligence Organisation" published this month in the *Melbourne University Law Review* has found.

Since "September 11" 2001, over 40 pieces of counter terrorism have been passed in Australia. In 2003, the *Australian Security Intelligence Organisation (ASIO) Legislation Amendment (Terrorism) Act 2003* (Cth) bestowed extraordinary "special powers" on ASIO to obtain warrants to question and detain Australian citizens, even if those people are not suspected of having committed a terrorism offence.

Under international human rights law, any limitation on fundamental freedoms, such as the rights to a fair trial and not to be arbitrarily detained, can only be justified if they are strictly necessary, proportionate, evidence-based and rationally connected to the threat posed. This was the key message in the HRLC's [submission](#) to the Council of Australian Governments when it reviewed related counter-terrorism powers under Commonwealth crimes legislation in 2012.

While the powers were put forward as necessary in the fight against terrorism, the article by Lisa Burton, Nicola McGarrity and Professor George Williams of the Gilbert & Tobin Centre of Public Law shows questioning powers have only been used 16 times since 2003 and at the time the research was conducted no special powers detention warrants had been issued. The fact that ASIO has been able to question suspects and lay charges without having to resort to using the special detention power leads the authors to conclude this power is simply not necessary for protecting national security, the stated basis for establishing the power.

When the questioning powers have been used, the authors found there was no statistical correlation between the use of the power and prosecutions for terrorism offences, undermining the asserted need for such powers. There are very few legal restrictions on the use of these powers. The fact they have rarely been employed does not legitimise these powers given the potential for abuse.

The authors of the report call on the Federal Government to repeal the detaining power or tighten the threshold for use by requiring ASIO to establish that it is strictly necessary to detain a person under the special powers to protect national security before a warrant will be issued. To restore the principle that rights shall only be restricted where it is strictly necessary and proportionate to the risk posed, they also argue questioning warrants should only be able to be issued if the issuing authority can be satisfied it will substantially assist ASIO to collect intelligence that is reasonably believed capable of preventing a terrorism offence or enabling prosecution.

The regime imposes a low threshold for issuing repeated warrants, restricts a person's access to legal representation and confidential communication with a person's chosen representative and prevents a person issued with a warrant to disclose that fact to the public inhibiting public scrutiny of use. These exceptional restrictions on fundamental protections should only be available in exceptional circumstances, the authors argue. Like the power to issue a warrant for questioning or detention, the authors call for these restrictive conditions to be rolled back to meet the proportionality requirement. A copy of the journal article is available [here](#).



STATE-BASED HUMAN RIGHTS DEVELOPMENTS

Victoria Police to commence public review following racial discrimination court settlement

Victoria Police will commence a public inquiry aimed at stamping out racial profiling in police practices as a condition of an agreed out of court settlement in *Haile-Michael and Others v Commissioner of Police and Others* [Court no. VID 969 of 2010] – a racial discrimination claim brought by Flemington & Kensington Community Legal Centre and a pro bono legal team on behalf of six young African-Australian men. The settlement was reached on the day the trial was due to start in the Federal Court in Melbourne.

Victoria Police acknowledged, in a joint statement read out in the Federal Court, that it has received many complaints of racial discrimination, including the complaints filed by the six applicants who alleged they were targeted for arbitrary stops (also known as street checks or “field contact”), police searches, assaults and racial abuse.

Victoria Police has agreed to a public review of field contact policy, the collection of data about field contacts and Victoria Police’s current cross-cultural training program. It will report on the results and its intended response by the end of this year.

Melbourne University Professor Ian Gordon, commissioned on behalf of the six complainants, analysed the police LEAP database, and found that African men in the Flemington and North Melbourne area were 2.5 times more likely to have their interactions recorded by police than the rest of the population, and that, according to the database, African men in the area committed significantly fewer crimes than men of other ethnicities.

Tamar Hopkins, Principal Solicitor Flemington Kensington Community Legal Centre, said the claimants deserved to be acknowledged as true champions of justice.

“They have stood up to what they and their community maintain has been years of ongoing and systemic racial discrimination meted out by Victoria Police,” she said.

Peter Seidel Public Interest Law Partner at Arnold Bloch Leibler, was encouraged by the Police’s cooperation and frankness during the settlement, a welcome change after failed pre-trial negotiations in 2010, which demotivated many of the original complainants.

“It is obvious that past reviews into relations between African-Australian community in Flemington and the police have failed dismally,” he said. “The announcement of this enquiry is a watershed moment in Victoria’s history, which will benefit both Victoria Police and the community generally, particularly minority groups.”

Anthony Kelly, Executive Officer, Flemington Kensington Community Legal Centre was enthusiastic about the possibilities the enquiry offers, stating that “the opportunity exists now for all concerned Victorians to fully engage in the enquiry process, to insist on nothing less than the introduction of clear and transparent laws and policies that prevent the abhorrent things that we say occurred here from ever happening again in the future.”

“International experience confirms that the disease of racial discrimination can and will be exposed through statistical collection and public dissemination of the results, complemented by a stop and search receipting system. Racial profiling must be specifically trained against, and those who engage in it strongly disciplined, with legislative backing” he said.

The case is an excellent example of the use of strategic litigation as an advocacy tool and demonstrates the positive role anti-discrimination legislation can play in addressing broad community concerns. It is hoped that the public inquiry will enable all voices to be heard to eliminate racially discriminatory practices in policing.

The Kensington & Flemington Community Legal Centre and Arnold Bloch Liebler media release is available [here](#).

A copy of the opinion piece by Tamar Hopkins (FKLC) and Peter Siedel (Arnold Bloch Leibler) can be accessed [here](#) and an opinion piece by Victoria Police's Chief Commissioner, Ken Lay, can be found [here](#).

Initiative to support Indigenous barristers

Victoria's legal sector has welcomed two developments which will support greater recognition for and inclusion of Indigenous Victorians in the profession.

The Victorian Bar Association became the first bar association in Australia to [launch its Reconciliation Action Plan](#). The Plan, endorsed by Reconciliation Australia, sets out tangible steps to promote full access to justice for Aboriginal and Torres Strait Islander Australians and to attract indigenous lawyers to the Bar, including scholarships and mentoring programs.

On the same day Rose Fella, acting deputy directorate manager of complex crime at the Office of Public Prosecutions and founding force behind Victoria's successful Koori Court, was [appointed to the Magistrate's Court of Victoria](#). Ms Fella is Victoria's first indigenous Magistrate.

RailCorp to pay for disability discrimination

For almost two years, Graeme Innes AM urged RailCorp NSW to get serious about its obligations towards Sydney's rail passengers with disability by ensuring that its trains provide audible "next stop" announcements.

After mediation with RailCorp failed, Mr Innes sued the state-owned rail corporation in the Federal Magistrates Court, alleging its failure to provide audible announcements breached Federal Disability Discrimination law.

In a landmark decision, the Federal Magistrates Court sided with Mr Innes. Federal Magistrate Kenneth Raphael ordered RailCorp to pay \$10,000 in compensation to Mr Innes.

Justice Raphael said Mr Innes had suffered indirect discrimination, and RailCorp had been "reactive and haphazard" in its response to Mr Innes' complaints.

Public Interest Advocacy Centre Chief Executive, Edward Santow, said court action was taken to ensure RailCorp complied with its obligations under the Disability Standards for Accessible Public Transport 2002. He said Mr Innes, who is blind, is entitled to use public transport services without discrimination.

"Audible train announcements are crucial because they allow passengers with vision impairment to know they are getting off at the right station," Mr Santow said.

Mr Innes, who is the Disability Discrimination Commissioner, took the case in his private capacity. "All I wanted was for RailCorp to do what they do for everyone who is able to read print. That is, tell me where I am," he said.

Source: Public Interest Advocacy Centre.



HRLC MEDIA COVERAGE

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

- David Crisante, [Children's Commissioner 'will help refugees'](#), *SBS Radio*, 26 February 2013
- Darren Mara, [Applause for report on anti-discrimination laws](#), *SBS World News Australia Radio*, 22 February 2013
- AAP, [Cut church exemptions: rights group](#), *Nine News*, 21 February 2013
- Breakfasters, [Hear Anna Brown talk human rights on Summer Breakfasters](#), *Triple R*, 6 February 2013
- Melissa Lahoud, [Coalition policy likely to turn back genuine Sri Lankan refugees](#), *The Wire*, 5 February 2013
- Anna Brown, [Big picture lost in debate over anti-discrimination laws](#), *The Drum*, 30 January 2013
- Kristina Kukulja, [Australia's human rights obligations 'don't end' at its borders](#), *SBS World News*, 29 January 2013
- ABC News, [Discrimination laws could be changed](#), *ABC News*, 24 January 2013
- AAP, [Victims call for workplace law protections](#), *The Australian*, 23 January 2013
- AAP, [Victims call for workplace law protections](#), *SBS World News*, 23 January 2013
- Milanda Rout, [Adding injury to insult](#), *The Australian*, 23 January 2013
- Jane Lee and Clay Lucas, [Religious groups free to discriminate against pregnant women](#), *The Age*, 17 January 2013
- Andrea Petrie, [A supreme dose of injustice in store for those awaiting their fate](#), *The Age*, 14 January 2013
- Kristina Kukulja, [UN lists rights questions for Australia](#), *SBS World News Australia*, 20 December 2012



SEMINARS & EVENTS

Save the date! The Annual Human Rights Dinner

Friday 3 May, Melbourne

A very special international guest will deliver the keynote address at this year's Human Rights Dinner: **Justice Edwin Cameron**, judge of the Constitutional Court of South Africa.

Described by former South African President Nelson Mandela as one of South Africa's modern heroes, Justice Cameron worked to safeguard human rights in the new Constitution of South Africa, the first national constitution to include sexual orientation in its equality clause, and continues to advocate passionately for stronger equality laws.

The Annual Human Rights Dinner is an opportunity to come together to celebrate recent achievements and to energise the human rights movement to tackle challenges that lie ahead. It is also an important fundraiser for HRLC and PILCH. Tickets will go on sale in the coming weeks.

Business & human rights workshops: Introduction to the UN Guiding Principles

26 March, Melbourne

The UNAAA's workshops are an essential training program for business, government and NGO professionals on how to monitor and manage corporate human rights risks and impacts. The workshops provide practical guidance on how to integrate human rights considerations into everyday business operations, and on the implementation of the [UN Guiding Principles](#) - the global standard of practice on business and human rights. The workshops are hosted by Allens. For more information and online registration: www.unaavictoria.org.au.

The Charter: Understand your rights

14 May, 27 August and 21 November, Melbourne

Members of the community are invited to attend a free workshop hosted by the Victorian Equal Opportunity & Human Rights Commission on the Victorian Charter of Human Rights and Responsibilities. The workshop will introduce the human rights protected by the Charter, explain the responsibilities of public authorities under the Charter, explain how the Charter relates to the *Equal Opportunity Act 2010* (Vic) and outline how to make a complaint using the Charter.

Book online at humanrightscommission.vic.gov.au/training or call (03) 9032 3415.

The Charter: Understand your responsibilities

20 May and 10 September, Melbourne

Managers, employees and office holders in state and local government agencies and public authorities are invited to attend a workshop hosted by the Victorian Equal Opportunity & Human Rights Commission on the Victorian Charter. The workshop provides a practical introduction the Charter and shows how to use it to develop and deliver better services and improve participation for all Victorians. The workshop costs \$264 (\$66 for volunteers, community advocates and community organisations).

Book online at humanrightscommission.vic.gov.au/training or call (03) 9032 3415.



HUMAN RIGHTS JOBS

Australian Human Rights Commission

The AHRC, located in Sydney, is an independent statutory organisation and report to the federal Parliament through the Attorney-General. The Commission is currently looking to fill two positions: a [Project/Research Officer in the Racial Discrimination Team](#), and a [Media Advisor working in the Communications Unit](#).

ANTaR

ANTaR is seeking a new [National Director](#) to provide leadership and management expertise to assist it to achieve justice for Aboriginal and Torres Strait Islander peoples.

North Melbourne Legal Service Inc.

The North Melbourne Legal Service is a Community Legal Centre providing legal assistance to individuals in the North Melbourne and surrounding area. The centre is seeking a full time **Senior Solicitor** with capacity to provide legal advice and with proven management and leadership skills.

Flat Out

Flat Out is a state wide advocacy and support service for women who have been criminalised through the criminal justice and/or prison system in Victoria. Flat Out is looking for a **Co-ordinator for the Centre for the Human Rights of Imprisoned People (CHRIP)**, a project of Flat Out focusing on education, community capacity building, and systemic advocacy.

Amnesty International

Amnesty International is seeking a **Regional Growth Coordinator**, working as part of the Asia Pacific Regional Hub team in Hong Kong. Applicants will know about Human Rights trends and developments in the Asia Pacific region and have a proven track record addressing the opportunities and challenges for growth and mobilisation in the region.



FOREIGN CORRESPONDENT

The Mining Indaba and extractive sector cooption of the development agenda

In the first week of February, mining executives, government delegates, non-government organisation staff and consultants walked the halls together at the Mining Indaba in Cape Town, South Africa. The Mining Indaba is described by organisers as the “largest mining investment conference” in the world.

Scanning through the dizzying agenda of meetings and presentations in the four-day event, there is little mention of the meetings that have begun to grab the attention of human rights organisations – those involving development NGOs, mining companies and government aid and trade delegates.

Whether through initiatives such as the Devonshire Initiative in Canada, the Mining for Development Initiative in Australia and the Australia-Africa Mining Industry Group (AAMIG), in recent years the global mining industry has increasingly availed itself of the skills and good names of aid agencies and development NGOs. These groupings, some of them as “multi-stakeholder initiatives”, are part of the response by the global mining industry to do something to challenge the weight of literature detailing “the resource curse”, a phenomenon characterised by the relatively poor human rights, environmental and development track-records of those developing countries that have strongly embraced resource extraction as an economic model for development.

In the development and human rights world, partnerships between different stakeholder groups assembled to overcome challenging issues are not new. Sometimes these alliances can bring about progress towards the achievement of critical development, environment and human rights objectives. However, the groups involved are hardly without checkered reputations. AAMIG’s Chairman, Bill Turner, recently stepped down as CEO of Anvil Mining, a company with bases in Australia and Canada. The United Nations has documented how Anvil, under the leadership of

Bill Turner, was complicit in the killing of 73 people in Kilwa in 2004. Anvil Mining's drivers drove the vehicles used by the army of the Democratic Republic of Congo that perpetrated these atrocities. The UN report also noted that "Anvil also admitted that it contributed to the payment of a certain number of soldiers".

But there is more to the concerns about these multi-stakeholder initiatives than worries about mingling with folks with bad rap sheets. The notion that promoting mining is an effective or responsible approach to sustainable development is not self-evident. A recent "Reality of Aid" report critically examines the role of mining in development – casting real doubt over some of the proposed benefits of mining company involvement in development strategies.

The resource curse cannot simply be explained as a phenomenon of governments poorly managing resource revenues or community disputes. As has been argued repeatedly, companies have for many years made the most of the gaps in host governments' willingness or capacity to impose stringent environmental and human rights requirements. As Paladin CEO John Borshoff, and member of AAMIG, has summed up publicly in an Australian newspaper, "Australia and Canada have become overly sophisticated ... There has been an over-compensation in terms of thinking about environmental and social issues in regard to uranium operations in Australia, forcing companies like Paladin into Africa".

While views of this kind from mining executives might not be a surprise, what has changed recently is the promotion by state aid agencies of "mining for development" approaches to sustainable development. The Australian Agency for International Development (AusAID) now has the aforementioned "Mining for Development Initiative" and the Canadian International Development Agency (CIDA) has directed funding to groups such as World Vision and Pact to partner with companies on corporate social responsibility activities, predominantly in Africa.

Australian tax-payer money is channeled through AusAID to the Department of Foreign Affairs to administer small projects in host countries – meaning it is therefore technically outside of AusAID's "Mining for Development Initiative". So while AusAID officials have stressed that none of the Mining for Development Initiative money is paid to companies, their overall development model is shifting in the same direction as CIDA's. Some of these projects have supported the corporate social responsibility activities of Australian mining companies in Burkina Faso, Ghana and Niger. So while the funding of these activities may be more overt in Canada, the end result is the same – tax-payer aid and development money supporting corporate social responsibility activities.

These projects include schools, water facilities and the like. While the creation of a school may be a valuable contribution to a community, the ends don't justify the means. Corporate social responsibility initiatives are about gaining community support for a mining project. State tax-payer aid money is for the alleviation of poverty and realisation of human rights. Companies profess to be ignorant of the skills necessary to adequately execute their corporate social responsibility projects, but they cannot claim they don't have ample resources of their own to hire private sector development experts to assist them, so why should they access tax-payers' money from their home governments to foot the bill?

Mr Julian Fantino, Canada's new Minister for International Development, views things differently. From his perspective, expressed in a recent press interview, Canadian dollars should be used to bring benefits to Canadians. "We are part of Canadian foreign policy ... We have a duty and a responsibility to ensure that Canadian interests are promoted" Mr Fantino said. "This is Canadian money. ... And Canadians are entitled to derive a benefit". This approach is commonly referred to as "tied aid". Aid agencies around the world have a history of wrestling with this problem. With the

approach advanced in Canada and Australia, it seems we may be in an upswing of appreciation of Mr Fantino's view, with the mining sector being the big winner.

International human rights obligations require States to regulate the actions of their companies abroad, ensuring the protection of human rights. In 2012, the United Nations Committee that oversees adherence to international legal obligations to uphold the rights of children noted that "the Committee is concerned at reports on Australian mining companies' participation and complicity in serious violations of human rights in countries such as the Democratic Republic of Congo, the Philippines, Indonesia and Fiji, where children have been victims of evictions, land dispossession and killings". The Committee recommended that Australia "examine and adapt its legislative framework (civil, criminal and administrative) to ensure the legal accountability of Australian companies and their subsidiaries regarding abuses to human rights, especially child rights, committed in the territory of the State party or overseas and establish monitoring mechanisms, investigation, and redress of such abuses, with a view to improving accountability, transparency and prevention of violations".

In 2010, the equivalent United Nations Committee that oversees adherence to international legal obligations to eliminate racial discrimination noted "with concern the absence of a legal framework regulating the obligation of Australian corporations at home and overseas" and the impacts this oversight can have on "rights to land, health, living environment and livelihoods", in this case for Indigenous Peoples. So far the Australian Government has failed to implement these recommendations.

Instead of accompanying mining executives to Indaba events and lending legitimacy to them through provision state aid funding and partnerships, Australian and Canadian Government officials could better use their time examining how mining affects communities, ensuring that mining companies uphold their human rights obligations and supporting local civil society groups to hold mining companies to account. As for mining companies, they should foot the bill for their own corporate social responsibility activities and leave aid money for non-commercial activities that have the primary aim of alleviating poverty.

The full version of this article is available at: <http://www.escr-net.org/node/365082>

The Corporate Accountability Working Group of ESCR-Net promotes and undertakes collaborative initiatives that advance accountability of corporations for human rights and environmental abuses. This piece is a collaboration of groups monitoring the relationship between state aid agencies and extractive industry corporations. ESCR-Net, AID/WATCH, CAOI, Citizens for Justice, Human Rights Law Centre, Mineral Policy Institute and MiningWatch Canada participated in the creation of this piece.

*If you're interested to participate in this initiative, please contact **Dominic Renfrey** at drenfrey@escr-net.org.*



IF I WERE ATTORNEY-GENERAL...

Adequate legal aid funding is vital for a just and equitable society

If I were Attorney-General, I would set about transforming the disregard that government has for the role of legal aid in a just and equitable society. There'll be no more funding until there is a fundamental re-assessment of whether and why legal aid matters.

Funding to legal aid commissions is in a dire and embarrassing state. It is dire because every day, throughout Australia, the absence of legal information, assistance, advice and representation causes people to be confused, distressed, angry and disadvantaged. It is embarrassing on a number of counts, ranging from the tiny amount of funding to Australia's failure to meet the expectations of the UN's 2012 Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

The Principles define legal aid to include "legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses", as well as "legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes". Even limited to the criminal justice system, as the UN Principles are, that idea of legal aid is a long way from where Australia is or aspires to be.

Because of the High Court decision in *Dietrich* a lot of legal aid goes into representation in serious criminal trials – so much so that we have the unedifying sight of ACT Legal Aid in court arguing (successfully) to limit the scope of an accused's trial rights under the ACT *Human Rights Act*, and Victoria Legal Aid having to justify restrictive funding guidelines that have led to the stay of criminal trials. Apart from crime, the sheer size and pressing nature of the demand in family law means that a lot of money goes into family dispute resolution. That accounts for most legal aid funding, leaving "not so serious" (for whom?) criminal matters largely unfunded, along with credit and debt matters, employment, injuries, tenancy, administrative review and so on.

While the accused in a serious criminal matter faces loss of liberty, unrepresented parties in civil proceedings can face consequences that are no less serious: the loss of their home, job, income, family, property and possessions. The consequent loss of dignity and self-respect, and the adverse effects on physical, emotional and mental health, are a high price to pay for want of legal representation.

Just how much money goes to legal aid commissions? In 2012–13, of a budgeted federal expenditure of \$376.3 billion, just \$206m was budgeted for the commissions: 0.00055 percent (55 one-hundred-thousandths of 1 percent) of the budget. That is less than \$9 per person, or about \$58 for every person aged between 20 and 64 grossing under \$50,000 pa.

Under the current government, the Commonwealth's proportion of funding to legal aid commissions has not risen above 34.5 percent. Another 45 percent comes from the States and Territories, and the rest is from "earned income" and interest on clients' funds held in statutory and trust accounts.

The inadequacy of legal aid is hidden to an extent by the work of a host of other legal services such as community and indigenous legal services and pro bono legal activity, and mechanisms such as litigation funding and conditional fee arrangements. Each of these has a unique role to

play in guaranteeing public access to law, but together they are not part of any coherent, national, strategic response to legal need by the Commonwealth.

The Commonwealth's "Strategic Framework for Access to Justice in the Federal Civil Justice System" insists that court proceedings can and should be avoided, failing to recognise that, every day, people find themselves having to defend legal claims, or being unable to demand legal entitlements. With the same mind-set, the 2012–2015 Strategic Plan of the Commonwealth Attorney-General's Department does not refer to court proceedings at all when setting out strategies to "Protect people's rights". And there is no strategy to promote access to justice itself, only one to "promote equity and efficiency" as a means to improve access to justice. It is simply not possible for a system that faces the demands of legal aid to be "equitable and efficient" on such a mean allocation of funds. At that level of resourcing, legal aid is necessarily and chronically inequitable and inefficient.

All governments have been intractable in resisting significant increases in legal aid funding; political parties see no electoral mileage in enhancing legal aid, and calls for increased funding are easily characterised as coming from the self-interested legal profession. There may be a "business case" for legal aid, a net economic gain from avoiding the adverse social consequences of the loss of liberty, autonomy, homes, jobs, income, family, property and possessions. But sometimes principle, respect and a belief in human rights and dignity compel a policy response. Until and unless governments believe that equality before the law is a substantive right, they will not be ashamed of the negligible budget priority given to legal aid funding.

Simon Rice is a Professor of Law, and Director of Law Reform and Social Justice, at the Australian National University.

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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