Human Rights Law Centre

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RIGHTS AGENDA

Monthly Bulletin of the Human Rights Law Centre

OPINION: UNIVERSAL LEGALLY BINDING RIGHTS OF INDIGENOUS PEOPLES

Co-Chair of the National Congress of Australia's First Peoples**. Les Malezer**, looks at Australia's continuing struggle to become a reconciled nation.

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Board members of the Victorian Equal Opportunity and Human Rights Commission have resigned following the AG's refusal to endorse their unanimous recommendation for the next Human Rights Commissioner.

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THANK YOU FOR INVESTING IN HUMAN RIGHTS

Fundraising update

During June, the Human Right Law Centre ran an end-of-financial-year fundraising appeal. We are very pleased to announce that our generous supporters – you! – donated approximately $50,000 to sustain and strengthen our human rights work.

We really appreciate your generous support. These much needed funds will ensure that we can continue to research, advocate, litigate and educate to improve the promotion and protection of human rights in law and on the ground.

Thank you!

OPINION

The struggle for the realisation of Indigenous rights in Australia continues

On 13 September 2007 the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples. It was a major achievement in international governance, a significant step towards redressing the unjust taking of the lands and resources of Indigenous Peoples around the world.

In the development of the Declaration on the Rights of Indigenous Peoples, Australia was both the hero and the villain. In the early stages Australia stood up for the right of self-determination of Indigenous Peoples. But by the final stages of negotiations Australia's position had changed, opposing the right to self-determination and the right to free, prior and informed consent as giving Indigenous peoples the power of veto over sovereign parliaments.

Along with Canada, the USA and New Zealand, Australia ultimately sought to frustrate the adoption of the Declaration by the United Nations. These four States would be the only ones to vote against the Declaration on the Rights of Indigenous Peoples when it was finally adopted by the General Assembly.

The Declaration contains no new provisions of human rights. It affirms many rights already contained in international human rights treaties, but rights which have been denied to Indigenous Peoples. It is a tool for peace and justice, based upon mutual recognition and mutual respect. The Declaration also represents a compromise reached between Indigenous peoples and States.

I can assure you that the Indigenous peoples of the world will never allow this piece of history to be undone. There is no going back.

However hard it is or will be for the political leadership of Australia, or for the citizens of Australia, the right of the Aboriginal peoples and Torres Strait Islander peoples to self-determination, and the rights that follow from the exercise of self-determination, cannot be put "back in the box". The demand by the Aboriginal and Torres Strait Islander people, and from their supporters, for substantial change cannot be disregarded.

I believe that Bob Hawke realised that when he was met with the mini revolt in 1985 after reneging on national land rights legislation. I believe Paul Keating understood that when he delivered his "Redfern Speech" on International Human Rights Day in 1992. I believe John Howard was told that on 27 May 2000 when half a million people walked across Sydney Harbour Bridge.

I must admit I am not so sure what the current leadership understands at this stage, although I take some comfort from the Federal Government's statement of 3 April 2009 finally expressing support for the UN Declaration on the Rights of Indigenous Peoples.

I believe the steps already taken to change the Constitution of Australia are consistent with a will to create good faith with Aboriginal peoples and Torres Strait Islander peoples.

While certain members and leadership within our Indigenous community prefer to assert their "sovereign" identity and impose a political solution through resistance and opposition to the Australian nation, the preparedness by government and society to re-examine the Constitution in this new millennium should not be rejected outright.

The Expert Panel established to review the Constitution has produced an excellent report. It is a consensus report and, given the diversity of this Expert Panel, that has to mean a lot.

In my role as Co-Chair of the National Congress of Australia's First Peoples, I am committed to holding the Declaration high as we unravel the bequest of Australia's race history, redeem the cultural integrity of the world's most ancient surviving civilisation and culture, and navigate the political maze of the rich and powerful "haves" and the ostracised and exploited "have nots".

Congress is a non-government body and, apart from financial strings, the government cannot exercise any control over the Congress. Our establishment as a Congress is consistent with article 18 of the Declaration on the Rights of Indigenous Peoples which states that Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures.

The "intervention laws" anger me greatly, bringing me back to my roots in Queensland in the 1970s when we fought, both physically and psychologically, to end the notorious "black acts".

Bound to New York in 2007 as I worked on negotiation and adoption of the Declaration I was stirred to ask these questions. "How and why are people accepting this process for fast-track law-making?" Even anti-terrorism laws were more carefully handled. "How can a government be so prejudiced and so prepared to create racial division in this way, and why aren't the people rioting in the streets?"

I was incredulous. I was living in two worlds – the world of human rights, and the world of outright racial oppression.

The change of government at the end of 2007 brought hope. But somehow the language and images used by the Howard Government did not change under the Rudd Government.

The racist laws of the Intervention were criticised directly by the UN Special Rapporteur on the Rights of Indigenous Peoples and then the UN High Commissioner for Human Rights, who publically expressed her concerns regarding the human rights implications of the policies and laws.

To my knowledge no attention has been given to these reports by the Parliament of Australia.

The Senate is in the process of the Second Reading of the "Stronger Futures" Bills and the intervention laws, whichever way the government wants to describe these new Bills, are set to be extended by another ten years.

Article 19 of the Declaration says "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

There should be no doubt that Australia is not only defaulting on its support for the Declaration but is failing to ensure that the Bills comply with Australia's international human rights obligations.

Congress has requested that the Minister and the parliament examine the Bills for compliance with international human rights standards. The Minister has, to date, failed to respond to that request. Congress is in the process of requesting that the Parliamentary Joint Committee on Human Rights consider the Bills. At this stage we are uncertain if the Committee will respond positively to our request.

Self-determination is the essential factor, and self-determination requires government to dismantle the belief that direct intervention into lives of the First Peoples at the very personal level is necessary. This is the approach of the coloniser. Fortunately history reveals the mistakes of the coloniser, and the magnitude of the cost of such mistakes upon the First Peoples.

Congress believes it is not too late for the Gillard Government to revise its policies and direction in Aboriginal and Islander Affairs.

Congress remains ready to sit down with the Prime Minister and Minister to look for true solutions.

***Les Malezer** is Co-Chair of the National Congress of Australia's First Peoples.*

This is an edited extract from his keynote speech to the Annual Human Rights Dinner. A copy of the full speech can be found online here.

NEWS IN BRIEF

Board exodus from Victoria's human rights watchdog

Board members of the Victorian Equal Opportunity and Human Rights Commission have resigned following the Attorney-General's refusal to endorse their unanimous recommendation for the next Human Rights Commissioner. The AG, Robert Clark, said leading NGO head, community worker and human rights advocate Hugh de Kretser was not sufficiently qualified to be appointed. The resigning board members said the AG's refusal to accept the recommendation of all seven Board members was evidence of his lack of confidence in the Board's ability to perform its statutory duty and that it had undermined the Commission's independence.

Australia releases seven more Indonesian boys from adult gaols

Australia has released a further seven Indonesian nationals from Australian adult prisons following completion of a review into the detention of persons suspected of people smuggling who claim to be minors. Announcing the boys' release and return to Indonesia, Commonwealth Attorney-General Nicola Roxon said that "Minors don't belong in adult gaols, which is why the Government has conducted this review as quickly as possible".

Assange seeks asylum

Julian Assange has sought political asylum at the Ecuadorean embassy in London, following the rejection of his appeals against extradition to Sweden to face accusations of sex crimes. Should his plight for asylum fail, Assange claims that his extradition to Sweden may expose him to potential onward extradition to US on possible espionage charges. The Australian Senate has passed a motion put forward by Greens Senator Scott Ludlam calling on PM Gillard to retract "prejudicial statements" and to provide Assange with the highest level of consular support. Assange has been served an extradition notice by British police, the first step in the removal process.

Off-shore processing bill rejected by Senate

The House of Representatives passed a bill introduced by independent MP Rob Oakshott to allow offshore processing of asylum seekers, but it was blocked in the Senate. Backing the bill, the Labor Party unsuccessfully sought to use the recent deaths at sea of asylum seekers to urge the Opposition and the Greens to vote for it. During the often heated and emotional parliamentary debate, Foreign Affairs Minister Bob Carr made an extraordinary attack on the High Court about its decision regarding the "Malaysian Solution".

Future scrutiny of Taser ruling

The rules for when and how New South Wales police should use Tasers are about to come under close scrutiny, with the police challenging a magistrate's ruling from earlier this year.

Escalation of violence in West Papua

Indonesian soldiers have been accused of going on a rampage in the troubled province of West Papua. And more outbreaks of violence have pushed Papua to breaking point following the police shooting of an independence activist.

Review of defensive homicide laws

The adequacy of defensive homicide laws, introduced into Victoria in 2005, is being investigated by the Baillieu Government in light of claims that the law is difficult and confusing to apply. A recent study raised the possibility that people are getting away with murder as a result of secret plea deals.

Day of mourning to mark Stronger Futures legislation

Aboriginal leaders have said they will declare a day of mourning when legislation to extend the Northern Territory intervention in remote indigenous communities for another decade passes parliament. Aboriginal leaders in the Northern Territory rallied in Darwin to call for the withdrawal of the legislation and said they want more control over their lives.

INTERNATIONAL HUMAN RIGHTS DEVELOPMENTS

UN Committee on the Rights of the Child releases damning report on Australia

The UN Committee on the Rights of the Child has handed down a damning report on Australia following its periodic review which took place on 4 and 5 June. The Committee's "Concluding Observations" are a comprehensive set of recommendations to Australia on steps it should take to ensure better compliance with its international legal obligations under the Convention on the Rights of the Child (CRC).

The Committee's report card on children's rights in Australia indicates that despite some positive developments over the last few years, such as the recent move to establish a National Children's Commissioner, the situation for many children in Australia continues to be a serious concern and one of international significance. The Committee expressed particular frustration at the ongoing failure of Australia to implement key general measures of the CRC, including:

- the absence of comprehensive legislation enshrining children's rights in Australia's domestic law;
- the lack of adequate coordination between government departments and federal and state governments; and
- the absence of a National Plan of Action to implement the CRC in Australia.

The Committee also raised concerns in relation to the allocation of adequate resources, data collection, international aid and the human rights obligations of the business sector.

In additional to these important institutional issues, the Committee also expressed concern about a diverse range of issues affecting children in Australia, such as:

- violence against women and children;
- children in out-of-home care;
- abuse and neglect;
- access to health services;
- children and young people who are homeless;
- early childhood care and education; and
- asylum-seeking and refugee children.

In addition, the Committee highlighted particular concern about continued serious and widespread discrimination against Aboriginal and Torres Strait Islander children. In addition to a large number of specific issues facing these communities, the Committee made a number of recommendations focusing on the importance of meaningful participation, empowering children and supporting community based programs to advance the rights of Aboriginal and Torres Strait Islander children.

A copy of the Committee's Concluding Observations is available at http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf.

A coalition of NGOs submitted a comprehensive report to the Committee on the Rights of the Child in May 2011. A copy of the NGO Report, *Listen to children*, is available at http://www.childrights.org.au/, together with NGO materials including fact sheets and information about the CRC.

Call to save the human rights treaty body system

"The establishment of the human rights treaty bodies and the evolution of the treaty body system is one of the greatest achievements in the efforts of the international community to promote and protect human rights," United Nations High Commissioner for Human Rights Navi Pillay said in her report on the strengthening of the human rights treaty body system.

Pillay confirms in her report that the treaty body system is in a crisis and cannot be sustained without immediate action to help strengthen and improve it.

The 10 human rights treaty bodies are committees of independent experts that periodically examine the implementation of all treaties that State parties have ratified under international law.

"The system provides authoritative guidance on human rights standards, advises on how treaties apply in specific cases, and informs States parties or what they must do to ensure that all people enjoy their human rights," United Nations Secretary-General Ban Ki-moon said in the introduction to the report.

In order to strengthen the treaty body system, Pillay's 100-page report provides recommendations to enhance the visibility of the human rights treaty system and its accessibility to individuals and communities throughout the world who need it the most. "In late 2009, I called upon all stakeholders to embark upon a process of reflection on ways to strengthen the treaty body system," Pillay said.

The report focuses on strengthening the system rather than reforming it. "Lessons learned from previous reform initiatives have led me to base this process on the premise that the legal parameters of the treaties should not be altered," Pillay said.

According to her report, the treaty body system has nearly doubled in size since 2000. The system has seen a growth in treaty bodies and its members, as well as an increase in the amount of reports submitted by States and individuals, although only 16 per cent of States parties report strictly on time. The system also features several new tools to promote human rights.

Unfortunately, the resources needed to sustain this complex system have stayed the same. "In doubling the size of the human rights treaty body system under these new instruments, there has been chronically insufficient attention given to properly resource this fundamental human rights mechanism," Pillay said. "At a time when human rights claims are increasing in all parts of the world, it is unacceptable that the system can only function because of State's non-compliance to their reporting obligations," she said.

The report presented key recommendations to create a more efficient and streamlined approach to the treaty body system. Pillay proposed the use of a reporting calendar, so that every report is reviewed on time. Pillay hopes that this will result in equal treatment of all States.

Her report also recommended the utilization of new technologies, including webcasting and videoconferencing to increase visibility and accessibility to these treaty bodies. "Technology can and should serve human rights," Pillay said.

"The ultimate objective of this process was to take stock of the challenges and improve the impact of treaty bodies on States parties and individuals or groups of individuals at the national level by strengthening their work while fully respecting their independence," Pillay said. She

added that it was absolutely made clear through the process that "the approach of absorbing new mandates within existing resources is not sustainable."

Source: www.ohchr.org

Tensions run high in Papua as Amnesty calls for investigation

Amnesty International has called on Indonesian authorities to ensure a prompt, independent and impartial investigation into reports of unnecessary and excessive use of force including the use of firearms by security forces in Wamena, Papua province.

The HRLC's Tom Clarke said a number of recent incidents reveal just how on-edge the troubled Indonesia province is.

"Despite the effective media ban on international journalists from travelling to Papua, a very disturbing picture is emerging. The overall mood seems to be very tense and if the various tensions and resentments are not addressed in a constructive way, it's likely the situation will deteriorate further," Mr Clarke said.

Amnesty's statement was in response to violence that was ignited when on 6 June two soldiers on motorcycles reportedly ran over and injured a three year old who was playing by the side of the road in a remote village.

Villagers who witnessed the incident chased the soldiers and stabbed one to death and injured the other. In retaliation, two trucks of soldiers soon arrived and reportedly opened fire on the village killing one person. According to Amnesty's sources, the soldiers also stabbed around a dozen people with their bayonets and burned down a number of homes, buildings and vehicles during the attack. Many of the villagers have fled the area and are afraid to return to their homes.

Eight days later on 14 June Indonesian authorities shot dead the deputy chairman of the West Papua National Committee, Mako Tabuni. This sparked rioting and a security crackdown followed.

In the police version of events, Mr Tabuni was threatening to shoot a police officer who had tried to arrest him, while witnesses have said he was unarmed and was shot as he tried to run away. Police have since claimed Mr Tabuni was carrying a gun that had been used in the non-fatal shooting of a German tourist in May.

Police spokesman Senior Commissioner Johannes Nugroho confirmed to the Sydney Morning Herald that the weapon Mr Tabuni is claimed to have possessed was a police-issue Taurus and said, "Mako Tabuni did have a gun with him and it belonged to the police. They stole it but I don't remember when."

Jakarta Post acknowledges that while the Indonesian Government continues to blame the OPM (the Free West Papua Movement), for the deteriorating security situation in Papua, it has so far declined to provide concrete evidence of the group's complicity in the violence that has wracked the province in recent months.

The Human Rights Law Centre believes the Australian Government can and should be doing more to encourage Indonesia to allow journalists and human rights monitors into Papua.

"The situation in Papua is like a tinderbox. It's foolish and unsustainable for the Australian Government to maintain its policy of turning a blind eye. It's not in our interests to have a festering human rights problem on our doorstep and it's certainly not in the interests of the people of West Papua," Mr Clarke said.

UN Human Rights Council session opens against a back drop of human rights crises

Ms Navi Pillay, having been appointed to a second term as the High Commissioner for Human Rights, opened the 20th Special Session of the Human Rights Council on 18 June. Ms Pillay reminded delegates that the "backdrop of crises" – political, economic and humanitarian – against which they now meet pose serious obstacles to the realisation of human rights across the globe.

The most pertinent international concern to be addressed at the 20th Session is the deteriorating situation in Syria. The country has seen an escalation of violence, resulting in a significant increase in civilian suffering and the suspension of the UN Supervision Mission. Ms Pillay called upon the Government of Syria to cease the use of heavy armaments and further urged the international community to "overcome divisions and work to end the violence".

Ms Pillay drew the delegates' attention to the Rio de Janeiro UN Conference on Sustainable Development held from 20-22 June 2012. The Commissioner emphasised the importance of ensuring that human rights considerations are integrated into the outcome document of the negotiations.

Addressing the thematic priorities of the OHCHR; Ms Pillay emphasised the human rights dimensions of migration and gave an overview of the work currently being undertaken in preparation for the High Level Dialogue on International Migration and Development. The Commissioner further stressed the importance of respecting, protecting and fulfilling rights to counter the persistence of poverty and wide wealth disparities across the globe. In the areas of accountability and rule of law, Ms Pillay confirmed the OHCHR's continuing support of truth and reconciliation progress in Togo, Cote D'Ivoire, Tunisia, Libya, Yemen and Colombia.

The OHCHR continues their work to counter racism, racial discrimination and xenophobia and Ms Pillay noted with satisfaction the number of states requesting assistance in developing their national action plans against racism. The OHCHR is working with countries towards the enshrinement of women's rights in legal documents and ensuring non-discrimination against persons with disabilities. It further aims to "step…up" its work on the rights of indigenous peoples.

Turning to specific country concerns, Ms Pillay reports a serious deterioration in the human rights situation in Mali, which is exacerbating the already dire situation in neighbouring countries who play host to a large number of Mali's refugees. Concerning reports from Eritrea indicate serious violations of human rights including arbitrary detention, torture, executions and restrictions on movement, expression and religion. The OHCHR has closed its office in Nepal in compliance with the Nepalese Government's requests to do so, while fear of a reoccurrence of violence in upcoming elections persists in Zimbabwe. Ms Pillay further expressed concern about political prison camps and public executions in the DPRK, violence against reporters in Latin America, incidents of racism across Europe and homophobia in Russia, Ukraine and Moldova, the many challenges facing the newly formed government of South Sudan, and the use of drones and concerning counter terrorism measures in Pakistan.

Ms Pillay concluded her opening address to the 20th Session by urging states to fulfill their commitments to the OHCHR through issuing invitations to and facilitating visits by the Special Rapporteurs, responding promptly to communications and implementing UPR recommendations.

Source: http://www.ohchr.org

NATIONAL HUMAN RIGHTS DEVELOPMENTS

Professor Gillian Triggs appointed President of the Australian Human Rights Commission

Professor Gillian Triggs, the Dean of Sydney Law School, has been appointed as the new President of the Australian Human Rights Commission. She will replace the Hon Catherine Branson QC, who will step down as President in July 2012. Professor Triggs is a leading international law expert and is highly regarded as an administrator and strategist. The Human Rights Law Centre congratulates Professor Triggs on her appointment to this important position and looks forward to working closely and collaboratively with her to promote and protect human rights in Australia.

Joint Parliamentary Committee urges Government to take urgent action to prevent ill-treatment in detention

A bipartisan parliamentary committee has unanimously recommended that the Federal Government take immediate action to improve monitoring and accountability, and prevent ill-treatment, in places of detention.

The Joint Standing Committee on Treaties (JSCOT) has recommended that Australia ratify and implement the Optional Protocol to the Convention against Torture as a matter of priority.

The Optional Protocol aims to prevent ill-treatment and promote humane conditions by establishing systems for independent monitoring and inspection of all places of detention.

“It is not only in the interests of persons deprived of liberty, but also the broader community, that all places of detention – whether prisons, psychiatric hospitals, police cells or disability facilities – promote rehabilitation and reintegration. It is fundamental that all detainees are treated with basic dignity and respect. Independent inspections and oversight are critical in this regard,” said Human Rights Law Centre Executive Director Phil Lynch.

At the national level, the Optional Protocol requires that countries establish what is known as a “national preventative mechanism”, or NPM. An NPM is an independent body with a mandate to conduct both announced and unannounced visits to places of detention, to make recommendations to prevent ill-treatment and improve conditions, and to report publicly on its findings and views. JSCOT recommended that “the Australian Government work with the states and territories to implement a national preventive mechanism fully compliant with the Optional Protocol to the Convention against Torture as quickly as possible”.

At the international level, the Optional Protocol establishes an independent committee of experts, the UN Sub-Committee on the Prevention of Torture, with a mandate to carry out country missions to monitor deprivations of liberty.

According to Mr Lynch, “The whole system is premised on the evidence and experience that external scrutiny of places of detention can prevent ill-treatment and promote human dignity. By making places of detention more open, transparent and accountable, it helps to ensure that persons deprived of liberty – whether people with psychiatric illness, prisoners, people with disability or asylum seekers – are treated with basic dignity and respect.”

Australia signed the Optional Protocol in May 2009. Since that time, progress on ratification and implementation has been slow, with wrangling between the states and the Commonwealth about who is to foot the modest bill for detention monitoring and oversight. According to Mr Lynch, “This

is despite international evidence as to the very high social and economic costs of failing to prevent and redress ill-treatment."

Mr Lynch said that, "The JSCOT report makes it clear that the Commonwealth, state and territory governments should all prioritise ratification and implementation of the Optional Protocol. Any further delay in the prevention of ill-treatment has intolerable social and economic costs."

The HRLC submission to JSCOT on ratification and implementation of OP-CAT is here.

The JSCOT report, tabled in Federal Parliament on 21 June 2012, is here (Chapter 6).

National Children's Commissioner Bill passes parliament

The Australian Human Rights Commission Amendment (National Children's Commissioner) Bill has been passed to create a new Commissioner position that will monitor whether Australia is adhering to its obligations under the United Nations Convention on the Rights of the Child.

In addition, the Commissioner will examine the impact of Commonwealth laws and policy on young people, children and their representatives through consultation and research into areas of particular relevance.

STATE-BASED HUMAN RIGHTS DEVELOPMENTS

Human Rights Charter helping to create a fairer, more inclusive Victoria

Victoria's Charter of Human Rights and Responsibilities continues to make a real, practical difference in the lives of Victorians, according to the fifth Charter report tabled in Parliament on 19 June.

Victorian Equal Opportunity and Human Rights Acting Commissioner Karen Toohey said that *Rights in focus: 2011 report on the operation of the Charter of Human Rights and Responsibilities* highlighted the way the Charter is helping Victorians to realise their rights and to resolve everyday issues that can have a profound effect on their quality of life.

Ms Toohey said that the Charter report clearly shows that its most significant and positive impact is felt by the vulnerable members of our community and that taking a human rights-based approach leads to fairer and more equitable government services and policies.

"We are in a unique position in Victoria, being the only state in Australia to have a Charter of Human Rights and Responsibilities.

"It is clear that government bodies are using the Charter to guide all aspects of government services and decision-making processes – from policy development through to service delivery," Ms Toohey said.

"And this doesn't just mean better services – it also reduces the risk of policy decisions that do not take individuals' human rights into proper account, which can lead to unintended consequences for many vulnerable people in our community," Ms Toohey said.

Real life examples of the Charter being used for the benefit of everyday people also feature strongly in the report.

- The Department of Premier and Cabinet took the Charter into account in the development of policies and programs, including projects for specific communities that address areas of concern, such as health, unemployment and loss of cultural identity.

One project included setting up women's health clinics for Iraqi and Congolese communities in and around Shepparton to convey critical information about reproductive health.

- VALID, an advocacy group for adults with intellectual disabilities and their families, was able to use the Charter to prevent a group of young people in a rehabilitation facility from being forced to move into an aged-care facility.
- A 96-year-old woman was given 60 days to vacate her home. During this time she was unable to find alternative accommodation and was at risk of homelessness. Her advocates used the Charter to secure a 30-day extension, enabling her to find suitable accommodation.
- Inspired by the Charter, the Office of the Child Safety Commission has undertaken a range of projects to ensure that the voices of vulnerable children and young people are heard and that their best interests are reflected in all policy decisions.
- The Charter was central in a Supreme Court decision that prevented a woman and her two children being homeless after she was initially issued with an eviction notice.

The full report, as well as a range of consultation reports and reports from previous years, can be found at humanrightscommission.vic.gov.au/charterreport. Printed copies are available on request.

Source: Victorian Equal Opportunity and Human Rights Commission

Reporting racism survey closing soon! Have your say today

The Victorian Equal Opportunity and Human Rights Commission is conducting research to learn more about the experiences of racism and racial and religious vilification in Victoria.

The *Reporting racism*: *what you say matters* survey is closing soon. So have your say about racism and racial and religious vilification in Victoria today.

You can fill in the survey by going online to www.humanrightscommission.vic.gov.au/reportingracism.

Taking this survey will help identify actions and solutions we can all take to help address racism and vilification.

Do you speak a language other than English?

If you would prefer to fill in this survey in a language other than English, call the Interpreter line on 1300 152 494 and an interpreter will assist you in completing the survey.

AUSTRALIAN HUMAN RIGHTS CASE NOTES

Compatibility of intrusive bail conditions with the right to privacy under the ACT Human Rights Act

R v Wayne Michael Connors [2012] ACTSC 80 (28 May 2012)

Summary

Chief Justice Higgins of the ACT Supreme Court has rejected claims made by Mr Connors that a bail condition requiring he undergo urinalysis (urine testing) to enforce abstinence from illicit drugs was beyond the powers conferred by section 25 of the *Bail Act 1992* (ACT). The court confirmed that the bail conditions did not breach Mr Connors' right to privacy under section 12 of the *Human Rights Act 2004* (ACT).

Facts

Wayne Michael Connors, currently awaiting trial in the ACT on a charge of aggravated robbery, was released on bail with the condition that he obey all reasonable directions of the Director-General of the ACT Corrective Services, including submitting to urinalysis.

Mr Connors alleged that the requirement that he submit to urinalysis was beyond the scope of section 25 of the *Bail Act 1992* (ACT) (which defines permissible conditions of bail as those which are not more onerous than is necessary to achieve those purposes prescribed) and was a breach of his right to privacy under section 12 the *Human Rights Act 2004* (ACT).

Decision

Chief Justice Higgins addressed the following legal questions:

(a) Is the condition beyond the power conferred by section 25 of the Bail Act 1992 (ACT)?

Mr Connors' argument rested on the recent case of *Lawson v Dunlevy* [2012] NSWSC 48, in which Justice Garling overturned Magistrate Dunlevy's decision to impose a breath test requirement on the accused Jeremy Lawson as a condition of his bail. Justice Garling ruled that the breath test requirement was not permitted by the relevant legislation, namely section 37 of the *Bail Act 1978* (NSW), as it did not fulfil any of the purposes listed in section 37(1) as justifying imposition of a bail condition.

Chief Justice Higgins disagreed with this interpretation, opining that the breath test requirement was ancillary to fulfilment of one of the permitted purposes (namely section 37(1)(a) promoting effective law enforcement) and was thus itself lawful as per the decision of Justice Dixon in *Wragg v State of NSW* (1953) 88 CLR 353. In addition, it served the purpose of deterring or detecting the breach of another condition of bail, namely that the accused not consume alcohol.

With regard to the current case, Chief Justice Higgins held that the requirement that the accused undergo urinalysis was ancillary to the prescribed purposes of bail and it assisted in avoiding breach of another bail condition (namely preventing offending whilst on bail), and was thus lawful under section 25 of the *Bail Act 1992* (ACT).

His Honour did, however, express concern that the condition be "reasonably framed so as to be least obtrusive", and to this end ordered an amendment to Connors' bail condition stating that he was only required to give urine "if so directed in the course of supervision" by a corrections officer.

(b) Is the condition in breach of section 12 of the Human Rights Act 2004 (ACT), notwithstanding that reasonable limitation of rights as permitted by section 28?

Turning to the *Human Rights Act 2004* (ACT), Chief Justice Higgins considered whether a bail condition requiring testing at random by urinalysis breached the accused's right to privacy under section 12 of the *Human Rights Act*, or conversely whether it could be justified as a reasonable limitation on that right as per section 28 of the Act.

Chief Justice Higgins recognised the limitation such bail conditions posed on the accused's right to privacy, and the danger that they would be enforced aggressively in an unfairly oppressive manner. However, his Honour accepted that in this case the limitation on the rights of the accused was reasonable, lawful and "demonstrably justified in a free and democratic society" pursuant to section 28 of the *Human Rights Act*, and thus did not breach section 12.

Relevance to the Victorian Charter

This case has direct relevance to the *Charter of Human Rights and Responsibilities 2006* (Vic), as the ACT *Human Rights Act* sections 12 and 28 are analogous to sections 13 and 7(2), respectively, of the Victorian *Charter*.

Thus, the Court's application of section 28 of the ACT *Human Rights Act* in its discussion as to whether the imposition of a bail condition mandating urinalysis and subsequent limitation on the accused right to privacy is reasonable given its purpose to facilitate compliance with the law and the primary condition of bail (that the accused abstain from consuming illicit drugs) gives useful guidance on what approach may be taken to the application of section 7(2) of the Victorian *Charter* with regard to the impact on the right to privacy on bail conditions within Victoria.

The decision can be found online at: http://www.austlii.edu.au/au/cases/act/ACTSC/2012/80.html

***Beth King** is a volunteer at the Human Rights Law Centre.*

INTERNATIONAL HUMAN RIGHTS CASE NOTES

When is it permissible to limit the right to vote?

Scoppola v Italy (No 3) [2012] ECHR 868 (22 May 2012)

Summary

In this decision, the European Court of Human Rights found that an Italian legislative regime that disenfranchised persons who had been convicted of specific offences and persons sentenced to terms of imprisonment greater than three years did not contravene article 3 of Protocol No 1 to the European Convention on Human Rights, which protects the right to vote.

Facts

In November 2000, the applicant was convicted of murder, attempted murder, ill-treatment of his family and unauthorised possession of a firearm. After a violent family argument, the applicant had attempted to strangle his wife and subsequently fired several shots at her and one of his sons. He was sentenced to life imprisonment (later reduced to 30 years).

The Italian Criminal Code provided that a sentence of imprisonment of five years or more entailed, as an ancillary penalty, a lifetime ban from public office. Under presidential decree, a ban from public office resulted in a forfeiture of the right to vote for the duration of that ban. The

consequence of the applicant's sentence was, therefore, that he was permanently deprived of the right to vote.

The Italian legislation did not disenfranchise all prisoners. Under the Criminal Code, the ban from public office (which resulted in the disenfranchisement) attached to various specific offences (such as, for instance, embezzlement of public funds), regardless of the penalty. However, any person sentenced to more than three years' imprisonment was also banned from public office (and therefore disenfranchised) for five years, while any person who, like the applicant, was sentenced to more than five years' imprisonment was subject to a lifetime ban.

The issue before the Court was whether the Italian regime contravened article 3 of Protocol No 1 to the Convention, which states:

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

It is established that article 3 guarantees the rights to vote and to stand in elections.

Decision

The Court affirmed that the rights guaranteed by article 3 are "crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law", and reiterated that "the right to vote is not a privilege". However, it observed that the rights are "not absolute", with states "afforded a margin of appreciation" to reflect their own "democratic vision".

The Court had to determine whether the Italian government had interfered with the applicant's rights under article 3; whether such an interference pursued a legitimate aim; and, if so, whether the means to achieve the aim were proportionate. It was clear that the applicant had been deprived of his right to vote, which was an interference with that right, and the Court accepted that the legislation could be considered to pursue the legitimate aims of enhancing civic responsibility and respect for the rule of law and ensuring the proper functioning and preservation of the democratic regime. The question, therefore, was whether the applicant's disenfranchisement was a proportionate means to pursue those aims.

In his submissions, the applicant relied on *Hirst v United Kingdom (No 2)* [2005] ECHR 681, where the Court held that legislation disenfranchising all persons serving a term of imprisonment for the duration of that term violated the Convention. The Court affirmed *Hirst*, emphasising that

> when disenfranchisement affects a group of people generally, automatically and indiscriminately, based solely on the fact that they are serving a prison sentence, irrespective of the length of the sentence and irrespective of the nature or gravity of their offence and their individual circumstances, it is not compatible with Article 3 of Protocol No 1.

The applicant submitted that any decision to deprive prisoners of the vote that was not taken by a court was, in its nature, disproportionate, in the sense that it applied generally and indiscriminately; only a judge's examination of a specific case could justify a penalty of disenfranchisement. The Court rejected this proposition. It held that disenfranchisement must be a proportionate penalty for the crime, but that that proportionality could be attained by a legislature determining the specific circumstances under which disenfranchisement is appropriate.

As to whether the Italian regime was disproportionate, the Court first observed that the ban on public office (with the concomitant disenfranchisement) was applied in specific instances: to

persons convicted of certain offences, and to persons sentenced to certain terms of imprisonment. Moreover, it noted that the duration of the disenfranchisement depended on the severity of the crime or sentence. These conditions showed "the legislature's concern to adjust the application of the measure to the particular circumstances of the case in hand, taking into account such factors as the gravity of the offence committed and the conduct of the offender." The Court contrasted the Italian legislation with the UK law in *Hirst* that had removed the vote from all prisoners, regardless of crime or sentence. The Court further noted the possibility in Italian law that convicted persons may recover the right to vote through a process known as rehabilitation. The Court held that, therefore, the Italian system does not have the relevant "general, automatic and indiscriminate character" that generates disproportionality. As such, it held that there was no violation of article 3 of Protocol 1.

Significance and relevance to Victorian Charter

This decision is the latest in a line of European Court cases examining the right to vote. The finding of implied rights that relate to the democratic process in a grandly worded but imprecise provision is similar to the High Court's explication of the phrase "directly chosen by the people" in sections 7 and 24 of the Australian Constitution. In *Roach v Electoral Commissioner* (2007) 233 CLR 162 (which was cited, albeit briefly, by the European Court in *Scoppola*) the High Court held that the Commonwealth does not have the power to disenfranchise all persons serving a term of imprisonment. The outcomes of *Roach* and *Scoppola* are in fact quite similar; both held that while a legislative regime that disenfranchised all prisoners was not permissible, a scheme that disenfranchised only those that had committed serious crimes, as determined by their sentences, could stand. *Scoppola*, however, upheld a law that was far more punitive than that left standing in *Roach*. Under the impugned legislation in *Roach* (and indeed that in *Hirst*) no prisoner could vote, but all regained the right after completing their sentence. In the Italian legislation, those convicted and sentenced to more than five years' imprisonment received a lifetime ban on voting.

The right to vote is protected in section 18 of the Victorian Charter of Human Rights and Responsibilities. However, as the Court acknowledged in *Scoppola* and as the Victorian Parliament enunciated in section 7 of the Charter, that right has limits. In *Scoppola*, the European Court attempted to define those limits by permitting disenfranchisement when the penalty is sought for legitimate reasons and in specific, reasoned circumstances. The precise scope of the franchise, and the state's power to determine it, will remain a contested question.

The decision is available online at: http://www.bailii.org/eu/cases/ECHR/2012/868.html

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Liberty and security of mentally ill persons at trial

Centre for Addiction and Mental Health v Ontario, 2012 ONCA 342 (24 May 2012)

Summary

The Court of Appeal for Ontario allowed an appeal by the Centre for Addiction and Mental Health and another setting aside an order of the trial judge requiring immediate treatment of a mentally ill prisoner to be conducted at the Centre. The Court held that while to delay such treatment on the basis that there was not sufficient space at the Centre for the prisoner would undoubtedly be a deprivation of life, liberty and security of his person per article 7 of the Canadian Charter of Rights and Freedoms, to do so nonetheless came within the fundamental justice exception to that article.

Facts

The accused was charged with sexual assault. Because of his mental health difficulties, his matter was heard at "102 Court", a forum specifically designed for persons with such concerns. Following a finding that he was unfit to stand trial, the trial judge made an order under section 672.58 of Canada's Criminal Code requiring the accused to submit to antipsychotic drug therapy at the Centre.

The Centre advised the trial judge that there was no bed available for the accused and that none would become available for another six days. It refused consent for the order. The trial judge nonetheless proceeded, instructing that the accused was not to be taken to a jail or correctional facility under any circumstances. The accused was left in a hallway at an alternative mental health facility and the trial judge's order stayed with the launch of the hospital's appeal.

Decision

Justices of Appeal Simmons, Blair and Hoy agreed with the Centre's submission that the trial judge erred in granting the treatment order in the absence of any consent by the Centre and in the knowledge that the Centre would not have the capacity to treat the accused for at least six days.

Analysing the legislative power of the trial judge to order treatment, Justice Blair held that it was implicit in the (prerequisite) consent of the hospital or mental health facility to which the accused was directed that it would have the "necessary facilities to enable [it] to provide the treatment required in a manner that is effective and ensures the safety of the patient, the medical and hospital staff". As the Centre lacked bedspace, consent had not been satisfied.

Much of their Honours' reasoning focussed upon submissions made by an *amicus*, Mr Burstein. Chief among these was that the consent requirement under section 672.62 of the Code was unconstitutional as it violated an accused's rights under article 7 of the Canadian Charter of Rights and Freedoms; that is, "the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

Justice Blair accepted that a hospital's refusal to provide consent as a precursor to a treatment order could engage an accused's rights under article 7. After all, where accommodation cannot be made for an accused at a mental health facility he or she will likely be detained in jail. As Justice Blair noted, "detention and a threat of imprisonment can engage a person's liberty interest, as can a continuation of the deprivation of liberty", adding that "for mentally ill accused, the threat of imprisonment may also trigger particular security of person concerns".

Nonetheless, their Honours recognised that the "competing demands within the psychiatric hospital environment" meant that some impingement on article 7 rights was inevitable. This created no discord with the principles of fundamental justice as it was "not unreasonable" for the accused (and the judiciary) to expect delay with respect to space available at mental health facilities. Moreover, the trial judge's treatment order essentially leapfrogging the accused to the front of the queue may have "jeopardize[d] and disadvantage[d] other individuals who are also the subject of judicial orders". The trial judge should not have ignored the "overall policy context" of funding for mental hospitals, according to Justice Blair. The message was simple: "an allowance of a reasonable period of time for compliance with the [treatment] order should be permitted".

Finally, their Honours emphasised that the role of the trial judge in ordering any kind of treatment for the accused was "not medical but legal". Accommodation at the Centre or its equivalent was ordered to ensure the accused would be fit to stand trial; it was not "intended to be therapeutic or

[for his] medical benefit" and therefore minimal delay in the accused attaining that treatment was presumably more acceptable despite its bearing upon his article 7 rights.

Relevance to the Victorian Charter

This case is relevant to section 21 of the Victorian Charter. Similar to section 7 of the Canadian Charter, section 21 of the Victorian Charter protects the right to liberty and security of the person. While the Victorian provision does not contain the limitation that the right can be deprived "in accordance with the principles of fundamental justice", the analysis required by the Canadian provision is similar to that under section 7 of the Victorian Charter, which provides that human rights may be subject to "reasonable limits as can be demonstrably justified in a free and democratic society".

Few Victorian cases considering section 21 of the Charter have done so in the context of involuntary or court-ordered treatment as an alternative to incarceration. This case, as Justice Blair noted, provides an "illuminating window through which the tension between the court and the government and hospitals surrounding forensic psychiatric resources may be understood", and is likely to inform future consideration by Victorian courts of how the rights involved in this tension should be balanced.

The decision is available online at:
http://canlii.ca/en/on/onca/doc/2012/2012onca342/2012onca342.html

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UN Committee on the Rights of Persons with Disabilities requires individual circumstances be considered to prevent discrimination

HM v Sweden, UN Doc CRPD/C/7/D/3/2011 (21 May 2012)

Summary

HM v Sweden is the first decision of the UN Committee on the Rights of Persons with Disabilities.

The Committee found that a State party may violate the Convention on the Rights of Persons with Disabilities if it fails to consider an individual's particular health circumstances in applying its national laws, resulting in discrimination on the grounds of that individual's disability.

Facts

The author, HM, had a chronic connective tissue disorder, Ehlers-Danlos Syndrome (EDS) which led to hypermobility of joints, severe luxations and sub-luxations of joints, fragile and easily damaged blood vessels, weak muscles and severe chronic neuralgia. HM had not worked or stood for eight years and had difficulty sitting and lying down. She could no longer leave her house or go to hospital, so her only remaining option for rehabilitation to stop her impairment from progressing was hydrotherapy through an indoor pool in her house.

HM applied for planning permission to extend her house by approximately 63 square metres on her privately owned land. Most of this extension was on land where building was not permitted under the *Planning and Building Act*. The Örebro Local Housing Committee rejected her request for building permission. The matter was appealed several times, and HM petitioned the Supreme Administrative Court of Stockholm for leave to appeal a decision of the Administrative Court of Appeal. The petition was refused and the author complained to the Committee on the Rights of Persons with Disabilities.

Arguments

HM's complaint

HM claimed that the Sweden violated the Convention by failing to take into account HM's rights to equal opportunity for rehabilitation and improved health. This, she argued, resulted in discrimination against her.

Sweden's observations on admissibility and merits

Sweden's main submissions on admissibility included that the departure from the development plan was more than merely minor and so the decision-making authorities could not simply disregard existing legislation.

On the merits, Sweden submitted amongst other things that the Act applies in the same way to all, whether they have disabilities or not (ie there was no direct discrimination), and none of its clauses indirectly lead to discrimination against persons with disabilities. Furthermore, Sweden submitted that HM did not need to make an application under the Act and to rely on articles 25 and 26 because she should have sought health and medical services from the Council instead.

HM's comments on Sweden's observations

HM submitted that the refusal to issue building permission amounted to discrimination because all other avenues that could have ensured her rehabilitation were exhausted. Furthermore, her case was a matter of life-enhancing circumstances and she had a rightful claim to equality with regard to quality of life. HM referred to the applicability of the proportionality principle in cases where the purpose of the plan and the interests of the individual would strongly outweigh society's interests.

She submitted that the effect of the Act meant that, as a disabled person, she could not obtain proper health care, and was therefore exposed to discrimination. Sweden's national health laws were of little concern when her needs could not be met through the interpretation and application of those laws.

Decision

The Committee considered that allegations of violation of articles 3, 4, 5, 19, 25, 26 and 28 of the Convention were sufficiently substantiated and therefore the complaint was admissible. The Committee found that Sweden failed to apply the principle of proportionality, and did not weigh HM's interests in having the pool against the public interest in complying with the development plan.

Article 2

The Committee considered the definition of "discrimination on the basis of disability" under article 2(3). It noted that the definition extended to "denial of reasonable accommodation". The Committee found that the pool was essential to HM's health condition and an appropriate adjustment would be a departure from the development plan. Sweden had not indicated that this departure would impose a "disproportionate or undue burden".

The Committee observed that a law which is applied in a neutral manner may have a discriminatory effect when an individual's particular circumstances are not considered. It stated that "the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention can be violated when States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different".

Articles 25 (health) and 26 (habilitation and rehabilitation)

The Committee considered HM's right under article 25 "to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability". The Committee then considered a State party's obligations under articles 25 and 26, to take appropriate measures regarding the health, habilitation and rehabilitation of people with disabilities.

The Committee decided that a refusal to depart from the development plan was disproportionate and produced a discriminatory effect. This discriminatory effect adversely impacted HM's access to the health care and rehabilitation that she required. Accordingly, HM's rights under articles 5(1) and 5(3) (equality and non-discrimination) and article 25 (health), and Sweden's obligations under article 26 of the Convention, read alone and in conjunction with articles 3 (b), (d) and (e) and 4 (1) (d) of the Convention, had been violated.

Article 19(b) (living independently and being included in the community)

Article 19(b) states that States parties must "take effective and appropriate measures" to facilitate full enjoyment by persons with disabilities of their right to live and participate in their communities, and to do this they must provide support services. The Committee found that this article was violated because the rejection of HM's application for a building permit deprived her of the "only option that could support her living [in] and inclusion in the community".

The Committee recommended to Sweden that it remedy the violation of HM's rights by reconsidering her application for a building permit. Furthermore, Sweden was under an obligation to take steps to prevent similar violations in the future.

Relevance to the Victorian Charter

The Victorian Charter of Human Rights does not contain explicit human rights governing health care entitlements (such as articles 25 and 26 in the Convention). However, section 8 of the Charter and its sub-sections provide a broad suite of equality rights which may assist those facing difficulties like those faced by HM.

In *HM v Sweden*, the Committee recognised that a law which is applied in a neutral manner may have a discriminatory effect when the person's particular circumstances are not taken into consideration. The decision shows the importance of ensuring that Victorian laws are applied to people with disabilities in a process that considers their individual situation, and their right to equality before the law.

The decision is available online at:
www.ohchr.org/Documents/HRBodies/CRPD/CRPD.C.7.D.3.2011.doc

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The obligation to investigate suspected instances of torture or ill-treatment

MM and AO (A Child), R (on the application of) v Secretary of State for the Home Department [2012] EWCA Civ 668 (18 May 2012)

Summary

This case adds to pre-existing UK and European authority about the circumstances in which an investigation of an allegation of torture or ill-treatment will be required. In this particular case, an intervention to stop a protest at an immigration detention centre caused such physical and

psychological harm that a claim of ill-treatment was raised. The question was thus to what extent, especially in cases involving children, an independent investigation was required beyond procedures already in place.

Facts

The claimants in this case, a child with her mother and a man with his family, were unsuccessful asylum applicants awaiting deportation at Yarl's Wood Detention Centre in June 2009. At that time, there were serious complaints about the living conditions at the detention centre, particularly as regards the adequacy of food and medical facilities. As such, the detainees started protesting, culminating on 16 June 2009 with a “sit in”, where detainees moved their mattresses out into the corridors and refused to move until someone came to speak with them and address their concerns.

An 18-person team met to devise a way to stop the protest, and it was decided that an intervention would be staged to move named adults out to one containment area and their children to a classroom. During the intervention on 17 June, a number of children and parents became quite upset at their separation, particularly two children, who were later calmed down. The children and their parents were then kept apart for a significant period, in some cases over a week.

This separation, and the level of violence used in removing the detainees from the corridors, gave rise to claims of ill-treatment, contrary to article 3 of the European Convention on Human Rights. This article contains the absolute prohibition of torture and ill-treatment.

On 29 June, the claimants wrote to the UK Border Authority, complaining about their treatment. This was investigated by the Authority's Professional Standards Unit, who obtained statements from nine families, amongst other evidence. It concluded that the intervention was necessary and gave reasons why. The intervention was also the subject of an independent Justice Care report, prepared on behalf of the claimants, which criticised many aspects of the planning and execution of the intervention.

The appellants have also made civil claims, and the Prisons and Probation Ombudsman is investigating, although the Ombudsman's investigation must be put on hold whilst the civil claims proceed.

Decision

Several UK and European Court cases, such as *Banks v UK* [2007] and *R(AM) v Secretary of State* [2009] UKHRR 973, have found that inherent in the prohibition provided by article 3 of the European Convention is an obligation on states to investigate suspected breaches of article 3.

In oral argument the Secretary of State accepted that there was sufficient evidence to consider a case under article 3, based on the allegations in the Justice Care Report. This then enlivened the procedural obligation to investigate, and as such the question was whether this obligation to investigate had been fulfilled by the reports, inquiries and legal claims outlined above.

Sir Anthony May P found at first instance that the civil claim brought by the claimants would require a court to investigate and decide upon their article 3 claim, and thus this would constitute a sufficient investigation. The scope of the civil case would be no different from what the Ombudsman, or another independent investigator, would consider. If the civil claim and Unit report were insufficient, the Ombudsman plainly had broad enough jurisdiction so as to adequately investigate the incident at Yarl's Wood.

The Appeal Court generally supported the findings of Sir Anthony May P, both as to fact and law and found that

> An application must be considered on its merits, having regard to the nature, scale and consequences of the incident, the likelihood of recurrence, and the existence of other investigations conducted or available. The costs involved in a further investigation may also be taken into consideration as a factor.

His Honour did not discuss in detail the "nature, scale and consequences of the incident", aside from considering whether the duty to children in this case gave rise to a greater duty to investigate. It was submitted that, as is the case with the obligation to investigate breaches of article 2 (right to life), the obligation to investigate is greater in cases involving children.

As to the likelihood of recurrence, it was also emphasised by the applicants that the situation at Yarl's Wood could be repeated elsewhere, and that lessons needed to be learned in planning a future such intervention. The regime regarding children's migration detention has changed since 2009, and as such it is unlikely the exact situation would arise again. His Honour accepted that it was still necessary to take general lessons away from the Yarl's Wood investigation, but that many forms of investigation would be able to produce this result.

Accordingly, the main question at issue in this case was whether the other investigations — the Unit report, the Justice Care report, the civil claim and the possibility of Ombudsman investigation — were sufficient.

The Unit investigation was found to be valuable given its promptness, thoroughness and the fact that it marshalled a large amount of evidence. Whilst the investigation was not independent of government (as the Unit sits within the Authority) and thus did not meet the article 3 requirement by itself, his Honour found it to have "significant relevance".

The civil claims were equally found to be "relevant", as a means of both investigating what happened and learning lessons for the future. The merit of this process is that there is an independent judge, and whilst it is an investigation of the situation of the specific claimants, it will inevitably involve a consideration of the planning and conduct of the intervention. The prospect was raised that this matter might settle before an investigation was carried out, thereby undermining its effectiveness (especially as it would be the litigation friend of a child who would make this decision, and thus the child's voice would not be heard). His Honour found that whether the claim proceeds to final judgment or not "may be a factor in a subsequent decision as to what, if any, further investigation is required", but the possibility of the claim settling in the future does not impact upon the current application.

Regardless of the outcome of the civil claim, the Ombudsman may also decide to investigate, and this investigation would be independent with a large volume of evidence available to it. The fact that this possibility has been deferred because of the civil claims does not undermine its adequacy. His Honour made reference to the fact that it was the claimant's own decision to bring a civil claim that had deferred the Ombudsman's investigation, and stated that the "exercise of choice does not in present circumstances convert something sufficient into something insufficient".

As such, the combination of the Unit report, the Justice Care report and the civil proceedings did not currently give rise to a further obligation to investigate.

Relevance to the Victorian Charter

Article 10 of the Victorian Charter contains an equivalent provision to article 3 of the European Convention, prohibiting torture and cruel, inhuman or degrading treatment or punishment. The Victorian provision is phrased more broadly, but otherwise reflects the obligations contained in the European Convention and other instruments prohibiting torture.

This case will thus be relevant to instances of alleged torture or ill-treatment in Victoria, whether in the context of detention or otherwise.

This case will not, however, be relevant in the immigration detention context unless Victoria Police or another state body are involved.

The decision is available online at: http://www.bailii.org/ew/cases/EWCA/Civ/2012/668.html

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Disability discrimination in housing benefits determinations

Burnip v Birmingham City Council & Anor (Rev 1) [2012] EWCA Civ 629 (15 May 2012)

Summary

Due to severe disabilities, the applicants required extra bedrooms to accommodate their special needs. However, their housing benefits were only calculated based on what would reasonably be required for able-bodied person.

The applicants successfully argued before the England and Wales Court of Appeal that this breached their right to freedom from discrimination.

Facts

Ian Burnip and Lucy Trengove, who were severely disabled, were assessed as requiring carers overnight and as such required two-bedroom flats. They were both entitled to housing benefits but their local councils calculated the housing benefits by reference to the one-bedroom rate which would apply to able-bodied tenants.

In somewhat different circumstances, Richard Gorry, his wife and their three children lived in a four-bedroom rented house. Two of the young girls had disabilities (one had Down's Syndrome and the other Spina Bifida) so it was not appropriate for them to share a bedroom as would normally be expected. Nonetheless, the housing benefit was calculated with reference to the three-bedroom rate which would apply to the family if the girls were not disabled.

The three separate cases came to Court together and the key issue was whether the calculation of the housing benefits in each case amounted to unlawful discrimination pursuant to article 14 of the European Convention on Human Rights and Fundamental Freedoms which provides:

> [t]he enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

It is of relevance to note that a range of benefits, including discretionary housing payments, were, in principle, available to the applicants as a possible way to bring the gap between the housing benefits and the cost of an extra room. Also, an amendment to the social security legislation was subsequently introduced which provided housing benefits for "one additional bedroom in any case where the claimant or the claimant's partner is a person who requires overnight care".

Decision

The Court of Appeal held that the applicants had established a prima facie case of discrimination pursuant to article 14 and the State had failed to establish objective and reasonable justification for the discriminatory effect of the statutory criteria for housing benefits. The reasons for its decision are as follows.

The Court noted there was no dispute that disability is clearly within the concluding words "other status" of article 14 and housing benefits falls within the ambit of article 1 of the First Protocol as a "possession" so these circumstances were covered by article 14.

Further, the Court noted article 14 "embraces a form of discrimination akin to indirect discrimination in domestic law". However, the relatively non-technical drafting of article 14 avoids the legalistic requirements for indirect discrimination under domestic discrimination law (such as statistical evidence to identify correct comparators). Therefore, discrimination is established if a group recognised as being in need of protection (in this case, the severely disabled) is significantly disadvantaged by the application of ostensibly neutral criteria, subject to justification.

Having held the applicants fell within article 14, the Court then considered whether this discrimination was justified. In this regard, the Court confirmed the State must establish there was an objective and reasonable justification for the discriminatory effect of the relevant housing benefits criteria as they applied to the particular circumstances of the applicants. In other words, the State did not have to justify the scheme of housing benefits as a whole nor the general policy of calculating housing benefits in the private sector by reference to the number of occupiers. Instead, the State had to justify the difference in treatment resulting from the application of those criteria which have been held to infringe article 14.

In considering whether the discrimination was justified, the court noted there were a wide range of benefits available to the applicants that could potentially offset the cost of the extra room. However, the Court held that these benefits were not intended to help with their housing needs but rather their ordinary living expenses as a severely disable person. Also, whilst discretionary payments may be available, their duration and amount were unpredictable. Therefore, the Court held this was not an adequate justification for the discrimination in this case.

Moreover, when considering the relatively modest cost and human resource implications of accommodating such cases (given the very limited category of claimants with disabilities so severe they required an extra bedroom) and the fact that the legislation had now been changed to accommodate these kinds of cases, during times of general economic hardship, it could not reasonably be said that such discrimination was proportionate and just.

Application to the Victorian Charter

The right to freedom from discrimination is protected by section 8 of the Victorian Charter. This case confirms the decision of *Thlimmenos v Greece* (2001) 31 EHRR in which it was held that the right not to be discriminated against in the enjoyment of rights is also violated when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different and that this right imposes a positive obligation on the State to make provision to cater for the significant difference. Further, it confirms "a difference of treatment lacks objective and reasonable justification 'if it does not pursue a legitimate aim or if there is not reasonable relationship of proportionality between the means employed and the aim sought to be realised' ".

Of interest, the Grand Chamber in the matter of *Stec v United Kingdom* (2006) 43 EHRR 47 has remarked that there is a "margin of appreciation" enjoyed by the State arising from the fact that the State has direct knowledge of its society and its needs and as such is better placed, in principle, to appreciate the public interest on social or economic grounds. Accordingly, an international judge will "generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'".

The decision is available online at: http://www.bailii.org/ew/cases/EWCA/Civ/2011/629.html

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Right to fair hearing not engaged in process leading to dismissal from employment

Mattu v University Hospitals of Coventry and Warwickshire NHS Trust [2012] EWCA Civ 641 (18 May 2012)

Summary

The England and Wales Court of Appeal has found that a disciplinary process which resulted in the dismissal of an employee did not engage that employee's civil rights under the European Convention of Human Rights. Thus, the employer was not bound by the obligations to provide a fair hearing under the Convention.

Facts

The applicant, Dr Mattu, was employed as a consultant cardiologist. In 2002, he was suspended from his employment on disciplinary grounds. That disciplinary process took a number of years and, consequently, Dr Mattu remained suspended until July 2007. Due to his lengthy absence from work, Dr Mattu was required to update his clinical skills to ensure his safe return to medical practice.

The employer instructed Dr Mattu to engage in a re-skilling program. A dispute arose in relation to this issue and Dr Mattu refused to sign the employer's return-to-work action plan. This dispute led to new allegations against Dr Mattu, including allegations that he was "unmanageable" and had unreasonably refused to comply with the action plan.

There was a further misconduct hearing into these new allegations, which was conducted by an independent panel. The panel determined that Dr Mattu had engaged in "gross misconduct" and he was consequently dismissed from his employment. The dismissal did not affect Dr Mattu's entitlement to practise as a doctor.

Dr Mattu appealed the dismissal on a number of grounds, including the alleged failure by the employer to afford him a fair hearing in accordance with Article 6 of the Convention.

Issues

Relevantly, Article 6 of the Convention says:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Dr Mattu submitted that the misconduct hearing and the consequential decision to dismiss him from his employment was a "determination of his civil rights", which engaged article 6. Moreover, he argued that the panel which reached the decision to dismiss him was neither independent nor impartial and that he had not been afforded a fair hearing.

Decision

The Court held that the decision to dismiss Dr Mattu from his employment was an exercise of the employer's contractual rights – not Dr Mattu's civil rights – and, therefore, did not engage article 6 of the Convention.

The Court drew a distinction between an employer's contractual right of dismissal (which is *not* a civil right) and an employee's rights not to be unfairly or unlawfully dismissal (which *are* civil rights). The Court also indicated that it may have reached a different conclusion if the dismissal had affected Dr Mattu's ability to practise in the medical profession.

Relevance to the Victorian Charter

Under section 24 of the Charter, the right to a fair hearing is only engaged in circumstances where a person has been charged with a criminal offence, or is a party to a civil proceeding.

Although the position is perhaps already clear in Victoria, this case confirms that a public authority under the Charter is not obliged to give a fair hearing to an employee in matters concerning the contract of employment.

The decision is available online at: http://www.bailii.org/ew/cases/EWCA/Civ/2012/641.html

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Retrospective preventive detention incompatible with human rights

G v Germany [2012] ECHR 956 (7 June 2012)

Summary

The European Court of Human Rights has unanimously held that Germany violated the prohibition under article 7(1) of the European Convention on Human Rights on imposing a penalty heavier than that which existed at the time of the offence, by imposing a period of retrospective preventive detention.

Facts

Mr G (the applicant) is a German national who, at the time of instituting the proceedings, was detained in Straubing Prison in Germany. In 1992 he was convicted of three counts of murder and sentenced to 15 years' imprisonment. In addition to his prison sentence, the sentencing courts ordered the applicant's placement in a psychiatric hospital after serving his full prison term.

In 2007, the applicant's stay at the psychiatric hospital was terminated by the Regional Court, which held that he did not suffer from a condition diminishing his criminal responsibility. The applicant was subsequently placed in preventive detention, on the basis of article 66(3) of the German Criminal Code, which allowed a court to impose preventive detention retrospectively. The Regional Court found that a comprehensive assessment of the applicant, his offences and his development during placement in the psychiatric hospital showed it to be very likely that, if released, he would again commit serious offences resulting in considerable psychological or physical harm to the victims.

The Federal Court of Justice dismissed the applicant's appeal, and in August 2009 the Federal Constitutional Court declined to consider the applicant's constitutional complaints against the retrospective orders for his preventive detention.

The applicant subsequently brought proceedings to review his preventive detention. At the time of proceedings he was still in preventive detention.

Decision

The European Court found that there had been a breach of article 7(1) of the Convention, and ordered that the applicant be paid non-pecuniary damages of EUR 5,000 and costs and expenses of EUR 7,140 under article 41.

Arguments

The applicant contended that his preventive detention breached article 7(1) of the Convention as, at the time he committed the offences, a retrospective order for preventive detention was not possible after the judgment of the sentencing court had become final.

The State argued that the preventive detention was not a “penalty” under domestic law, as found by its Federal Constitutional Court. Furthermore, the preventive detention in the present case could not be classified as a 'heavier' penalty for the purposes of article 7(1) as the applicant's detention had not been ordered for the first time after his criminal conviction; he was merely transferred from one system of detention to another given the change in psychiatric diagnosis. The State also argued that releasing the applicant would have breached its positive obligation under article 2 of the Convention to protect potential victims from further murders or sexual assaults that the applicant would most likely commit.

Ruling

Under article 7(1), the preventive detention considered must be classified as a “penalty”. The European Court relied on its earlier decision in *M v Germany* (2009), where it found that preventive detention under the Criminal Code, when ordered following or by reference to a conviction for a criminal offence, is to be qualified as a penalty for the purpose of article 7(1). The European Court was not convinced that the conditions of the applicant's preventive detention differed substantially from the circumstances in *M v Germany*.

The European Court also referred to a recent decision of the Federal Constitutional Court, whereby the Court found that the provisions of the Criminal Code on preventive detention did not satisfy the constitutional requirement of establishing a difference between preventive detention and detention for serving a term of imprisonment.

Once satisfied that the preventive detention was a penalty, the European Court considered whether this penalty was “heavier” than that which was applicable at the time of the offences.

The European Court rejected the State's argument that the applicant had merely been transferred from one “measure of correction” to another, on the grounds that the Regional Court, at sentencing in 1992, expressly declined to order the applicant's preventive detention in addition to his placement in psychiatric care.

In addressing the State's argument that it would have breached its positive obligation under article 2 of the Convention if it had released the applicant, the European Court reiterated that the Convention neither obliges nor authorises State authorities to protect individuals from criminal acts of a person by measures in breach of that person's rights under article 7(1).

Relevance to the Victorian Charter

This decision is relevant to sections 21 and 27 of the Charter. Section 21, the right to liberty and security of person, codifies the right of people not to be subject to arbitrary arrest or detention. More specifically, section 27 on retrospective criminal laws adopts wording almost identical to its European equivalent.

Therefore, this judgment has direct relevance to, and may be persuasive in, future consideration and interpretation of section 27 and in other cases involving retrospective detention.

The decision is available online at: http://www.bailii.org/eu/cases/ECHR/2012/956.html.

***Lucinda Carter** is a law graduate at DLA Piper*.

Freedom of association permitted under workers' collective bargaining regime

Mounted Police Association of Ontario v Canada, 2012 ONCA 363 (1 June 2012)

Summary

In *Mounted Police Association of Ontario v Canada*, the Ontario Court of Appeal considered the scope of the freedom of association under section 2(d) of the Canadian Charter of Rights and Freedoms. The question for the Court was whether a statutory employee relations regime imposed on the Royal Canadian Mounted Police violated section 2(d) of the Charter. Justice Juriansz, with whom Justices Doherty and Rosenberg agreed, held that this statutory regime did not make it impossible for members of the Police to exercise their fundamental freedom of association. Consistent with this freedom, Police members were able to form independent employee associations to collectively achieve their workplace goals.

Facts

The applicants in this case, the Mounted Police Association of Ontario and the British Columbia Mounted Police Professional Association, challenged three provisions of their statutory labour relations regime for violating section 2(d) of the Charter. Clause 22 of the *Public Service Labour Relations Act 2003* allowed most employees in Canada's federal public service to engage in collective bargaining processes with their employers. Section 2(1)(d) of this Act excluded members of the Police from this scheme. Section 96 of the *Royal Canadian Mounted Police Regulations 1988* established a separate Staff Relations Representative Program for the Police. The Police argued that this regulatory scheme was not a genuine employee association with representatives freely chosen by employees, but a statutory association imposed upon them. At first instance, the applicant judge concluded that members of the Police had a constitutional right to form an independent association for labour relations that was free from management interference or influence. Section 96 of the Regulations violated this right, as the Program was neither an independent association representing employees nor an adequate vehicle for collective bargaining. Canada's Attorney General appealed this finding.

Decision

Section 2(d) of the Canadian Charter provides a fundamental freedom of association which, in the labour context, includes a right to collective bargaining. As Justice Juriansz explained, *Ontario (Attorney General) v Fraser* [2011] 2 SCR 3 "is the most important authority to consider when interpreting section 2(d), not only because it is the most recent, but also because it restates the Supreme Court's conclusions in the earlier cases". In *Fraser*, the Canadian Supreme Court held that the right to collective bargaining under section 2(d) was a "derivative constitutional right". This meant that a positive obligation to engage in good faith collective bargaining would only be imposed on an employer when it was effectively impossible for employees to act collectively to achieve their workplace goals.

The applicants argued that their freedom of association under section 2(d) was effectively useless unless a positive obligation was imposed on their employers to engage in collective bargaining. The Regulations permitted Police members to form voluntary employee associations. Once an association was created, the applicants argued that section 2(d) vested a right to negotiate with their employer on the basis of comparatively equal bargaining power. The Ontario Court of Appeal disagreed with this "expansive concept" of the constitutionally guaranteed right to collective bargaining. Following Canadian Supreme Court jurisprudence, the Court of Appeal held that "collective bargaining" under section 2(d) only protects the rights of employees to make

collective representations and to have those representations considered in good faith. As this was a "derivative right", government employers were only obliged to engage in collective bargaining where the derivative right was claimed. Employees could claim the derivative right by demonstrating that the exercise of their fundamental freedom was "effectively impossible".

Justices Juriansz, Doherty and Rosenberg found that it was not impossible for Police members to exercise their fundamental freedom of association guaranteed by section 2(d) of the Charter, for three reasons:

- First, the Supreme Court had already considered this question in *Delisle v Canada (Deputy Attorney General)* [1999] 2 SCR 989, holding that RCMP members had a right to create voluntary employee associations. This was contrasted with agricultural workers, who did not have this right and therefore whose freedom of association under section 2(d) was violated (see *Dunmore v Ontario (Attorney General)* [2001] 3 SCR 1016).
- Secondly, it was not impossible for Police members to exercise their fundamental freedom of association due to the existence of the Program. The Court found that while the Program was not institutionally independent and Police members did not have a right to choose their representatives, these factors were not determinative to the case at hand. Rather, the extensive collaboration between elected Staff Relations Representatives and the Police management showed that it was not impossible for Police members to associate to achieve their collective goals.
- Thirdly, a "Legal Fund" had been created, representing more than 14,000 Police members, to help members with employee-related issues. The existence and maintenance of this "robust" association, and the functions it performed, supported the Court's conclusions.

Ultimately, the Court of Appeal held that it was not effectively impossible for Police members to act collectively to achieve their workplace goals. Rather, as the Supreme Court's findings in *Delisle* confirmed, the Police did have the freedom to form independent employee associations. It followed that the applicants were unable to claim the constitutional derivative right to effective bargaining under section 2(d) of the Charter. The Court allowed the Attorney General's appeal and set aside the findings of the applicant judge.

Relevance to the Victorian Charter

Section 16(2) of the Victorian Charter of Human Rights vests a right in every person to freedom of association with others, "including the right to form and join trade unions". The Ontario Court of Appeal's decision may be relevant to interpreting this section, particularly concerning employees' collective bargaining rights as members of trade unions. Following this decision, the freedom of association under section 16 of the Charter vests in employees a right to collectively represent their interests and have those representations considered in good faith. This freedom does not, however, impose any positive obligation on employers to engage in collective bargaining with every trade union or employee organisation voluntarily created.

The decision is available online at:
http://canlii.ca/en/on/onca/doc/2012/2012onca363/2012onca363.html

Clare McKay, Law Graduate, King & Wood Mallesons Human Rights Law Group.

HRLC POLICY WORK AND CASE WORK

HRLC recommendations endorsed in Special Rapporteur on trafficking in persons' report on Australia

The Special Rapporteur on trafficking in persons, Joy Ngozi Ezeilo, has provided her report on her mission to Australia in November 2011 to the UN Human Rights Council. The Special Rapporteur commends Australia on recent positive developments, including proposed amendments to the *Criminal Code Act 2005* (Cth) to comprehensively reflect Australia's international legal obligations under the Trafficking Protocol. She also makes a series of recommendations in relation to data collection, capacity-building for government officials, addressing gaps in support programs and strengthening regional engagement.

The Human Rights Law Centre provided a briefing paper on the application of people smuggling laws to persons who may have been trafficked to Ms Ezeiol during her mission. Ms Ezilo refers to Australia's people smuggling laws in her report stating that:

> the strong political commitment to criminalizing and prosecuting people smuggling may have unintended negative consequences for victims of trafficking. In the past three years, new laws against people smuggling, with mandatory minimum sentences, resulted in the arrests of over 493 persons. However, of those charged, only six persons were actual organizers or facilitators of the smuggling operations. Many of those arrested are reportedly deceptively recruited to work on ships as crew members, with false promises about the nature of their work and their payment, and thus may themselves have been victims of trafficking. Nonetheless, they are treated as accused criminals and placed in jail. This is a clear violation of the international legal obligation of Australia to correctly identify victims of trafficking, to provide immediate protection and support to such persons, and to ensure that they are not criminalized for offences relating to the fact of their having been trafficked. The situation is particularly worrying given that some crew members of vessels involved in migrant smuggling appear to be children.

The report concludes that "Australia has demonstrated strong leadership in combating trafficking in persons regionally and domestically, as well as a willingness to learn from experience and adapt its approach accordingly. However, there are some weaknesses that prevent Australia from realizing a genuinely human rights- and victim-based response."

***Rachel Ball** is Director of Policy and Campaigns with the Human Rights Law Centre.*

Productivity Commission releases report on Australia's Export Credit Arrangements

Last year the Human Rights Law Centre made a submission to the Productivity Commission's inquiry into arrangements for the provision of export credit through Australia's Export Finance and Insurance Corporation (EFIC). EFIC is the Australian Government provider of financial services that support Australian exports and overseas investments.

The HRLC submission considered the discrete issue of EFIC's international human rights obligations and concluded that EFIC's current policies and operations do not comply with

Australia's obligation to protect human rights as established under the framework set out by the UN Special Representative on Business and Human Rights, Professor John Ruggie.

The Productivity Commission's report, *Australia's Export Credit Arrangements* was released on 26 June 2012. The report includes several far-reaching recommendations around the provision and pricing of EFIC's products and the need to enhance the transparency of EFIC's operations. The Report also recommends that the Minister should 'articulate international obligations, including human rights obligations, EFIC is required to comply with' and 'EFIC's compliance with these obligations should be included in its internal audit program with outcomes publically reported, including in EFIC's annual report'.

Slow but steady progress towards ratification of OP-CAT

In a report tabled in Parliament on 21 June 2012, the Joint Standing Committee on Treaties (JSCOT) urged the Federal Government to ratify and implement the Optional Protocol to the Convention against Torture. This affirms the HRLC's position as outlined in its March 2012 submission to JSCOT advocating Australia's ratification of OP-CAT.

The submission made the following key points:

- Independent monitoring and inspection of places of detention would assist in fulfilling existing legal obligations under the Convention against Torture and the ICCPR to prevent torture and ill-treatment and to ensure humane conditions of detention.
- Ratification and implementation would contribute to protecting the human rights of persons deprived of liberty, including prisoners, involuntary psychiatric patients, asylum-seekers and others in immigration detention, people with disability and juvenile detainees.
- OPCAT's holistic and preventative approach to addressing torture and ill-treatment in places of detention would complement and strengthen existing individualised complaints-based mechanisms.
- By promoting a constructive dialogue between the "national preventative mechanism" (an independent body with a mandate to conduct announced and unannounced visits to places of detention), international human rights experts and detaining authorities, OPCAT would foster best practice in detention monitoring and the prevention of ill-treatment in Australia.
- Ratification would demonstrate Australia's commitment to international and regional human rights leadership.
- The costs of ratification and implementation would be low. Conversely, the social, economic, legal and health costs of failing to prevent torture and ill-treatment are very high.

***Ben Schokman** is Director of International Human Rights Advocacy with the Human Rights Law Centre and a Senior Associate with DLA Piper.*

National Children's Commissioner Bill passes parliament

Australia will have a National Children's Commissioner following the passing of the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill through Parliament in June.

On 28 May 2012, the HRLC made a submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012.

The submission highlighted that the establishment 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 and review of national law and policy. In so doing, the Commissioner will be an important institutional mechanism contributing to the domestic implementation of Australia's international human rights obligations, particularly those arising under the Convention on the Rights of the Child.

The submission emphasised that the creation of a National Children's Commissioner has been consistently advocated by non-government organisations, including the National Children's and Youth Law Centre and Save the Children Australia; and the UN Committee on the Rights of the Child had previously expressed "concern that there is no commissioner within the Australian Human Rights Commission devoted specifically to child rights". The UN Human Rights Council also recommended that Australia appoint a national Children's Commissioner when it reviewed Australia's human rights record under the Universal Periodic Review in 2011.

The submission noted that the establishment of a National Children's Commissioner is also supported by experience in comparable jurisdictions. The experience from countries such as New Zealand, the United Kingdom and Norway – all of which have full-time children's rights commissioners – shows that an adequately resourced and mandated commissioner can play a valuable role in advocating for the human rights of children and young people.

The submission concluded that "the establishment of a full-time, adequately resourced and appropriately qualified National Children's Commissioner will make a significant contribution to the promotion and protection of the rights of the child in Australia".

***Ben Schokman** is Director of International Human Rights Advocacy with the Human Rights Law Centre and a Senior Associate with DLA Piper.*

HRLC MEDIA COVERAGE

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

- Farah Farouque, 'We fail on child rights, says UN', *The Age* , 25 June 2012
- Patricia Kervalas, 'Gillard asked to let inquiry assess bill's legality', *The Australian*, 16 June 2012
- Nicole Brady, 'Carlton man puts Uganda in dock over persecution', *The Age*, 10 June 2012
- Natasha Mitchell, 'National Children's Commissioner: What will it do?', *ABC Radio National (Life Matters)*, 04 June 2012
- Kesha West, 'Indonesian boy to sue over Australian detention', *Australia Network News*, 04 June 2012

SEMINARS & EVENTS

Tracking and communicating human rights performance & managing human rights related complaints, disputes and grievances

Thursday 12 July 2012 and Wednesday 1 August, Melbourne

The UNAA Business and human rights workshops are an essential program for corporate responsibility and sustainability managers, investors, risk and compliance managers, and corporate lawyers, on the implementation of the UN Guiding Principles – the global standard of practice on business and human rights. The workshops invite professionals from diverse backgrounds wanting to learn more about business and human rights and how to apply the UN Guiding Principles in practice. The workshops build capacity to monitor and manage corporate human rights impacts and risks, and provide practical guidance on how to integrate human rights considerations into everyday business practices.

Click here for further details and registration information.

Castan Centre Annual Human Rights Law Conference

Friday 20 July 2012, Melbourne

Keynote speakers include: Gareth Evans AO QC – The responsibility to protect after Libya; Professor Tim Flannery – Global warming and human rights; Sami Ben Gharbia – The Arab spring; Susan Ryan AO – Human rights never age; Dr Samantha Thomas – Public health and human rights (Obesity); Allan Asher – People just like us; human rights for asylum seekers!; Ron Merkel QC – Recent human rights cases in the courts; Dr Kerry Arabena – Recognition of Indigenous peoples in the Australian Constitution.

Click here for further details and registration forms.

Environmental Justice Symposium

Friday 27 July 2012

The Environment Defenders Office and Centre for Resources Energy and Environmental Law are hosting a symposium that will explore the idea that “environmental justice” has a particular relevance in Australia across a range of issues. Researchers, practitioners and community representatives across a diversity of fields are invited to attend. The keynote address: *Environmental justice: Then and now* will be delivered by David Schlosberg, Professor of Environmental Politics in the Department of Government and International Relations at the University of Sydney. For more information visit: http://www.edovic.org.au/downloads/files/seminars/2012/edo_EJ_symposium_program_2012.pdf

Australian National University, “Law and Democracy” Public Law Weekend Conference

20–22 September 2012

This year's Public Law Weekend theme is Law and Democracy, which seeks to examine the complements and tensions between the two ideals. Discussion will be encouraged across public, judicial and political processes, and from standpoints of domestic, comparative, transnational or international law. As part of the Weekend, **Judge Christopher Weeramantry** will deliver this

year's **Annual Kirby Lecture in International Law** and **Professor Adrienne Stone**, of Melbourne University Law School, will deliver the **15th Geoffrey Sawer Lecture**. The conference also includes various panels of speakers on themes such as comparative constitutional law and democracy, law and the Australian people, and Indigenous Australians and current developments. Visit the ANU College of Law website for more details.

2nd World Congress on Adult Guardianship

Guardianship and the United Nations Disabilities Convention: Australian and International Perspectives

15–16 October 2012, Melbourne

The congress will provide an opportunity to assess the impact of the Convention in reforming Australian and International guardianship laws and practices six years after its adoption by the UN General Assembly and four years after ratification by Australia. Click here for further information.

PROMOTIONAL GIVEAWAY

Where Do We Go Now? is a heart-warming film from Lebanon. By following a lively group of Christian and Muslim women who unite to protect their community from external religious tensions, it asks the question, if women ran the world, would there be any wars? If you would like to win one of five complimentary double passes to check it out cinemas, then be quick to rsvp here at hopscotch films.

HUMAN RIGHTS JOBS & RESOURCES

CLC Law Graduate Scheme 2013

The Federation of Community Legal Centres is pleased to announce that applications for two CLC Law Graduate Scheme positions to commence in early 2013 are now open. This program, funded by the Legal Services Board and Victoria Legal Aid, will provide an opportunity for two law graduates to start their legal career in Victorian community legal centres.

International Initiative to Promote Women's rights to Social Security and Protection

Rights Agenda readers may be interest in this webinar series on women's right to social security produced in April by the Human Rights Research and Education Centre at the University of Ottawa.

The Revenue Watch Institute

The Revenue Watch Institute is a non-profit policy institute and grantmaking organisation that promotes the effective, transparent and accountable management of oil, gas and mineral resources for the public good. The Revenue Watch Institute is seeking an Asia Pacific Regional Coordinator to lead its work in the region and a Senior Associate to support the Coordinator and the regional team.

FOREIGN CORRESPONDENT

The successes and challenges of the Universal Periodic Review

The Universal Periodic Review (UPR) has been hailed as the most successful mechanism of the UN human rights system. That praise has largely been based on the fact that all 193 member States of the UN had their human rights situation reviewed on schedule by the Working Group on the UPR. Compared to other UN review processes, most particularly the treaty body review process, which also relies on States presenting themselves for review and where delays of 10 years in submitting a report are not uncommon, this is indeed a major achievement of the UPR.

Real success, however, lies not in persuading States to submit themselves to the questions and recommendations of their peers, but in the ability of the mechanism to achieve change on the ground. The beginning of the second cycle, on 21 May, gave the Working Group its first opportunity to revisit the commitments that States made four years ago and to track how far, if at all, progress has been made.

There was a high level of interest in seeing how the first meeting of the second cycle proceeded, in particular how well States would balance the need to revisit recommendations from the first cycle with the need to continue to assess a country's human rights situation and raise new issues. Fears that States would focus too much on recommendations accepted during the first cycle were far from being realised. UPR-Info, an NGO that follows the UPR process very closely, noted that very few reviewing States made reference even to recommendations that they had made themselves during the first cycle.

While many countries lack the capacity to carry out their own assessment of steps taken within a country, there were readily available sources of information. For example, each State under review included in its national report an update on implementation of previous recommendations. Combined with this, civil society made an effort to provide an update on implementation, which was included in the stakeholder reports compiled by OHCHR. This should have provided at least a basis for States to follow-up on their recommendations, at least by putting questions to the delegation under review. Some countries, such as India, included an update on recommendations in an annex, thereby allowing the body of the national report to focus on the general human rights situation in the country. Given that at later sessions the number of recommendations received per State rose to over 130 on average, giving any detail on implementation in the 20 pages available in the national report will clearly be impossible at later sessions. Encouraging States to think about including such information in an annex may allow for the more detailed update required, as long as this does not also sideline the follow-up side of the process.

A possible obstacle to the Working Group following up systematically to the first cycle, as well as reassessing the overall human rights situation in a country, is the new approach to the speakers' list used for this cycle. As a result of available time now being shared equally amongst all States signed up to speak, speaking time was limited in some cases to around 80 seconds, with many States cut off before they had completed their entire statement. As States consider their own lessons from the first session of the second cycle, and how to adapt to this new working method, they may need to rethink the format of their statements, such as whether it is necessary in each case to welcome and congratulate the State under review.

On a practical level, it is worth noting that the new procedure for the speakers' list did work better than the old format in removing the need for States to queue early in the morning to ensure their inclusion on the list. The alphabetical arrangement of speakers also ensured that there was a mix of friendly and less friendly States on the list.

Another major obstacle to follow-up is that many of the recommendations made during the first cycle were extremely general. In fact, according to the data collected by UPR-Info, most of the recommendations accepted by States were of a general nature. Such recommendations, for example, may call on a State to "strengthen its efforts to ensure access to education – and to health care – for all its citizens, including those with disabilities, regardless of ethnicity, religion, tribal affiliation or economic status". The task of assessing implementation of a recommendation such as this is far more difficult than in the case of a specific recommendation such as "prohibit by law the practice of corporal punishment of children as a disciplinary method".

In this light the pledge made by 39 States during the 19th session of the Human Rights Council to make high quality recommendations, that is recommendations that are "precise, practical, constructive, forward looking, and implementable", goes to the heart of what could be the major weakness of the UPR process. Unfortunately the quality of recommendations did not show significant signs of improvement at this first session of the second cycle. It is to be hoped that the States making that pledge make strenuous efforts to enact it, and that other States also seek to improve the quality of their recommendations. Further, States could attempt to improve the quality of recommendations from the first cycle by re-presenting them to States and this time pinpointing areas in which a State could take concrete steps.

The full participation rate gives the Working Group and other stakeholders an excellent basis on which to contribute to on-the-ground improvement in the human rights record of all UN member States, but to achieve this the process must include systematic and sustained follow-up to previous cycles. The critical point to establish those good follow-up practices is now, before bad habits become entrenched.

Heather Collister *is a Human Rights Officer with the International Service for Human Rights in Geneva (www.ishr.ch).*

IF I WERE ATTORNEY-GENERAL…

Breaking cycles of disadvantage

As Attorney-General of Victoria, I would prioritise seeking changes to laws, policies and practices that compound cycles of disadvantage in our community. In the more eloquent words of my community legal sector colleague, Gary Sullivan, this would involve addressing systemic factors underpinning "the quiet desperation, chaotic lifestyles and multiple disadvantages that bring the poor and powerless into conflict with the broader community and the justice system" (see *Poor, powerless and in trouble with the law).*

A message I have carried from my parents since my happy and stable childhood is that when exercising the right to vote, we should always vote for the benefit of those experiencing the most serious hardship. It is now very clear to me that laws and policies aimed at alleviating disadvantage benefit the whole community. That's because enhancing equality is about enhancing the health and wellbeing of citizens, which in turn creates safer, more harmonious communities.

Also, we must not forget how life can easily take a turn for the worse. It is not uncommon in our sector to encounter people who are on track one minute, but experiencing great hardship the next. It is therefore important to recognise that disadvantage, while often systemic, is also a creature of sudden and unexpected circumstance.

These are the values I would bring to the role of Attorney-General: a view that human rights based laws aimed at enhancing equality and wellbeing benefit us all. I wouldn't come to the role with all the answers. Rather, I would proactively seek views from all relevant stakeholders on how we can improve laws and strengthen the justice system for the purpose of enhancing equality.

I very much appreciate the interdependent nature of human rights protection and would take a holistic approach to policy formulation. For example, any decisions on criminal justice policy would take full account of the importance of the rights to housing, work and health to preventing behaviours leading people towards the criminal justice system.

Below are examples of three legal areas that I believe are ripe for a human rights based review.

The infringements system

The infringements system works effectively for most members of the community in that it allows people to discharge their fine by payment without having to go to court or having to potentially receive a criminal record. At the same time, however, there is a small minority of poor and powerless people for whom the infringements system is ineffective and unfair. Significant sources of disadvantage, such as poverty, homelessness, addiction, mental illness and illiteracy, underpin behaviours for which many members of our community are receiving infringements. A human rights based infringements system would provide people in these circumstances with assistance and support to overcome or manage their hardship to reduce the likelihood of committing further offences. As Attorney-General, I would put ideas forward on, and seek views on, effective measures for directing people experiencing hardship to support services as opposed to court and potentially jail.

Expanding JobWatch – Victoria's specialist employment law service

The link between secure employment and the enjoyment of other human rights is obvious and well accepted. The Federal Government provides significant funding to both Fair Work Australia and the Fair Work Ombudsman, and both agencies play an important role in enhancing workplace rights. However, one of the largest areas of unmet legal need in Victoria is in the area of employment law. The Fair Work Ombudsman and Fair Work Australia can provide individuals seeking assistance with information, but cannot provide legal advice or advocacy. Considering the sensitive nature of employment disputes – for example, where raising problems with an employer can damage the employment relationship or lead to a loss of employment – what people really need is strategic legal advice on how to deal with their circumstances. This is evidenced by the fact that approximately 60 percent of calls received by Victoria's specialist community legal centre, JobWatch, come by way of referral from the Fair Work Australia and Fair Work Ombudsman. Unfortunately, JobWatch has gone through significant funding uncertainty and has a huge unmet demand. As Attorney-General, I would consult with community legal centres and other organisations on significantly expanding JobWatch's capacity to meet demand across Victoria. As employment legal issues can come under federal laws, I would again seek collaboration from the Commonwealth and State and Territory Attorneys-General to establish a well-resourced, nationwide specialist employment law service.

Debt collection practices of local councils

In Victoria, many local councils frequently sue their residents as an early means of recovering small amounts of unpaid rates, without first adequately exploring the reasons for non-payment

and negotiating a sustainable payment plan. This is occurring in circumstances where residents are experiencing genuine financial hardship. Legal costs and court fees for small debt matters typically exceed $650, which is sometimes more than the original rate arrears due. Adding these costs and fees to the rates debt makes it even more difficult for local residents to repay the original debt. I know that many people are being sued often in circumstances where the council is on notice about the resident's serious personal or financial hardship, including dealing with cancer, the death of an immediate family member, single motherhood combined with serious personal or family illness, long-term mental illness, and recent separation and divorce. Legal proceedings simply exacerbate these forms of hardship.

In addition to the harsh personal consequences, claims for unpaid rates take up a disproportionate and unnecessary amount of court resources, representing 50 percent of all undefended claims under $1000. Australia's biggest debt collection agency, Credit Corp, reports in its *2011 annual report* that improving its practices when dealing with people experiencing hardship, including by offering sustainable payment plans, has led to a significant increase in the recovery of debt. It is clear that responsible debt collection practices and hardship assistance benefits both business and community members. As Attorney-General, I would consult with relevant stakeholders, including local councils, financial counsellors, community lawyers and the State Ombudsman to improve the debt collection practices of local councils, including through the development of a financial hardship code of practice. I would take the outcomes and findings from this process to the Commonwealth and other State and Territory Attorneys-General to seek collaboration on enhancing responsible hardship assistance by all government and private organisations across Australia.

Jacqui Bell *is a Policy Officer with the Federation of Community Legal Centres (Victoria). Jacqui is currently working on a joint project with Footscray Community Legal Centre aimed at developing a hardship code of practice for the Victorian local government sector.*

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

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

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

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

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