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United Nations Universal Period Review 2015 – Australia's Human Rights Scorecard

ICJ Position Paper for Joint NGO Submission

THEMATIC AREA: CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

FACT SHEET

1. Australia should introduce a Human Rights Act[1] as recommended by the 2009 Australian Human Rights Consultation Report[2] and Australia's first UPR in 2010. Properly drafted it would address many of the issues raised under other UPR headings, including Aboriginal Reconciliation, compliance with international obligations, mandatory immigration detention (including that of children), asylum seekers' access to law and accountability of government departments and agencies and democratically elected governments to basic and universal human rights standards.

    a. The Australian Government's response to Australia's first UPR was that: "*i[t] does not intend to introduce a Human* Rights *Act*", asserting there were sufficient "existing mechanisms" in place in Australia to protect and promote human rights.[3] [4]

    b. The assertion is unsupported and not sustainable. That "existing mechanisms" neither effectively nor comprehensively protect people's human rights in Australia is demonstrated by Australia's record of failings before and since Australia's first UPR. While there have been advances in some specific areas,[5] stronger and legally enforceable human rights protection is needed under Australian law, in addition to parliamentary mechanisms to facilitate human rights compliance in policy and law making, and education about human rights.

    c. The current Australian "Human Rights Framework" is a dialogue "policy" which has failed to deliver concrete outcomes.[6] Even if the assertion were true (and it is not) that this current policy adequately protects human rights, government "policy" is notoriously fickle. It does not offer any legal guarantee of protection. Nor can "policies" be relied on to always do the right thing where the right thing may be unpopular or be perceived to harm a government's prospects of re-election. Nor can governments always oversee the minutiae of the effect of government policies or actions of government departments and agencies.

d. Following an extensive public inquiry, it has been established that the Australian public overwhelmingly wants a Human Rights Act.[7]

e. Protection *by law* of human rights in other jurisdictions has proven to be a positive force for the good of society, including in other democracies like Australia.[8]

f. Courts and other established tribunals, which are independent from government interference, are well used to adjudicating on and protecting such rights.[9]

g. A Human Rights Act will not only provide for mandatory consideration of human rights in government policy and law making, and in administrative decision-making, it will give people the protection of law for failings in human rights standards to which Australia has committed under its international obligations.[10]

2. Australia should fully incorporate its international human rights obligations into domestic law (in the meantime and in any event). For Australian governments to sign and ratify international instruments without incorporating such obligations into Australian domestic law neither fulfills Australia's international obligations nor the representation to the Australian electorate that these obligations will be honoured.

a. The 2010 UPR recommended domestic implementation of, *inter alia*, UN Declaration on the Rights of Indigenous Peoples[11], Convention on the Rights of Persons with Disabilities[12], Refugee Convention[13], International Convention on the Elimination of All Forms of Racial Discrimination[14], International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.[15, 16, 17]

b. The Australian Government has failed to accomplish this and in some cases has reduced (or sought to reduce) protection of rights in these areas.

3. The above changes cannot be done in isolation. They must be accompanied by public and school education[18] and an independent body with the remit for such education, its promotion, oversight and improvement.

a. The Australian Human Rights Commission (AHRC) should be that body and be entrenched, funded, staffed and empowered to do so.

b. The 2010 UPR recommended that the AHRC be funded and empowered to educate, arbitrate and recommend under such a regime. That has not happened.

c. More worrying is that the AHRC has been pared back and weakened.[19] In recent weeks, the AHRC has also been the subject of unfounded criticism from the Australian government about the integrity of its reasoning and lawful processes. [20]

d. Despite the AHRC being an independent national human rights institution (NHRI) in accord with the "Paris Principles", as Australian NGOs submitted to the 2010 UPR its "*mandate and powers ... are limited. The* [AHRC] *cannot make enforceable determinations and there is no requirement for the Australian Government to implement, or even respond to, the* [AHRC's] *recommendations*." This continues to be the case. Disturbingly, in recent years the AHRC has been the subject of the political appointment on ideological grounds of an acknowledged critic of AHRC and its role. [21]

RECOMMENDATIONS

1. Australia should introduce a Human Rights Act with a comprehensive range of judicially enforceable rights (and eventually entrench it into the Constitution).

2. In the meantime, in any event and at the very least, Australia should fully incorporate its international human rights obligations into domestic law.

3. The Australian Human Rights Commission should be entrenched, funded, staffed and empowered to properly administer and educate the public about, such a human rights regime.

4. Human rights components should be incorporated into Australian school curricula.

5. The powers of the AHRC should be broadened to allow it to make determinations that provide enforceable remedies. The government should be under compulsion to respond to findings by the commission.

SUGGESTED QUESTIONS

1. Why has the Australian Government failed to introduce a Human Rights Act despite its popular support and evident social benefit?

2. Why has Australia failed to fully incorporate into its domestic law all the international human rights obligations to which it is a party?

3. Why has the Australian Human Rights Commission had its funding cut and its powers and remit remained unchanged?

4. To what extent has education concerning human rights been incorporated into Australian school curricula?

THEMATIC AREA: DEMOCRATIC FREEDOMS

FACT SHEET

Introduction

1. On the topic of "democratic rights and freedoms", Australia's Department of Foreign Affairs and Trade[22] asserts that Australia protects human rights and freedoms, as a "reflection" of its "*liberal democratic ideals and a belief in the inherent dignity and equal and inalienable rights of all people*", through its federal structure, independent judiciary, robust representative parliamentary institutions and an independent national human rights institution, which it asserts "*provide a bulwark against abuses of power and denials of fundamental freedoms*". To promote a strong, free democracy it refers to "*key democratic principles and practices*"[23] said to operate within Australia and it relies on Australia having historically played a leading role in developing international human rights standards.

   a) Asserted ideals, beliefs and resolve must be distinguished from Australia's performance in practice.

   b) "Existing mechanisms" within Australia's prevailing democratic[24] and legal[25] institutions produce a yawning gap between asserted ideals and practice.

   c) "Existing mechanisms" within Australia's prevailing constitutional and legal system do not prevent populist laws and executive decisions adversely affecting people's human rights. Nor do they prevent them have a discriminatory effect on groups or segments of the community or being lawfully immunized from judicial challenge. Increased delegation of law making powers, the conferral of personal ministerial discretions and other lawful mechanisms limiting the jurisdiction of the Courts to review government decisions limit the grounds on which a legal challenge can be taken against government conduct. Imprisonment statistics showing the seriously disproportionate impact on imprisonment rates of Australia's Indigenous population resulting from the introduction of populist mandatory sentencing[26] laws also demonstrate that "existing mechanisms" which historically protected human rights in the criminal justice system are capable of being (and are being) eroded by the legislative removal of judicial discretion in sentencing.

   d) Such human rights failings should not exist in a free and democratic and wealthy society. A Human Rights Act would serve to close the gap between asserted ideals and practice by providing for legal protection of human rights under Australian law and comprehensive human rights consideration in government policy and law making and in administrative decision making and the actions of public authorities.

2. Free speech by community organizations reliant on government funding and the right to peaceful assembly and to protest against government policy have been the subject of restriction under policies and laws at a Commonwealth and State level. [27] These policies and laws seek to protect government from open criticism.

   a) These government restrictions on free speech and peaceful assembly seriously undermine democratic freedoms in Australia.

   b) Community organisations, including community legal centres, have considerable knowledge and expertise about the practical effect of government policies and laws gained through their day to day work within Australian society, particularly with disadvantaged individuals and groups. Historically, they have performed a valuable function in identifying ineffective or discriminatory laws and highlighting injustice. [28] They serve an invaluable function in the promotion of informed debate often leading to law reform. Stifling their freedom to engage in communication and debate heightens the risk that government policies and laws affecting people's rights are not subject to proper public scrutiny and, ultimately, not amenable to democratic sanction.

RECOMMENDATIONS

As an advanced and wealthy democracy, Australia should take all measures available to it ensure that Australia's democratic institutions serve the interest of all people in its diverse and multicultural society.[29] The enactment of a Human Rights Act is one such measure that Australia has failed to adopt and which it should adopt.

THEMATIC AREA: COUNTER-TERRORISM

FACT SHEET

Summary

Cumulative counter-terrorist legislation passed in Australia since 2001 presents a disturbing erosion of human rights and undermines fundamental principles of "rule of law". The three main areas of concern relate to:

a) the breadth and indeterminacy of terrorism offences in the Criminal Code;

b) excessive powers of detention granted to police forces and intelligence agencies with inadequate oversight and accountability mechanisms; and

c) the failure to implement mitigation policies such as rehabilitation or re-integration schemes to reduce the threat and promote social cohesion.

Accepting that the threat of terrorism has proven to be a real concern and that measures to minimise the possibility of a terrorist attack on Australian soil and ensure that those implicated in terrorist attacks are subject to proportionate criminal sanctions may be required to be taken, legislative amendments that create a pre-emptive counter-terrorist regime must comply with international human rights obligations in order to present an effective strategy to combat terrorism.

Australia is party to international human rights treaties that guarantee minimum protection of human rights for all people. In addition to international obligations, respect for human rights is an essential element in minimising the threat of terrorism. The Government of Australia should:

- Ensure that criminal offence provisions uphold international human rights obligations;
- Improve mechanisms of accountability of security forces, legislative oversight by an independent monitor and recourse for rights violations; and
- Develop and implement rehabilitation and re-integration strategies, especially in prisons and vulnerable communities.

RECOMMENDATIONS

1. The Criminal Code counter-terrorist scheme should be amended to be more narrow in scope;
2. Offences relating to terrorist acts must be expressed in clear and unambiguous terms;

3. Standard practices of criminal procedure and law enforcement must also apply to terrorism offences, as they are to any serious crime;

4. Any restriction of movement or liberty to should be based on clear, verifiable evidence. Reasons for detention should be made available and reviewable;

5. Detainees should be guaranteed unrestricted access to counsel;

6. Enhanced internal review or complaints mechanisms including strict disciplinary action for abuse of powers;

7. Instead of relying only on the expansion of criminal law mechanisms to reduce the threat of terrorism, the Government should make active efforts to build positive relationships with potential extremists, family members, communities and community leaders, building trust and mitigating hostility;

8. Support and rehabilitation services should be offered for individuals returning from conflict overseas;

9. Individually tailored intervention and re-education programs should be implemented in prison systems to prevent the spread of extremist ideology through networks of disenfranchised individuals.

Further background to Counter-terrorist legislation

Since 2001, the Australian Government has passed 57 pieces of counter-terrorist legislation, exceeding Canada, the UK and the US in volume.[30] These laws have already imposed significant burdens on human rights through the inclusion of broadly framed terrorism-related criminal offences that lack clarity and deviate from traditional principles of criminal law.[31] Counter-terrorist measures have granted extra-ordinary powers of detention and monitoring of non-suspects by law enforcement officers and security agencies. Many laws have generally been rushed through Parliament without adequate scrutiny or deliberation on their necessity and proportionality.

Through 2013 and 2014, the long-standing instability in Iraq and Syria generated a new concern for the Australian Government regarding Australian citizens travelling into conflict zones overseas to engage in hostile activities, being exposed to radical anti-Western ideology and returning to Australia with the will and capacity to engage in terrorist activity against Australia.[32] Between September and November 2014, three new pieces of counter-terrorist legislation, totalling 326 pages, were passed hurriedly through Parliament with bipartisan support, to address this threat.[33] These amendments further expanded controversial law enforcement powers and detention regimes, reduced safeguards against misuse, and

extended sunset clauses on amendments initially intended as temporary measures. The new laws fail to address standing human rights concerns, and reveal continuing erosion of human rights.

National Security and Human Rights

The importance of combatting the threat of terrorism cannot be understated. Terrorism is a crime of 'special status' in that a successful terrorist act inflicts vast harm upon an entire society. In addition, 'terrorism' as a crime defined by a political or ideological motivation[34] is an attack on fundamental Western political and social values of freedom and democracy. As a result, terrorist activity has been treated as a crime that must be addressed pre-emptively, justifying extra-ordinary police powers and reach of the criminal law.

Extensive counter-terrorist law enforcement powers pose two significant risks if they are not proportionate to the threat, necessary and in accordance with human rights obligations. First, excessive abrogation of the rights of individuals will lead to further community division, creating incentive for radicalisation, and perpetuating rather than diminishing the threat. Also, excessive power of the State at the expense of individual freedom erodes the political and social values that justify counter-terrorist legislation in the first place. Erosion of rights in the name of counter-terrorism creates new norms that may then be applied in non-terrorist situations, and lead to a 'creep' of Government disregard for human rights, perceptions of legitimacy for excessive use of force and failure to adhere to international legal obligations.

Particular Concerns

Three particularly concerning aspects about Australia's current counter-terrorist legislation are as follows.

1. Lack of clarity, certainty of the law and excessive restrictions on freedom of expression

The first area of concern relates to the overly broad range of conduct captured by criminal offence provisions relating to terrorism. Such offence provisions lack clarity and certainty in their application, undermining fundamental tenets of the rule of law, and impose disproportionate restriction on freedom of expression.

The 2005 counter-terrorist amendments to the Criminal Code added terrorist-related criminal provisions that capture any acts that are preparatory to a terrorist act,[35] even if the terrorist act does not occur, or if there is no specific terrorist act being planned.[36] Peripheral involvement in a potential terrorist act include being in possession of a document[37] or thing[38] 'connected with' a terrorist act. 'Terrorist act' is defined to include a threat of action, not just actual action. Terrorism provisions are also subject to extended or inchoate liability provisions of attempt, conspiracy and incitement.[39] As such, the scheme overall is excessively broad, and indeterminate in application. It undermines fundamental rule of law principles of clarity and certainty of the law, and imposes criminal sanctions on conduct that is not

inherently criminal. The danger of such broadly-applicable and indeterminate offence provisions that they are liable to be used against individuals of a certain personal profile, as opposed to any act they may have done that can be considered criminal.

In addition to the scheme already in place, 2014 amendments to the Criminal Code expanded the range of criminal conduct by including the offences of 'advocating terrorism.' This offence provision further extends liability for terrorist acts to include individuals who 'counsel, promote, encourage or urge' the commission of a terrorist act, and is reckless as to whether another person might commit a terrorist act.[40] The offender need not have any direct connection with any actual or planned terrorist act. What conduct can be considered to be 'urging' or 'promoting' a terrorist act is unclear. And there is no clear relationship between the advocating conduct and another person's terrorist act. The very broad scope of the offence could potentially capture many kinds of statements relating to political opinions or politically motivated public interventions. This broad scope, combined with its lack of clarity, imposes undue infringement on freedom of expression.

The consequences of being implicated in a terrorist offence are severe. The penalties are high, ranging from 5 years to life in prison. Also, police are granted extra-ordinary powers of enforcement, and procedural standards are compromised with regard to terrorism-related offences. There is a lowered threshold for arrest;[41] police can conduct searches of premises without presenting a warrant;[42] charged persons awaiting trial are not granted bail as a matter of course but only in exceptional circumstances;[43] non-parole periods for those convicted of terrorism offences are extended;[44] and evidence gathered from foreign agencies is admitted regardless of whether or not the evidence was procured through torture or other elicit means.[45]

2. Arbitrary detention and lack of accountability:

The second area of concern relates to the infringement on the right to be free of arbitrary detention, and the consequent risk of subsequent violations that arise when a person is held under someone else's control with insufficient oversight and accountability mechanisms. Control orders,[46] preventive detention orders (PDOs),[47] delayed notification arrest warrants,[48] detention powers by customs officials,[49] and ASIO powers of detention and questioning[50] impose disproportionate and indeterminate restriction on freedom of liberty[51] that amount to arbitrary detention.[52] PDOs and ASIO powers also impose conditions of detention that fail to adhere to international obligations, especially fair trial rights such as access to counsel,[53] and the right to hear the case against oneself.[54]

The powers to detain and restrict the movement of individuals should only be available in extenuating circumstances, and subject to comprehensive oversight and accountability mechanisms. With regard to PDOs and ASIO detention orders, the detainee is prohibited from disclosing to any other person their whereabouts, or that they are being detained, or for how long they will be detained. All contact a detainee has with their lawyer is monitored, burdening the right to access council; and lawyers are not

allowed access to any information relating to the grounds upon which the order was granted, which infringes upon the right to hear against oneself. Detention orders and ASIO questioning warrants are granted through administrative, non-judicial processes that are not subject to appeal, nor granted on the basis of any actual wrongdoing. Once detained, senior officers within the AFP or ASIO provide the only oversight over the conduct of more junior officers. And, if a cause for complaint arises due to mistreatment or failure to adhere to appropriate procedure and regulations, access to information that might be used to build a case is restricted.

3. Promoting social cohesion, rehabilitation and re-integration

The third area of concern relates to the absence of any policies or strategies implemented or funded by the Government to promote social integration and rehabilitation. Deterring acts of terrorism solely by force by means of the criminal justice system is counter-productive: heavy-handed acts of law enforcement that undermine a person fundamental civil and political rights will only increase a sense of alienation, and thus hostility from extremists. Furthermore, imprisoning persons convicted of terrorism offences without implementing rehabilitation schemes in prisons, creates opportunities for radicalised individuals to exchange information and tactics, and recruit and radicalise new members. By means of enhanced networks cultivated through prison connections, these individuals can pose a significant threat to security upon release.[55]

United Nations Security Council Resolution 2178 (2014)[56] issues a mandate for member States to combat the flow of terrorist fighters, and prevent radicalisation.[57] While such measures include criminal, The UNSC Resolution re-affirms the imperative that any counter-terrorist measures must comply with obligations under international law, human rights law, refugee law and humanitarian law. It re-iterates the conviction that failure to comply with international obligations contributes to radicalisation and increases the threat posed by such individuals and organisations.[58] Counter-terrorist measures must include 'promoting political and religious tolerance, economic development and social cohesion and inclusiveness'.[59]

THEMATIC AREA - ADMINISTRATON OF JUSTICE

Mandatory Sentencing

FACT SHEET

Summary

Mandatory sentencing laws currently apply in Western Australia, the Northern Territory, New South Wales, Queensland, South Australia, Victoria and under Commonwealth laws concerning people smuggling. Since the 2010 UPR new mandatory sentencing legislation (in addition to already existing legislation) has been introduced in the Northern Territory,[60] New South Wales,[61] Queensland[62] and Victoria.[63]

Mandatory sentencing laws are arbitrary and undermine fundamental "rule of law" principles because they prevent courts from imposing appropriate penalties based on the circumstances of each offence and offender. They have a disproportionate effect on indigenous people and young people and are inconsistent with Australia's international human rights obligations.

Further Facts

The National Congress of Australia's First Peoples has concluded that the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system is the most serious way in which the justice system is failing Aboriginal and Torres Strait Islander people.[64] Aboriginal and Torres Strait Islander adults are incarcerated at 14 times the rate of non-Aboriginal and Torres Strait Islander adults[65] and Aboriginal and Torres Strait Islander young people are 24 times more likely to be in youth detention than non-Aboriginal and Torres Strait Islander young people. In 2013 indigenous prisoners represented 86% of the Northern Territory adult prisoner population, 40% of the Western Australian prisoner population and 27 of the prison population nationally.[66] The most common offences in Western Australia and the Northern Territory carry mandatory sentences.[67]

While systemic social issues have been identified as contributing to the disproportionate presence of indigenous people in the criminal justice system, sentencing policies also play a significant role, particularly in states with high populations of indigenous people in which mandatory sentencing regimes apply, and individuals are often imprisoned for trivial offences.[68] The United Nations Human Rights Committee concluded in 2000 that mandatory imprisonment laws in Western Australia and the Northern Territory 'lead in many cases to the imposition of punishment that are disproportionate to the seriousness of the crimes committed and would seem to be inconsistent with the strategies of [Australia] to reduce the over-representation of indigenous person in the criminal justice system [and] raises serious issues of compliance with various articles of the covenant'.[69]

Mandatory sentencing laws also impact disproportionately on young Australians. In the Northern Territory and Western Australia the most common offences for juvenile detainees carry mandatory sentences.[70]

Mandatory sentencing laws are inconsistent with Australia's voluntarily assumed international human rights obligations, in particular:

> The prohibition against arbitrary detention (Article 9 of the ICCPR), in that detention is arbitrary if disproportionate in the circumstances;[71]
>
> The right to a fair trial and the requirement that prison sentences must in effect be subject to appeal (article 14 of the ICCPR), in that such laws preclude an appeal from penalty;
>
> Where they apply to juveniles, the obligation to ensure that decisions regarding children must have their best interests as a primary consideration and that children are only to be detained as a last resort and for the shortest possible appropriate period (articles 3, 37 and 40 of the Convention on the Rights of the Child).[72]

RECOMMENDATION

1. That Australia take active steps to have its state and territory governments repeal legislation that provides for mandatory sentencing.

SUGGESTED QUESTIONS

1. What measures is Australia taking to secure the repeal of mandatory sentencing legislation by its state and territory governments?

2. What steps is Australia taking to encourage the adoption of alternatives to mandatory sentencing such as justice reinvestment strategies and diversionary non-custodial options?

3. In the area of Indigenous incarceration rates, have targets been met in reducing these disproportionate rates following the recommendations of the Royal Commission into Aboriginal Deaths in Custody in 1991 and have mandatory sentencing policies had an effect on the prevailing rates?

Funding of Legal Aid Community Legal Centres

FACT SHEET

Funding for legal aid commissions, community legal services and specialist legal services for Aboriginal and Torres Strait Islander peoples continues to be inadequate. In May 2014, the Australian government announced a cut of $15 million from the legal aid budget over the next four years. This will have a significant impact on the capacity of legal assistance bodies to provide legal services to many Australians.

Legal aid fund cuts will have a disproportionate impact on disadvantaged groups who already face barriers in accessing the justice system.

The National Congress of Australia's First Peoples concluded in 2013 that Aboriginal and Torres Strait Islander legal service and community-led preventative, early intervention and rehabilitative programs struggle to keep up with demand and are chronically under-resourced and underfunded.[73]

Access to justice is a fundamental human right of itself and as a means to enjoy other human rights. Australia's cuts to legal aid jeopardise the fulfilment of these rights.

Of further concern is the re-introduction of 'gag clauses' by the Federal government to prevent community legal centres from using government funding to participate in any activity targeted towards law reform or advocacy. This is a step backwards. In 2014 the federal government removed the clause in the services agreement protecting the right of CLCs to enter into public debate or criticism of the Commonwealth. Gag clauses also exist at a state level in New South Wales and Queensland.

These clauses threaten the freedom of political communication that is characteristic of an open, democratic society. Further, community legal centres are uniquely placed to see first-hand, how laws and the legal system impact the community. Working to address systemic barriers to justice by advice and submissions to government, education campaigns and public advocacy is a critical part of the role played community legal centres in facilitating access to justice.

RECOMMENDATIONS

Australia should:

1. establish concrete mechanisms to determine the minimum level of funding of legal aid commissions and community legal services necessary to meet legal need, and take immediate and ongoing steps to increase legal aid funding to meet that need;

2. remove gag clauses in funding agreements that prevent the use of government funding by community legal centres for advocacy and law-reform activities;

3. enact legislation banning the use of gag clauses in contracts between the federal government and community legal centres;

4. seek to obtain the agreement of its state governments to implement equivalent measures.

SUGGESTED QUESTION

1. What steps is Australia taking to determine and provide the minimum level of funding of legal aid commissions and community legal services necessary to meet legal need?

2. What steps has Australia taken to remove contractual gag clauses that would limit the ability of community legal centres to participate in public advocacy and law reform? How has Australia acted to protect the ability of community legal centres to continue to participate in public advocacy and law reform?

Continued detention of serious sex offenders beyond their term of imprisonment

FACT SHEET

Summary

Several Australian states and territories have implemented legislation which allows the continued detention of serious sex offenders beyond their term of imprisonment. Laws governing continued detention orders inadequately protect the rights of sex offenders. In some jurisdictions continued detention orders are made for an indefinite term. The right of an offender to review a decision is available only in exceptional circumstances. Additionally, not all jurisdictions conduct a periodic judicial and merits review.

Background

Five of Australia's states and territories have enacted legislation which enables serious sex offenders who have served their term of imprisonment to continue to be imprisoned under continued detention orders. The primary rationale for this legislation is that it seeks to protect the community from an 'unacceptable risk' of an individual reoffending, and States may apply to a Court to make the order. The relevant legislation is the *Crimes (High Risk Offenders) Act* 2006 (New South Wales), *Serious Sex Offenders (Detention and Supervision) Act* 2009 (Victoria), *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Queensland), *Dangerous Sexual Offenders Act* 2006 (Western Australia) and *Serious Sex Offenders Act* (Northern Territory)

In Queensland, Western Australia and the Northern Territory, continued detention orders can be made for an indefinite term. In Victoria and New South Wales, a continued detention order is issued for a specific period of time, not exceeding three and five years respectively, and can be renewed. The Victorian

position provides the best human rights protection due to the shorter term of a continued detention order, although the order is renewable. Longer order terms and the capacity for an order to be made for an indefinite term in the other jurisdictions raises human rights concerns.

In all jurisdictions, orders are subject to periodic reviews, usually conducted on an annual basis. These usually take the form of a judicial review, except in New South Wales, where an annual administrative review is undertaken to determine whether an order should be referred to the Court to be varied or revoked. It is important that continued detention orders are subject to periodic and consistent merits and judicial review to ensure that offenders' human rights are upheld.

Every jurisdiction makes provision for an offender to appeal a Court order decision, subject to general restrictions on time frames and a Court granting leave to appeal. However, the rights of an offender to have their order reviewed are limited in most jurisdictions. Victoria offers the broadest protection by allowing an offender to apply for leave to review an order when new facts or circumstances arise or the review is in the interests of justice, the same conditions as are applied to the State. New South Wales legislation makes no mention of an offender's right to review an order. In Queensland, Western Australia and the Northern Territory, an offender can only seek a review of the order where there are exceptional circumstances relating to the offender that justify the review. This is a very limited right to the review the order and offers poor human rights protection.

RECOMMENDATIONS

1. Australia should ensure that continued detention orders for sex offenders are made only for short fixed terms and are subject to regular periodic reviews which take the form of both merits and judicial review;

2. Australia should ensure that offenders have a clear and consistent right of appeal and a right to request a review of the order in general circumstances.

SUGGESTED QUESTION

1. How does Australia ensure that the rights of sex offenders are upheld once their term of imprisonment has been served?

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[1] Debeljack, J., "Does Australia Need a Bill of Rights?" being chapter 3 in Gerber, P & Castan, M. (eds), Contemporary Perspectives on Human Rights in Australia (2013 Lawbook Co.) pp.37-70; Robertson, G., The Statute of Liberty: How Australians can take back their rights (2009 Vintage).

[2] Castan, M. & Gerber, P., "Human Rights Landscape in Australia" being chapter 1 in Gerber, P & Castan, M. (eds), Contemporary Perspectives on Human Rights in Australia (2013 Lawbook Co.) pp. 1-16.

[3] Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A /HRC/17/10/Add.1

[4] This was despite the independent committee appointed by the Australian Government in 2008 to conduct a national consultation on the protection and promotion of human rights in Australia finding that (as noted in the NGO submission to the 2010 UPR) "(a) Australia's democratic and legal institutions do not provide adequate protection of human rights; (b) human rights are not enjoyed fully or equally by all Australians, both in fact and in law; and (c) there is strong public support for enhanced legal and institutional protection of rights".

[5] Notably the continued bi-partisan commitment and momentum towards recognition of Aboriginal and Torres Strait Islander people in the Australian Constitution, the launch of the National Action Plan on Human Rights, the commencement of the National Disability Insurance Scheme and the appointment within the Australian Human Rights Commission of the first National Children's Commission (ref Australian UPR 2013 Progress Report)

[6] Lynch, P., "Australia's Human Rights Framework: Can there be Action without Accountability?" being chapter 2 in Gerber, P & Castan, M. (eds), Contemporary Perspectives on Human Rights in Australia (2013 Lawbook Co.) pp.17-36.

[7] Dunn, K.M., "Do Australians Care about Human Rights? Awareness, Hierarchies of Sympathy and Universality" being chapter 21 in Gerber, P & Castan, M. (eds), Contemporary Perspectives on Human Rights in Australia (2013 Lawbook Co.) pp. 515-530.

[8] E.g. the United Kingdom's *Human Rights Act 1998*, the Victorian *Charter of Human Rights and Responsibilities Act 2006* and the ACT's *Human Rights Act 2004*.

[9] *The Report of the National Human Rights Consultation* (2009) at 265-280 demonstrated that such an Act would promote more accountable government, improve public services, address poverty and disadvantage, and enshrine fundamental unifying values. At 280 the *Report* confronted and comprehensively debunked arguments that a Human Rights Act would lead to an activist judiciary usurping parliament, and that the legislative protection of human rights would generate a flood of litigation. See further Robertson, G., Statute of Liberty (2009) at 118-150.

[10] Only in confined areas does specific legal protection against discrimination currently exist in Australia. Notwithstanding the democratic institutions of government currently prevailing in Australia, "key democratic principles and practices" (discussed below) are not a failsafe in practice. Administrative review (by independent tribunals) is not available in relation to all executive decisions affecting people's fundamental rights. Judicial review (by Courts of law) is circumscribed under Australian law to consideration of the legality of the decision. Under the current Australian system, whether human rights are protected in policy and law making depends ultimately on the goodwill and resolve of the government that may be in power from time to time.

[11] Gooda, M., "Human Rights and Australia's Indigenous Peoples" being chapter 13 in Gerber, P & Castan, M. (eds), Contemporary Perspectives on Human Rights in Australia (2013 Lawbook Co.) pp. 301-331.

[12] Basser, L.E., "Are We There Yet? Is Australia Respecting the Rights of People with Disabilities?" being chapter 8 in Gerber, P & Castan, M. (eds), Contemporary Perspectives on Human Rights in Australia (2013 Lawbook Co.) pp. 181-198.

[13] Penovic, T., "Boat People and the Body Politic" being chapter 14 in Gerber, P & Castan, M. (eds), Contemporary Perspectives on Human Rights in Australia (2013 Lawbook Co.) pp. 333-370.

[14] Gaze, B., "Anti-discrimination Laws in Australia" being chapter 7 in Gerber, P & Castan, M. (eds), Contemporary Perspectives on Human Rights in Australia (2013 Lawbook Co.) pp. 155-180.

[15] See generally Gerber, P & Castan, M. (eds), Contemporary Perspectives on Human Rights in Australia (2013 Lawbook Co.)

[16] On Economic, Social and Cultural Rights, see specifically Byrnes, A., "The Protection and Enjoyment of Economic, Social and Cultural Rights" being chapter 6 in Gerber, P & Castan, M. (eds), Contemporary Perspectives on Human Rights in Australia (2013 Lawbook Co.) pp.125-153.

[17] Eastman, K., "Australia's Engagement with the United Nations" being chapter 5 in Gerber, P & Castan, M. (eds), Contemporary Perspectives on Human Rights in Australia (2013 Lawbook Co.) pp. 97-124.

[18] Gerber, P. & Pettitt, A., "Human Rights Education in the Australian Curriculum" being chapter 22 in Gerber, P & Castan, M. (eds), Contemporary Perspectives on Human Rights in Australia (2013 Lawbook Co.) pp. 531-555.

[19] Rachel Siewert, "Funding cuts to Human Rights Commission an irresponsible step" 2 July 2014 http://rachel-siewert.greensmps.org.au/content/media-releases/funding-cuts-human-rights-commission-irresponsible-step ; "Budget cut sees job go from Human Rights Commission" 16 May 2014 http://www.northernstar.com.au/news/budget-cut-sees-job-go-human-rights-commission/2260823/ ; Stephanie Anderson "Human Rights Funding Slashed" 14 May 2014 http://www.sbs.com.au/news/fragment/human-rights-funding-slashed

[20] *See* http://icjvictoria.com.au/2015/01/statement-in-support-of-the-australian-human-rights-commission.

[21] In December 2013 the current Australian Government made the acknowledged political and ideological appointment to the position of "Human Rights Commissioner" of a member of the government's own party

who had been a vocal critic of the AHRC, considering it focused on anti-discrimination ahead of free speech and that "*human rights ... have been conflated well outside of their ambit of what is a human right*": https://www.youtube.com/watch?v=PxwbFQlv0ac (ABC 24, The Drum, 20 February 2013);

[22] *See* http://www.dfat.gov.au/facts/democratic_rights_freedoms.html.

[23] Including "*responsible government; the separation of legislative, executive and judicial powers; the observance of constitutional safeguards; the rule of law; a transparent criminal justice system; equitably resourced and respected opposition parties; and a free media. Australia's strong democratic institutions are complemented by a number of specific legal protections for human rights.*"

[24] "Responsible government", to take the first example, only provides a potential political remedy. Even a change in government at a future election does not guarantee change in a particular policy or law. The institution of responsible government is a highly problematic protection for vulnerable and marginalised groups often the target of populist governments. Rarely does it provide redress for individuals or sections of society whose human rights have been harmed. Given the realities of modern politics in even a robust democracy and the sheer volume of government laws and policies, it is ineffective to stop breaches of human rights occurring in the first place.

[25] To take the next examples, "constitutional safeguards" and the separation of "judicial power" from "legislative and executive power", also both provide limited protection for human rights in Australia, there being no constitutional Bill of Rights in Australia. Rights and freedoms underpinning Australia's Constitution are largely confined to values held and recognised under common law at the time of Federation in 1900. Australia's Constitution was conceived at a time when the right to freedom from discrimination (whether on grounds of sex, race, disability, sexuality, age or otherwise) was not fully understood or accepted as a norm of society. Australia's current Constitution continues to contain a "race power" that permits valid laws to be made for or against people of different races. While separation of judicial power is embedded in the Australian constitution and underpins the "rule of law", neither a strong separation of judicial power nor the rule of law is sufficient to protect against governments adopting policies and laws that infringe human rights. Despite some judicial developments in the common law aligning some Australian laws towards human rights standards (notably *Mabo*, the interpretative "doctrine of legality" and the administrative law decision in *Teoh*) nothing in the Australian Constitution mandates compliance with international human rights standards, which in the main, require legislative implementation in Australia. Human rights are given patchwork and limited protection by some Federal and state laws. Discrimination laws protect some, but not all human attributes from discrimination. Further they only provide protection against discrimination in some areas of life, but with numerous exemptions. Only one State and one Territory in Australia has enacted a human rights Act. Each adopting a so-called "dialogue" approach to the protection of human rights that encourages governments to take account of human rights in policy and law making, neither provides a cause of action for breaching the Act. The availability of remedy or relief is also limited if public authorities fail to meet their human rights obligations under the Act. Not being constitutional laws limiting the exercise of legislative power, each permits legislation to be enacted that breaches human rights or which permits public authorities to breach human rights.

[26] See this thematic area below.

[27] Reference here prohibition of advocacy by community organistions including community legal centres (discussed further below under thematic issue "Administration of Justice", topic heading "Funding of Legal Aid Community Legal Centres"), and state laws restricting peaceful assembly and protest and heightened police "move on" powers.

[28] See National Association of Community Legal Centre, *Why Community Legal Centres are Good Value*. The Federation of Community Legal Centres Victoria, *Supplementary Submission to the Productivity Commission Report on Access to Justice Arrangements,* 8-13 also provides examples of important advocacy and law reform work in Victoria.

[29] "It is the dignity and importance of the individual which is the essence and cornerstone of democratic government": *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779 at 812.

[30] Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011), 310, quoted in George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136, 1146.

[31] See Edwina MacDonald and George Williams, 'Combatting Terrorism' (2007) 16 Griffith Law Review 27.

[32] See, eg, Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 [1]; ASIO Director-General's Speech 'Evolution of Terrorism – and what it means for Australia' (Speech delivered at the Australian Institute of International Affairs, 12 August 2014); SC Res 2178, UN SCOR, 7272nd mtg, UN Doc S/RES/2178 (24 September 2014).

[33] National Security Legislation Amendment Bill (No 1) 2014 (Cth); Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) ('*Foreign Fighters Bill*'); Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth).

[34] *Criminal Code Act 1995* s101.1 (definition of 'Terrorist Act'): 'the action is done or the threat is made with the intention of advancing a political, religious or ideological cause'. See also MacDonald and Williams, above n 2, 28-33.
[35] See esp *Criminal Code Act 1995* (Cth) s101.6. See also, *Criminal Code Act 1995* (Cth) ss 101.2(1)(b), 101.4(1)(b), 101.5(1)(b).
[36] See esp *Criminal Code Act 1995* (Cth) s101.6(2). See also, *Criminal Code Act 1995* (Cth) ss 101.2(3), 101.4(3), 101.5(3).
[37] *Criminal Code Act 1995* (Cth) s101.5.
[38] *Criminal Code Act 1995* (Cth) s101.4.
[39] *Criminal Code Act 1995* (Cth) Div 11.
[40] *Foreign Fighters Bill* cl 61: 'Advocating Terrorism.'
[41] *Foreign Fighters Bill* cl 47.
[42] Ibid cl 51.
[43] *Crimes Act 1914* s 15AA.
[44] Ibid s 19AG.
[45] *Foreign Fighters Bill* cl 125.
[46] *Criminal Code Act 1995* Div 104.
[47] *Criminal Code Act 1995* Div 105.
[48] *Foreign Fighters Bill* cl 47.
[49] Ibid Sched 3, cl 8.
[50] *Australian Security Intelligence Organisation Act 1979* (Cth) Div 3 ('*ASIO Act*')
[51] *International Covenant of Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9 ('*ICCPR*').
[52] Human Rights Committee, *General Comment No 35: Article 9: Liberty and Security of Person* [12].
[53] With reference to Preventive Detention Orders, see: *Criminal Code Act 1995* (Cth) s 105.37. With reference to ASIO detention and questioning powers, see: *ASIO Act*, s34ZO.
[54] With reference to Preventive Detention Orders, see: *Criminal Code Act 1995* (Cth) s105.7(2A), 105.32(3), 105.32(9), 105.32(10). With reference to ASIO detention and questioning powers, see: ASIO Act s34ZL; *National Security Information (Criminal and Civil Proceedings) Act 2004*.
[55] Global Counterterrorism Forum, *Rome Memorandum on Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders* (adopted on 7-8 June 2012) <https://www.thegctf.org/documents/10162/38330/Rome+Memorandum-English>.
[56] *UNSC Resolution 2178*, UN Doc S/RES/2178.
[57] Ibid [4]
[58] Ibid, preamble para 7.
[59] Ibid, preamble para 13.
[60] *Sentencing Amendment (Mandatory Minimum Sentences) Act* 2013 (NT)
[61] For example, *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW)
[62] For example, *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) and *Vicious Lawless Association Disestablishment Act 2013 (Qld)*
[63] *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic)
[64] National Congress of Australia's First Peoples, 'Statement to the Expert Mechanism on the Rights of Indigenous Peoples', February 2013, p.19
[65] Australian Bureau of Statistics, 'Prisoners in Australia 2011'.
[66] Australian Bureau of Statistics, 'Prisoners in Australia, 2013', (Report 5), 2013.
[67] Australian Bureau of Statistics, 'Prisoners in Australia, 2013', (Report 5), 2013.
[68] Law Council of Australia, 'Policy Discussion Paper on Mandatory Sentencing', May 2014, p.30
[69] United Nations Human Rights Committee, 'Concluding Observations on Australia in 2000', (2000) UN doc A/55/40, [522]
[70] Northern Territory Correction Services Annual Report 2011-2012, pp33-34; Western Australian Department of the Attorney General, 'Report on Criminal Cases in the Children's Court of Western Australia, 2007/8 – 2011/12', p.7
[71] *A v Australia* (560/93); United Nations Human Rights Committee, Concluding Observations on Australia in 2000 (2000) UN Doc A/55/40, [522]; Joint Standing Committee on Treaties, 'Inquiry into the United Nations Convention on the Rights of the Child', Parliament of Australia, 1998, p.346
[72] See the Commonwealth Parliament Joint Standing Committee on Treaties, 'Inquiry into the United Nations Convention on the Rights of the Child', Parliament of Australia, 1998, pp.347-349
[73] The National Congress of Australia's First Peoples, 'Statement to the Expert Mechanism on the Rights of Indigenous Peoples Expert Seminar on Access to Justice for Indigenous Peoples', February 2013, p.20, 35-39