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Human Rights Committee
Office of the United Nations High Commissioner for Human Rights
United Nations Office at Geneva
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Dear Committee

Australian Human Rights Law Resource Centre

Observations on Draft General Comment No 32 – Article 14: Right to a Fair Trial

Thank you for the opportunity to comment on the Draft General Comment No 32 ("**Comment**") on the Right to Equality Before Courts and Tribunals and to a Fair Trial prepared by the United Nations Human Rights Committee ("**Committee**").

1. General Remarks

- 1.1 The Human Rights Law Resource Centre ("**HRLRC**") supports the spirit and the content of the Comment, which aims to ensure the proper administration of the guarantees contained in article 14 of the *International Covenant on Civil and Political Rights* ("**Covenant**"). We recognise and affirm the importance of the right to a fair trial to ensure that all members of the community are guaranteed the protection of their human rights and that the procedural means of the rule of law are safeguarded. Access to justice is a human right *sui generis* and a critical element of the promotion, protection and fulfilment of other human rights.

2. Equal Access to Courts

- 2.1 We strongly support the recognition in paragraph 8 of the Comment that equality before courts encompasses the right of equal access to the courts. We consider that equal access to courts requires a State's legal system to be set up in such a way as to ensure that people are not excluded from the court process.
- 2.2 The right of equal access to the justice system should be enshrined in the domestic law of States. The European Court of Human Rights has held that the fulfilment of the right to a fair trial under the ECHR requires positive action by the State.¹ Accordingly, we consider that the Comment should recognise the positive obligation of a State to ensure effective access to the courts.

3. Right to Legal Advice and Representation

- 3.1 We strongly support the recognition in paragraph 9 of the Comment that the availability of legal assistance often determines whether or not an individual can access and participate in judicial proceedings in a meaningful way. We approve the recognition that the Comment gives not only to ensuring *participation* in the judicial system, but also ensuring *access* to the courts.
- 3.2 We strongly endorse the statement in paragraph 9 of the Comment that States are encouraged to provide free legal aid for individuals in civil proceedings and that, in some cases, they may even be obliged to do so. We note that jurisprudence of the European Court of Human Rights has determined that a State must provide legal assistance in situations where a party may be prevented from putting forward their case effectively because of the complexity, high emotional content and serious consequences of the proceedings.² We believe strongly that the failure of a State to provide an applicant with a lawyer in circumstances where legal representation is deemed to be indispensable is a violation of article 14 of the Covenant.
- 3.3 An individual's access to the justice system should not be prejudiced by reason of his or her inability to afford the cost of independent advice. We consider that the denial of adequate access to legal advice prior to commencement of a proceeding also constitutes a violation of the right to a fair trial. Jurisprudence of the European Court of Human Rights indicates that the fair conduct of a civil proceeding is meaningless if one does not have the right to bring the proceeding in the first place.³ The Court held that an individual's right to a fair hearing may be violated where he or she is prevented from commencing a proceeding, even though he or she is not prevented from bringing a proceeding altogether; the right to a fair trial presupposes the right of access to the courts just as it presupposes the existence of the courts themselves.

¹ *Airey v Ireland*, 6289/73 [1979] ECHR 3 (9 October 1979).

² *P C and S v United Kingdom*, 56547/00 [2002] ECHR 604 (16 July 2002).

³ *Golder v United Kingdom*, 4451/70 [1975] ECHR 1 (21 February 1975).

- 3.4 We consider that the Comment should also recognise that civil proceedings are serious enough to warrant an entitlement to legal aid when they concern the attempted enforcement of a right protected by the Covenant.⁴ Based on this view of the Committee, a State should be under a positive obligation to ensure that individuals are provided with legal assistance in such cases.
- 3.5 We consider that the provision of legal aid by a State is only one means by which a litigant may be guaranteed the right to a fair trial. A State may meet its obligation to ensure a fair trial by increasing accessibility to courts by simplifying procedure. For example, the Committee has stated that that it may be necessary for a State to accelerate reform of its judicial system through, among other things, the simplification of procedures and the training of judges and court staff in efficient case management techniques.⁵

4. Costs of Litigation

- 4.1 An important aspect of ensuring equal access to justice is the applicant's ability to pay the associated costs of litigation. An inability to afford costs such as court fees, disbursements and awards of costs has a discriminatory effect on disadvantaged members of the community.
- 4.2 We strongly endorse the recognition in paragraph 10 of the Comment that the imposition of fees on parties to judicial proceedings may *de facto* prevent their access to justice and that courts should consider the implications of a rigid duty to award costs to a winning party. We agree that the imposition of substantial costs against a disadvantaged claimant may prevent them from bringing a proceeding at all and therefore hinder their ability to remedy a breach of their rights.
- 4.3 The European Court of Human Rights has held that the requirement to pay court fees may be a violation of the right to a fair trial because it imposes a disproportionate burden on the individual.⁶ While the right to a fair hearing does not endow citizens with the right to free civil proceedings, we consider that the imposition of court fees must be balanced against the burden placed on the individual litigant.
- 4.4 It is clear that the availability of funding for the costs of litigation is critical to ensuring access to justice for impecunious litigants. In many cases, a lack of available funding creates a significant barrier to progressing claims and may result in an individual being unable to access justice effectively.
- 4.5 We consider that the Comment should recognise the positive obligation of a State to ensure that impecunious litigants are provided with assistance to access and participate in the judicial process.

⁴ *Concluding Observation on Norway*, UN Doc CCPR/C/79/Add. 112(1999). This was particularly so in the context of the discriminatory impact of high legal costs and the absence of legal aid on Sami protection of traditional livelihood from competing land uses.

⁵ *Concluding Observations on Croatia*, UN Doc CCPR/CO/71/HRV(2001).

⁶ *Kreuz v Poland*, 28249/95 [2001] ECHR 398 (19 June 2001).

5. Right to Procedural Fairness

- 5.1 Equal access to courts is linked to the notion of equality before the courts. We strongly endorse the recognition in paragraph 12 of the Comment that the right to equality before courts and tribunals also ensures equality of arms and that all the parties involved in judicial proceedings should be provided with the same procedural rights. We consider that the right to a fair trial must ensure that litigants have the opportunity to present their case in conditions without substantial disadvantage compared to the other party.
- 5.2 We consider that the Comment should recognise the jurisprudence of the Committee that the interests of equality between parties demand that each side be given the opportunity to respond to evidence put forward by the other. Justice requires the ability of each party to contest the arguments and evidence of the other party. This may include access to material held by the other side or an equal ability to cross-examine witnesses. The Committee will recall its jurisprudence in *Gertruda Hubertina Jansen-Gielen v The Netherlands*⁷ where it stated that there is a duty imposed on courts (in the absence of time limits) to ensure that each party has the opportunity to challenge the documentary evidence that the other has filed. Further, in *Anni Aarela and Jouni Nakkalajarvi v Finland*,⁸ the authors were precluded from responding to a brief the other party had submitted and which was then relied upon to their detriment. The European Court of Human Rights has also found that a fair hearing requires parties to have the opportunity to have knowledge of and comment on all evidence adduced.⁹
- 5.3 In the United Kingdom in the case of *Daniels v Walker*,¹⁰ the parties agreed on a joint expert in accordance with the UK Civil Procedure Rules. However, one of the parties was dissatisfied with the report but was denied permission to seek their own expert. They consequently argued a breach of the right to a fair trial because denial had 'barred the essential or fundamental part of [their] claim'. The Court of Appeal agreed and said that where there were sound reasons for a party wishing to obtain further evidence before deciding whether to challenge part or whole of a report, then the request to instruct another expert should be allowed at the court's discretion. If, however, the damages claimed are modest, the court may, in the interests of proportionality, refuse the request and merely allow the party to put questions to the expert who had already prepared the report.
- 5.4 In the case of *Pappas v Noble*,¹¹ the ACT Supreme Court held that a provision in another Act which had the effect of rendering evidence inadmissible that would otherwise be determinative in civil proceedings would be inconsistent with the right to a fair trial.
- 5.5 We consider that the Comment should recognise the themes developed in such jurisprudence to ensure that the principle of the equality of arms between parties to civil proceedings is upheld.

⁷ UN Doc CCPR/C/71/D/846/1999.

⁸ UN Doc CCPR/C/73/D/779/1997.

⁹ *Van Orshoven v Belgium*, 20122/92 [1997] ECHR 33 (25 June 1997).

¹⁰ [2000] 1 WLR 1382.

¹¹ [2006] ACTSC 39.

6. Right to an Expeditious Hearing

- 6.1 We strongly support the recognition in paragraph 24 of the Comment that an important aspect of the fairness of a hearing is its expeditiousness and that delays in proceedings that cannot be justified by the complexity of the case or the behaviour of the parties are not compatible with the principle of a fair hearing.
- 6.2 Undue delays in criminal prosecutions or proceedings should result in prosecutions being permanently stayed or struck out. In Australia, the High Court has held that a court has power to stay criminal proceedings that will result in an unfair trial.¹²
- 6.3 We consider that the Comment should further recognise that a lack of resources and chronic under-funding of the legal system generally cannot be an excuse for unacceptable delays.¹³ The House of Lords (drawing on jurisprudence of the European Court of Human Rights) has stated that it is generally incumbent on contracting states to organise their legal systems so as to ensure that the reasonable time requirement is honoured.¹⁴

7. Right to a Public Hearing

- 7.1 We consider that the right to a public hearing is one of the essential elements of the concept of a fair trial. We strongly endorse the recognition in paragraph 25 of the Comment that the publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. While the right to a public hearing is one that belongs to the parties in the litigation, it also belongs to the general public in a democratic society.
- 7.2 The publicity of a trial includes both the public nature of the hearings and the publicity of the judgment eventually made in a case. We therefore endorse the statement in paragraph 26 of the Comment that, even in cases in which the public is excluded from the trial, the judgment must be made public, except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

8. Right to an Interpreter

- 8.1 While the right to the free assistance of an interpreter is only guaranteed under article 14 in criminal proceedings, we consider that, in certain circumstances, the right to a fair hearing in civil matters should include the right to an interpreter. We strongly believe that a failure to do so may violate the equality of arms principle enshrined in the right to a fair trial. A party's inability to understand aspects of judicial proceedings, such as witness testimony, may constitute a substantial disadvantage to that party and compromise his or her ability to present their case.
- 8.2 We strongly recommend that the Comment recognise the right to the free assistance of an interpreter in civil proceedings to ensure the equality of parties before the courts.

¹² *Dietrich v The Queen* (1992) 177 CLR 292.

¹³ Suzanne Lambert and Andrea Lindsay Strugo, *Delay as a Ground of Review* (2005) One Crown Office Row <www.humanrights.org.uk/1030/> at 21 December 2006.

¹⁴ *Procurator Fiscal v Watson and Burrows* [2002] UKPC D1, 55.

9. Limitations on the Right to a Fair Hearing

- 9.1 In accordance with jurisprudence of the European Court of Human Rights, we consider that the Comment should explicitly recognise that any limitations placed on an individual's right to a fair hearing should involve consideration of a range of factors, including the proportionality between a legitimate aim and the impact on the party's access to the court.¹⁵
- 9.2 In this respect, we consider that the Comment should include reference to the Committee's *General Comment 31*¹⁶ and to the UN Economic and Social Council in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*¹⁷ regarding any limitations or restrictions made to rights under the Covenant.
- 9.3 We believe that the Comment should also include reference to jurisprudence of the European Court of Human Rights that while restrictions impacting on the right to a fair hearing are allowed in some cases, a restrictive interpretation of the right to a fair hearing should not be taken.¹⁸ This is particularly important in relation to criminal proceedings which may result in deprivation of liberty. We note with concern the tendency towards limitations on the right to a fair trial (such as the admission of evidence obtained pursuant to cruel or degrading treatment) in terrorist-related matters.

10. Right Not to be Tried or Punished Again

- 10.1 We note that paragraph 54 of the Comment states that the prohibition contained in article 14(7) applies to criminal offences only and not to disciplinary measures that do not amount to a sanction for a criminal offence within the meaning of article 14.
- 10.2 We note that in *Gerardus Strik v The Netherlands*,¹⁹ which is cited in paragraph 54 of the Comment, the Committee determined that only disciplinary measures were imposed on the author and that the imposition of these measures did not relate to a 'criminal charge' or a 'criminal offence' within the meaning of article 14 or 15 of the Covenant.
- 10.3 While we agree with the Committee's decision that article 14(7) should not apply in that case, we consider that the position may be different with respect to disciplinary measures or sanctions that are imposed in conjunction with or as a consequence of criminal charges or offences. Where additional disciplinary measures or sanctions are imposed on an individual that have a nexus with a criminal offence within the meaning of article 14, we consider that the guarantee contained in article 14(7) should apply. Accordingly, we believe that the principle stated in paragraph 54 of the Comment should be refined to clarify this position.

¹⁵ *Tinnelly & Ors v UK*, 20390/92 [1998] ECHR 56 (10 July 1998).

¹⁶ UNHRC, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004) [6].

¹⁷ UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985).

¹⁸ See, for example, *Moreira de Azevedo v Portugal*, 11296/84 [1990] ECHR 26 (23 October 1990).

¹⁹ Communication No. 1001/2001.

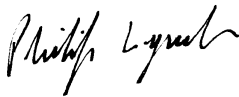
11. Rights of Non-Citizens

- 11.1 We believe that there should be no discrimination in the application of the right to a fair trial on the basis that an individual is a non-citizen within a State. We note that paragraph 59 of the Comment refers to article 14 not applying to expulsion proceedings. While the Comment acknowledges that article 13 of the Covenant guarantees procedural rights in the case of expulsion proceedings, we consider that the substantive provisions of article 14 should also apply to expulsion proceedings.
- 11.2 In this respect, we note the Committee's statement in General Comment 15 that
- the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness The general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.
- 11.3 We believe strongly that benefits under the right to a fair trial should be available to all people who are within the jurisdiction or under the control of a particular State, including individuals who may be subject to expulsion proceedings. This is consistent with the principle of interpretation that, recognising the interdependence of human rights, treaties should be read as a whole. Indeed, paragraph 55 of the Comment recognises that
- [a]s a set of procedural guarantees, Article 14 of the Covenant often plays an important role in the implementation of the more substantive guarantees of the Covenant that must be taken into account in the context of determining criminal charges and rights and obligations of a person in a suit at law.
- 11.4 For example, in the case of the deportation or expulsion of long-term residents on the basis of criminal convictions, many States, including Australia, provide very limited capacity to seek review of character-based decisions to cancel residency visas. Accordingly, we consider that the substantive guarantees provided by article 14 of the Covenant should apply to expulsion proceedings to ensure that the rule of law is safeguarded and that such individuals are guaranteed the protection of their human rights.

12. Concluding comment

- 12.1 We would like to thank the Committee for the preparation of the Comment and the opportunity to provide feedback.
- 12.2 We believe that the Comment is of great value and significance as it clarifies and fosters a deeper understanding of the contents of article 14 of the Covenant, and imposes positive duties and obligations of implementation on Member States. Subject to any amendments, we would like to reiterate our overall support for the Comment.

Yours faithfully



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