ACCESS TO JUSTICE
Heather Osland's fight for justice

DEBBIE KIRKWOOD considers this curious case of appeals

On 23 June 2010 Heather Osland was successful in her bid to obtain the release of legal advices considered by the Victorian Government in the consideration of her Petition of Mercy.

Heather Osland was convicted in 1996 for the killing of her violent husband, Frank Osland, in Bendigo, Victoria and sentenced to 14.5 years imprisonment. Heather and her four children had endured over 13 years of physical, sexual and psychological abuse. Her adult son, David, who struck the blow that killed his stepfather, was acquitted on the basis that he acted to defend himself and his mother. Heather Osland unsuccessfully appealed her conviction to the High Court in 1998.[1]

There was widespread community concern about Heather's case. Campaigners advocated for her release from prison and for the reform of homicide laws for women who act to defend themselves from violent partners. Heather's case was the catalyst for significant reform to homicide laws in Victoria.

In 1999 Heather lodged a Petition of Mercy with the Victorian Attorney-General seeking a pardon through the exercise of the royal prerogative of mercy. This prerogative may be exercised by the Governor of Victoria, acting on the advice of the Premier who, in turn, is advised by the Attorney-General.

The Petition outlined six grounds for compassion, as follows:

- with appropriate law reform acknowledging gender difference in provocation and self-defence, she would have been found to have acted in self-defence;
- her sentence was severe compared to similar cases;
- she already suffered 13 years of family violence;
- the State failed to protect her from the violence;
- there was new and additional evidence about the abuse she experienced; and
- she had never committed any other offence and was not a threat to the community.

In 2001 the Victorian Attorney-General, Rob Hulls, denied the Petition of Mercy and issued a press release stating that joint advice he had received from three Queen's Counsel recommended that the petition be denied on each of the grounds. Heather was required to serve the remainder of her prison sentence and has only recently completed parole. It is now apparent that this press release did not disclose that the Attorney-General had also received advice from the Victorian Government Solicitor which recommended giving serious consideration to granting the pardon, and from Senior Counsel, Robert Redlich QC, which recommended the granting of executive mercy.

In 2001 Heather lodged an application under the *Freedom of Information Act 1982* (Vic) ('the FOI Act') for access to all of the advices obtained in relation to the petition. The government refused to release the documents. Heather appealed this decision to the Victorian Civil and Administrative Tribunal ('VCAT'). The then President of VCAT, Justice Morris, found that the documents were prima facie exempt from FOI on the grounds of legal professional privilege,[2] but that the documents should be released under the public interest override,[3] and ordered the release of the documents.[4]

The Victorian Government successfully appealed this decision to the Victorian Court of Appeal[5] and Heather successfully appealed to the High Court.[6] The matter was reheard by the Victorian Court of Appeal and Heather was again unsuccessful.[7] Heather then appealed once again to the High Court.

On 23 June 2010, almost 10 years since lodging the FOI request, the High Court upheld Heather's appeal and costs were awarded in her favour.[8] This significant outcome would not have been possible without the pro bono legal team consistently led by Nieva Connell from Hunt and Hunt. The end result was that the VCAT Order, releasing the advices, stood. The majority decision of the High Court recognised that the Attorney-General did not, in his press release, reveal that differing advices had been proffered and said:

> The nature of the differences between the advices, throwing up opinions about the fairness and authority of the criminal justice system, the circumstances of Mrs Osland's situation, and asserted inadequacies in the law in relation to chronic domestic violence, was such as to be capable of supporting the formation of an opinion that the public interest required the disclosure of the documents. It was, at the very least, arguable, in the circumstances of the case, that the high-threshold public interest standard was met and that the public interest required disclosure of the contending, essentially normative propositions which the Attorney-General had before him when he recommended that Mrs Osland's petition be denied.[9]

The documents have now been publicly released.[10] A reading of the documents reveals that the Victorian Government Solicitor, Ronald Beazley, in his advice on 17 August 1999 to the then Attorney-General Jan Wade, stated that there was a 'substantial body of extra-legal material calculated to arouse public unease at Mrs Osland's continued imprisonment'. He said that this meant a basis existed for an exercise of executive mercy on grounds of rational compassion. He reiterated this in an advice to the Attorney-General, Rob Hulls, on 8 December 1999, and recommended that the Attorney-General give 'serious consideration to the grant of a compassionate pardon'. In doing so, he also suggested taking into account advice from the Crown Prosecutor's Office. The advice from the Crown Prosecutor's office was provided by Bill Morgan Payler SC, the prosecutor at Heather Osland's trial, who was not supportive of the Petition.

REFERENCES

1. *Osland v R* (1998) 197 CLR 316
2. *Freedom of Information Act 1982* (Vic), s 32.
3. *Freedom of Information Act 1982* (Vic), s 50(4).
4. [2005] VCAT 1648.
5. *Secretary, Department of Justice v Osland* [2007] VSCA 96.
6. *Osland v Secretary, Department of Justice* (2008) 234 CLR 275.
7. *Secretary, Department of Justice v Osland (No 2)* [2009] VSCA 69.
8. *Osland v Secretary to the Department of Justice* [2010] HCA 24.
9. *Osland v Secretary to the Department of Justice* [2010] HCA 24, [47].
10. See Department of Justice website <http://doj.webwombat.com.au/lan?ix=osland&sitegroup=%21justice&sk=justice&x=34&y=15> at 6 August 2010.

An advice on whether the prerogative of mercy should be granted was then obtained from Robert Redlich QC and Trish Riddell in August 2000. The advice, which exceeds 100 pages, is comprehensive and clearly supports the exercise of executive mercy. It outlined why Heather Osland's special circumstances made her case exceptional. It states that:

> Following an extensive examination of the voluminous material with which we have been provided we have concluded that circumstances exist which justify the exercise of executive mercy. In our view it would be appropriate for there to be a remission of the petitioner's sentence.

A year after receiving the Redlich advice, the government obtained further advice from Susan Crennan QC, Jack Rush QC and Paul Holdenson QC. This joint advice, which is under 30 pages, was dismissive of all of the grounds of the Petition of Mercy and advised that the prerogative of mercy not be exercised.

It is now apparent that the government could have taken the advice of Robert Redlich, a highly respected QC and now a judge at the Victorian Court of Appeal, which supported the remission of Heather Osland's sentence.

It is also apparent that the government sought to conceal the existence of this advice. It is not mentioned in the Attorney-General's press release when the Petition of Mercy was denied. It is not mentioned in the letter from the Attorney-General to the Premier, or the letter from the Premier to the Governor of Victoria, in relation to denying the Petition. The government spent nine years in litigation to prevent disclosure of the advice. A considerable sum of taxpayers money must have been spent on the two VCAT hearings, two Court of Appeal hearings and two High Court hearings.

It remains unclear why the government sought further advice a year after already receiving advice on exactly the same aspects of the Petition of Mercy. And why they sought that further advice from a panel of three QCs? Was it to outnumber the advices they had already received, that were supportive of the petition?

Over the last 10 years, the government has undertaken significant reforms in response to family violence issues in Victoria, including as they relate to homicide laws. Yet there does not seem to be an explanation why the government could not show mercy to a woman who was clearly a victim of long-term family violence, who acted to protect herself, and for whom there was widespread community support.

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CITIZENSHIP

Global governance and the democratic deficit

JONATHAN KUYPER looks at both the feasibility and necessity of a global democracy

Global governance is a complex and multi-dimensional concept. By examining four key strands of global governance — human rights, the global economy, international relations/law and the environment — this Brief will seek to show why global governance should be geared towards greater democratisation.

These four key disciplines are now taking seriously the question of how we should institutionalise democracy and, importantly, what form democracy should take. Each strand of global governance is placing increased emphasis on democratisation — a situation offering hope to proponents of global democracy that the process is both feasible and desirable. However, it is also imperative that we have greater interdisciplinary analysis to help synthesise and extract ideas from each area in a productive way.

Terms such as 'global governance' and 'global democracy' are difficult to define because they are used slightly differently in each discipline. A useful broad definition is that global governance consists of the regulation of organisations, governments and actors in the global sphere.[1] Within global governance there exists a 'democratic deficit' because citizens have little participation in global decision-making procedures. The concept of global democracy seeks to address this deficit by putting in place a system that guarantees social, civil, economic and political rights for all people; thereby increasing citizen participation at the global level.[2] The above four strands of global governance form the basis of this Brief, which will canvass the ways in which these disciplines have moved towards democratisation to ensure a type of legitimacy and accountability in the global system of governance.

Human rights

The United Nations' *Universal Declaration of Human Rights* ('UDHR') Article 29.1 states that:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law [...] in a democratic society.[3]

Since the UDHR was enacted in 1948, the concept of liberal democracy has sat alongside the notion of human rights. Philosopher Carol Gould has noted that the concept of human rights, in the past, has been tied to national conceptions of democracy and ingrained in national constitutions.[4] Recently, the trend has been

REFERENCES

1. For a similar definition, see 'Introduction' in David Held and Mathias Koenig-Archibugi (eds), *Global Governance and Public Accountability* (2005) 1, 6.

2. David Held, 'Democracy: From City-States to a Cosmopolitan Order?' (1992) 40 *Political Studies* 34.

3. United Nations Declaration of Human Rights <un.org/en/documents/udhr/> at 24 July 2010.