

CORONERS COURT OF WESTERN AUSTRALIA

INQUEST

INTO THE DEATH OF ANDREA LOUISE PICKETT

FILE NUMBER: 41/09

SUBMISSIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION

1 The role of the Australian Human Rights Commission in this Inquest

1. The Australian Human Rights Commission was granted leave to intervene to assist the Coroner in:
 - a. identifying the relevant human rights issues;
 - b. understanding the interplay between those rights and the circumstances surrounding Andrea's death; and
 - c. understanding the obligations on the State in the protection and implementation of those rights.

2 Relevance of human rights to this Inquest

2. Human rights instruments and jurisprudence are relevant in assisting the Coroner in making comments in the inquiry.
3. Human rights are a legitimate influence on the exercise of the Coroner's statutory discretions and obligations. It is a well settled principle of statutory construction that, to the extent of any ambiguity, all domestic statutes should be applied as far as practicable so as to conform to Australia's obligations

under international law.¹ It is also an accepted principle that human rights law is a valid influence on the development and interpretation of the common law.²

4. International human rights law provides practical assistance in assessing whether the standard of care shown to Andrea was adequate.

3 Obligations of the State

5. The State of Western Australia had the following human rights obligations in relation to Andrea:

- a. To prohibit discrimination against her, in the form of gender based (domestic) violence, and to take all appropriate measures to eliminate that discrimination by any person or organisation³ including through:
 - i. criminal penalties and civil remedies;
 - ii. services to ensure her safety including refuges, counselling and rehabilitation programmes; and
 - iii. rehabilitation programmes for perpetrators of domestic violence.⁴
- b. To take all appropriate steps to safeguard Andrea's life⁵ including:
 - i. detaining a person who is known to be a threat to her life,⁶

¹ *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 384 (Gummow and Hayne JJ.); *Jumbunna Coal Mine N/L v Victorian Coalminers' Association* (1908) 6 CLR 309, 363 (O'Connor J). This principle applies to all statutes, not just those statutes that seek to implement Australia's treaty obligations: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 Brennan, Deane and Dawson JJ; Pearce and Geddes, *Statutory Interpretation in Australia* (5th ed, 2001), [5.14]. 'Ambiguity' in this context is to be construed broadly: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). See further Wendy Lacey, *Implementing Human Rights Norms: Judicial Discretion & Use of Unincorporated Conventions* (2008), esp Chapters 4 and 5.

² *Queensland v Mabo (No 2)* (1991) 175 CLR 1, 42 (Brennan J).

³ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 United Nations, *Treaty Series*, 13 (entered into force 3 September 1981), available at: <http://www.unhcr.org/refworld/docid/3ae6b3970.html> [accessed 22 June 2012], art 2(b) and (e).

⁴ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38)*, 1992, A/47/38, available at: <http://www.unhcr.org/refworld/docid/453882a422.html> [accessed 22 June 2012] paras 24(r) (i) (iii) (iv).

⁵ UN General Assembly, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 United Nations, *Treaty Series* 171 (23 March 1976 except Article 41 which came into force 28 March 1979), available at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html> [accessed 22 June 2012]. Article 6. See also CEDAW Committee, *Views: Communication No 2/2003*, 32nd sess, UN Doc. CEDAW/C/32/D/2/2003 (26 January 2005) ('*A. T. v Hungary*'); CEDAW Committee, *Views: Communication No 6/2005*, 39th sess, UN Doc CEDAW/C/39/D/6/2005 (1 October 2007) ('*Fatma Yildirim v Austria*'); CEDAW Committee, *Views: Communication No 5/2005*, 39th sess, UN Doc CEDAW/C/39/D/5/2005 (6 August 2007) ('*Şahide Goekce v Austria*').

- ii. providing appropriate training of personnel such as police to ensure the right to life is adequately protected; and
 - iii. to investigate promptly, thoroughly, impartially and seriously all allegations of domestic violence and bring the offenders to justice.
- c. In all of the actions taken by a State to prevent and respond to acts of violence against women there is an overarching requirement to act with or exercise due diligence in fulfilling those obligations.⁷
6. In addition, the State owed a duty to Andrea's 13 children to:
- a. have the best interests of the children as a primary consideration in all actions concerning them; and⁸
 - b. take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, ... negligent treatment, maltreatment ... while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.⁹

4 Obligation to prohibit and eliminate discrimination in the form of gender based violence

7. Article 2 of *Convention on the Elimination of All Forms of Discrimination Against Women* imposes an obligation on States to prohibit discrimination against women, to establish legal protection of the rights of women on an equal basis with men and to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.¹⁰
8. Discrimination against women includes gender-based violence. Domestic violence is gender-based violence. While domestic violence can be perpetrated against men and women, women are overwhelmingly affected. In Australia one in three women has experienced physical violence since the age

⁶ European Court of Human Rights, *Opuz v Turkey* [2009] ECHR 33401/02 (Application No 33401/02, 9 June 2009); *Jessica Lenahan (Gonzales) et al v United States* (Inter-American Commission on Human Rights, Report No 80/11, Case 12.626, 21 July 2011).

⁷ UN Economic and Social Council, *Integration Of The Human Rights Of Women And The Gender Perspective: Violence Against Women – The Due Diligence Standard As A Tool For The Elimination Of Violence Against Women – Report Of The Special Rapporteur On Violence Against Women*. [29].

⁸ *Convention on the Rights of the Child* opened for signature 20 November 1989, 1577 United Nations, Treaty Series 3 (entered into force 2 September 1990). Article 3.

⁹ *Ibid* Article 19.

¹⁰ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 United Nations, *Treaty Series*, 13 (entered into force 3 September 1981), available at: <http://www.unhcr.org/refworld/docid/3ae6b3970.html> [accessed 22 June 2012], art 2(b) and (e).

of 15.¹¹ Of these women, over 40% experienced the violence at the hands of a current or former partner.¹²

9. Every week in Australia approximately one woman is killed by her current or former partner,¹³ often after a history of domestic violence.¹⁴ Violence is a leading cause of disability and death among 15-45 year olds.¹⁵ Intimate partner homicides account for one fifth of all homicides.¹⁶
10. Indigenous women in Australia are 45 times more likely to be victims of domestic violence than non-Indigenous women.¹⁷
11. In the Concluding Observations issued in 2006 (and again in 2010) on Australia's report on the implementation of CEDAW, the Committee raised concerns about the prevalence of violence against women and the low rates of reporting prosecutions and convictions in sexual assault cases. The Committee was concerned that laws that protect victims of violence and require perpetrators of domestic violence to leave the family home were not regularly enforced. In particular, the Committee was concerned about the high levels of violence against women, particularly domestic violence, in indigenous, refugee and migrant communities.¹⁸
12. The CEDAW Committee has noted that women's human rights to life and to physical and mental integrity cannot be superseded by other rights [of the perpetrator], including the right to property and the right to privacy.¹⁹

5 Obligation to protect life and to prevent death

13. The right to life is provided for by article 6(1) of the *International Covenant on Civil and Political Rights* (ICCPR) as follows:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.²⁰

¹¹ Australia Bureau of Statistics ABS, *Personal Safety Survey* (2005), p 7.

¹² Ibid.

¹³ J Mouzos and C Rushforth, *Family Homicide in Australia*, (2003), Australian Institute of Criminology, p 2.

¹⁴ J Dearden & W Jones, *Homicide in Australia: 2006 - 06 National Homicide Monitoring Program Annual Report* (2008), Australian Institute of Criminology p 2.

¹⁵ VicHealth (2004), *The health costs of violence: Measuring the burden of disease caused by intimate partner violence*, p 8.

¹⁶ J Dearden & W Jones, *Homicide in Australia: 2006 - 06 National Homicide Monitoring Program Annual Report*, Australian Institute of Criminology (2008), p 2.

¹⁷ C Cunneen, 'Preventing violence against indigenous women through programs which target men' (2002) 25(1), *University of New South Wales Law Journal Forum*, p 242.

¹⁸ Committee on the Elimination of Discrimination against Women, *Concluding comments of the Committee on the Elimination of Discrimination against Women: Australia* (2006), 34th session, 16 January-3 February 2006, CEDAW/C/AUL/CO/5, p 3.

¹⁹ CEDAW Committee, *Views: Communication No 2/2003*, 32nd sess, UN Doc. CEDAW/C/32/D/2/2003 (26 January 2005) ('A.T. v Hungary') para 9.3.

14. Consequent upon the obligation to protect life, there is a positive duty to prevent death.
15. This positive obligation to protect life has been found to be violated in the context of domestic violence in a number of international cases.²¹
16. In *Opuz v Turkey* the European Court of Human Rights (ECHR) has held that for a positive obligation to arise.²²

it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

5.1 Training

17. A further element of the duty to protect life is to provide appropriate training of personnel, such as police and custodial officers, to ensure that the right to life is adequately protected. The CEDAW Committee has recommended that States parties provide gender-sensitive training for law enforcement officials.²³
18. In *V.K. v Bulgaria*²⁴ the CEDAW Committee having found the State to have failed to protect V.K. effectively against domestic violence recommended that mandatory training be provided for law enforcement personnel on, inter alia, the definition of domestic violence and on gender stereotypes.
19. Given the incidence of domestic violence involving Aboriginal women, the training should ensure that frontline officers dealing with Aboriginal victims are culturally competent. This requires more than cultural 'awareness'.²⁵

²⁰ UN General Assembly, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 United Nations, *Treaty Series* 171 (23 March 1976 except Article 41 which came into force 28 March 1979),

²¹ European Court of Human Rights, *Opuz v Turkey* [2009] ECHR 33401/02 (Application No 33401/02, 9 June 2009); CEDAW Committee, *Views: Communication No 6/2005*, 39th sess, UN Doc CEDAW/C/39/D/6/2005 (1 October 2007) ('*Fatma Yildirim v Austria*'); CEDAW Committee, *Views: Communication No 5/2005*, 39th sess, UN Doc CEDAW/C/39/D/5/2005 (6 August 2007) ('*Şahide Goekce v Austria*').

²² European Court of Human Rights, *Opuz v Turkey* [2009] ECHR 33401/02 (Application No 33401/02, 9 June 2009)[129].

²³ Committee on the Elimination of Discrimination against Women, *General Recommendation No 19: Violence*, 11th sess, UN Doc A/47/38 at 1 (1993) ('*General Recommendation No 19*'), [24(b)].

²⁴ CEDAW Committee, *Views: Communication No 20/2008*, 49th sess, UN Doc CEDAW/C/49/D/20/2008 (17 August 2011) ('*V.K. v Bulgaria*').

²⁵ T Farrelly and B Lumby, 'A Best Practice Approach to Cultural Competence Training' (2009) 33(5) *Aboriginal & Islander Health Worker Journal* 5, p 5. See further, J Coffin, 'Rising to the Challenge in Aboriginal Health by Creating Cultural Security' (2007) 31 (3) *Aboriginal & Islander Health Worker Journal* 22, p 23 and Australian Human Rights Commission Social Justice Commissioner, *Social Justice Report 2011*. http://www.humanrights.gov.au/social_justice/sj_report/index.html. Chapter 4.

6 Overarching duty of Due Diligence: the duty to protect and prevent

20. States are obliged to prevent and respond to acts of violence against women with due diligence.²⁶

6.1 Obligation to protect

21. The obligation to protect is a positive obligation upon States parties to exercise due diligence to protect women from violence committed by non-State actors, for instance family members. The obligation to protect includes combating a climate of impunity and silence whereby violence is socially legitimated and women suffer extreme violence without criminal accountability for perpetrators. Such impunity feeds further violence. Combating impunity requires prompt, thorough, impartial, and serious investigation of allegations of violence against women.²⁷

22. Where there is a known and real risk to a person's life, then the right to life is paramount and it is reasonable to limit the rights of the alleged perpetrator in order to protect the life of a victim/survivor of domestic/family violence.²⁸

6.2 Access to services and safe housing

23. The CEDAW Committee has also determined that the unavailability of shelters to women and children seeking protection from domestic violence, constitutes a violation of the State party's obligation under article 2 (c) and (e) of CEDAW to provide for the immediate protection of women from violence, including domestic violence.²⁹

6.3 Obligation to prevent

24. The CEDAW Committee has also confirmed that States parties have a due diligence obligation to prevent, investigate, prosecute and punish acts of gender-based violence.³⁰ The Committee has noted that under general international law and specific human rights covenants, States may also be

²⁶ UN Economic and Social Council, *Integration Of The Human Rights Of Women And The Gender Perspective: Violence Against Women – The Due Diligence Standard As A Tool For The Elimination Of Violence Against Women – Report Of The Special Rapporteur On Violence Against Women*. [29].

²⁷ Marsha A. Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 71, 469.

²⁸ CEDAW Committee, *Views: Communication No 2/2003*, 32nd sess, UN Doc. CEDAW/C/32/D/2/2003 (26 January 2005) ('*A. T. v Hungary*').

²⁹ CEDAW Committee, *Views: Communication No 20/2008*, 49th sess, UN Doc CEDAW/C/49/D/20/2008 (17 August 2011) ('*V.K. v Bulgaria*').

³⁰ Committee on the Elimination of Discrimination against Women, *General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 47th sess, UN Doc CEDAW/C/GC/28 (16 December 2010) ('*General Recommendation No 28*') [19].

responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.³¹

25. The UN Declaration on the Elimination of Violence Against Women³² further outlines that States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:

Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.³³

26. Part of that obligation is the duty to ensure that interventions designed to prevent and respond to violence against women are based on accurate empirical data. This requires reliable statistics and indicators concerning violence against women and the evaluation of interventions designed to eliminate them.³⁴

27. The standard of due diligence is high.³⁵ Having a system in place to address the problem of domestic violence is insufficient; the system must be put into effect by the States who understand and adhere to the obligation of due diligence.³⁶

28. The Human Rights Council has reiterated the duty of States to accelerate efforts to eliminate all forms of violence by exercising due diligence to protect women against and prevent violence. To this end it has urged States to

adopt and implement policies and programmes that enable women to avoid and escape situations of violence and prevent its recurrence, and that provide, inter alia, financial support and affordable access to safe housing or shelters, childcare and other social supports³⁷

³¹ Committee on the Elimination of Discrimination against Women, *General Recommendation No 19: Violence*, 11th sess, UN Doc A/47/38 at 1 (1993) ('*General Recommendation No 19*'), [9].

³² UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104, available at: <http://www.unhcr.org/refworld/docid/3b00f25d2c.html> [accessed 25 June 2012].

³³ *Ibid*, Article 4(c).

³⁴ UN Economic and Social Council, *Integration Of The Human Rights Of Women And The Gender Perspective: Violence Against Women – The Due Diligence Standard As A Tool For The Elimination Of Violence Against Women – Report Of The Special Rapporteur On Violence Against Women*. [37].

³⁵ Above n 27, 466.

³⁶ Marsha A. Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 71, 466-467, citing CEDAW Committee, *Views: Communication No 6/2005*, 39th sess, UN Doc CEDAW/C/39/D/6/2005 (1 October 2007) ('*Fatma Yildirim v Austria*') at [12.1.2] and CEDAW Committee, *Views: Communication No 5/2005*, 39th sess, UN Doc CEDAW/C/39/D/5/2005 (6 August 2007) ('*Şahide Goekce v Austria*'). at [12.1.2].

³⁷ United Nations Human Rights Council, *Accelerating Efforts to eliminate all forms of violence against women: ensuring due diligence in prevention*, UN Doc A/HRC/RES/14/12, [5]

and to:

provide protection and support to women and girls who have been subjected to violence, and that failure to do so violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms.³⁸

29. In *Fatima Yildirim v Austria*³⁹ the CEDAW Committee held that Austria had breached its due diligence obligation to protect a woman murdered by her husband in failing to detain him despite him making repeated death threats which were known to police.

30. Similarly, in *Opuz v Turkey*⁴⁰ the ECHR held that Turkish authorities had failed in their positive obligation to protect the right of a woman killed by her partner despite several complaints of violence to the police.

6.4 **Obligation to investigate gender based violence**

31. It is well established under international law, including the CEDAW,⁴¹ that the due diligence obligation to investigate applies to gender-based violence against women, including domestic violence.⁴²

32. The Committee on the Elimination of Discrimination against Women has explained, for instance, that, 'under general international law and specific human rights covenants, States may ... be responsible for private acts if they fail to act with due diligence ... to investigate ... acts of violence...'.⁴³ The

³⁸ United Nations Human Rights Council, *Accelerating efforts to elimination all forms of violence against women: ensuring due diligence in protection*, resolution 17/11, UN Doc A/HRC/17/L.6 para 2.

³⁹ CEDAW Committee, *Views: Communication No 6/2005*, 39th sess, UN Doc CEDAW/C/39/D/6/2005 (1 October 2007) (*Fatma Yildirim v Austria*).

⁴⁰ [2009] ECHR 33401/02.

⁴¹ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 United Nations, *Treaty Series*, 13 (entered into force 3 September 1981), available at: <http://www.unhcr.org/refworld/docid/3ae6b3970.html> [accessed 22 June 2012], art 2(e) (requiring States Parties to 'take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise'). See also Committee on the Elimination of Discrimination against Women, *General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 47th sess, UN Doc CEDAW/C/GC/28 (16 December 2010) ('*General Recommendation No 28*') [13]; CEDAW Committee, *General Recommendation No 19: Violence*, 11th sess, UN Doc A/47/38 at 1 (1993) ('*General Recommendation No 19*') [9].

⁴² See, eg, *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, adopted on 11 May 2011, CETS No.: 210 (not yet in force), art 5; *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém Do Pará)*, adopted 9 June 1994 (entered in force 5 March 1995), art 7(b); IACHR, Case 12.051, Report No. 54/01, *Maria Da Penha Maia Fernandes v Brazil*, Annual Report, 2000, OEA/Ser.LV.II.111 Doc.20 rev. (2000). See also *The Due Diligence Standard as a Tool for the Elimination of Violence against Women*, Report of the UN Special Rapporteur on violence against women, its causes and consequences, UN Doc E/CN.4/2006/61 (20 January 2006).

⁴³ Committee on the Elimination of Discrimination against Women, *General Recommendation No 19: Violence*, 11th sess, UN Doc A/47/38 at 1 (1993) ('*General Recommendation No 19*'). See also Committee on the Elimination of Discrimination against Women, *General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 47th sess, UN Doc CEDAW/C/GC/28 (16 December 2010),

responsibility lies in the failure of the State to take reasonable measures to investigate alleged violations of human rights by a non-state actor.⁴⁴

33. The obligation to investigate aims to, amongst other things:

- a. ensure the effective implementation of laws and policies that protect human rights related to gender-based violence, including the right to life;
- b. avoid repetition of the violence, both against the individual victim/survivor and more broadly within society;
- c. ensure accountability of State actors for deaths occurring under their responsibility; and
- d. end impunity for gender-based violence against women.⁴⁵

34. To this end, comments by the Coroner in this inquest are an important part of meeting Australia's positive duty under international law.

(a) *Content and meaning of the obligation to investigate*

35. In *A.T. v Hungary*,⁴⁶ the CEDAW Committee recommended that the State Party take steps to '[i]nvestigate promptly, thoroughly, impartially and seriously all allegations of domestic violence and bring the offenders to justice in accordance with international standards' (emphasis added)⁴⁷

CEDAW Committee, *Views: Communication No 20/2008*, 49th sess, UN Doc CEDAW/C/49/D/20/2008 (17 August 2011) ('*V.K. v Bulgaria*'); CEDAW Committee, *Views: Communication No 6/2005*, 39th sess, UN Doc CEDAW/C/39/D/6/2005 (1 October 2007) ('*Fatma Yildirim v Austria*'); CEDAW Committee, *Views: Communication No 5/2005*, 39th sess, UN Doc CEDAW/C/39/D/5/2005 (6 August 2007) ('*Şahide Goekce v Austria*'); CEDAW Committee, *Views: Communication No 2/2003*, 32nd sess, UN Doc CEDAW/C/32/D/2/2003 (26 January 2005) ('*A.T. v Hungary*'); *Report on Mexico Produced by the Committee on the Elimination of Discrimination Against Women Under Article 8 of the Optional Protocol to the Convention, and Reply from the Government of Mexico*, CEDAW, 32nd sess, UN Doc CEDAW/C/2005/OP.8/MEXICO (27 January 2005) (*Ciudad Juárez Inquiry*).

⁴⁴ Andrew Byrnes, 'Article 2' in Marsha A. Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 71, 88.

⁴⁵ See, eg, European Court of Human Rights, *Opuz v Turkey* [2009] ECHR 33401/02 (Application No 33401/02, 9 June 2009)[150]; *González et al ('Cotton Field') v Mexico* (Inter-American Court of Human Rights, Ser C No 205, 16 November 2009) [289].

⁴⁶ CEDAW Committee, *Views: Communication No 2/2003*, 32nd sess, UN Doc. CEDAW/C/32/D/2/2003 (26 January 2005) ('*A.T. v Hungary*'). See also *Ciudad Juárez Inquiry*, UN Doc CEDAW/C/2005/OP.8/MEXICO, [271]-[286].

⁴⁷ CEDAW Committee, *Views: Communication No 2/2003*, 32nd sess, UN Doc. CEDAW/C/32/D/2/2003 (26 January 2005) ('*A.T. v Hungary*'), p 12

36. Other international decision-making bodies have also regularly called on States Parties to conduct investigations that are prompt, thorough, impartial and serious.⁴⁸

37. International jurisprudence provides some guidance on the measures necessary to ensure an investigation that is prompt, thorough, impartial and serious.⁴⁹ Much of this jurisprudence approaches this question from the perspective of the 'particular vulnerability of victims of domestic violence'.⁵⁰

(i) Prompt investigation

38. To satisfy the due diligence obligation to investigate, a State must be able to demonstrate that it initiated, without unreasonable delay, an investigation into allegations of domestic violence.⁵¹ There may be obstacles or difficulties that prevent progress in an investigation in a particular situation.⁵² However, unreasonable delays in initiating an investigation, slow and unjustified progress in the investigation and the absence of activity in case files are some likely indicators of a failure to carry out a prompt investigation and may constitute a form of impunity for acts of violence.

39. The obligation to conduct a prompt investigation requires States to adopt measures to ensure the necessary framework and resources are in place so that authorities can provide an immediate and effective response to reports of violence.⁵³

40. In order to be held accountable under the due diligence obligation to investigate, it must be established the State failed to put in place the necessary framework and resources or that the authorities knew or ought to have known of the existence of a real and immediate risk to life but failed to 'take measures within the scope of their powers which, judged reasonably,

⁴⁸ *González et al ('Cotton Field') v Mexico*, above n 5, [290]-[293] (citations omitted). See also *Ana, Beatriz and Celia González Pérez (México)* (Inter-American Commission on Human Rights, Report No 53/01, Case 11.565, April 4, 2001) [84]-[88]; Inter-American Commission on Human Rights, *The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination*, OEA/Ser.LV/II.117, Doc. 44 (2003) [132].

⁴⁹ See generally *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, ECOSOC Res 1989/65 of 24 May 1989. At: <http://www2.ohchr.org/english/law/executions.htm>.

⁵⁰ *Hajduová v Slovakia* (European Court of Human Rights, Application No 2660/03, 30 November 2010) [50]. See also European Court of Human Rights, *Opuz v Turkey* [2009] ECHR 33401/02 (Application No 33401/02, 9 June 2009) [157].

⁵¹ and CEDAW Committee, *Views: Communication No 5/2005*, 39th sess, UN Doc CEDAW/C/39/D/5/2005 (6 August 2007) ('*Şahide Goekoe v Austria*'); [12.3(b)]; European Court of Human Rights, *Opuz v Turkey* [2009] ECHR 33401/02 *Opuz v Turkey*, Application No 33401/02, 9 June 2009 [150]; *Jessica Lenahan (Gonzales) et al v United States* (Inter-American Commission on Human Rights, Report No 80/11, Case 12.626, 21 July 2011) [179].

⁵² European Court of Human Rights, *Opuz v Turkey* [2009] ECHR 33401/02 (Application No 33401/02, 9 June 2009) [150].

⁵³ *Jessica Lenahan (Gonzales) et al v United States* (Inter-American Commission on Human Rights, Report No 80/11, Case 12.626, 21 July 2011) [285].

might have been expected to avoid that risk'.⁵⁴ This includes a prompt investigation. Whether or not the authorities did all that could be reasonably expected of them in their investigation to avoid a real and immediate risk to life is a question that can only be answered in the light of all the circumstances of any particular case.⁵⁵

41. A number of international bodies have found States accountable for failures to protect victims from imminent acts of domestic violence when the authorities knew of a situation of real and immediate risk and they failed to undertake reasonable measures to protect them from harm, including through the establishment of an investigation into allegations of violence.⁵⁶

(ii) Thorough investigation

42. To satisfy the due diligence obligation to investigate, a State must be able to demonstrate that it conducted a thorough investigation into allegations of gender-based violence against women.

43. This would include taking reasonable steps to 'secure relevant evidence in order that the investigation is capable of identifying and punishing the perpetrators'.⁵⁷ It has been explained that the State 'is ultimately the one responsible for ascertaining the truth of its own initiative ... In accordance with its special protection obligation and the due diligence principle, this obligation is particularly critical in cases implicating the right to life of girl-children'.⁵⁸

(iii) Serious investigation

44. To satisfy the due diligence obligation to investigate, a State must be able to demonstrate that it carried out a serious investigation into the alleged violence.

45. In *Velásquez Rodríguez v Honduras*, the Inter-American Court of Human Rights explained that the duty to investigate

is not breached merely because the investigation does not produce a satisfactory result ... [I]t must be undertaken in a serious manner and not as a mere formality preordained

⁵⁴ European Court of Human Rights, *Opuz v Turkey* [2009] ECHR 33401/02 (Application No 33401/02, 9 June 2009) [129], See also at [130], [136].

⁵⁵ *ibid* [130].

⁵⁶ See generally *Jessica Lenahan (Gonzales) et al v United States* (Inter-American Commission on Human Rights, Report No 80/11, Case 12.626, 21 July 2011) *Hajduová v Slovakia* (European Court of Human Rights, Application No 2660/03, 30 November 2010).

⁵⁷ Philip Leach, 'Article 2 ECHR (the right to life) – Positive Obligations', 2, <http://www.londonmet.ac.uk/fms/MRSite/Research/HRSJ/EHRAC/Reports/Art%20%20positive%20obligations%20-%20Law%20Soc%205%2011%20PL.pdf>. *Jessica Lenahan (Gonzales) et al v United States* (Inter-American Commission on Human Rights, Report No 80/11, Case 12.626, 21 July 2011), [290]-[293] (citations omitted); *Ana, Beatriz and Celia González Pérez* (México) (Inter-American Commission on Human Rights, Report No 53/01, Case 11.565, April 4, 2001) [84]-[88], [84]-[88]; IACHR, *The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination*, OEA/Ser.LV/III.117, Doc. 44 (2003) [132].

⁵⁸ *Jessica Lenahan (Gonzales) et al v United States* (Inter-American Commission on Human Rights, Report No 80/11, Case 12.626, 21 July 2011). [181].

to be ineffective.... Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.⁵⁹

46. A number of factors are likely to be relevant to a determination concerning the seriousness of an investigation into domestic violence. These include whether or not the investigation was adequate in the context of known threats of violence, the severity and extent of those threats, past history of violence and the particular vulnerability of domestic violence victims. In *Opuz v Turkey*, for example, the ECHR suggested that, in light of the 'positive obligation to take preventive operational measures to protect an individual whose life is at risk, it might have been expected that the authorities, faced with a suspect known to have a criminal record of perpetrating violent attacks, would take special measures consonant with the gravity of the situation with a view to protecting'⁶⁰ the victim against violence.
47. Treating domestic violence as a private matter, trying to convince a victim/survivor to drop a complaint of violence and/or blaming the victim for provoking the violent behaviour of the perpetrator are likely indicators that an investigation into allegations of violence is not being treated seriously by State authorities.⁶¹
48. States are under a positive obligation to adopt measures to ensure that their authorities have the capacity and sensitivity to understand the seriousness of the phenomenon of violence against women and the willingness to act immediately.⁶² This includes providing the competent authorities with the necessary training, material and human resources to act with due diligence to investigate gender-based violence and would extend both to the technical aspects of investigations and the human rights and gender issues associated with violence.⁶³

⁵⁹ Inter-American Court of Human Rights, *Velásquez Rodríguez v Honduras*, Series C no. 4, Judgment of 29 July 1988, [177]. See also Christine Chinkin, 'Violence Against Women' Marsha A. Freeman, Christine Chinkin and Beate Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 443, 469.

⁶⁰ European Court of Human Rights, *Opuz v Turkey* [2009] ECHR 33401/02 (Application No 33401/02, 9 June 2009) [148].

⁶¹ *Ibid*[195]-[197].

⁶² UNSRVAV United Nations Special Rapporteur on the Violence Against Women guidelines; *Jessica Lenahan (Gonzales) et al v United States* (*Inter-American Commission on Human Rights, Report No 80/11, Case 12.626, 21 July 2011*), [285]; *Inter-American Commission on Human Rights, The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination, OEA/Ser.LV/II.117, Doc. 44* [276].

⁶³ *Inter-American Commission on Human Rights, The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination, OEA/Ser.LV/II.117, Doc. 44* [278].

7 Obligation upon States to take measures to protect children.

49. Article 3 of the Convention on the Rights of the Child requires that:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.⁶⁴

50. In addition, Article 19 of the Convention on the Rights of the Child requires that:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

51. It is well established that exposure to domestic violence can have detrimental psychological, behavioural, and health impacts upon children. In Australia almost one in four children has witnessed violence against their mothers or step-mothers.⁶⁵ It has been found that 42% of Indigenous young people reported witnessing violence against their mother or stepmother, compared with 23% of all children.⁶⁶ The National Council's Plan for Australia to Reduce Violence Against Women and their Children recommends that the Australian Government work with State and Territory governments to ensure the National Framework for protecting Australia's Children meets the needs of children who witness or experience domestic and family violence.⁶⁷

52. The Committee on the Rights of the Child has acknowledged that violence against women in the family detrimentally affects children.⁶⁸ In its most recent concluding observations on Australia it has indicated that it

...is gravely concerned at the high levels of violence against women and children prevailing in the country and notes that there is an inherent risk that the co-existence of domestic violence, lawful corporal punishment, bullying, and other forms of violence in the society are inter-linked, conducing to an escalation and exacerbation of the situation. The Committee is particularly concerned that:

⁶⁴ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 United Nations, Treaty Series 3 (entered into force 2 September 1990).

⁶⁵ Crime Research Centre and Donovan Research, *Young people and domestic violence: national research on young people's attitudes to and experiences of domestic violence*, Commonwealth Attorney-General's Department, Canberra. Cited in D Indermaur, 'Young Australians and domestic violence' *Trends & Issues in Crime and Criminal Justice* no. 195, Australian Institute of Criminology, Canberra, 2001.

⁶⁶ Richards, Kelly, Australian Institute of Criminology, Children's exposure to domestic violence in Australia, *Trends & issues in crime and criminal justice* No. 419 June 2011. P 2

⁶⁷ Time for Action, The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021, March 2009, see recommendation 9.

⁶⁸ R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2002), p260.

(a) Women and children of Aboriginal origin are particularly affected;

...

(c) Programmes for the reintegration of child victims of domestic violence remain inadequate including because of the absence of monitoring systems of children victims who are reintegrated with their families;

(d) There is a lack of attention and specific procedures in cases where family members are the perpetrators of ...;

46. Emphasising the State party's obligations under articles 19 and 37(a) of the Convention and the Committee's General Comment 13 (2011) on the right of the child to freedom from all forms of violence, the Committee urges the State party to develop federal legislation as a general framework to reduce violence and promote the enactment of similar and complementary legislation at state and territory level. It also recommends that the State party adopt a specific plan of action to make operational the provisions under the National Plan to Reduce Violence against Women and Their Children (2010-2022), including such measures as:

(a) Ensuring that the factors contributing to the high levels of violence among Aboriginal women and children are well understood and addressed in national and state/territory plans;

(c) Establishing mechanisms for ensuring effective follow-up support for child victims of domestic violence upon their family reintegration;

...

(d) Developing alternatives for cases where a parent or other family member is the perpetrator; ...⁶⁹

8 Failure to fulfil Australia's human rights obligations

53. The evidence in this matter demonstrates a range of systemic failures that contributed to Andrea's death. In particular:

- a. The failure of the Violence Restraining Order to prevent Andrea's death. This failure arose as a result of failure to investigate breaches of the Orders promptly, thoroughly and seriously.
- b. The failure of the Parole system to prevent re-offending. In particular the parole system failed to:

⁶⁹ UN Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention Concluding observations: Australia, CRC/C/AUS/CO/4*, 19 June 2012, [45- 46].

- i. Ensure that Mr Pickett was detained in circumstances where it knew or ought to have known at the time of the existence of a real and immediate risk to Andrea's life.
- ii. Adequately supervise Mr Pickett, in contravention of s 31 of the *Sentence Administration Act 2003* (WA). In particular:
 1. failing to adequately assess the risk and appropriate level of supervision required for Mr Pickett despite relevant and cogent information being available.
 2. failing to ensure Mr Pickett had adequate counselling both before and after his release, particularly in circumstances where he had requested further counselling.
 3. releasing Mr Pickett to Narembeen with the condition that he attend counselling when it was known that the available services were difficult to obtain and not adequate in the circumstances.
 4. treating the distance from Narembeen to Perth as a safety factor in circumstances where it was known that Mr Pickett was authorised to travel to Perth to have access to his children.
 5. failing to adequately monitor Mr Pickett's compliance with the conditions of his Parole Order.
 6. failing to ensure that breaches of the conditions of the Parole Order were adequately dealt with.
- c. The failure to promptly, thoroughly and seriously investigate allegations of domestic violence. In particular, the lack of integration of police systems and practices and the lack of integration of police, Department of Corrective Services and Department of Child Protection systems to ensure maximisation of knowledge and information available to investigate allegations and protect Andrea and her children.
- d. The failure to provide adequate training to Police Officers regarding the nature and consequences of domestic violence and how to respond appropriately to situations involving domestic violence, particularly in relation to Aboriginal women.
- e. The failure to provide adequate housing for Andrea and her children.
- f. The failure to ensure that the best interests of the child were a paramount consideration in particular in relation to the youngest child of Andrea and Mr Pickett on the night of the murder.

9 Recommendations

54. The Commission acknowledges that the State has taken significant steps to address the above failings and continues to assess their systems and implement appropriate changes. On the available evidence it is difficult to determine the extent to which the measures taken have addressed these failings.
55. In order to ensure the State is fulfilling its obligations in relation to domestic violence, the Commission submits the Coroner should make the following recommendations:

9.1 General recommendation

- a. The Department of Child Protection, as lead agency with responsibility for domestic violence, implement an independent and comprehensive monitoring and evaluation program of the measures taken to implement the State's obligations with respect to domestic violence.
- b. All State Government Departments who deal with victims and perpetrators of domestic violence involving Aboriginal or Torres Strait Islander Peoples implement a meaningful programme of training in cultural competence to enable them to provide their services to Aboriginal and Torres Strait Islander Peoples in a culturally appropriate manner that ensures they have equal access to those services.

9.2 Department of Corrective Services

The Department of Corrective Services take the following actions:

- a. Research and assess the efficacy and desirability of a system of GPS monitoring, in accordance with human rights, of appropriately assessed parolees who are perpetrators of domestic violence and constitute an ongoing risk to the victim. Such system should encompass the possibility of a warning system to the victim to enable her to take positive action to protect herself and her children.
- b. Review the system of risk assessment and determination of the supervision and monitoring of parolees. The review should specifically assess the appropriateness of the current forms and processes to adequately take into account:
 - i. all the personal circumstances of the parolee and the victim, including whether any children may be involved.
 - ii. any factors arising from the geographical location of the parolee and his ability to access services
- c. Steps be taken to ensure that necessary and appropriate delegations are made under s 97A of the *Sentence Administration Act 2003* to

enable the disclosure of personal information of the parolee in appropriate circumstances.

- d. Training be provided to staff of the Department of Corrective Services to enable them to appropriately assess when disclosure of personal information is appropriate and permissible.
- e. Systems and practices be implemented to enable all relevant officers of the Department to have prompt access to relevant information regarding the parolee including sentencing remarks, victim impacts statement and any other relevant documents in appropriate circumstances.

9.3 Western Australian Police Service

The Western Australian Police Department take the following actions:

- a. Identify any police officer who has not received the currently available training in relation to domestic violence and require them to undertake appropriate training. Such training should include the Parole system and any relevant roles and responsibilities relating to Police. It should also include meaningful consideration of issues relating to domestic violence in Aboriginal families and circumstances and factors impacting on Aboriginal families experiencing domestic violence.
- b. Implement a programme to ensure all relevant officers receive refresher training on domestic violence at appropriate intervals and upon commencement in a relevant area of policing.

25 June 2012



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