



RIGHTS AGENDA

Monthly Bulletin of the Human Rights Law Centre

OPINION: A HUMAN RIGHTS VISION FOR THE NEW ATTORNEY-GENERAL

The HRLC's Phil Lynch looks at how principled leadership and energetic action in key priority areas will help to realise the vision of a nation which respects and protects human rights.

NEWS: TWO CORONIAL INQUESTS INTO DEATHS IN CUSTODY HIGHLIGHT NEED FOR URGENT REFORM

Coroner finds authorities failed in their duty of care to three men who committed suicide at Sydney's Villawood Immigration Detention Centre.

CASE NOTES:

VCAT considers first Indigenous employment and special measures.

IF I WERE ATTORNEY-GENERAL...

We ask some of Australia's leading human rights advocates, activists and academics to nominate the top human rights priority that Australia's new AG, Nicola Roxon, should focus on in 2012.

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Thanks for your support for our Human Rights Week Appeal!

As many readers will be aware, during Human Rights Week we ran an appeal to raise critical funds to sustain and strengthen our work.

I am pleased to report that the Human Rights Week Appeal was a great success, raising over \$29,000 in public donations. We received donations from more than 80 individuals, including a former Prime Minister, two former members of the UN Human Rights Committee, community lawyers and workers, commercial lawyers and law firm partners, barristers, and many more! With the match funding offered by Mallesons Stephen Jaques, DLA Piper and Blake Dawson, the campaign raised a total of almost \$60,000!

On behalf of the Board and all staff, thank you for your generous contributions to this Appeal. With no recurrent funding beyond 2012, **we need your financial support to continue and expand our high-impact human rights work.** We look forward to working with you to promote and protect human rights in 2012 and beyond.

Phil Lynch, Executive Director, Human Rights Law Centre



A human rights vision for the new Attorney-General

In her maiden speech to Parliament in 1998, Australia's new Attorney-General spoke of her long-term vision for the nation's legal system. For Nicola Roxon, values of fairness, dignity and equality were recurring themes. The Australian Human Rights Commission will no longer be "chronically underfunded", she said. Women will be "truly equal". Protected by "workable sex discrimination legislation", they will be appropriately represented as judges and around boardroom tables.

It is a vision which many Australians share. The 2009 National Human Rights Consultation, which received over 35,000 public submissions, demonstrated that human rights matter deeply to Australians, resonating with democratic values such as the rule of law and a fair go.

The Consultation also demonstrated, however, that our laws and institutions do not adequately protect human rights, particularly for vulnerable or disadvantaged groups. There was a strong view, it found, that "we could do better in guaranteeing fairness for all within Australia and in protecting the dignity of people who miss out".

Thirteen years after her maiden speech, Attorney-General Roxon is now in a position to make her prescient vision a reality.

So what should be the priorities for an Attorney-General committed to human rights, equality and the rule of law?

First, the Attorney-General should enhance Australia's anti-discrimination laws. Strengthened equality laws would contribute to social cohesion, higher productivity and participation, and improved outcomes in areas including education and health. The equality law consolidation process initiated by Roxon's predecessor, Robert McClelland, is an important opportunity to strengthen Australia's complex anti-discrimination regime, with the government keen to streamline laws and reduce their regulatory burden. The key measure of Roxon's success,

however, will be the effectiveness of the revised laws in preventing and remedying discrimination and promoting substantive equality.

Second, and again building on the positive work of McClelland, the new Attorney-General should strengthen the protection of human rights in law. The Human Rights (Parliamentary Scrutiny) Act, passed on parliament's last sitting day this year, is a modest but important step in this direction. It requires that all new legislation be developed with fundamental human rights and freedoms in mind. The Human Rights Framework of which this new law is part is due to be reviewed in 2014. Roxon should use this review to lead the enactment of a national Human Rights Act.

It is in the interests both of persons deprived of liberty and also the broader community that all places of detention promote rehabilitation and social integration. Unfortunately, many places of detention – whether prisons, psychiatric hospitals, police cells, immigration detention centres or disability facilities – fall well short of this aim. As a third priority, therefore, the Attorney-General should enhance oversight of places of detention by immediately ratifying the Optional Protocol to the Convention against Torture. The Optional Protocol aims to prevent ill-treatment by establishing national and international systems for independent monitoring and inspection of all places of detention. Australia signed the Optional Protocol in May 2009. Since that time, however, progress has been slow, with wrangling between the states and the Commonwealth about the modest bill for detention oversight. This is despite evidence as to the very high social and economic costs of failing to prevent and redress ill-treatment.

As a fourth priority, and as recently recommended by a Senate committee, the Attorney-General should order a review of people smuggling offences under the Migration Act. These are the provisions under which a number of vulnerable Indonesian children have been detained for extended periods in adult prisons. Such a review is necessary to protect the rights of children and ensure that the offences, which carry mandatory gaol sentences, are appropriate and effective.

As a fifth priority, the Attorney-General should take urgent steps to address issues of Aboriginal and Torres Strait Islander disadvantage and disenfranchisement. Drawing on her experience as Health Minister, Roxon should work with all Australian governments to include 'justice' within the key areas covered by the 'Closing the Gap' program. Just as there are targets to close the life expectancy gap, we need concrete targets to reduce Aboriginal and Torres Strait Islander imprisonment and re-offending.

Roxon should also work hard to ensure the success of a referendum to recognise Aboriginal and Torres Strait Islander peoples and guarantee against racial discrimination in Australia's constitution. As the president of the Business Council of Australia recently wrote, such recognition will contribute in both a "symbolic and practical" way to equality and social wellbeing.

Of course, this is a far from comprehensive human rights agenda. There is much remedial work to be done in the reform of counter-terrorism laws, for example, and much agenda setting work in areas such as business and human rights. Together, however, principled leadership and energetic action in these priority areas could go a long way to realising the vision of a nation which respects and protects human rights – a vision shared by Nicola Roxon those thirteen years ago.

Phil Lynch is Executive Director of the Human Rights Law Centre



NEWS IN BRIEF

Two coronial inquests into deaths in custody highlight need for urgent change

The Queensland coroner says [urgent changes are needed in prisons](#), following the suicide of a [female prisoner](#) who had endured pain for a month having been denied medical pain relief. Meanwhile the New South Wales coroner has found [authorities failed in their duty of care to three men who committed suicide at Sydney's Villawood Immigration Detention Centre](#).

Prominent Australians question Assange's ability to receive fair trial in US

Former Prime Minister Malcolm Fraser and [dozens of other public figures have called on Foreign Minister Kevin Rudd to make sure WikiLeaks founder Julian Assange is protected from "rendition" to the United States](#).

Conscience vote on gay marriage wins favour

A new poll shows that [an overwhelming majority believes that all MPs should have the opportunity to vote their conscience on same sex marriage](#). The *Herald* /Nielsen poll showed that 81 per cent of people believe there should be a conscience vote on the issue. Meanwhile, Opposition leader Tony Abbot has given his strongest indication that [he will not support moves for Liberal MPs to have a conscience vote](#).

Release sought for asylum boy who attempted suicide

A 17 year old boy who attempted to commit suicide has become the focus of a legal challenge into the prolonged detention of recognised refugees whilst they are awaiting ASIO security checks. The claim also [raises issues regarding the duty of care Immigration Minister Chris Bowen has to unaccompanied children](#), particularly in relation to their mental health.

Juries lie at the heart of justice

In an editorial the Daily Telegraph has called for the retention of jury trials, [rejecting the assertion by Justice Peter McClellan of New South Wales that modern trials have become too complex for juries to adjudicate on](#). Justice McClellan noted that while previously juries merely had to deal with the testimony of witnesses now they have to deal with the conflicting testimony of scientists.

Clinton links US Aid to gay and lesbian rights

The United States Secretary of State Hillary Clinton has [delivered a speech in strong support of gay and lesbian rights worldwide](#) claiming the continued receipt of American foreign aid may depend on how a particular country treats its gay and lesbian communities.

ALP returns to offshore processing policy

Immigration Minister Chris Bowen, at the recent ALP national conference, won support for his [proposal to increase Australia's refugee intake while embracing offshore processing](#). The proposal was criticized by [refugee advocates](#), including [Julian Burnside QC](#) and the [ALP's Left faction](#).

Police action leaves tent protester semi-naked

An Occupy Melbourne activist dressed in a tent costume to ridicule the banning of camping equipment being used as part of the ongoing protests had a police officer remove the tent costume, leaving her semi-naked. The protester has accused the police officer of sexual assault.

Violence continues in West Papua following 'Independence Day' demonstrations

A human rights group says at least 17 people died last week after police using helicopters fired on houses in the Indonesian province of West Papua. The attacks come in the same month as two people were reportedly shot as a result of Independence Day demonstrations and further clashes occurred with reports of two Indonesian police officers being killed by the OPM and the anti-terrorist brigade responding by setting fire to schools, a church and houses in the highlands. Greens Senator Richard Di Natale said Australia can no longer stand silent while West Papua burns.

Remove racism of a previous era from the heart of our constitution

Graham Bradley, the former President of the Business Council of Australia has suggested that the Constitution be amended to remove from its text "the last vestiges of racism". In December 2010 Mr Bradley was appointed by Prime Minister Gillard to a panel to advise on appropriate constitutional recognition of the "traditional owners of the continent and waters".



INTERNATIONAL HUMAN RIGHTS DEVELOPMENTS

What are the top 10 issues in business and human rights in 2012?

On International Human Rights Day, 10 December 2011, the Institute for Human Rights and Business released its list of the top 10 emerging business and human rights issues for 2012. Through its top 10 list, the IHRB seeks to address diverse aspects of how the 'Protect, Respect and Remedy' Framework and the Guiding Principles on Business and Human Rights can be implemented to achieve real change in corporate human rights performance over the coming year and beyond.

Issues which made the top 10 list for 2012 include:

- combating casualisation of labour and the erosion of workers' rights;
- providing legal redress for business participation in human rights violations;
- putting children squarely on the business agenda;
- ensuring that companies respect human rights in cyberspace;
- recognising the importance of women's rights in business;
- strengthening community consultation by business;
- engaging investors on the need for human rights due diligence;
- linking the fight against corruption to corporate respect for human rights;
- operating responsibly in high risk environments; and

- addressing the negative impacts of land acquisition and use on communities and nations.

In its list, the IHRB highlights a number of high profile developments from the past year which are likely to gain further attention during the course of 2012. For example, the list draws attention to human rights impacts associated with the use of internet and cell-phone technology during the Arab Spring uprisings and the principles developed by the Global Network Initiative to guide decision-making by information technology companies. It also highlights the recently launched UNICEF, Save the Children and the United Nations Global Compact Children's Rights and Business Principles Initiative and the increasingly pressing need to develop tools to leverage the potential of the financial sector to facilitate rights realisation.

In addition to these recent developments, the top 10 list identifies a number of issues which have been firmly on the agenda for some time but remain prominent and significant. The list recognises significant issues such as the impact of changed political circumstances, such as the independence won by South Sudan, on activities in high risk environments, and also recent breakthroughs to address barriers to effective community consultation. The list further notes that the US Supreme Court is due to hear *Kiobel v Royal Dutch Petroleum Co* in 2012 to consider whether businesses can be held liable under the Alien Torts Claims Act.

With the recently established United Nations Expert Working Group on Business and Human Rights due to announce its work plan and formally commence work in January 2012, we can look forward to these and other business and human rights issues featuring more prominently on the international agenda in the year ahead.

The IHRB works to raise corporate standards and strengthen public policy around business-related human rights issues. Its top 10 list can be accessed at:

http://www.ihrb.org/top10/business_human_rights_issues/2012.html#

Catie Shavin is a lawyer and member of Allens Arthur Robinson's Corporate Responsibility Group



NATIONAL HUMAN RIGHTS DEVELOPMENTS

Leading Australians recognised in Australia's annual Human Rights Awards

Ron Merkel QC has been announced as the winner of the prestigious 2011 Human Rights Medal at the Australian Human Rights Commission's annual Human Rights Awards in Sydney.

Meanwhile, a legal team comprising Allens Arthur Robinson, the Refugee and Immigration Legal Centre, Debbie Mortimer SC and Richard Niall SC were awarded the Human Rights Law Award for their outstanding legal advocacy for refugees and asylum seekers.

Commission President Catherine Branson QC congratulated Ron and all winners for their extraordinary efforts in protecting and promoting human rights in Australia.

"All winners and indeed all finalists should be treasured by all of us for the often selfless way in which they try to make Australia an even fairer and more equal society than it already is," Ms Branson said.

“For 40 years, Ron Merkel has devoted himself to access to justice for people who are marginalised and disadvantaged. He has had a long and outstanding commitment to the promotion and advancement of human rights as a legal practitioner.

“Ron Merkel takes on cases that many others would avoid and his advocacy spreads far and wide including defending the rights of prisoners to vote in elections and protecting the rights of Indigenous Australians not to be racially discriminated against,” Ms Branson said.

The Medals were announced at a sold-out event in Sydney in celebration of International Human Rights Day. More than 200 entries were received for this year’s Awards with 40 finalists selected in 10 categories. Details of all winners and finalists can be [found online here](#).

Source: Australian Human Rights Commission

New website showcases arresting and shocking human rights facts

Australian Human Rights Commission President Catherine Branson QC delivered the 2011 Human Rights Day Oration and announced a major new Commission initiative to build understanding and respect for human rights in Australia.

“I am proud to be able to launch an innovative online initiative today, known as Something In Common, which aims for greater community engagement with human rights issues,” Ms Branson said.

“In order to respond to the desire for human rights facts, as part of our Something In Common project we have developed a microsite – [Tell Me Something I Don’t Know](#).

“Tell Me Something I Don’t Know presents a series of human rights facts that are arresting and sometimes shocking,” she said. “In addition, there are a number of engagement features where users have the opportunity to not only add their own stories to the site, but contribute to Australian film reviews that deal with human rights issues, respond to polls and commit to taking a number of online and offline actions.

“Something In Common seeks to build on these ideas to enable us to speak about human rights in ways that will inspire people to promote, defend and apply human rights in their daily lives through social media,” she said.

“It is impossible to refute the reach of social media and impossible to ignore it if human rights education and community engagement are to remain relevant.”

Source: Australian Human Rights Commission



STATE-BASED HUMAN RIGHTS DEVELOPMENTS

Community lawyers call for stronger human rights protections

The Victorian Government should strengthen existing protections under the Human Rights Charter in the spirit of Human Rights Week, says the Victorian Federation of Community Legal Centres.

A new Federal government report released on 9 December highlights a number of Australian communities whose human rights are threatened.

The Charter has been facing an uncertain future since the Scrutiny of Acts and Regulations Committee Report recommended winding back key aspects of its operation. The majority

Coalition committee has been criticised for ignoring the overwhelming community support for the Charter expressed in submissions and evidence given to the inquiry. The Victorian Government is expected to announce its decision on the recommendations shortly.

“While Victoria has relatively good record of human rights protection, we still have a long way to go to ensure vulnerable communities have access to equal treatment,” said Federation Policy Officer Jacqui Bell. “Human Rights Week is an opportunity to celebrate the progress we have made in promoting fairness and equality, but also a chance to reflect on where we still need to do better.”

“It is the most vulnerable and marginalised members of our community who will be affected by any decision to wind back human rights protections under the Victorian Charter,” said Disability Discrimination Legal Service Manager Julie Phillips. “A recent report demonstrates that the quality of life for people with disabilities in Australia is the worst in the developed world with almost half living in or near a state of poverty. This is no time to be winding back human rights protections.”

“The Charter has been an effective tool for improving the lives of many Victorians, and we need to build on these positive developments by making sure people have access to justice for a broader range of human rights,” said Human Rights Law Centre Director of International Human Rights Advocacy Ben Schokman. “Human Rights Week is an appropriate time to recognise the positive impact of the Charter over the last five years, but that existing protections still need to be strengthened so all Victorians have access to the same fundamental human rights.”

Source: *Victorian Federation of Community Legal Centres*

Time for ACT to lead on rights again

At a gathering marking 20 years of the ACT’s anti-discrimination laws, the ACT Attorney-General, Simon Corbell, said he wants to widen the territory’s legal recognition of human rights so it includes economic, social and cultural rights. He said he would encourage his cabinet colleagues to make the ACT a leader again on rights legislation.

The Department of Justice and Community Safety has previously looked at the feasibility of including economic, social and cultural rights in the ACT’s Human Rights Act and Mr Corbell believes the Act, the nation’s first, should be expanded. He wants the territory government to adopt the recommendations of a report produced last year, on economic, social and cultural rights.

Meanwhile, the former ACT chief minister Jon Stanhope has also used a speech to mark Human Rights Week by urging the ACT Government to extend its human rights regime. Mr Stanhope said all deaths in custody should be covered by corporate murder laws.

Mr Stanhope believes Australia should follow Britain’s lead and introduce laws to allow negligence leading to a death in custody to be prosecuted.

“There have been 27 deaths in immigration detention since 2000, with five in the last year, and there is a sense of growing concern about the mental health and treatment of detainees in privatised detention centres,” Mr Stanhope said. “These deaths are currently dealt with in coroners’ courts and in an ad hoc manner, state by state or territory, and mostly in a highly reactive way.”

Such laws would mean authorities in charge of prisons, police lock-ups, immigration detention centres and psychiatric facilities would be liable for prosecution if their negligence results in the death of detainees.

Mr Stanhope also criticized the CPSU – the union representing prison guards – for opposing needle exchange programs in prisoners in the ACT.

Source: *The Canberra Times*



AUSTRALIAN HUMAN RIGHTS CASE NOTES

Tribunal considers special measures and discrimination under the Charter and new Equal Opportunity Act

Parks Victoria (Anti-Discrimination Exemption) [2011] VCAT 2238 (28 November 2011)

Cummeragunja Housing & Development Aboriginal Corporation (Anti-Discrimination Exemption) [2011] VCAT 2237 (28 November 2011)

The Ian Potter Museum of Art (Anti-Discrimination Exemption) [2011] VCAT 2236 (28 November 2011)

Summary

On 28 November 2011, the Victorian Civil and Administrative Tribunal delivered judgments in three matters, each dealing with applications for exemption from the *Equal Opportunity Act 2010* (Vic) (EOA) to enable the limiting of employment in specified roles to Indigenous persons.

The Victorian Equal Opportunity and Human Rights Commission intervened under s 159 of the EOA in all three matters to provide assistance to the Tribunal, in particular in relation to the operation of the new special measures provision at s 12 of the EOA and the application of the new factors for consideration in deciding exemption applications at s 90 of the EOA.

These are the first decisions of their kind under the EOA which came into force on 1 August 2011. They provide detailed consideration of the operation of the special measures provision under the EOA and the right to equality under s 8 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Facts

Parks Victoria applied to the Tribunal for an exemption from certain provisions of the EOA to enable it to advertise for and employ only Indigenous persons, with preference to be given to members of the Wurundjeri Tribe Land Compensation & Cultural Heritage Council Inc, in field and office based positions working to care and protect Wurundjeri country.

Cummeragunja Housing & Development Aboriginal Corporation sought an exemption to enable it to advertise for and employ only Indigenous persons in the positions of Mental Health Worker, Aboriginal Health Worker, Trainee Aboriginal Health Worker and Administration Trainee.

The Ian Potter Museum of Art applied to the Tribunal for an exemption to enable it to advertise for and employ only an Indigenous person in the role of Vizard Foundation Assistance Curator.

Decisions

In each case, the Tribunal held that the proposed conduct constituted a special measure and was, therefore, not discrimination for the purposes of the EOA. As such, the Tribunal found there was no need for an exemption and the applications were struck out under paragraph 75(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

Section 90 of the EOA sets out the factors that must be considered by the Tribunal in deciding whether to grant an exemption. Those factors include:

- whether the proposed exemption is unnecessary, either because the proposed conduct does not constitute prohibited discrimination or an exception or exemption already applies; and
- whether the proposed exemption is a reasonable limitation on the right to equality set out in the Charter.

Whether the proposed exemption is unnecessary

In each case, the Tribunal found that the exemption was unnecessary as the proposed conduct constituted a special measure under s 12 of the EOA. Section 12 relevantly provides:

- A person may take a special measure for the purpose of promoting or realising substantive equality for members of a group with a particular attribute.
- A person does not discriminate against another person by taking a special measure.
- A special measure must –
 - a) be undertaken in good faith for achieving the purpose set out in subsection (1); and
 - b) be reasonably likely to achieve the purpose set out in subsection (1); and
 - c) be a proportionate means of achieving the purpose set out in subsection (1); and
 - d) be justified because the members of the group have a particular need for advancement or assistance.

In **Parks Victoria**, the Tribunal found that the proposed conduct was intended to be engaged in for the purpose of providing employment opportunities to Indigenous people, to increase the number of Indigenous people employed by the applicant, to provide opportunities of connection and care for the Wurundjeri country by its traditional owners and also for the maintenance of the culture associated with the country. The Tribunal found that those purposes had the broader purpose of realising substantive equality for Indigenous persons and was satisfied that it would be undertaken in good faith. The Tribunal found that the proposed conduct was reasonably likely to achieve the purpose as the persons offered employment would benefit, as well as Indigenous people more broadly. The Tribunal was satisfied that the measure was proportionate in light of the fact that, at the time the application was made, only 7.6% of Parks Victoria's workforce were Indigenous.

In **Cummeragunja**, the Tribunal considered that the proposed conduct was intended to be engaged in for the purpose of providing employment opportunities for Indigenous applicants, as well as for providing health services to local Indigenous people in a manner that is most relevant and appropriate. The Tribunal found that those purposes also had the broader purpose of promoting substantive equality for Indigenous people. The Tribunal was satisfied that the proposed conduct would be undertaken in good faith. The proposed conduct was regarded by the Tribunal as being reasonably likely to achieve the purpose as the individuals employed, as well as the broader Indigenous community, would benefit. In addition, it was found that, by having Indigenous staff provide the health and administrative services required, it was likely that the health services would be provided in a manner that was most relevant and appropriate. At the time of making the application, there were almost equal numbers of Indigenous to non-Indigenous staff employed at Cummeragunja, while 95% of people using the services were Indigenous. In light of those statistics, the Tribunal was satisfied that the measures were proportionate.

In **The Ian Potter Museum of Art**, the Tribunal held that the proposed conduct was intended to be engaged in for the purpose of providing an employment opportunity for an Indigenous person and to address the Museum's intention to increase the number of Indigenous persons it employs

to better reflect the proportion of Indigenous persons in the Australian population. The Tribunal found that those purposes had the broader purpose of promoting substantive equality for Indigenous people and was satisfied that the proposed conduct would be undertaken in good faith. The Tribunal also found that the proposed conduct was reasonably likely to achieve the purpose as the persons offered employment, and Indigenous people more broadly, would benefit. The Tribunal found that the measure was proportionate given that the proportion of Indigenous staff was dramatically less than the number required to represent the proportion of Indigenous people in the wider population.

In making each of the findings, the Tribunal took judicial notice of information from the Australian Bureau of Statistics in support of its finding that Indigenous people have a particular need for advancement and assistance.

Whether the proposed exemption is a reasonable limitation on the right to equality

The Tribunal proceeded to consider in each of the matters whether the proposed exemptions were reasonable limitations on the right to equality at s 8 of the Charter. In each case, the Tribunal was satisfied that the proposed conduct met the description at s 8(4) of the Charter as they were “[m]easures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination”. Section 8(4) of the Charter provides that such conduct does not constitute discrimination. The Tribunal was therefore satisfied that the proposed conduct was a special measure under the Charter and, therefore, would not limit the right to equality.

Implications

Special measures

The new EOA sought to clarify that special measures are not unlawful discrimination. With these decisions, the Tribunal has confirmed that where proposed conduct is found to constitute a special measure, an exemption is not required as there is no discrimination.

The Tribunal identified how to determine whether the proposed conduct constitutes a special measure stating that the definition set out at s 12(1) of the EOA comprises a test. In relation to the additional factors set out at s 12(3), the Tribunal held that they have a dual role of being further requirements that must be met, as well as going to whether the definition at s 12(1) is satisfied. The Tribunal considered that this latter role was appropriate given that the factors at s 12(3) are consistent with previous case law considering whether special measures provisions in legislation other than the EOA are established.

In considering whether the special measure is justified because the members of the group have a particular need for advancement or assistance as required by s12(3)(d), the Tribunal held that it is not necessary for the whole group to be disadvantaged, so long as disadvantage applies to an overwhelming majority.

Charter

Section 90(b) of the EOA also now explicitly requires the Tribunal to consider whether the proposed exemption is a reasonable limitation on the right to equality at s 8 of the Charter. The Tribunal noted that the right to equality encompasses a number of rights, some of which import, to some extent, the meaning of discrimination under the EOA. As such, the Tribunal stated that arguably, where a special measure applies under the EOA, the rights which turn on discrimination in s 8 of the Charter will not arise.

However, in all three cases, the Tribunal nevertheless went on to consider whether the right to equality had been limited without reference to its finding that the proposed conduct constituted a

special measure under the EOA. If reference to that finding about the scope of the Charter right had been followed, the Tribunal may have found that the right to equality was not limited on the basis that the conduct constituted a special measure under the EOA and was, therefore, not discriminatory. The Tribunal decided not to take into account that finding on the basis that “given the expansive and important objects of the Charter, it would be inappropriate to exclude consideration of the protected rights with an overly technical reading of the legislation”.

The Tribunal noted that s 8(4) of the Charter, contains a provision similar to the special measures provision in the Charter. It provides that “[m]easures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination”. The Tribunal held that the Charter provision is narrower in scope than the special measures provision under the EOA because the Charter provision requires that the disadvantage which the special measure seeks to remedy must exist “because of discrimination”. The Tribunal held that where the proposed conduct is a special measure under the EOA, but not under the Charter, “it would be necessary to have recourse to the justification test in the Charter”.

The decision for Parks Victoria can be found online at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2011/2238.html>

The decision for Cummeragunja can be found online at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2011/2237.html>

The decision for The Ian Potter Museum of Art can be found online at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2011/2236.html>

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INTERNATIONAL HUMAN RIGHTS CASE NOTES

Occupy Toronto and limitations on the right to protest

Batty v City of Toronto [2011] ONSC 6862 (21 November 2011)

Summary

In *Batty v City of Toronto*, the Ontario Superior Court of Justice considered an application challenging the constitutional validity of a Trespass Notice issued to a group of protestors on the basis it violated the protestors’ rights under the *Canadian Charter of Rights and Freedoms*. It was ultimately held that the Notice was constitutionally valid under s 1 of the Charter, which provides that the rights and freedoms set out therein are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. The protestors’ application was therefore dismissed.

Facts

Since 15 October 2011, the applicants and other protestors had camped overnight in St. James Park as part of the ‘Occupy Toronto’ movement and the broader global ‘Occupy Movement’, concerning various economical, social and environmental issues. The Protesters did not ask for permission from those who used or lived in or around the park to conduct their protest.

On 15 November 2011, the City of Toronto served the Protestors with a Notice under the *Trespass to Property Act, R.S.O. 1990*. The Notice prohibited Protesters from installing, erecting or maintaining a tent, shelter or other structure and using, entering or gathering in the park

between 12.01am and 5.30am. If they did not comply with the Notice, then the City would remove such tents, shelters or structures.

On 15 November, an interim order was granted preventing the City from enforcing the Notice and from restraining the applicants and any other persons from installing, erecting or maintaining any structure. The Protesters then commenced proceedings challenging the validity of the Notice.

Argument

The Protesters argued that the Notice, and any action taken to enforce it, violated their constitutional rights under the Charter – in particular, their rights of freedom of conscience, expression, peaceful assembly, and association – and that the Act was contrary to the Charter.

The Respondents, the City, sought orders allowing them to enforce the Notice so as to have the Park return to the full use of all citizens. The Respondents relied upon parks by-laws and the enforcements mechanisms of the Act to support its application for enforcement of the Notice. The City filed affidavits on behalf of 11 citizens of Toronto which outlined how their enjoyment of the Park had been infringed since the arrival of the Protesters.

Decision

The Court recognised that the Protesters act of camping out and taking over the Park was activity that *did* engage the rights of freedom of expression and peaceful assembly under s 2 of the Charter. The Court stated that “the applicants are engaged in conduct expressing political and social messages” and that “the structures which the Protesters have erected in the Park are an important part of the manner by which they are expressing their messages”.

The key question then became whether the curtailment of the Protesters’ rights under ss 2(a) to (d) of the Charter could be ‘justified’ as a reasonable limit prescribed by law, in accordance with s 1 of the Charter. In determining whether the Notice was ‘justified’, the Court adopted the two-step test set out in *R v Oakes* (1986) SCC 46. Under this test, a limitation on rights must be “designed to achieve an objective of sufficient importance to warrant overriding the constitutionally protected right or freedom” and must also be “proportional to the objective”.

Applying *Oakes*, the Court held that the Notice was a reasonable limitation on the Protesters’ rights, being issued under parks-by-laws, having the important purpose of “enabling all to share a common resource and ensuring that the uses of the parks will have a minimal adverse impact on the quiet enjoyment of surrounding residential lands”, and being rationally connected and proportionate to that purpose. In the Court’s view, the Notice attempted to “balance, in a fair way, the different uses we wish to make of our public parks so, at the end of the day, we all get to enjoy them”.

Relevance to the Victorian Charter

Sections 14, 15 and 16 of the Victorian *Charter of Human Rights* mirror ss 2(a)-(d) of the Canadian Charter, while s 7 of the Victorian Charter correlates closely with the limitations provision under s 1 of the Canadian Charter.

The decision in *Batty* is timely and relevant given the continuation of various ‘Occupy Movements’ around the world, particularly in parts of Australia. If a Victorian protestor were to rely on ss 14, 15 and 16 of the Victorian Charter in defending or objecting to a notice removing them from a public space, then the decision in *Batty* is likely to provide important guidance to Victorian courts in weighing the interests of protestors against those wanting to enjoy public spaces. However, any decision would turn on the facts of each particular case and much would depend upon what impact the enforcement of protestor’s various rights would have on others.

The decision can found online at:

<http://canlii.ca/en/on/onsc/doc/2011/2011onsc6862/2011onsc6862.html>

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Preventive detention of G8 protesters a violation of the right to liberty and peaceful assembly

Schwabe and M.G. v Germany - 8080/08 [2011] ECHR 1986 (1 December 2011)

Summary

The European Court of Human Rights has ruled that the detention of two German citizens, who planned to be involved in protests against the 2007 G8 summit, constituted an unlawful breach of the rights to liberty and security of person and freedom of peaceful assembly under the European Convention on Human Rights.

Facts

During 6 – 8 June 2007, Germany hosted the G8 summit for Heads of State and Government in Heiligendamm, in the vicinity of Rostock. In the lead-up to the summit German police held fears about terrorist attacks and property damage by extremists planning to sabotage the summit. Serious riots broke-out during the week prior to the summit. Some 400 police officers were injured and over 1000 rioters were detained.

On the evening of 3 June 2007, the applicants were in the car park of Waldeck Prison, in Rostock, with seven other people when they were approached by police. One of the applicants allegedly resisted an identity check by the police. There was some evidence of a minor scuffle. After ascertaining the applicants' identities, the police searched their car and found banners bearing the inscriptions "freedom for all prisoners" and "free all now". The police arrested the applicants on the spot and seized their banners.

In the early hours of 4 June 2007, the applicants were brought before a District Court which ordered their detention until 9 June 2007 in order to prevent the applicants from committing crimes.

The applicants' numerous appeals to German courts failed. They remained in detention for some five and a half days, by which time the G8 summit was over. Criminal proceedings against one of the applicants for obstructing the police officers in the course of the identity check were dropped and charges for incitement offences were never laid.

Decision

Liberty and security of person

The Court held that the applicants' arrest and detention unlawfully breached their rights to liberty and security of person under article 5 of the Convention.

In reaching this conclusion, the Court rejected Germany's claims that its actions complied with the Convention because the detention was reasonably necessary to prevent the commission of a criminal offence (article 5(1)(c)) and for the purpose of meeting Germany's obligation to protect its citizens (article 5(1)(b)).

The Court said that article 5(1)(c), which provides a basis for detention "when it is reasonably necessary to prevent his committing an offence", goes no further than enabling a state to prevent a "concrete and specific offence". In order to rely on this basis, the state must be able to identify the place, time and victims of the impending offence. Further, the detention must be effected for

the purpose of bringing the person before a competent legal authority to respond to criminal allegations.

The Court noted that Germany's lower courts had failed to consistently identify the offences that the applicants were supposedly about to commit. For example, one lower court found that the applicants had intended to incite others to free prisoners by force at Waldeck Prison, while another lower court said they planned to drive to Rostock and incite the crowd (including violent demonstrators) there. Ambiguity also arose from the language printed on the banners – the applicants claimed it was not intended to incite civilians to release prisoners but was, instead, directed at the authorities. Further, the Court said the detention was not “reasonably necessary” in the circumstances, as it would have been sufficient for the police to seize the banners. For these reasons, the Court held that the detention was not justifiable under article 5(1)(c).

The Court also said that article 5(1)(b), which provides a basis for detention to secure “the fulfillment of any obligation prescribed by law”, is limited to cases where a person is detained in order to compel him or her to fulfill a “real and specific obligation” which he or she has already failed to fulfill. The detention must not be punitive and must cease as soon as the obligation has been fulfilled. Article 5(1)(b) did not justify detention, in this case, because Germany failed to identify any specific legal obligation, such as a particular criminal law, that the applicants had failed to comply with.

Freedom of peaceful assembly

The Court also found that Germany had breached the applicants' right to freedom of peaceful assembly (article 11) when read in conjunction with their right to freedom of expression (article 10). The breach arose because the detention prevented the applicants from expressing their views together with other demonstrators protesting against the G8 summit.

The Court reiterated that article 11 only extends to a right to *peaceful* assembly and does not cover demonstrations where the organizers and participants have violent intentions. However, the risk of violent extremists becoming involved in protests does not take away the right. Rather, where this risk exists, the right to freedom of assembly may be limited in manner that is “prescribed by law”, pursued for a legitimate aim (including national security, public safety or the prevention of disorder or crime) and “necessary in a democratic society”. Hence, it becomes a question of appropriately balancing competing rights and freedoms.

In this case, the Court said the applicants' detention for a number of days was a disproportionate response to the risks. Specifically, the Court noted that *“a fair balance between the aims of securing public safety and prevention of crime and the applicants' interest in freedom of assembly could not be struck by immediately taking the applicants into detention for several days”*.

The Court ordered Germany to pay each applicant EUR 3,000 in damages, plus their legal costs for the breaches.

Relevance to the Victorian Charter

The Victorian Charter of Human Rights and Responsibilities also contains rights to liberty and security of person (s 21), freedom of expression (s 15) and freedom of peaceful assembly and association (s 16) which, although worded differently from the Convention, are based on the same international legal principles.

This case provides useful commentary about what is 'lawful' detention and what constitutes a reasonable limitation on the right to freedom of peaceful assembly under international law which may have application to cases under the Charter.

The decision is available at <http://www.bailii.org/eu/cases/ECHR/2011/1986.html>.

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Economic and social rights are fundamental, justiciable and enforceable

Osman v Minister of State for Provincial Administration & Internal Security and Ors eKLR [2011] (16 November 2011)

Summary

The High Court of Kenya has held that the forced eviction of 1,122 people was a violation of the right to adequate housing enshrined in the Kenyan Constitution and a number of other rights, and made injunctions compelling the government to return the evictees to their land and to reconstruct reasonable housing for the community.

Facts

In December 2010, local and district administration officials and police visited communities at Medina, Kenya, stating that a ring road would be constructed in the area and that houses in the affected area would be demolished. No written information was provided, no court process was undertaken and subsequent attempts by the community to communicate with the authorities were unsuccessful.

On 24 December 2010, armed police and unidentified youths arrived at the community and, without warning, began to demolish houses which they claimed were on government land. The evictions continued on 30 and 31 December 2010 and, when the community resisted, police used tear gas and violence as part of the eviction.

One hundred and forty-nine houses were demolished, affecting 1,122 people, including children and the elderly. No alternative accommodation was provided; in fact, the community was prevented even from salvaging any of their possessions. The community was left in the open without shelter, food, water or sanitation, and the education of the children was interrupted.

The community filed a petition alleging breaches of the Constitution of Kenya, seeking injunctive relief and damages. The community was represented by the local human rights organization Hakjiamii (www.hakjiamii.com), while a number of organizations associated with the international human rights network ESCR-net appeared as amicus curiae.

Decision

The Kenyan Constitution of 2010 recognises civil and political rights and economic, social and cultural rights, and makes both justiciable. It also applies international human rights covenants signed by the Kenyan government as the law of Kenya.

The High Court found that the evictions breached a number of rights in the Kenyan Constitution of 2010, including the rights to: life; the inherent human dignity and security of the person; access to information; protection of property; accessible and adequate housing, reasonable standards of sanitation and health, freedom from hunger and access to clean and safe water; and the rights of older persons.

The court also held that the evictions violated the right to adequate housing under the ICESCR, the protection against arbitrary or unlawful interference with privacy, family or home under the ICCPR, and rights protected in the *African Charter on Human and Peoples' Rights*.

The court noted that the appropriate remedy in cases of forced eviction is restitution, which should restore victims to the position before the violation of human rights. The court ordered that the authorities return the land to the community and construct alternative accommodation.

The court also issued an injunction permanently restraining authorities from further evictions until the law was followed.

In reaching its decision, the court emphasized the interdependence of civil and political rights and economic, social and cultural rights.

The court drew heavily on the General Comments of the UN Committee on ESC Rights relating to adequate housing and forced evictions, and on the Concluding Observations of the UN Human Rights Committee relating to forced evictions in Kenya. The court also drew on the seminal decisions of the Constitutional Court of South Africa relating to forced evictions.

Relevance to the Victorian Charter

The factual situation of this eviction, although sadly common in the global south, is not replicated in Victoria today. However, it does not follow that forced evictions, as defined in international human rights law, do not occur in Victoria.

The decision affirms that forced evictions may constitute a violation of a number of civil and political rights that are recognized in the Victorian Charter, including the protection of privacy (s 13), access to information (s 15) and right to life (s 9). Charter jurisprudence has already recognized that evictions may violate the right to privacy.

The decision emphasizes the interdependence of all human rights. It also reinforces that court enforcement of ESC rights plays a role in constraining arbitrary and unlawful administrative actions of the state, a role that is entirely consistent with the function of courts in the Australian system.

This stands in stark contrast to the deeply flawed findings of the recent review of the Victorian Charter by the Scrutiny of Acts and Regulations Committee of Parliament, which recommended ESC rights should not be added to the Victorian Charter because it would necessarily involve courts commenting on resource allocation by government in a way that is inconsistent with the functions of courts in Victoria.

The decision is available at http://kenyalaw.org/Downloads_FreeCases/Embu_Pet_2_2011.pdf.

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Legal advice not essential before a detainee can be taken to have validly waived the right to legal advice

McGowan (Procurator Fiscal, Edinburgh) v B (Scotland) [2011] UKSC 154 (23 November 2011)

Summary

In this case, the Supreme Court of the United Kingdom held that it is not necessary for an accused in custody to receive advice from a lawyer in order to effectively waive their right of access to a lawyer under article 6 of the European Convention of Human Rights. The Court did observe, however, that where people are vulnerable or the questioning is long and complex, they may need to be given additional protections to ensure they understand the rights in question.

Facts

The Respondent, 'B', was questioned about alleged housebreaking with intent to steal and having in his possession a controlled drug contrary to s 5(2) of the *Misuse of Drugs Act 1971*. He was offered a consultation with a solicitor prior to the interview but declined the offer. He was ultimately charged with both of these offences.

In advance of the trial, B's solicitor lodged a Devolution Minute claiming B's right to legal assistance under article 6(3)(c) of the Convention would be breached if the Crown were to lead evidence of the police interview. It was argued that access to a solicitor should be automatic when someone has been detained in custody.

The propositions in the Minute were based on observations of the High Court of Justiciary in *Jude v HM Advocate* [2011] HCJAC 46, 2011 SLT 722 ('*Jude*'). In that case Lord Justice Clerk said that he could not see how a person could waive his or her right to legal advice when he had not had access to legal advice on the point. In light of the importance raised by this observation, the Lord Advocate invited the sheriff to refer the issue to the Supreme Court. The amended questions for the Court, agreed between the parties, were:

- Whether it would necessarily be incompatible with articles 6(1) and 6(3)(c) for the Lord Advocate to lead and rely upon evidence of answers given during a police interview of a suspect in police custody who, before being interviewed: had been informed of his or her *Salduz*/Article 6 rights to legal advice; and without having received advice from a lawyer, had stated that he did not wish to exercise such rights.
- Whether it would be compatible with B's rights under articles 6(1) and 6(3)(c) for the Lord Advocate to lead and rely upon evidence of answers given in his police interview.

Decision

By a 4-1 majority, the Supreme Court answered the first question in the negative, and remitted the second question to the sheriff.

Lord Hope, in the majority, noted that article 6(1) read with article 6(3)(c) does not expressly require that a person has legal advice before he or she can be taken to have waived the right to legal advice. But the article is to be interpreted broadly by reading into it a variety of other rights to give practical effect to the right to a fair trial.

His Lordship found there was no basis in the jurisprudence of the Strasbourg Court for holding that, as a rule, an accused must have had access to legal advice on the question whether or not he should waive his or her right to consult a solicitor before being interviewed by police. Statements to the contrary in the lower court in *Jude* should be disapproved. It will ordinarily be sufficient for an accused, having been informed of his or her rights, to state that he does not want to exercise them.

However the Strasbourg cases do show that, in order to be effective as a waiver of a Convention right, the acts from which the waiver is to be inferred must be voluntary, informed and unequivocal. The court must be alive to the possibility that the words of caution, and notice that the detainee has the right to legal advice, may not be fully understood by everyone. This may depend on all the circumstances, including the age, health, apparent intelligence and state of mind of the person and the likely length and complexity of the interview. Lord Hope (Lords Brown, Dyson and Hamilton agreeing) made two suggestions for improving current practice:

- In order to minimise the risk of misunderstanding, police should point out that the right to speak to a solicitor includes the right to speak to a solicitor on the telephone. If the detainee continues to waive the right the officer should ask the detainee for his or her reasons for waiving his or her right to legal assistance, and record the reasons given; and
- In order fully to apprise a person interrogated of the extent of his or her right, police should inform the detainee not only of the right to legal assistance, but also of the

arrangements that may be made if he or she is unable to name a solicitor or is concerned about the cost of employing one.

The majority decided it would not be appropriate to reach a decision on the second question as the issue came before the Court as a reference, not an appeal. As it raised questions of fact it was more appropriately dealt with by the sheriff, after hearing all evidence on the issue.

Lord Kerr would answer both questions in the negative. He would require the suggestions made by Lord Hope to be implemented in every case in order to ensure the waiver is voluntary, informed and unequivocal. No attempt had been made to discover why B had refused to exercise his right to legal assistance in this case. Accordingly it was impossible to say on the available evidence that there had been an unequivocal and informed decision to waive his right.

Relevance to the Victorian Charter

Section 25(2)(d) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) recognises a right of access to a lawyer similar to that recognised by the Convention. Like article 6(3)(c) of the Convention, s 25(2)(d) explicitly provides that a person charged with a criminal offence is entitled to legal assistance chosen by him or her.

This case clarifies the uncertainty introduced by *Jude*. If the interpretation in *McGowan* is adopted and applied in Australia to s 25(2)(d), legal advice as to whether a person should exercise the right to legal advice will not be necessary in every case. However where the person is vulnerable or the questioning is long and complex, the court may find that legal advice is necessary in order to ensure the waiver was voluntary, informed and unequivocal.

Further, police should consider in each case whether additional protections are appropriate. This may include informing the person they can telephone a solicitor, asking why they have declined legal advice, noting down their reasons, and informing them that arrangements can be made if they do not know a solicitor or cannot afford one. Section 25(2)(e) of the Victorian Charter explicitly provides that if a person is eligible for legal aid and does not have legal assistance they are to be told of the right to legal aid.

The decision is available online at: <http://www.bailii.org/uk/cases/UKSC/2011/54.html>

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Restrictions on head dress an impermissible violation of the right to freedom of religion

Singh v France, UN Doc CCPR/C/D/102/18767/2009 (22 July 2011)

Summary

The UN Human Rights Committee recently decided that a French regulation requiring persons to appear bare headed in identity photographs used for residency permits constitutes an impermissible limitation on the applicant's freedom of religion in violation of article 18 of the International Covenant on Civil and Political Rights.

Facts

The author was an Indian refugee who had held a French permanent residence permit since 1992. In 2002 the author submitted an application to renew his permit and provided two photographs of him wearing a turban, as he had done when filing his previous application.

The author's application was rejected on the basis that the photographs failed to meet the requirements of Decree No. 46-1574 (as amended in 1994), which required all identity photos accompanying residence card applications to show applicants full-faced and bareheaded.

The author contended that as a Sikh, the wearing of a turban was an integral part of his faith and identity and that removing his turban could be viewed as a rejection of his faith and would be deeply humiliating. Moreover, because the photo would be shown as proof of identity, that humiliation would be repeated at every instance where identification is requested. He argued that the relevant provisions of the Decree amounted to a violation of article 18 of the Covenant.

The State party argued that the requirement to appear bareheaded in identity photos was a one-time requirement that constituted a reasonable measure to minimise the risk of fraud or falsification of residence permits and was justified in order to protect public order and safety.

Decision

Under art 18 (2) of the Covenant every person is to be free from coercion which would impair their freedom to have or adopt a religion of their choice. General Comment No. 22 concerning article 18 of the Covenant considers that the freedom to manifest a religion encompasses the wearing of distinctive clothing or head coverings.

Article 18(3) guarantees the freedom to manifest one's religion or beliefs subject only to reasonable limitations which are prescribed by law, and are necessary for the protection of public safety, order, health, or morals, or to protect the fundamental rights and freedoms of others.

The Committee acknowledged that wearing a turban constitutes a fundamental part of being a Sikh and considered that the Decree interfered with the exercise of freedom of religion. Accordingly, the Committee undertook a balancing exercise to determine whether the limitation of the applicant's right to manifest his religion or beliefs was authorised under art 18(3).

The Committee found that the State party did not adequately explain why the wearing of the turban would make it more difficult to identify the author, since he wore his turban at all times, or how identity photographs in which people appear bareheaded help to avert the risk of fraud or falsification of residency permits.

The Committee also pointed out that the removal of the turban for the identity photo could not be described as a one-time requirement as he would always appear without his religious head-covering in the photo and could therefore be compelled to remove his turban during identity checks.

The Committee concluded that the requirement that an individual appear bareheaded in an identity photo was a limitation on the author's freedom of religion in violation of article 18 of the Covenant.

Relevance to the Victorian Charter

The decision provides a good example of analysis concerning the scope of permissible limitations on the right to freedom of religion. This analysis occurs under article 18(3) of the Covenant and s 7(2) of the Charter, but in both cases requires that any limitation must be justified with clear, cogent and persuasive evidence.

The decision is available at http://www.bayefsky.com/pdf/france_t5_ccpr_1876_2009.pdf.

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Admissibility of unsolicited statements made in a police interview

Jude v Her Majesty's Advocate (Scotland) [2011] UKSC 55 (23 November 2011)

Summary

In this case, the Supreme Court of the United Kingdom held that admitting evidence of unsolicited statements made to the police by an accused who had waived his right to access legal advice did not deny him a fair trial contrary to article 6(1) of the European Convention on Human Rights.

Facts

The judgment concerned appeals by three accused against their convictions. However, the only appeal to raise issues of an accused's right to a fair trial under the Convention was that of Birnie. Birnie was arrested in relation to an alleged sexual assault and detained for questioning by the police. After being interviewed for about two hours, Birnie told the police that he wanted to make a statement. He was emotionally distressed at the time. The police offered Birnie the right to access a lawyer before making his statement, which he declined. Birnie then admitted to sexually assaulting the complainant. The Crown relied on Birnie's statement at his subsequent trial. He was convicted and sentenced to imprisonment.

Decision

The question in Birnie's appeal to the Court was whether admitting evidence of his unsolicited statement denied him a fair trial contrary to article 6(1) of the Convention. By a majority of 4:1, the Supreme Court held that Birnie had not been denied a fair trial.

The leading judgment was delivered by Lord Hope, with whom Lords Brown, Dyson and Hamilton agreed. Lord Kerr dissented in relation to Birnie's appeal. Lord Hope held that Birnie's statement was admissible on two grounds.

Birnie had waived his right to legal advice

Lord Hope held that Birnie had effectively waived his right to access a lawyer, even though he had not been given legal advice on whether he should have waived the right. Birnie's waiver was held effective for several reasons.

First, Birnie had been told prior to making his statement that he had the right to access a lawyer. This overruled a finding made in the High Court that Birnie did not know that he had a right to access legal advice.

Second, Lord Hope held that there was no absolute rule according to the jurisprudence of the European Court of Human Rights that an accused must be given legal advice on the question of whether to access further legal advice, in order for the accused's waiver to be effective.

Third, His Lordship held that it was not necessary for Birnie's reasons for declining legal advice to be understood in order for his waiver to be effective. The fact that he had not received legal advice was merely a circumstance which could be taken into account to determine whether he understood the right being waived. In this case, it appeared that Birnie understood what he was doing.

Birnie's statement was voluntary

Lord Hope also held that Birnie's statement was voluntary and not elicited by police questioning. His Lordship considered authorities on the common law test of voluntariness and international decisions which referred to the jurisprudence of the Strasbourg Court. The authorities indicated (perhaps unhelpfully) that rigid rules should not be adopted in order to determine whether an

accused's statement was voluntarily made. Rather, they indicated that each case should be examined on its own facts.

In this case, there were indications that Birnie may have been particularly vulnerable at the time he made his statement. These were his young age (18 years) and the fact that he was emotionally distressed after the police interview. However, those circumstances did not conclusively indicate that Birnie's statement was not voluntarily made.

Ultimately, Lord Hope chose not to decide the point for jurisdictional reasons concerning Scottish criminal law and procedure. His Lordship ordered that the matter be remitted to the High Court for final determination.

Lord Kerr's dissent

Lord Kerr dissented in relation to Birnie's appeal. His Lordship held that it was necessary for some inquiry to be made as to why an accused declined to access legal advice, unless the reasons were obvious. In this case, there were several indications that Birnie was not fully informed and that his waiver was therefore ineffective. These were his young age, his emotional state after the police interview and the fact that when he was asked if he wanted a lawyer present, the procedure was carried out in a "routine" way and did not guarantee that his decision was fully informed.

His Lordship also held that although it was not an absolute rule that an accused be provided with legal advice in order to make a subsequent waiver effective, providing legal advice will typically be the most effective way of ensuring that it is effective.

Relevance to the Victorian Charter

The Victorian Charter guarantees the right to a fair hearing (s 24). It also guarantees persons accused of a criminal offence the right to communicate with a lawyer or adviser of their choice under s 25(2)(d). These rights are analogous to those guaranteed by articles 6(1) and 6(3)(c) of the Convention, both of which were relevant in this case. It is therefore possible that the rights under ss 24 and 25(2)(d) of the Charter could be interpreted as not preventing evidence of unsolicited statements being admitted where an accused has waived the right to legal advice.

On the other hand, the Supreme Court in *Jude* (in relation to Birnie's appeal) relied predominantly on the jurisprudence of the Strasbourg Court for its authority. The Court did not decide whether an accused's waiver of the right to legal advice would be effective in the same circumstances at common law. Therefore, the case may be confined to the context of decisions which relate to the Convention and have little to say about how the Victorian Charter should be interpreted. It does, however, provide an example of a factual situation where the accused's acts overruled their rights guaranteed under human rights legislation.

This decision is available online at: <http://www.bailii.org/uk/cases/UKSC/2011/55.html>

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Investigations of deaths implicating the state must be comprehensive and fully independent

R, Mousa v Secretary of State for Defence & Anor [2011] EWCA Civ 1334 (22 November 2011)

Summary

The UK Court of Appeal recently considered the investigation obligation under articles 2 and 3 of the European Convention on Human Rights in the context of an inquiry established by the UK

Government to investigate allegations of mistreatment of Iraqis by British troops. The Court found the inquiry did not possess requisite independence because the investigating body was staffed with members of a branch of the military which had been involved in the detention and internment of suspected persons in Iraq during the period under investigation.

Facts

The Secretary of State for Defence established a body to investigate numerous allegations of ill-treatment of persons detained in Iraq by members of the British Armed Forces over the period 2003 to 2009 with a view to identifying and punishing anyone responsible for wrongdoing. The Iraq Historic Allegations Team (IHAT) was to be led by a civilian, who would report to the Provost Marshal (Army) (PMA). The PMA also served as head of the Royal Military Police. Upon being satisfied that a case had been adequately investigated, the Head of IHAT was to make a written report of the investigation to the PMA along with a recommendation on what action should follow. However, the final decision would rest with the PMA. The PMA was also head of the Provost Branch, a military branch which had operated in Iraq.

The legal proceeding concerned an application to review the decision of the Secretary not to conduct a full public inquiry into the allegations and the systemic issues that arise. Whilst not eliminating the possibility of a public inquiry at a later stage, the Secretary's position was that it was inappropriate to initiate such an inquiry while the IHAT was investigating. He determined that it was appropriate to adopt a 'wait and see approach', pending the outcome of IHAT's investigations.

The claimant was an individual representing a group of more than 140 Iraqis who had allegedly suffered mistreatment at the hands of British Armed Service personnel. The claimants argued that the procedure adopted by the Secretary fell short of the investigative requirement under Articles 2 (right to life) and 3 (right to be free from torture, and inhuman or degrading punishment) of the European Convention. It was argued that the only way the Secretary could satisfy his obligations under the Convention was to order a single and comprehensive inquiry using his powers under the *Inquiries Act 2005 (UK)*.

Decision

In the first instance, the Divisional Court found in favour of the Secretary, finding that the IHAT investigation was sufficiently independent and the Secretary's 'wait and see' approach to conducting a public inquiry was permissible. The claimant appealed that decision. The issues at appeal were, first, whether the involvement of the Provost Branch meant that the IHAT investigation was not "hierarchically, institutionally and practically independent" and therefore in breach of article 3. Second, whether it was permissible for the Secretary to adopt the 'wait and see' approach.

The Court of Appeal determined that, as a matter of perception, the practical independence of IHAT had been substantially compromised. The effect of the involvement of Provost Branch on the ground in Iraq alongside the composition and structure of IHAT meant that it became an unavoidable conclusion that IHAT lacked the requisite independence.

Problematically, Provost Branch members of IHAT had been involved in incidents surrounding the detention and internment of suspected insurgents in Iraq. If it transpired that the allegations were true, then legitimate questions could be raised concerning the ability of IHAT to discharge its investigative responsibility with impartiality. Moreover, questions over the PMA's independence would also be raised considering his position as head of the Provost Branch members.

In coming to their conclusion, the Court emphasised that there was no evidence that any individual member of the Provost Branch was involved in reprehensible conduct towards detainees in Iraq and that for the claimant to succeed in establishing a lack of independence it was not necessary to provide that some element or person in IHAT actually lacks impartiality. Public perception of the possibility of unconscious bias was, of course, sufficient to compromise the independence of the investigation.

The Court determined that in the face of a compromised investigation, the ‘wait and see’ approach adopted by the Secretary of State was not appropriate. The Court of Appeal decided that it was for the Secretary of State to reconsider how his obligation to investigate under article 3 would be best satisfied.

It should be noted that while this case was primarily concerned with article 3 of the Convention rather than article 2, it was accepted by the Court that the same broad principle applies in both instances.

Relevance to the Victorian Charter

Section 10 of the Charter contains the right to freedom from cruel, inhumane, or degrading treatment or punishment, which is the equivalent to article 3 of the European Convention. Section 9 of the Charter guarantees the right not to be arbitrarily deprived of their life and is the equivalent of article 2 of the Convention.

This case provides an instructive example of the application of the legal principles on the procedural obligations attaching to these rights, particularly in the context of investigation of systemic issues and large-scale inquiries. The decision provides further weight to criticisms made by the HRLC and others around the sufficiency of current investigation models in Victoria, including in relation to police-related deaths and deaths in psychiatric hospitals: for example, see the HRLC Report “Upholding our Rights: Towards Best Practice in the Police Use of Force”.

The decision can be found online at: <http://www.bailii.org/ew/cases/EWCA/Civ/2011/1334.html>

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When will restrictions on autonomy amount to a deprivation of liberty?

Cheshire West and Chester Council v P [2011] EWHC 1330 (Fam) (9 November 2011)

Summary

The Court of Appeal has found that the care plan of a man lacking capacity under the *Mental Capacity Act 2005* (UK) did not involve a deprivation of liberty within the meaning of article 5 of the ECHR. In so doing, it has usefully clarified the principles which should be taken into account when considering whether a person has been deprived of his or her liberty within the meaning of article 5. Most significantly, the judgment has clarified that in analysing whether article 5 is engaged:

- the objective reason for, and objective purpose/aim of, the restrictions imposed are relevant considerations (whereas subjective motives or intentions are of limited relevance); and
- that person's situation must be compared with the appropriate comparator (namely, “another person of similar age with the same capabilities, affected by the same condition or suffering from the same inherent mental and physical disabilities and limitations”).

Facts

P, a 39 year old man with cerebral palsy and Down's Syndrome, lacked the capacity to make decisions about his own care and residence as a result of his physical and learning disabilities. From November 2009, he resided at a facility called 'Z House'. The question arose whether P was deprived of his liberty during his time at the facility, by virtue of certain restrictions imposed upon P by the staff:

- to manage his general living conditions; and
- to address certain challenging behaviour identified in his care plan (including placing soiled continence pads into his mouth, picking at his skin causing wounds, being aggressive towards others and banging/ slapping his head).

These restrictions included P being under the control of staff at all times and occasional physical restraint and physical intervention (for instance, 'finger sweeping' to remove soiled continence pads from his mouth).

At first instance in the Court of Protection, Barker J found that while care had been taken to ensure P's life was 'as normal as possible' and it was in his best interests to continue to reside at 'Z House', his care plan involved a deprivation of liberty because he was under the staff's control at all times and the interventions targeting certain behaviour 'as a matter of concrete fact and legal principle, involve[d] a deprivation of his liberty'. The question did not go to the legality of the deprivation as the order made lawful anything that would breach article 5, but rather whether P was entitled to the procedural protections of article 5(4).

The Cheshire West and Chester Council, which was responsible for P's care, appealed the decision to the Court of Appeal, arguing that P's care plan at 'Z House' did not involve a deprivation of liberty.

Decision

The Court of Appeal (Munby LJ, Lloyd LJ and Pill LJ agreeing) unanimously decided in favour of the Council, holding that P's care plan did not constitute a deprivation of liberty.

After considering the ambit of article 5 and reviewing the relevant case law on deprivation of liberty, Munby LJ drew attention to 'some aspects of the jurisprudence which are likely to be of significance in the kind of cases that come before the Court of Protection ([102]). In essence, these were:

- The starting point is the 'concrete situation', taking account of a whole range of criteria such as the 'type, duration, effects and manner of implementation' of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, not nature or substance.
- Deprivation of liberty must be distinguished from restraint. Restraint by itself is not deprivation of liberty.
- Account must be taken of the individual's whole situation.
- The context is crucial.
- Mere lack of capacity to consent to living arrangements cannot in itself create a deprivation of liberty.
- In determining whether or not there is a deprivation of liberty, it is legitimate to have regard both to the objective *reason* why someone is placed and treated as they are and also the objective *purpose/ aim* of the placement.

- Subjective motives or intentions have only limited relevance. The test is essentially an objective one. An improper motive or intention may have the effect of making something a deprivation when it otherwise would not have been one. However, good intentions are neutral at best.
- In determining whether or not there is a deprivation of liberty, it is always relevant to evaluate and assess the 'relative normality' (or otherwise) of the concrete situation.
- But the assessment must also take account of the particular capabilities of the person concerned.
- In most contexts, the relevant comparator is the ordinary adult going about the kind of life which an average able-bodied person would normally be expected to lead.
- However, this is not the case in the kind of cases typically before the Court of Protection, which typically dealt with adults whose lives were dictated by their own cognitive and other limitations.
- In these cases, the appropriate contrast is not with the life led by X, nor with the life of an able-bodied person, but with the kind of lives that people like X would normally expect to lead. The comparator is a person of similar age with the same capabilities as X, affected by the same condition or suffering the same inherent mental and physical disabilities and limitations as X.

Munby LJ also emphasised that the mere fact that a domestic setting could involve a deprivation of liberty, did not mean that such a finding was likely in most cases. On the contrary, when considering the care of vulnerable children or adults by friends, family or carers in a small specialist facility, there would typically be no deprivation of liberty. He went on to indicate that, in the absence of an improper purpose or improper motive, he expected these kinds of cases could be dealt with simply and quickly.

Applying this analysis to P's situation, Munby LJ (with whom Lloyd LJ and Pill LJ agreed) departed from Baker J's reasoning and held that there was no deprivation of liberty amounting to an infringement of article 5. Most significantly, Munby LJ considered that there was nothing to show that the life P was living at 'Z House' was significantly different from the kind of life that anyone with similar disabilities would expect to lead and he was living a life (both inside and outside 'Z House') as normal as possible for someone in his situation with his capabilities. The kinds of occasional and brief restraint placed upon P were likely to have been adopted by anyone caring for P in any setting and were 'far removed indeed from anything that begins to approach a deprivation of liberty' ([114]).

Relevance to the Victorian Charter

The right to liberty and security of the person is protected by s 21 of the *Charter*. Section 21 relevantly provides that every person has the right to liberty and security, a person must not be subjected to arbitrary arrest or detention and a person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law. Section 21(7) also provides that a person deprived of liberty is entitled to apply for a declaration or order regarding the lawfulness of the arrest or detention. The principles articulated in this case about what constitutes a deprivation of liberty under article 5 of the ECHR, and in particular, the appropriate comparison by reference to which such a determination should be made, could thus provide useful guidance as to the interpretation of s 21 of the *Charter*.

The decision is available online at: <http://www.bailii.org/ew/cases/EWCA/Civ/2011/1257.html>

Mary Quinn is a Seasonal Clerk at Allens Arthur Robinson

Warrantless search of home by police justified exclusion of evidence from criminal proceedings

R v Larson, 2011 BCCA 454 (10 November 2011)

Summary

In this case, the Court of Appeal for British Columbia overturned Mr Larson's conviction for unlawful production of cannabis under s 7(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19. The decision was based on the finding that the warrantless search of Mr Larson's residence, which uncovered his marijuana growing operation, was unlawful under s 8 of the *Canadian Charter of Rights and Freedoms*, which confers the right "to be secure against unreasonable search or seizure". Evidence obtained in this and subsequent searches was excluded by the court under s 24(2) of the *Canadian Charter*, which provides for exclusion of evidence obtained in a manner that infringes any *Charter* rights if admission of the evidence would bring the administration of justice into disrepute.

Facts

Mr Larson was found by police officers swimming in Shuswap Lake, allegedly trying to escape from a group of persecutors. After he was convinced to come ashore, he remained agitated and reported that two men had invaded his home and that passing cars were shooting at him. Recognising his clearly paranoid delusional state, the officers apprehended him and transported him to hospital.

While Mr Larson was in hospital, two police constables went to his house to investigate the reported invasion. Although the police suspected that Mr Larson grew marijuana, the officers testified that on this occasion their sole purpose in going to his house was to investigate the alleged assault. A preliminary investigation of the premises and surroundings returned no indication that a home invasion had occurred.

Despite the lack of evidence to confirm Mr Larson's report, the police entered the house. They found no sign of forced entry, assault or other disturbance. However, in the course of their search they uncovered a marijuana growing operation in the basement. Subsequently, they obtained a search warrant and re-entered the residence to investigate the marijuana production.

At trial, the judge found the warrantless entry lawful under the common law police power to protect public and individual safety. This was based on his finding that the police had a subjective belief that a home invasion had occurred, and that this belief was reasonable. Consequently, he held that the subsequent warrant (issued based on evidence uncovered in the warrantless search) was valid, and that the evidence obtained should not be excluded.

On appeal, Mr Larson argued that both searches of his residence were illegal and therefore the evidence obtained was inadmissible.

Decision

Legality of the Warrantless Search under s 8 of the Canadian Charter

The majority, overturning the trial judge's findings, concluded that the warrantless search was not reasonably justified on the basis that it was conducted to protect life and safety. It therefore violated Mr Larson's rights under s 8 of the *Canadian Charter*.

Under Canadian law, a warrantless search conducted without the occupant's consent is *prima facie* unreasonable and therefore a breach of s 8. However, under the principles set out in *R v Godoy* [1999] 1 SCR 311, the police have a common law power to enter a dwelling without a warrant if there is reason to believe that such entry is necessary to protect the lives or safety of

the occupants or the public. The scope of this power is limited by the *R v Waterfield* [1964] 1 QB 164 test, which requires any use of such power to be justified (ie necessary and reasonable in the circumstances).

The justifications for police entry into Mr Larson's residence proposed by the trial judge included investigating the report of the home invasion and determining whether a threat to Mr Larson's or public safety existed. While the majority acknowledged that despite Mr Larson's obviously delusional state, it was possible that an invasion had occurred and a police investigation was warranted, they rejected the adequacy of these justifications in supporting the use of the common law power. The first justification related only to investigating a completed crime, so could support the issue of a search warrant but could not justify warrantless entry. The second justification, while in theory capable of justifying use of the common law power, lacked the urgency needed to support warrantless entry in this instance.

Accordingly, the warrantless search was found to be unlawful, and any evidence obtained in its course incapable of supporting the issue of a warrant for the subsequent search.

Exclusion of Evidence under s 24(2) of the Canadian Charter

The majority held that this was a case in which evidence obtained in the two unlawful searches should be excluded. This conclusion was based on the three considerations for exclusion of evidence under s 24(2) laid down in *R v Grant* [2009] 2 SCR 353: the seriousness of the state's *Charter*-infringing conduct, the impact on the *Charter*-protected rights of the accused, and the society's interest in the case being adjudicated on the merits. In balancing these considerations, the majority found that while there was substantial public interest in prosecuting the case against Mr Larson, this was outweighed by the seriousness of the police breach and the impact it had on Mr Larson's privacy rights.

Relevance to the Victorian *Charter*

While the Victorian *Charter* does not expressly provide for a right to be secure against unreasonable search and seizure, the discussion of the requirement that police interference with privacy within the home must be reasonably justified may be relevant to interpreting s 13(a) of the Victorian *Charter*, which protects the right of persons not to have their privacy, family, home or correspondence arbitrarily interfered with. With respect to exclusion of evidence, improper search and seizure by police conducted in breach of s 38(1) of the Victorian *Charter* may lead to exclusion of evidence so obtained under s 138 of the *Evidence Act 2008* (Vic), which provides for 'exclusion of improperly or illegally obtained evidence'.

The decision can be found online at:

<http://canlii.ca/en/bc/bcca/doc/2011/2011bcc454/2011bcc454.html>.

Julia Freidgeim is a Seasonal Clerk at Allens Arthur Robinson



HRLC POLICY WORK AND CASE WORK

Update on Occupy Melbourne legal challenge to uphold the right to peaceful protest

As reported in the last edition of the Bulletin, the HRLC is part of a legal team taking action on behalf of the Occupy Melbourne protesters. A proceeding has been commenced in the Federal Court challenging the enforcement action taken by the Council and Victoria Police against the protesters on a number of bases, including that such action is in breach of the implied freedoms

of political communication and association contained in the Australian Constitution and the right to peaceful assembly and freedom of expression under the Victorian Charter.

Since our last update, the enforcement action by the City of Melbourne and Victoria Police has continued unabated. Over 150 compliance notices have been issued to protesters since 21 October. Since the start of December, City of Melbourne council officers and members of the Victoria Police maintain a continuous presence at the protest site in Flagstaff Gardens during the day and night, confiscating property and goods from the protesters and patrolling the protest site, including shining torches in the faces of the protesters while they attempt to sleep.

The actions of the authorities attracted significant public interest when members of Occupy Melbourne wore tents as clothing in protest against the authorities' enforcement of the parks and gardens regulations. One young female protester was left semi-naked and distraught in the gardens after being surrounded by large numbers of police and council workers and council officers forcibly removed the tent from her body. The police officers also threatened to charge the protesters with further criminal offences relating to indecency once the tents were removed.

As the Occupy Melbourne protesters continue their daily battle to maintain their protest and presence in the City of Melbourne, the legal battle has continued in the courts. The matter was last before the Court on 16 December for directions and a trial date has now been set in March 2012.

Update on National Human Rights Action Plan

On 9 December, the former Attorney General, Robert McClelland, announced the release of the final version of the Baseline Study and draft National Human Rights Action Plan (NHRAP), a key initiative of the Government's Human Rights Framework.

The Baseline Study was the first step in the development of the NHRAP. The purpose of the study is to provide a comprehensive assessment of human rights protection in Australia to identify priority areas for the Action Plan to address and to provide a basis for measuring progress over time. It is pleasing to see that the Baseline Study has expanded significantly to incorporate input received from NGOs and the wider community through the Government's consultation process. However, unfortunately a number of weaknesses identified in the draft Study still remain. The Baseline Study can be downloaded from the Attorney-General's website [here](#).

The NHRAP (available [here](#)) should contain specific goals and practical actions designed to address the issues identified in the Baseline Study. The exposure draft of the NHRAP reflects work currently underway within Government but also includes a number of new actions, some of which reflect commitments made by the Australian Government throughout the [Universal Periodic Review](#) process. Certainly, there are many more commitments that could, and should, be added to the final version of the NHRAP. It is also important for the NHRAP to include specific timeframes and targets and contain adequate monitoring and evaluation mechanisms. NGOs and the wider community are invited to provide any comments on the draft NHRAP by **29 February 2012**.

We hope the resources on our dedicated website www.humanrightSACTIONPLAN.org.au will be of use in preparing submissions on the draft NHRAP. If you would like to submit a [blog](#) on any of the issues raised (or, more importantly, not raised) in the draft NHRAP or post a submission on the website please email anna.brown@hrlc.org.au.



HRLC MEDIA COVERAGE

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

- Dean Felton, 'Stripped protester takes action', 7 News, 8 December 2011



SEMINARS & EVENTS

Justice for all? The International Criminal Court – Ten Years in Review

14-15 February, Sydney

The Australian Human Rights Centre and the Faculties of Arts and Law at the University of New South Wales are convening a conference to mark the 10th anniversary of the operation of the International Criminal Court. It will examine the contribution of the ICC to the achievement of gender justice, and analyse the uneven participation of Asia Pacific states within the ICC framework.

Speakers include ICC President, Judge Sang-Hyun Song, ICC Registrar Silvana Arbia, ICC Deputy Prosecutor (now Prosecutor-elect) Fatou Bensouda, Christian Wenaweser, immediate past President of the Assembly of States Parties, and a number of leading academic, government and civil society experts on the Court.

Further details including current program and registration details at www.justiceforall.unsw.edu.au

Eve Ensler – Australian Human Rights Centre s Annual Public Lecture

To coincide with the above mentioned conference, American playwright and women's rights activist, Eve Ensler, will deliver the Australian Human Rights Centre Annual Public Lecture at the Sydney Theatre Company on 12 February 2012.

Further details at www.justiceforall.unsw.edu.au

International conference on human rights in places of detention

Implementing Human Rights in Closed Environments

20-21 February 2012, Monash University Law Chambers, Melbourne

Where liberty is restricted in closed environments, such as prisons, police cells, immigration detention, and closed psychiatric and disability settings, the potential for human rights abuses is high. The management of such environments requires a delicate balance between the rights of individuals, and the safety and security of others in the closed environment and the broader community.

This conference will bring together eminent international and national speakers to examine how human rights are implemented and monitored in closed environments. It will provide an analysis of the comparative experiences of practical implementation of human rights in closed environments, as well as canvas current approaches to the national implementation of the Optional Protocol to the Convention Against Torture, and the role of regulatory frameworks more broadly in facilitating human rights implementation.

Further information is [available here](#).



RESOURCES

Understand human rights, influence social policy: Master of Social Science (Policy and Human Services) at RMIT

In response to industry demand for human rights education, RMIT's Master of Social Science (Policy and Human Services) now offers a suite of human rights electives for professional practice in human services. The program is one of the few social policy coursework Masters programs offering a human rights specialisation.

Through this degree you will:

- develop your policy and management skills,
- acquire critical expertise in human rights
- engage with NGOs, advocates and policy makers using human rights to deliver social change

Make a change. Apply now. For more information and to apply please contact the Program Coordinator, Kate Driscoll on 9925 8287 or email kate.driscoll@rmit.edu.au

Papua New Guinea Human Rights Film Festival

The second Papua New Guinea Human Rights Film Festival was held in December and various photos, reviews and discussions surrounding the event have been posted to their [website](#).



HUMAN RIGHTS JOBS

YWCA Australia / Equality Rights Alliance

YWCA Australia is seeking a dynamic, experienced [policy advocate and manager for the 'Equality Rights Alliance'](#), Australia's largest network of gender equality advocates. Based in Canberra, the part time position will be responsible for a small team working with ERA members to deliver policy advice to government that will advance women's equality in Australia. ERA's current advocacy focus is on housing that meets the needs of women, equality laws, and supporting our members to strengthen their federal budget advocacy work.

Director of Public Interest Law at Melbourne Law School

Melbourne Law School is seeking to appoint a Director of Public Interest Law. This is a new position (0.75 EFT, fixed two years). It will be the responsibility of the Director to establish and oversee a public interest law program at MLS. The role will have a particular focus on teaching, including a public interest lawyering subject with clinical placements attached and a subject in which law students will teach some legal subjects in state secondary schools. Other aspects of the program will include a leadership forum for students, coordinating communication about public interest events at MLS, and working with the Careers Office with respect to public interest internships. See: <http://www.hr.unimelb.edu.au/careers>



FOREIGN CORRESPONDENT

The Arab Spring at the Human Rights Council: Success and selectivity

2011 was the year of unexpected and unprecedented change for the Middle East and North Africa (MENA). Events in the MENA region also tested the relevance and efficiency of the international human rights mechanisms, such as the UN Human Rights Council (HRC). The HRC has often been criticized for its inability and inflexibility when it comes to responding to country-specific situations. So, did the Arab awakening translate into the awakening of the HRC? In 2011, as the hundreds and thousands who took to the streets to demand their right to dignity and democracy across the MENA region faced brutal repression by the authorities, the HRC proved able to provide a potent response – but selectively so.

In February 2011, the HRC held its first ever Special Session on a country from the MENA region (except for to address violations by Israel and Sudan) to discuss the situation in Libya. At this session the HRC adopted by consensus a strong resolution which fed into the UN processes in New York, leading to the suspension of Libya from the HRC – another first time event.

The HRC also convened three Special Sessions on Syria, and established a Fact Finding Mission to investigate and report on the situation in the country, followed by a Commission of Inquiry. This is indicative of the severity of the situation on the ground, but equally of the political will of states to address Syria in particular. While the resolutions adopted at these sessions were substantially weakened due to objections by governments opposed to international accountability, nonetheless, these sessions constituted a relative success of the HRC.

During this year, the HRC also strengthened its work on thematic issues of particular relevance to recent events in the MENA region. At its September session, the HRC established a Special Procedures mandate on Transitional Justice: the Special Rapporteur on the promotion of truth, justice, reparation, and guarantees on non-recurrence. This mandate will be important for monitoring the advancement of the goals of the revolutions in the Arab world. In March, the HRC also elected Maina Kiai as the first Special Rapporteur on the rights to freedom of peaceful association and assembly – rights that have been deeply undermined in the Arab region and which lie at the core of the pro-democracy movements. The new mandates are both very significant and very timely given the events in the Arab region and beyond.

In the shadow of these successes, calls by national, regional, and international NGOs from every part of the world for the HRC to address the crackdown on protesters in Tunisia, Egypt, Bahrain, and Yemen, fell on deaf ears. The lack of political will by actors such as the US, Russia, and the European Union, the intransigent belief in the “repression = stability” equation, as well as the dynamics of block politics that plague the HRC, were largely responsible for this failure. Most disappointing was perhaps the position of democracies such as South Africa, India, and Brazil, which failed to fully support efforts for international accountability for crimes committed against peaceful protesters. In the absence of decisive action on Egypt, Bahrain, and Yemen, a panel on human rights in the context of peaceful protests was held at the HRC in September. While the panel was itself a success, a general thematic debate with no concrete outcome was hardly an adequate response to the widespread extrajudicial killings, arbitrary detentions, and rampant torture taking place in these countries.

There are reasons to believe that the positive action by the HRC with regards to Libya and Syria may not constitute a positive precedent for the Council's ability to address the worst human rights

violations committed by authorities all over the world. At its last session this year, the HRC once again failed to adequately address the ongoing violence in Yemen, instead adopting a resolution asking Yemen to investigate its own crimes – a feeble response to a full-fledged human rights and humanitarian emergency. In addition, the HRC remained silent while over 12,000 civilians were tried in military courts and unprecedented attacks against NGOs and human rights defenders were taking place in Egypt under military rule since the fall of Mubarak. When violence once again broke out in November, and another 41 deaths were added to the list of those killed in their fight for democracy in Egypt, one could still not expect, nor hope, that the HRC would be prepared to respond.

The degree of attention and action by the UN to promote and protect human rights and democracy within the Arab region during 2011 is historically unparalleled. However, the events of this year also served to emphasize the political limitations and double standards associated with the promotion and protection of human rights within the Arab region. These double standards were blatantly displayed by states from around the world at the HRC – by democracies and autocracies alike. The HRC had some accomplishments in 2011. In order for the HRC to genuinely strengthen its ability to fulfill its mandate of promoting and protecting human rights, in 2012 it will have to add to its list of accomplishments coherence and non-selectivity.

Laila Matar is the UN Advocacy Representative at the Cairo Institute for Human Rights Studies



IF I WERE ATTORNEY-GENERAL...

Australia's new Attorney-General, Nicola Roxon, was sworn in on 14 December 2011.

We asked some of Australia's leading human rights advocates, activists and academics to tell us, in less than 100 words, what the Attorney's top human rights priority or initiative for 2012 should be. Here's what they had to say.

Catherine Branson QC – President of the Australian Human Rights Commission

My hope is that the new Attorney-General's priorities will include bringing along her fellow ministers and parliamentarians in making the new human rights scrutiny processes effective and seeing through the consolidation of federal discrimination laws process to create an effective national equality law. She should also ensure the ratification of the Optional Protocol to the Convention against Torture and establish a national system of monitoring places of detention. Finally, the Attorney must ensure that human rights considerations inform policy in all areas of her portfolio, for example in security policy where there is an urgent need for a system enabling review of adverse security assessments.

Claire Mallinson – National Director of Amnesty International Australia

With the start of a New Year and a new Attorney General in place there is a real opportunity to address the serious human rights violations that are currently occurring.

Amnesty International's 142,000 supporters in Australia and our millions more across the world are looking to the new Attorney General to show leadership and implement the Government's statements of commitment to human rights.

Real change, including significant legislative and policy reform must occur to ensure human rights are protected, including implementation of the 145 recommendations that the UN Human Rights Council made to the Australian government earlier this year.

A genuine commitment to upholding human rights needs to be at the core of Nicola Roxon's work.

Julian Burnside AO QC – Leading human rights barrister and refugee advocate

Apart from a Human Rights Act, the Attorney-General should make sure that ASIO decisions concerning refugees are timely and effectively reviewable. Boat people can remain in detention for many months – more than a year in some cases – after being assessed as refugees, waiting for an ASIO assessment. People assessed as refugees but adversely assessed by ASIO face lifetime detention, without being given reasons. ASIO refuses to give reasons for an adverse assessment, thus making judicial review extremely difficult. Al Kateb's case means that a refugee who is refused a visa (because of ASIO) and cannot be removed from Australia (because they are a refugee) can stay in detention forever. The A-G needs to ask whether this fits our conception of a just society.

Ed Santow – Chief Executive Officer of the Public Interest Advocacy Centre

Over the last few years, the Australian Government has made progress in improving the protection of our basic rights. However, Australia still lacks a comprehensive human rights law. This increases the vulnerability of already disadvantaged people -- like Indigenous Australians, people experiencing homelessness and people with a disability. To rectify this, the new Attorney-General should take the lead in fully implementing the recommendations of the 2009 National Human Rights Consultation, including by enacting a comprehensive Human Rights Act.

Chris Sidoti – International human rights expert and member of the HRLC's Advisory Committee

Rob McClelland was a good Attorney General for human rights. But he failed the biggest need and challenge, to achieve an Australian Charter of Rights – not through lack of personal commitment, it has to be said, but through Prime Ministerial and Labor Party opposition.

Nicola Roxon's challenge is the unfinished business:

- having the new parliamentary human rights committee elected and put to work quickly and effectively
- completing outstanding treaty ratifications: the Optional Protocol to the Convention Against Torture, the Migrant Workers Convention, the Optional Protocols on complaints of violations of economic, social and cultural rights and of the rights of children
- ensuring that, at long last, Australia's regime for boat people conforms with international human rights law
- most importantly, reviving work to get us an Australian Charter of Rights by 2014.

Professor Hilary Charlesworth – Director of the Centre for International Governance and Justice at ANU

The 2011 Universal Periodic Review of Australia provides a useful agenda for the new Attorney-General. While various aspects of the Human Rights Council's recommendations have been accepted by Australia, some of the major concerns have been rejected or sidelined. These include ensuring that the treatment of asylum-seekers is consistent with our international commitments and that Indigenous Australians can enjoy the rights set out in the Declaration on the Rights of Indigenous Peoples. Taking the UPR seriously not only at the domestic level but also in our foreign and aid policies would be a fruitful human rights investment for Australia.

Nicky Friedman – Head of Pro Bono & Community Programs with Allens Arthur Robinson

The new Attorney should ensure that asylum seekers can access and exercise their legal rights. Since the High Court's decision in M61, which confirmed that review by the courts is available to asylum seekers who are processed offshore, legal assistance providers have been hit with floods of applications for legal representation in judicial review proceedings. Despite the huge increase in demand, no extra funds have been provided and legal aid and community legal centres are turning away desperate people. The Attorney should provide funds to boost the capacity of refugee and immigration community legal centres and legal aid commissions to deal with these matters immediately.

Professor Sarah Joseph – Director of the Castan Centre for Human Rights Law

There are many human rights priorities for Australia in 2012, such as properly implementing the new Human Rights (Parliamentary Scrutiny) Act and vastly improving this country's impoverished refugee debate. As the number one priority, however, I would say that the Australian Government must take the lead in vigorously supporting amendment of the Australian Constitution to better recognise and protect the rights of Indigenous peoples, and to educate Australian people about the need for such amendment. A campaign against Constitutional recognition has already begun (see eg, J Albrechtsen in *The Australian* on 14 December). The government and the opposition must get on the front foot to counter the scaremongering.

Nicolas Patrick – Partner and Head of Pro Bono with DLA Piper

I would prioritise the human rights of people in places of detention.

A significant proportion of Australia's prison population suffer from mental illness. There is a causal and consequential link between imprisonment and mental illness. Australia is warehousing people with mental health problems in prisons, where mental health care is entirely inadequate.

The number of juveniles in detention is also a major concern, along with the over-representation of Aboriginal and Torres Strait Islander peoples. These issues raise significant concerns with respect to Australia's obligations under the Convention against Torture, the Convention on the Elimination of Racial Discrimination and the International Covenant on Civil and Political Rights and require the urgent attention of the Australian Government.

Robin Banks is Tasmania's Anti-Discrimination Commissioner

Work has begun on the important work of consolidating federal anti-discrimination laws. This is a once in a decade opportunity not only to consolidate the laws but to modernise them and bring them into line with international developments in equality law. At a minimum, the federal government should provide leadership on the next generation of equality laws and ensure federal protection against discrimination for all those currently protected by state or territory laws, with the capacity to readily extend the protection to newly emerging disadvantaged groups. A proactive compliance model should be at the core of the reforms.

Anna Cody – Director of Kingsford Legal Centre

The Australian Government has a great opportunity to make life fairer for disadvantaged people through the consolidation of Commonwealth anti-discrimination laws project. This has the potential to impact on the most disadvantaged in our community – Indigenous peoples, particularly Indigenous women and Indigenous people with disability. The Attorney General's Department has made a great start and should ensure creation of a pro active regulatory approach which doesn't rely on individuals making complaints and can address systemic discrimination. For example a new framework can look at the experience of Indigenous women in getting secure, affordable housing and eradicate institutional barriers.

David Manne – Executive Director of the Refugee and Immigration Legal Centre

There are a range of areas where Australia's treatment of asylum-seekers and refugees is inconsistent with international human rights obligations and domestic legal norms. A pressing reform priority is the management of ASIO security assessments. A growing number of people have been recognised as refugees but remain indefinitely detained due to negative security assessments, without any explanation of the basis on which they supposedly pose a security risk, and without any opportunity to respond to such concerns. This process needs to be brought in line with international and domestic principles of natural justice, and in particular, the provision of a meaningful opportunity to respond to adverse information, to challenge it, and access to independent review.

Professor Spencer Zifcak – President of Liberty Victoria

The first major announcement Nicola Roxon should make is that the Government will appoint a Commonwealth Children's Commissioner. The Commissioner's primary task should be to act as an advocate for children's rights and interests. Children in many categories are significantly disadvantaged. These include Indigenous children, refugee children, homeless children, children with physical and mental disabilities, and children in state care. Yet they have no official representative to articulate their needs and their opinions. It is time they had one. The UN Committee on the Rights of the Child has recommended that Australia take this initiative. The A-G should seize this opportunity to make children's rights real.

Stephen Keim SC – President of Australian Lawyers for Human Rights

The challenge for any Australian Attorney-General is to put human rights principles ahead of political convenience.

This means standing up for accountability in respect of alleged torturers and war criminals, whether they are from the United States or Sri Lanka, on the one hand, or a conveniently deposed Libyan dictator on the other.

It is no more honourable, now, to encourage an international culture of impunity than it was when a former Australian government stood aside and allowed Australians, David Hicks and Mamdouh Habib, to be rendered, tortured and illegally imprisoned for years on end.”

Kristen Hilton – Director of Civil Law, Access & Equity with Victoria Legal Aid

Under the Federal Government's Access to Justice Framework, better and more transparent primary decision making is a key goal.

Statistics show that nearly a third of challenged Centrelink decisions are changed on internal review and more are changed at higher tribunals. Similarly, poor primary decision by the Department of Immigration on refugee applications has meant that two out of three decisions have been overturned on appeal. In one of the least transparent exercises of government decision making, asylum seekers who have received negative security assessments not only have no right to appeal, they have no right to know the reasons behind the decision.

Restoring public confidence in effective, transparent decision making that is based on principles of fairness and justice and a respect of individuals' rights would greatly improve access to justice and should be a key priority.

Rodney Croome – Director of the Australian Coalition for Equality

The Attorney's priorities should be as follows:

1. Comprehensive national laws prohibiting sexuality and gender identity discrimination and vilification are long overdue. “Comprehensive” means no exemptions for church schools and welfare agencies.
2. It's not enough for federal politicians to support marriage equality. If reform is to occur it needs heterosexual, front-bench champions like the Attorney-General. She must also remove the bureaucratic barriers to same-sex couples marrying overseas, immediately!
3. The civil and political rights of LGBTI people are still regularly violated and need the protection of a Charter of Rights. The ICCPR already acts as a de facto charter for Australia, albeit a weak one. It's time for us “repatriate” our human rights protections so Australian human rights violations can be judged by Australian courts according to standards set by the Australian people.
4. The implementation of these reforms will not be easy. The Attorney must establish an LGBTI reference group to help her Department, similar to groups at the state level.

Professor David Kinley – Chair in Human Rights Law at Sydney Law School

Pay very close attention to the newly established parliamentary human rights scrutiny committee. This is a sleeping giant, whose potential power and range is underappreciated; indeed largely unnoticed. Having authority to scrutinise all bills for compliance with *all* Australia's international human rights obligations goes far beyond the scope of any equivalent mechanism overseas, and it will embarrass and expose. So, heads up for the enhanced human rights scrutiny of the next wave of immigration, anti-terrorism or workplace relations proposals.

PS. Don't take up smoking this year.

Professor Andrew Lynch – Director of the Gilbert + Tobin Centre of Public Law

Alongside the perennial challenge of how Australia treats those who seek asylum here, the Attorney-General's particular human rights priority for 2012 is handling the lead-up to the referendum in the interests of Indigenous Australians. When the Expert Panel reports on its consultation process in mid-January, the ball is firmly back in the government's court. I want to see less emphasis on simply 'constitutional recognition' and greater willingness to seize this once-in-a-generation opportunity to place a meaningful guarantee of racial equality in our Constitution for the protection of all in our community, but most importantly our First Peoples.

John Tobin – Associate Professor at Melbourne Law School and member of the HRLC Advisory Committee

The prioritisation of efforts to address human rights considerations is always fraught with danger. But the reality of limited resources means that prioritisation is a fact of political life. Given this reality, the top priority for the new Attorney General in 2012 must be ensuring the successful implementation of the Human Rights (Parliamentary Scrutiny) Act 2011. The requirement to scrutinize all new legislation in light of international human rights standards must not be reduced to a shallow process of compliance. Instead, the Attorney General must lead from the front and demonstrate that substantive engagement with international human rights standards leads to more effective and equitable legislative outcomes.

Lucy Adams – Senior Lawyer with the PILCH Homeless Persons' Legal Clinic

On census night in 2006, approximately 105,000 Australians were homeless, including approximately 7,480 families. Australia needs a human rights-based framework for addressing homelessness.

In Victoria, we have seen how legislative protection of human rights can work in practice through the Victorian Charter of Human Rights. The HPLC has relied on the Charter's binding obligations on public bodies – to give proper consideration to human rights in decision-making and to act compatibly with human rights – to avoid the eviction of 42 people, including 21 children, from social housing into homelessness.

Enforceable human rights obligations, including national homelessness legislation that enshrines the right to adequate housing, are critical to Australia's ability to effectively prevent and address homelessness.

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

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

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

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

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