human rights law resource centre

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Human Rights Law Resource Centre Ltd
Level 17, 461 Bourke Street
Melbourne, Vic, 3000, Australia
www.hrlrc.org.au
www.twitter.com/rightsagenda
ABN: 31 117 719 267

The Human Rights Law Resource Centre is a leading community legal centre.

The Centre promotes and protects human rights through policy analysis, advocacy, strategic litigation and capacity building.

Through these activities, the Centre contributes to the alleviation of poverty and disadvantage and the promotion of freedom, dignity and equality.

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Opinion

Strengthening the People's Charter for a Fairer, Stronger Victoria

In 2006 Victoria led the way when it became the first Australian state to pass a Charter of Human Rights. The Charter was enacted after a period of significant public consultation, with Victorians overwhelmingly calling for human rights to be better protected in law and practice. For the last three years, the Victorian Charter has quietly provided much-needed human rights protection for us all, particularly for marginalised and disadvantaged people in Victoria. With a change of government, the future of Australia's first state Charter is now uncertain.

Since its enactment, the Charter has secured beneficial outcomes for people in different ways. Most of its impact has not been in courtrooms, but in peoples' everyday interactions with public services.

The Charter has been used by young people with acquired brain injuries to prevent being moved to live in aged care facilities. The Charter was used by people affected by Black Saturday to ensure their voices were heard in the Bushfire Royal Commission. Following arguments that the right to life required the Commission to ensure involvement by families of people who died or were seriously endangered by the fires, the Commission adopted a practice of hearing daily evidence from persons affected by the fires.

The Charter requires government to comply with human rights. This legal obligation has been the catalyst for cultural change in the way that government services are delivered. The Victorian Equal Opportunity and Human Rights Commission described the Charter as 'reinvigorating and reinforcing existing ethical frameworks and principles of practice'.

Because government is legally bound to comply with human rights, and because sometimes it has not done so, some people have gone to court to enforce their rights. This has led to fair and common sense outcomes that are critically important to the lives of people involved.

For example, a man subject to involuntary and invasive mental health treatment was successful in obtaining judicial review of his treatment after the Mental Health Review Board delayed his hearing for over a year. In another case, a man and his three year old son who sought to remain in public housing following the death of the man's mother, the tenant, from cancer relied on the right to family and home under the Charter to avoid being evicted into homelessness.

The Charter has achieved these results because it promotes cultural change in government and because people have legally enforceable rights. It's that old adage of the carrot and the stick.

There are two essential elements that give the Charter teeth: first, government's duties to consider and comply with human rights; and, second, the ability to enforce rights in the courts. Both aspects are crucial to ensuring remedies for violations and the inspiration for cultural change.

So what will the change of government mean for our Charter?

In his Human Rights Week address the Attorney-General, Robert Clark, spoke for the first time since being appointed about his plans for the Victorian Charter. While stopping short of saying he will repeal it, the Attorney described the Charter as 'riddled with flaws', saying that it 'could not continue in its current form'. Instead, of a comprehensive Charter enshrining legal rights and responsibilities, he expressed a preference for 'clear statements of government services and the standards to which individuals are entitled'.

The Attorney's comments are worrying for two reasons.

First, the Attorney's vision for the Charter appears to be of an unenforceable and aspirational instrument, which lacks both of the key ingredients that give the Charter teeth. If you remove government responsibilities and judicial oversight, as suggested by the Attorney, you remove the very mechanisms that provide protection and create real and beneficial change. Just as drink-driving laws are sometimes necessary to regulate what should be common sense behaviour, so too are human rights laws sometimes necessary to regulate what should be common sense public services.

Secondly, the Charter is not a partisan document and it would be a mistake for the Charter to be seen as part of a left agenda or to be used as a political football.

Human rights are not the domain of the right or the left but are fundamentally a set of universal principles that seek to advance the freedom, respect, equality and dignity of all human beings. Human rights have had champions on all sides of politics and are very much aligned with the tradition of Australia's 'Liberal' party. It was Gough Whitlam who signed the International Covenant on Civil and Political Rights, on which the Charter is based, but Malcolm Fraser who, in one of his first acts as Prime Minister, ratified and brought it into force. Human rights laws have long been championed by conservative politicians; Sir Winston Churchill was a key early proponent of the European Convention and a British Human Rights Act, calling for a charter of human rights 'guarded by freedom and sustained by law'.

The Attorney has said that he wants to deliver justice and fairness and services of a high standard. As the Attorney said, the Charter is not the 'be all and end all' of fairness and justice, but it is now a fundamental part that framework in Victoria.

The Charter will be reviewed in 2011. Having been the first Australian state to enact a Charter of Rights, let's not become the first to take the regressive step of repealing one.

Emily Howie *is Director of Advocacy and Strategic Litigation and* ***Phil Lynch*** *is Executive Director with the Human Rights Law Resource Centre*

Global Framework and Principles on Business and Human Rights Must be Strengthened

This time next year, the world may well have a new procedure in the United Nations to address the issue of business and human rights. The mandate of the current procedure, the Special Representative of the UN Secretary-General on transnational corporations and other business enterprises (SRSG), ends in June 2011. Exactly what any new procedure will do is yet to be determined, but in Amnesty International's view, a follow-on procedure to the SRSG's work is vital to the development of clear international standards for the protection of human rights against corporate abuse.

Appointed in 2005 to clarify standards of corporate responsibility and accountability for human rights, the SRSG, Professor John Ruggie, has been the focal point for debate on business and human rights issues. In 2008, the SRSG proposed a 'Protect, Respect and Remedy Framework', which was unanimously welcomed by the UN Human Rights Council. The Framework rests on three principles: (1) the State duty to protect against human rights abuses by third parties, including business; (2) the corporate responsibility to respect human rights; and (3) the need for more effective access to remedies.

As the SRSG's mandate comes to an end in June 2011, discussions are centring around proposed 'Guiding Principles' on implementing the Protect, Respect and Remedy Framework, and consideration of post-SRSG options.

In late November 2010, the SRSG released a draft of these Guiding Principles, which draw on the SRSG's previous reports to the UN Human Rights Council. The draft contains a number of useful suggestions to States and business as to implementation of the Protect, Respect and Remedy Framework. However, in striving to articulate principles that would be broad enough to cover a wide variety of circumstances and to be supported by all States and business the draft often falls short of the clear, concrete and practical recommendations needed to strengthen fulfilment of the State duty to protect human rights against abuse by companies.

The Draft Guiding Principles

There are four key areas in which the draft Guiding Principles require significant attention:

1. *Addressing the challenges of transnational business operations*

After examining the capacity of, and broad array of circumstances in which, corporate entities abuse human rights, the SRSG identified in 2008 that:

> The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences.

Similarly, in his draft Guiding Principles, the SRSG refers to 'institutional misalignments' creating the permissive environment within which corporate abuses of human rights occur without adequate sanctioning or reparation.

One of the greatest gaps, or institutional misalignments, is the capacity of corporate entities to operate across State borders with ease, while State borders simultaneously often present institutional, political, practical and legal barriers to corporate accountability and redress for the victims of corporate human rights abuses. UN treaty bodies have commented that States must take appropriate steps to prevent their own citizens and companies from abusing the rights of individuals and communities in other countries. In a recent observation on Australia, for example, the Committee on the Elimination of Racial Discrimination noted 'with concern the absence of a legal framework regulating the obligation of Australian corporations at home and overseas whose activities, notably in the extractive sector, when carried out on the traditional territories of Indigenous peoples, have had a negative impact on Indigenous peoples' rights'. Consistent with commentary and recommendations of other UN treaty bodies, the Committee urged Australia 'to take appropriate legislative or administrative measures to prevent acts of Australian corporations which negatively impact on the enjoyment of rights of Indigenous peoples domestically and overseas and to regulate the extra-territorial activities of Australian corporations abroad". Despite such strong consistent statements by UN treaty bodies, the draft Guiding Principles fail to direct States to take such steps. The draft Guiding Principles also fail to urge States to engage in international cooperation and assistance to progress investigations that cross territorial borders, and to aid the ability of rights-holders to access effective remedial mechanisms.

2. *Requiring corporate respect for human rights – essential for prevention, accountability and remedy*

The draft Guiding Principles include a strong statement that States must protect against business-related human rights abuses within their territory and/or jurisdiction, but they do not clearly state that corporate entities should be required to respect human rights. Instead, the draft Guiding Principles often emphasize that States should only require corporate respect for human rights 'where appropriate', without elaborating what this is intended to mean. Yet, requiring corporate respect for human rights, including by requiring corporate human rights due diligence, is an essential component often lacking in many contexts, which inhibits accountability and can prevent human rights-holders from being able to obtain effective remedies. Legally and conceptually, there is no sound reason why private entities should not be required to undertake human rights due diligence.

3. *Lack of guidance on protecting and respecting the rights of those most commonly at risk from corporate human rights abuse*

Despite a UN Human Rights Council resolution directing the SRSG to 'integrate a gender perspective throughout his work and to give special attention to persons belonging to vulnerable groups, in particular children', the draft Guiding Principles do not substantively address these issues. There is, for example,

little mention of the rights of Indigenous peoples and human rights defenders, despite the significant and increasing risks faced by them in the context of many corporate activities. The Guiding Principles should provide particular guidance for the effective protection of the human rights of these groups and integrate a gender perspective. Such guidance should draw upon the recommendations contained in reports of other UN experts, such as the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, and the Special Rapporteur on the situation of human rights defenders, each of whom has released reports relevant to the protection of human rights in the context of corporate activity.

4. Remedy

While there is a more balanced focus on judicial and state-based non-judicial remedial mechanisms in the draft Guiding Principles than earlier reports of the SRSG, there continues to be a lack of recognition of the right to effective remedy, the duty of States to protect that right, and the responsibility of corporate entities to respect the right. Further, the draft Guiding Principles neither recognize nor provide guidance on overcoming the significant challenges often faced by rights-holders who are impoverished and face large imbalances in power, resources and information compared with corporate actors. Within the context of remedies, as elsewhere in the draft Guiding Principles, the role of home States is also significantly under-examined.

The need for robust follow-on mechanisms at the UN

The SRSG's Framework has provided guidance to States and companies, but there is clearly more guidance that could and should be provided. In many respects, the Guiding Principles will not mark the end of a process, but rather another step in a continuing process. It is vital that the UN Human Rights Council looks for means by which the process of establishing clear standards for States and business can continue to evolve, and seeks to supplement and build on the work undertaken by the SRSG since 2005. In so doing, it will be important that any post-mandate mechanism be able to review the Protect, Respect and Remedy Framework as it is applied in practice, and distil valuable lessons that can benefit the protection of human rights. This must involve consideration of the circumstances in which corporate human rights abuses occur, the steps taken by States and corporate actors to implement the SRSG's Framework, and the effect of those actions on rights-holders. Follow-on institutional arrangements within the UN for business and human rights should also play the important role of elaborating additional guidance as required.

Whether these functions are fulfilled by a Special Rapporteur, a Working Group, or some other procedure established by the Human Rights Council will be the subject of much discussion over the coming six months. Whichever form the procedure takes, consistent with the purpose of the UN to achieve international cooperation in solving international problems and promoting respect for human rights, it is essential that the UN strive to establish clear international standards for the protection of human rights in the context of business activities.

Shanta Martin *is Head of Business and Human Rights with Amnesty International in London*

News

A BIG Human Rights Thanks to our Donors and Supporters!

To celebrate Human Rights Week, our partners at Allens Arthur Robinson, DLA Phillips Fox, Lander & Rogers and Mallesons Stephen Jaques very generously agreed to match tax deductible donations to the Human Rights Law Resource Centre.

Thanks to you, we received $4400 in donations from individual donors which, when matched by the firms, provides us with an additional $8800!

With recurrent funding of just $120,000 per annum, and the promotion and protection of human rights at a critical juncture in Australia, we need and greatly appreciate your support to make our human rights work even more expansive and effective!

To support our work and promote human rights and dignity, visit www.hrlrc.org.au/donate.

Phil Lynch *is Executive Director of the Human Rights Law Resource Centre*

Human Rights Commission Calls for Immediate End to Australian Policy of Mandatory Immigration Detention as Conditions and Health of Detainees Deteriorates

On 14 December 2010, the Australian Human Rights Commission released a statement on the policy and practice of mandatory immigration detention following a visit to immigration detention facilities in Darwin which house 'high numbers of families with children and unaccompanied minors' for extended periods of time.

In her statement, Commission President Catherine Branson QC said she was concerned about the impacts prolonged detention were having on the health, education and psychological needs of children.

Ms Branson said the Commission continued to have serious concerns about Australia's mandatory immigration detention system, in particular, the increasing length of time people were spending in immigration detention and the impacts of prolonged and indefinite detention on people's mental health.

'The Commission met with a number of people in detention, including children, who had experienced significant trauma in their home country or who had attempted self-harm while in detention,' Ms Branson said.

'The Commission continues to call on the Australian Government to reconsider the mandatory detention system. People should only be held in immigration detention if there is a risk that justifies detaining them, she said. 'If no such risk exists, they should be allowed to reside in community-based alternatives to detention while their refugee claims are assessed.'

The Commission's full statement is at www.humanrights.gov.au/human_rights/immigration/idc2010_darwin.html.

Australian Human Rights Commission

Winners of Australian Human Rights Medal and Awards Announced

The Human Rights Law Resource Centre congratulates all those individuals and organisations who were short-listed for and conferred with Australian Human Rights Awards on 10 December 2010.

In particular, the Centre congratulates Therese Rein, who was honoured with the prestigious Human Rights Medal, and our partners at GetUp!, which was recognised with the Australian Human Rights Award for Community Organisations, and the Northern Australian Aboriginal Justice Agency, which was conferred with the Australian Human Rights Law Award.

For further details on the Medal and Awards, see www.humanrights.gov.au/hr_awards/index.html.

New Business and Human Rights Initiative Launched

Australia's first Human Rights Working Group for Business, established by the Global Compact Network Australia, a local network of the United Nations Global Compact, was launched on 10 December 2010.

The Human Rights Working Group for Business 'aims to facilitate shared learning on human rights challenges and opportunities amongst Australian corporations by providing practical guidance through expert facilitators and concrete tools, as well as a forum for best practice sharing. The Working Group will provide an opportunity for Australian businesses to learn about and input into relevant international and domestic developments in this area.

The first Working Group participants included representatives from a range of industries including ANZ, BHP Billiton, Intrepid Travel, Origin Energy, Rio Tinto, Sebel Furniture, Telstra and Woolworths.

Welcoming the initiative, Australian Human Rights Commission President Catherine Branson QC, commended all those involved in the launch of the Business and Human Rights Working Group.

'Growing numbers of Australian companies are recognising that doing business in a way that demonstrates respect for human rights is not only the correct thing to do, it makes good business sense,' she said.

'Paying respect to human rights can protect against reputational damage and reduce costs associated with labour disputes, security issues and stakeholder damage control.'

Ms Branson said that the Australian Human Rights Commission looked forward to working in partnership with GCNA and the working group to advance business understanding of, and respect for, human rights.

For further information, see http://thehub.ethics.org.au/ungc/network_news.

Australian Human Rights Commission

Australian Human Rights Grants Announced

On 10 December, International Human Rights Day, the Australian Foreign Minister, the Hon Kevin Rudd MP, announced $3 million of funding for more than 30 projects aimed at promoting and protecting human rights in developing countries around the world.

The Human Rights Grants Scheme, administered by AusAID, provides 'funding to non-government organisations and human rights institutions based or operating in developing countries to promote and protect human rights in direct and tangible ways'.

The selection of successful projects is overseen by an independent panel of international human rights experts, including the Executive Director of the Human Rights Law Resource Centre, with 'extensive global experience in human rights work'.

Projects funded through the Human Rights Grants Scheme in 2010 include:

- a project in Cambodia to establish a Human Rights Defenders Commission;
- projects in Nepal and Sri Lanka to support human rights defenders to advocate for the implementation of key UN human rights recommendations;
- educating teachers and children in Yemen about the Convention on the Rights of the Child and related national legislation, and taking action against school violence, a major cause of children dropping out of school; and
- working to eliminate violence against women in Solomon Islands through community training and advocacy programs to build safer communities.

For further details, see www.ausaid.gov.au/business/other_opps/humanrights_scheme.cfm.

Joint NGO Submission on UN Treaty Body Reform

Twenty NGOs, including the International Service for Human Rights, have recently presented their views and recommendations for strengthening of the UN human rights treaty bodies. The joint NGO submission was developed in response to and released on the one year anniversary of the Dublin Statement on the Process of Strengthening the United Nations Human Rights Treaty Body System, which has been a catalyst for renewed reflection on how the treaty body system could be made more effective.

While reform of the treaty bodies is an on-going process there is growing momentum for changes that could significantly enhance the functioning of the treaty bodies and contribute to improved human rights protection. The proposals put forward include recommendations to the treaty bodies themselves, the Office of the High Commissioner for Human Rights, and States. In recognition of the important role of civil society in the work of the treaty bodies and in any reform process, the submission also contains commitments by the organisations to engagement with the treaty bodies.

To read the joint NGO response to the Dublin statement, see www.ishr.ch/treaty-bodies/966-joint-ngo-submission-on-treaty-body-reform.

International Service for Human Rights*, Geneva*

HRLRC Brings You the Latest Human Rights News and Views

The HRLRC now brings you the latest Australian, regional and international human rights news, views and developments as they happen. To keep informed of the latest developments, and to be a part of the HRLRC community:

- follow us at http://twitter.com/rightsagenda for updates as they occur;

- join us at www.facebook.com/pages/HumanRightsLawResourceCentre; and
- visit www.hrlrc.org.au every Friday for a weekly human rights news summary.

National Human Rights Framework Developments

Australia to Prepare New National Human Rights Action Plan

The Government has announced that it is developing a new National Human Rights Action Plan to 'outline future action for the promotion and protection of human rights' in Australia. The Government has said that a new Action Plan, a key aspect of *Australia's Human Rights Framework*, will involve a 'comprehensive assessment of human rights needs in Australia, which is then translated into specific goals and practical actions'.

As a first step in the process, the Attorney-General's Department has released a background paper setting out the proposed process for the development of an Action Plan. The Department has invited comments on that process by **10 February 2011**. Thereafter, it is proposed that the Australian Government will work with the State and Territory Governments to develop an exposure draft of the Action Plan. At the same time the Australian Government will develop a draft report, or Baseline Study, on Australia's human rights status. Both will be released for public comment in April 2011.

For further information, see www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_NationalHumanRightsActionPlan.

Phil Lynch *is Executive Director of the Human Rights Law Resource Centre*

Australian Human Rights Framework Education Grants Announced

On 10 December, the Commonwealth Attorney-General, the Hon Robert McClelland, announced funding of $250,000 for 15 projects across Australia to promote human rights education.

The 'Human Rights Framework Education Grants' are intended to respond to the recommendation of the National Human Rights Consultation to 'human rights education be a priority' and are a key aspect of the National Human Rights Framework established in response to that inquiry.

According to the Attorney, 'projects were selected based on their ability to promote human rights education in a way that raised awareness of rights, responsibilities and freedoms in the Australian community'. The Attorney said that 'the projects will target broad sections of the community as well as vulnerable groups and will be delivered by youth organisations, community legal centres, organisations representing people with disabilities and carers and religious community groups.'

Successful applicants included Eastern Community Legal Centre, Kingsford Legal Centre, the National Association of Community Legal Centres, People with Disability Australia, Uniting Church in Australia Assembly, and Women's Legal Services NSW.

Further information about Australia's Human Rights Framework – Education Grants program is available at www.ag.gov.au/hrgrants.

Phil Lynch *is Executive Director of the Human Rights Law Resource Centre*

State Charter of Rights Developments

ACT Report Concludes it is 'Desirable and Feasible' to Enshrine Social and Economic Rights in Human Rights Act

On Human Rights Day, the Report of the ACT's Economic, Social and Cultural Rights Research Project was tabled in ACT parliament and made public. The report contains the findings of an extensive research project looking at whether the ACT Human Rights Act should include economic, social and cultural rights (ESC rights).

Importantly, the Report finds that it is both 'desirable and feasible' for ESC rights to be protected in the HRA and a model bill is proposed to give effect to the conclusions and recommendations. In short, the Report recommends the following:

- The ACT Human Rights Act should include protection for most rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR). The rights included are described as:
    - the right to adequate housing;
    - the right to health, including food, water, social security and a healthy environment;
    - the right to education;
    - the right to work, including the right to just and favourable work conditions and the right to form and join work related organisations; and
    - the right to take part in cultural life.
- A peoples' right to self determination should not be included, but such a right should be the subject of a later review.
- Some aspects of the ESC rights that are included should be immediately enforceable, but others should be clearly stated to be subject to an obligation of 'progressive realisation'. In relation to the latter, this means that the ACT government must take reasonable measures to progressively realise those aspects of the rights.
- Like the civil and political rights that are currently protected in the Human Rights Act, the Model Bill proposes:
    - that ESC rights would form part of the legislative scrutiny process of the ACT parliament;
    - laws would be required to be interpreted consistently with ESC rights where possible;
    - public authorities will be bound to consider ESC rights and act in accordance with them;
    - failure of public authorities' duties would result in a stand alone cause of action, with all remedies available save for damages.
- When considering whether the ACT Government has taken reasonable measures, the courts are directed to consider the availability of resources (but not whether money could have been better spent) and also the wide margin of appreciation provided to government to determine and give effect to the duty of taking reasonable measures.
- A failure by the ACT Government to take reasonable measures can result in a 'declaration of incompatibility by omission', which is not an individual remedy but is tabled in ACT parliament and requires a response from the responsible Minister within 6 months.

The Government has not yet responded to the Report, which is at http://acthra.anu.edu.au/index.html.

Emily Howie *is Director of Advocacy and Strategic Litigation with the Human Rights Law Resource Centre*

New Victorian Attorney-General Speaks on Human Rights and the Future of the Charter of Human Rights and Responsibilities

In a speech on 8 December 2010 to mark Human Rights Week, the new Victorian Attorney-General, the Hon Robert Clark MP, made his first public remarks since appointment on the protection of human rights in Victoria and the future of the *Charter of Human Rights and Responsibilities Act 2006*. A small, edited extract of these remarks is set out below.

"Victoria's new government is not a government that is about silencing discussion and debate. As Attorney-General, I welcome constructive and positive dialogue about what is the best way forward on issues relating to justice.

As Attorney-General, I am happy to engage with those who approach issues with goodwill and sincerity, whether or not I agree with their conclusions. The commitment of the new government to just and fair outcomes for Victorians is no less strong than that of our predecessors.

The incoming government's initiatives in the field of justice will be directed towards restoring Victoria's legal system to make Victorians safer, improve access, reduce costs and waiting times, uphold rights and support the independent, impartial and efficient operation of our courts and tribunals.

Let me say a few words specifically about rights, justice and the Charter of Human Rights and Responsibility Act.

As someone who trained in the law and practised as a lawyer, I am very proud of the role that lawyers can play in society, and proud of what the law has done and continues to do to uphold rights and to protect liberties over the ages.

Indeed one should not get involved in the law unless one is passionate about preventing and remedying injustice. I admire the sincerity and dedication of those many lawyers, particularly young lawyers, who are keen to play a role in areas such as pro bono work, or working for community legal centres or human rights centres, or working for just and fair outcomes within the public sector. All good lawyers want to uphold rights and uphold justice.

However, any notion that a legally-driven Charter Act is the be-all and end-all of justice and fairness for Victorians is sadly mistaken.

The Charter Act is not a set of Ten Commandments handed down on tablets of stone from on high. As I have made clear in the past, the Charter Act is riddled with flaws and anomalies, as even many of its supporters acknowledge.

The Court of Appeal judgment in *R v Momcilovic* [2010] VSCA 50, currently subject to appeal to the High Court, strongly criticised my predecessor for urging the court to adopt an interpretation of the charter legislation directly contrary to assurances as to its interpretation which he gave to Parliament at the time the legislation was enacted.

In Parliament, the previous government adopted an *Animal Farm* approach to the interpretation of the Act, often arguing that the 'human rights' set out in the Act were not being violated because it was 'justified' in a 'free and democratic society' to abrogate them, as permitted by section 7. Just as in *Animal Farm* 'all animals are equal, but some animals are more equal than others', so everybody would have the human rights set out in the Charter Act, but some of those rights would be more rights than others.

Many of the 'human rights' included in the legislation are specified in poorly defined and open-ended terms which are often inconsistent with the International Covenant on Civil and Political Rights.

For example, the Charter Act expressly asserts a right to abrogate rights which the Covenant says may never be abrogated.

Let me also cite just a few of many other departures of the Charter Act from the International Covenant, which may or may not be justified departures, but which again show that one cannot hold up the Charter Act as if it were the be-all and end-all of what amounts to human rights.

The obligation of a penitentiary system to aim for the reformation and social rehabilitation of prisoners, contained in Article 10.3 of the Covenant, is not set out in the Charter Act.

The Charter Act also fails to provide for respect for the liberty of parents and legal guardians to ensure the religious and moral education of their children in accordance with their own convictions, as contained in Article 18.4 of the Covenant.

The new government supports and welcomes scrutiny of proposed laws against international benchmarks. However, we consider issues regarding compliance or non-compliance are matters to be decided through democratic processes, not as matters of judicial policy making.

We also strongly support the availability of effective remedies against denials of individuals' rights and entitlements by government entities.

However, rather than relying primarily on a Charter Act specified in broad and vague terms, to best avoid and remedy such injustices requires clear statements of the public services and standards to which individuals are entitled, with honest and thorough benchmarking and reporting of service delivery performance, and proper channels of internal redress, backed up by an independent and diligent Ombudsman and accessible administrative law remedies.

To try to use a Charter Act based on civil and political rights to achieve the introduction of economic and social rights is like trying to use a spanner to drive home a nail – it might work from time to time, but it is not the best tool for job.

Ensuring clear accountabilities and remedies for the delivery of public services is something I will be pursuing not only in my capacity as Attorney-General, but also as Minister for Finance, a portfolio which

has responsibility for the setting, measuring and reporting of standards of service delivery and performance.

In terms of the future of the Charter Act, as I have made clear in the past and as you will have gathered from my remarks today, in my view this legislation cannot continue in its present form. At present, my top priority as incoming Attorney-General is to deliver on the commitments we have made to Victorians during the election campaign. Even in just the six days since the new government was sworn in last week, some good progress has been made in getting things underway, but it is still early days and there is a lot to be done.

Once these commitments to the Victorian electorate are in hand, and the various time-bombs left to me by my predecessor have been defused, my next priority will be to give attention to other issues, including the future of the charter legislation.

In the meantime, for those of you who are working within the public sector to achieve more just and fair outcomes for Victorians – continue with that quest. Just and fair outcomes are a core element of what the Baillieu Government is about."

A full copy of the speech is at www.robertclark.net/news/towards-a-just-and-fair-victoria/.

Major Coalition of Community Organisations, Corporations and Religious Bodies Calls on Victorian Attorney-General to Strengthen the Charter of Human Rights

On 10 December 2010, a coalition of over 70 human rights NGOs, community organisations, corporations and religious groups wrote to the new Victorian Attorney-General, the Hon Robert Clark MP, calling on him to strengthen the *Charter of Human Rights and Responsibilities Act*.

The signatories wrote that, overall, the *Charter* has had a positive impact on:

- governmental transparency and accountability;
- legislative and policy development, including by integrating human rights considerations and safeguards into laws and processes; and
- public service delivery and outcomes.

Most significantly, the *Charter* has been used in individual cases to uphold the rights and dignity of vulnerable and disadvantaged people, including people experiencing or at risk of homelessness, the elderly, people with mental illness and people with disability.

The legal rights (Part 2) and public authority duties (section 38) enshrined in the *Charter*, together with the ability to vindicate rights in legal proceedings, are crucial to the *Charter's* effectiveness and the benefits referred to above.

The signatories also wrote that, notwithstanding these overall benefits, the *Charter* and associated policies and programs could be strengthened to better protect human rights and make Victoria a fairer, stronger and more inclusive community. Accordingly, they call on the Baillieu Government to commit to a review of the *Charter* in accordance with section 44 of the Act and on the following terms:

- The review should focus on the operation and impact of the *Charter* and not on whether Victoria needs a *Charter*, which was the focus of widespread community consultation in 2005.
- The review should commit to strengthening the promotion and protection of human rights in Victoria or, at least, not abrogating or limiting existing human rights.
- The review should consider ways in which to ensure that individuals and groups are aware of their human rights under the *Charter* and have 'accessible, affordable and effective remedies' where their human rights are violated or breached.
- The review should be conducted by an independent review team, including at least one member with significant expertise in human rights law and practice, with the secretariat support of the Department of Justice Human Rights Unit. The independent review team should also consult with the Victorian Equal Opportunity and Human Rights Commission given its functions under Part 4 of the *Charter*.
- The review should be evidence-based and involve consultation with key stakeholders, including advocates and representatives of marginalised and disadvantaged communities and groups.

A copy of the letter is at www.hrlrc.org.au/content/topics/victorian-charter-of-human-rights/attorney-general-should-strengthen-charter-and-protection-of-human-rights/.

Phil Lynch *is Executive Director of the Human Rights Law Resource Centre*

Statements of Compatibility under the Victorian *Charter*

Section 28 of the *Charter* requires a Statement of Compatibility to be issued for every Bill that is introduced into a House of Parliament. Below is a summary of some significant recent statements.

Bail Amendment Bill

The *Bail Amendment Bill 2010* (Vic) amends the *Bail Act 1997* (Vic) and the *Magistrates' Court Act 1989* (Vic) to clarify aspects of current bail law, codify existing practices and promote efficiencies in the operation of the bail system.

The Bill follows on from the Victorian Law Reform Commission's (VLRC) *Review of the Bail Act: Final Report* (2007), and represents the first stage of reforms to Victoria's bail system, responding to 40 of the 157 recommendations made by the VLRC.

The Statement of Compatibility identifies seven rights protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) that are engaged by the Bill.

The Scrutiny of Acts and Regulations Committee identified in its Alert Digest No 12 of 2010, that the 'right to liberty and security of a person', contained in s 21(6) of the *Charter*, is the right most engaged by the Bill.

Section 21(6) of the *Charter* provides that a person awaiting trial must *not be automatically detained* in custody, but has the right to be released on bail subject to providing a guarantee to attend for trial. Clauses 8 and 15 of the Bill were recognised by the Committee to raise issues of incompatibility with s 21(6). Clause 8 authorises a court to impose conditions on bail to reduce the likelihood that the accused may commit an offence while on bail, and clause 15 provides that any bail conditions imposed can only be varied if it is 'reasonable' in the circumstances to do so.

The Government acknowledged that these clauses may limit the right recognised in s 21(6). However they argued in the Statement of Compatibility that any limitations imposed by clauses 8 and 15 are reasonable limits under s 7 of the *Charter*, having regard to the need to preserve the integrity of the criminal justice system and to protect the community. The Statement also justifies the limitations, by arguing that procedural safeguards, such as the requirement that conditions be no more onerous in nature than required (new s 5(4) of the *Bail Act*), ensure that only appropriate conditions of bail are imposed.

The Committee found that clauses 8 and 15 may be incompatible with s 21(6) of the *Charter*. Clause 8, for instance, allows the court to impose conditions on bail to reduce the likelihood of *any offence* being committed while on bail. Given that such conditions can be imposed even for offences that involve neither danger to others not the obstruction of justice (for example using drugs during bail), the Committee observed that such a limitation goes beyond that justified by the *Charter*. The Committee also noted that in other jurisdictions, conditions on bail have been limited to cases of serious offences, dangerous offences, or offences that the defendant has committed previously. Accordingly, clause 8 by allowing conditions on bail to be imposed for *any offence* may be too broad, and may therefore be an unreasonable limitation imposed on s 21(6) of the *Charter.*

Clause 15 of the Bill permits a court to vary bail conditions only in circumstances where it is 'reasonable' to do so, having regard to prescribed criteria such as the seriousness of the offence. The Committee found that this may raise issues of compatibility with s 21(6), as the 'reasonableness' test is vague, giving the courts discretion to define the circumstances sufficient to justify pre-trial detention. Clause 15 also does not require the court to consider the purpose for imposing a bail condition, contained in the new s 5(3). As the Committee observed that breach of a bail condition can lead to a cancellation of bail, it considered that clause 15 may raise inconsistencies with the right against automatic detention recognised in s 21(6) of the *Charter*.

In conclusion, the Committee referred to the Parliament the questions of whether or not clause 8 and clause 15 of the Bill are reasonable limits on s 21(6) of the *Charter* which provides for the right not to be

automatically detained in custody awaiting trial, but to be released subject to guarantees to attend for trial.

***Wendy Ooi**, Seasonal Clerk, Mallesons Stephen Jaques*

Confiscation Amendment Act 2010

The *Confiscation Act 1997* (Vic) provides for the confiscation of proceeds of crime and property suspected to be tainted in relation to serious criminal activity. The *Confiscation Amendment Act 2010* (Vic) amends the *Confiscation Act* and seeks to:

- expand the scope of the asset confiscation scheme by providing for tainted property substitution declarations in automatic forfeiture offences (so that, for example, a drug dealer is not able to protect his or her own house by carrying out criminal activity in rented premises);
- improve information gathering powers;
- improve procedural matters relating to the asset confiscation scheme; and
- clarify and improve the operation of the civil forfeiture powers.

There are two schemes. The conviction-based forfeiture scheme is directed at persons convicted of criminal offences, while the civil forfeiture scheme enables property suspected of being 'tainted' to be confiscated in the absence of a criminal conviction.

The schemes give rise to different human rights issues, so the Statement of Compatibility discusses each separately. This article notes how each right is engaged and briefly outlines the responses given in the Statement of Compatibility.

<u>Conviction-based forfeiture scheme</u>

- **Privacy:** *Charter* s 13(a)
    - Issue: Provisions require disclosure of information that may be regarded as private.
    - Response: Circumstances in which information must be provided, and the nature of required information, are closely circumscribed.
- **Property, protection of the home:** *Charter* ss 20 and 13
    - Issue: Restraining orders and forfeiture orders involve deprivation of property, which may include the home.
    - Response: Deprivation will occur pursuant to a clear statutory power, in defined circumstances, for a legitimate objective. Safeguards, such as court discretion, also exist.
- **Right not to incriminate oneself, fair hearing:** *Charter* ss 25(2)(k) and 24(1)
    - Issue: Provisions require information to be provided that may incriminate the person giving it and potentially prejudice a criminal trial.
    - Response: The Act states that such information cannot become incriminating testimony in criminal proceedings and provides further means of protecting accused persons.
- **Presumption of innocence:** *Charter* s 25(1)
    - Issue: Provisions involve the imposition of consequences on the accused without proof beyond reasonable doubt.
    - Response: The provisions form part of the penalty for the offence the accused has been convicted of, and therefore do not involve a separate allegation that must be established to the criminal standard of proof.
- **Double jeopardy:** *Charter* s 26
    - Issue: As automatic forfeiture does not occur at the time of sentencing but rather under the Act, it may amount to a further punishment for the same offence.
    - Response: Automatic forfeiture is part of the final punishment directly related to the offence.
- **Fair hearing:** *Charter* s 24

- Issue: Procedural provisions relating to the hearing of applications engage this right.
- Response: There are extensive requirements for persons with an interest to be notified and heard.

- **Families and children:** *Charter* s 17
  - Issue: Anti-avoidance provisions and forfeiture powers may engage these rights.
  - Response: The court must ensure that orders constitute the minimum necessary interference with family and children rights.

Civil forfeiture scheme

- **Criminal process rights:** *Charter* ss 24, 25, 26 and 27
  - Issue: These rights would apply if the civil forfeiture scheme were characterised as imposing a criminal charge or penalty. They may also be engaged where separate criminal charges are laid.
  - Response: The scheme is not a criminal one. Its purposes are remedial and preventative, it does not involve conviction or imprisonment, and an application is made in respect of property (not directed towards a particular person). Safeguards protect rights where there are separate criminal charges.
- **Fair hearing in civil proceedings:** *Charter* s 24
  - Issue: This right is engaged by applications for orders.
  - Response: Notice is given to persons with an interest in the property before the order is made or, if the court thinks it necessary, afterwards (so far as reasonably possible).
- **Property, protection of the home:** *Charter* ss 20, 13
  - Issue: Restraining orders and forfeiture orders involve the deprivation of property, which may be a person's home.
  - Response: Grounds for exclusion from an order protect innocent owners. Property may also be excluded where hardship would be reasonably likely to occur.
- **Families and children:** *Charter* s 17
  - Issue: Orders may affect a family home, and consequently the family unit and children.
  - Response: Grounds for exclusion allow the effect upon a family and children to be considered.

The Statement concludes that the *Confiscation Amendment Act* is compatible with the *Charter*.

The Statement gives detailed consideration to the rights implications of the Act and refers to relevant comparative jurisprudence. The Scrutiny of Acts and Regulations Committee has noted that it 'contains a thorough and balanced account of the very complex human rights issues raised by schemes to confiscate crime-tainted property.'

***David Foster**, Seasonal Clerk, Mallesons Stephen Jaques*

State Charter Case Notes

Director of Housing Considers Rights of Vulnerable Tenants

Director of Housing v TK [2010] VCAT Ref R2010/11921 (Unreported, 16 November 2010)

A recent VCAT decision has shown that public housing authorities are developing a more thoughtful and engaged model of decision making that gives proper consideration to the human rights of vulnerable tenants.

Facts

The Director of Housing sought to evict a tenant, TK, on the basis of three separate instances of drug trafficking:

1. On 15 July 2009, a police operative met and purchased heroin from TK at the stairwell just outside rented premises.
2. On 7 August 2009, TK met a covert police operative at the door of his flat and after receiving $180 he handed the operative a silver foil containing heroin.
3. On 11 August 2009, TK met the covert police operative on the 5th floor of the apartment building (where the rented premises were located) and purchased heroin.

On 19 August 2009, Victoria Police executed a search warrant at TK's rented premises and the tenant was arrested, but no scales or drug paraphernalia were found. On 9 February 2010 TK pleaded guilty to trafficking charges and was placed on a community based order for 18 months.

On 12 March 2010, the landlord served TK with a Notice to Vacate pursuant to s 250 of the *Residential Tenancies Act 1997* alleging that the tenant used, or permitted the rented premises to be used for an illegal purpose – namely, the trafficking of heroin.

On 22 March 2010 the landlord applied to the Victorian Civil and Administrative Tribunal for possession of premises.

Arguments for the tenant

The application for a possession order was opposed by the tenant on the following grounds:

1. the landlord's service of the Notice to Vacate and subsequent application to VCAT for a possession order breached the landlord's obligations under s 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* and could not provide the basis for an application for possession; and
2. the landlord could not prove the grounds for service of the Notice to Vacate.

In considering this application the Deputy President declared in an interlocutory hearing that the decision of Justice Bell in *Director of Housing v Sudi* [2010] VCAT 328 would apply.

Justification by the landlord

During the hearing, employees of the landlord gave evidence as to its consideration of circumstances relating to the tenant. NL (a team manager for the landlord) explained that she had only prepared a Notice to Vacate after conducting an interview with the tenant and considering his:

- right to home;
- long and successful tenancy;
- mental health issues; and
- language issues.

PA (a housing manager for the landlord responsible for managing the inner-city public housing program for around 12,500 properties) gave evidence that he had considered issues similar to those considered by NL. PA also noted he had considered the duties of the landlord to provide quiet enjoyment and good amenity across the estate and the concerns of various individuals who had raised the detrimental impact of drugs trafficking.

VCAT found that PA had referred to the police summary, community based order and medical reports whilst also taking into account TK's gambling problem and his admissions to drug trafficking. PA was also aware that if evicted, it may be difficult for TK to comply with the terms of the CBO.

Decision

Section 38 of the Charter

Section 38(1) of the Charter is as follows:

> Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

The tenant submitted that the two limbs present in s38 (1) of the Charter were separate and distinct obligations that VCAT must consider independently. The landlord was therefore:

1. prohibited from acting in a way that was incompatible with human rights; and
2. required to give proper consideration to TK's human rights in making the relevant decisions.

As to the specific Charter rights engaged by the actions of the landlord, it was alleged that section 13(a) was engaged, which prohibits unlawful or arbitrary interference with the home.

Despite expressing reservations, the Tribunal elected to consider both limbs of the section for the sake of completeness.

Limb 1: Did the landlord act in a way that was incompatible with a human right?

The Deputy President was satisfied by the evidence that there had been no interference with the s 13(a) right because the interference was not unlawful or arbitrary:

- lawfulness: the Notice to Vacate was a 'technically lawful application' that fulfilled the statutory criteria; and
- arbitrariness: the Deputy President adopted the comments of Justice Kaye in *WBM v Chief Commissioner of Police* [2010] VSC 219 where arbitrary was held to denote an interference with the right which is 'capricious and not based on any identifiable criterion or criteria.' In this matter it was held that there was no evidence before VCAT to suggest that the landlord acted capriciously: the landlord's approach evidenced method and order and adherence to the proper policies and protocols.

The Deputy President was also satisfied that the landlord had not acted incompatibly with TK's rights because, if there was interference, it was justifiable in terms of s 7(2) of the Charter.

Limb 2: Did the landlord fail to give consideration to a relevant human right?

The Deputy President made comprehensive reference to the decision in *Castles v Secretary to Department of Justice* [2010] VSC 310 in discussing VCAT's obligations under s 38, including that while giving proper consideration:

> requires a decision-maker to more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker turned his or her mind to the possible impact of the decision on the person's human rights and the implications thereof…and that the countervailing interests or obligations were identified.

In applying the decision of *Castles* to TK, VCAT found that the landlord 'did more than merely invoke the charter like a mantra' and had seriously turned its mind to the possible impact of the decision on TK's human rights and countervailing interests. VCAT noted:

- the landlord sought legal advice as to correct procedures to be followed;
- a request was made for TK to attend an interview;
- the landlord agreed to delay a decision to issue a Notice to Vacate;
- the landlord considered TK's medical situation; and
- the landlord's legal and policy area considered submissions from TK's legal advisers.

The Deputy President was satisfied that the landlord gave proper consideration to TK's rights and VCAT was therefore able to determine the application for possession order.

Possession Application: Were the premises used illegally?

After finding that the Notice to Vacate was not unlawful on Charter grounds, VCAT then considered whether the tenant had infringed s 250 of the RTA by his use of the premises. Section 250 states:

> A landlord may give a tenant notice to vacate rented premises if the tenant has used the rented premises or permitted their use for any purpose that is illegal at common law or under an Act"

The Deputy President noted that the provisions of s 250 apply only to the rented premises and not common areas. VCAT found that the rented premises were the scene of the commission of a crime but had not been used by the tenant for an illegal purpose. The Deputy President stated:

> … it is not sufficient that the premises are merely the scene of the commission of the crime. There must be a deliberate use of the premises for the illegal purpose. There must be some real connection between the use of the rented premises and the illegal activity alleged. It is not sufficient that there be a passing connection to the rented premises… This interpretation is consistent with the important right to a home as articulated in s 13(a) of the Charter.

VCAT held that in order to succeed in the application for possession, the landlord must establish that TK *used* the rented premises for an illegal purpose. It is not sufficient that the premises are merely the scene of the commission of the crime; there must be a deliberate use of the premises for an illegal purpose.

The application for possession was therefore dismissed.

Significance to the Application of the Charter

VCAT relied on the *Sudi* case to determine that it had jurisdiction, agreeing that VCAT should not and cannot entertain an application founded on illegality. The Court of Appeal has reserved its decision in the appeal brought by the landlord in *Sudi*, and this decision may significantly impact the ability of affected persons in cases to assert and protect their human rights in cases such as these.

However, of greater significance is the evidence presented before VCAT relating to the landlord's process in paying proper consideration to the tenant's human rights. Unlike previous reported VCAT cases, the Director of Housing led evidence of its processes and policies in ensuring that tenants' rights are considered in decision-making processes. This is significant, as it demonstrates that the Director is now engaging in constructive and thoughtful consideration of human rights in making decisions about vulnerable tenants. This is a welcome departure from the opaque technical compliance evidenced in other cases, and demonstrates that the Charter is having a real impact in government decision making culture.

The decision is at http://www.austlii.edu.au/au/cases/vic/VCAT/2010/1839.html.

Chris Povey *is a Senior Lawyer with the PILCH Homeless Persons' Legal Clinic and* ***Petrea Dickinson*** *was an HPLC intern*

What is the Relevance of the Charter to 'Open Justice' and the 'Public Interest'?

Inquest into the Death of Tyler Cassidy: Ruling on suppression application by the Chief Commissioner of Police pursuant to s 73(2)(b) of the Coroners Act 2008

During the coronial inquest into the fatal shooting of a teenager by the Victoria Police, the Victorian State Coroner considered an application by the Chief Commissioner of Police ('CCP') for an order prohibiting the publication of certain documents. The application was made pursuant to s 73(2)(b) of the *Coroners Act 2008*, which states that a coroner must order that a report about any documents, material or evidence provided to the coroner as part of an inquest not be published if the coroner reasonably believes that the publication would be contrary to 'the public interest'.

In deciding whether or not to grant the application, the Coroner considered how s 73(2)(b) ought to be approached in light of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), in particular, the impact of the *Charter* in weighing up what is in the 'public interest.'

Facts

On 11 December 2008, 15 year old Tyler Cassidy was fatally shot by police. A coronial inquest into the circumstances surrounding Tyler's death is currently underway.

The CCP applied for suppression of two categories of documents produced to the inquest:

- first, the contents of internal workings, debriefs and reviews of the processes of policing in Victoria; and
- second, the details of procedures, training, protocols and methods of operational police in Victoria including operational training and tactics of Victoria police.

The CCP applied for an order seeking non-publication of both categories of documents on the grounds that publication would be contrary to the public interest in 'police being effective in exercising their duties as police'. In relation to the first category of documents, the CCP submitted that the publication of such material might put in jeopardy the 'full and frank discourse' of future reviews and debriefs, as it would mean such communications would no longer be guaranteed to be confidential. In relation to the second category of documents, the CCP submitted that the publication of police tactical, operational and training documents would undermine the ability of the police to effectively engage with volatile members of the public who have been made aware of police tactical approaches through such publication.

A number of objections to the suppression order were raised by Tyler's family, Victoria Legal Aid, and the ABC. The Human Rights Law Resource Centre also provided submissions to the Coroner as to the appropriate way to assess the public interest in light of the *Charter*. The focus of these objections and submissions was largely on the manner in which the principle of open justice ought to be balanced against other matters of public interest, and how the rights enshrined in the *Charter* needed to be taken into account, in particular, the right to freedom of expression, and the procedural dimension of the right to life – being the right to a public and independent investigation of a death at the hands of a State authority.

Decision

In reaching a view as to what is contrary to the public interest in any particular application pursuant to s 73, the Coroner noted that there will be competing considerations which must be balanced to reach a decision in the particular context. Consideration must be given to the purpose, function and role of the coronial jurisdiction generally and in a particular case, as well as considerations of what is best in a free and democratic society and the relevant rights enshrined in the *Charter*, in particular the right to freedom of expression and the procedural obligations connected to the right to life.

The Coroner stated that the starting point for consideration of a suppression application is the fundamental principle of the need to have the courts open to public scrutiny, including scrutiny by the media. This principle of open justice has particular resonance in the coronial jurisdiction where certain deaths are mandated to be investigated by public hearing and where, in Victoria, the Parliament has made clear the importance of the publication of coronial findings. The Coroner accepted that the principle of open justice means that:

- an order prohibiting the publication of documents tendered into evidence or prohibiting the reporting of oral evidence is an incursion into the principle of open justice;
- any non-publication order should not be wider than necessary, should be proportionate to the harm sought to be avoided, and should not routinely be made;
- embarrassment or distress because of the publication of evidence given in open court is not sufficient to make an incursion into the principle of open justice; and
- the risk of ill-informed debate or inaccurate reporting is not a basis for ordering the non-publication of evidence.

The Coroner noted, however, that the principle of open justice is not absolute and is subject to exceptions in order to preserve the integrity of the court process and to ensure an injustice is not caused.

Charter Considerations

The Coroner agreed that when the Coroner's Court comes to interpreting the meaning of 'public interest' in this case, it should look to the rights enshrined in the *Charter* as building blocks. Her Honour accepted the submission of the Human Rights Law Resource Centre and other parties that, because Parliament enshrined a set of rights in the *Charter*, there is a presumption against interfering with those rights. In particular, the Coroner referred to the right to freedom of expression, which is enshrined in s 15 of the *Charter* and noted that freedom to obtain information is expressly linked to the freedom of expression. Her Honour also noted, however, that freedom of expression is not an unlimited right, and is restricted by s 15(3) of the *Charter*, as well as by s 73(2) of the Coroners Act. When using the power in s 73(2) of the Coroners Act to limit the right, however, that power must be exercised with the least infringement of the right possible, and in a manner that is proportionate to the harm sought to be avoided.

Her Honour also referred to the right to life contained in s 9 of the *Charter*, and in particular the requirement that in the event a life is lost as a result of any action or inaction by the State, what must follow is an independent and effective investigation into that loss of life. Her Honour agreed that a public hearing carried with it a requirement that the publication of the evidence produced at the public hearing should be generally available, but considered there are limits on that obligation which, again, must be exercised with the least infringement of the human right as possible, and in a manner that is proportionate to the harm sought to be avoided.

Findings

Notwithstanding her recognition of the importance of the principle of open justice and the impact of *Charter* rights on the public interest balancing exercise, her Honour largely found in favour of the CCP's application for non-publication.

Her Honour observed that it is plain that the principles of open and public hearings carry with them a right to the media to attend and report on the proceedings and to have access to all relevant information, and there is a public interest in the media having open access to all the relevant evidence provided to the inquest so that they may report as fully as possible on the proceedings in open court. However, she observed that this is subject to some limitations. Her Honour noted that the interest in publication needs to be balanced against the need to not put at risk either police members or the community by allowing public access to details of police training and tactics and operational equipment, thereby potentially giving forewarning to enable persons to take actions in retaliation or to avoid being apprehended.

The Coroner concluded that, for documents which detailed operational resources, tactics and procedures, safety principles, police equipment, training, and internal reviews in which individuals involved in the incident had been interviewed and identified, the public interest would be best served by ensuring those documents are not released into the public arena.

Her Honour ordered that only parts of the reports (category (a) above) were not to be published, but ordered that all of the documents relating to procedures and training etc (category (b) above), were not to be published.

Discussion

The Coroner's decision in this case made it clear that the principles of open justice and the rights enshrined in the *Charter* inform the consideration of what constitutes the 'public interest' in s 73(2) of the Coroners Act. In considering the public interest, Her Honour also took into account the fact that the documents in question had been made available to the Coroner and to the interested parties, and that Victoria Police members would be giving evidence during the inquest and could be drawn on the issues contained in those documents generally, in terms that would not risk the safety of other police members or the community.

The ruling has not been published.

Verity Quinn *is a Senior Associate with Allens Arthur Robinson and is representing the Human Rights Law Resource Centre as an intervener in the Cassidy inquest*

Does Freedom of Conscience Excuse Otherwise Criminal Behaviour?

R v AM [2010] ACTSC 149 (15 November 2010)

The ACT Supreme Court recently considered to what extent freedom of conscience under the ACT *Human Rights Act* 2004 ('the HR Act') influenced the interpretation of criminal offences. An applicant sought to argue that her consciousness beliefs should provide her a defence to otherwise criminal conduct, and if not, that the Court should issue a declaration of incompatibility on the basis the relevant offence was inconsistent with the HR Act.

Facts

AM is charged with contravening a protection order under s 90 of the ACT *Domestic Violence and Protection Orders Act 2008* ('the DVPO Act'). She had previously been committed to stand trial. That Act replaced the former *Domestic Violence and Protection Orders Act 2001* following the judgment in *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125*,* a decision which also raised issues under the ACT *Human Rights Act 2004.*

Earlier this year, AM's parents each obtained Interim Domestic Violence Orders prohibiting AM from attending their residence until 24 March 2010. AM was served with both orders on 15 February 2010. On 16 February 2010 she attended their home and was arrested.

Prior to her trial, in these proceedings, AM sought two orders in relation to her criminal charges. Firstly, that the Interim Domestic Violence and Protection Orders taken out by her parents be declared invalid, and, secondly, that she be allowed to defend herself according to the defence of lawful authority under

ACT Criminal Code, using s 14 of the HR Act in her trial. Alternatively, she sought a declaration that parts of the *Criminal Code 2002* were inconsistent with the HR Act.

Decision

Striking out of Original Orders

Refshauge J quickly dismissed the first application on the basis that it was inappropriate to deal with such an order because the correct parties, being AM's parents, were not before the Court. His Honour also found that because the order was one of an inferior court, the challenge should have been on the basis of a jurisdictional error and not merely that the order should not have been issued.

What is Freedom of Conscience?

His Honour dealt with the interaction between the HR Act and DVPO Act in some detail. Section 14 of the HR Act provides that everyone has the right to freedom of thought, conscience and religion. This includes freedom to have or adopt a religion or belief, and the freedom to demonstrate his or her religion or belief in public or private. Subsection 14 (2) states,

> No-one may be coerced in a way that would limit his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.'

His Honour noted that in several Australian cases freedom of conscience in relation to military service had been found to include conscientious objection, including Barwick CJ of the High Court in *R v District Court of the Northern District of the State of Queensland; Ex parte Thompson* (1968) 118 CLR 488:

> A conscientious belief because it is a matter of conscience with its compulsive quality is durable though not unchangeable...The inclusion of non-combatant service in the exemption indicates the wide sweep which the conscientious objection must have. Such a belief must be carefully distinguished from mere intellectual persuasion which by its very nature maybe transient.

In a human rights context, Refshauge J noted the potential difference between religious beliefs and conscience, citing the comments of Linden JA in the Canadian case of *Roach v Canada (Minister for State of Multiculturalism and Citizenship)* (1994) 113 DLR (4^{th}) 67. Burton J of the UK Employment Appeals Tribunal (*Grainger PLC v Nicholson* [2009] UKEAT 0219/09/ZT) recently reviewed the relevant UK authorities, and suggested that in order to be recognised,

> (i) The belief must be genuinely held.
>
> (ii) It must be a belief and not, as in McClintock, an opinion or viewpoint based on the present state of information available.
>
> (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.
>
> (iv) It must attain a certain level of cogency, seriousness, cohesion and importance.
>
> (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with fundamental rights of others.

In reviewing the authorities both locally and in other human rights jurisdictions, Refshauge J concluded.

> There is a strong sense that freedom of conscience, unlike freedom of religion, is limited to the beliefs and mental processes of an individual and that it does not necessarily protect any action motivated by the conscience of the person.

Application to AM

His Honour had difficulty determining from her submissions what AM's conscientious beliefs were, short of pacifism. Whilst noting that the authorities recognised such a belief, it was also inconsistent with her actions in breaching a protection order. At its highest, His Honour characterised her beliefs 'a conscientious obligation to confront persons whom she believes have inflicted harm on her and to do so in a non-violent way.' Even then, His Honour found such a belief would not be consistent with the definitions of conscience, as it seemed to lack the 'serious, cohesion and importance that is necessary'. Such a belief also seemed to conflict with her parents rights to privacy, security of person and perhaps freedom of association under the HR Act.

His Honour nonetheless also considered how freedom of conscience should interact with the criminal law using s 30 of the HR Act. Section 30 of the HR Act requires legislation to be interpreted in a way that is compatible with human rights, so far as that interpretation is consistent with its purpose. This decision predated that of *R v Islam* [2010] ACTSC 147, which appeared to lay out a new test for the

application of s 30 to ACT laws. His Honour therefore applied the decision of the ACT Court of Appeal in *R v Fearnside* (2009) 3 ACTLR 25. That test essentially requires that in applying the HR Act to ACT legislation, the court should consider whether the law infringes a human right, and if so, if that infringement is justified under s28 of the HR Act.

His Honour applied this test to s 90(2) of the DVPO Act 2008. He found that even if AM's beliefs were to constitute a conscientious belief, and therefore engage the protection of s 14 of the HR Act, the offence of breaching a protection order under s.90 of the DVPO Act would be justified. His Honour stated,

> It is clear to me that public safety and order are clearly purposes of Domestic Violence Orders and, as such, they are justified as restraints on the actions of others. Indeed, there may be some obligation for the Territory to make such protections.

Even if AM had successfully argued that s 90 was an unjustified limitation on s 14 of the HR Act, a declaration of incompatibility may have been the only result and that would not have helped her. Such declarations do not result in a change to the law, but rather oblige parliament to reconsider the law in question. The Court applies in the law in its current, incompatible state.

Lawful Authority

AM also sought to rely on s 43 of the ACT Criminal Code, which provides that a person is not criminally responsible for an offence if the conduct required for the offence is justified or excused under a law. She sought to argue that a law in this context should include the HR Act. In finding that AM did not have the requisite conscientious belief under s 14 of the HR Act, His Honour refused this order. He did note however that she might argue in her trial that her views were relevant to questions of the requisite fault elements of mens rea of the offence.

Comments

Whilst AM failed to prove that her beliefs met the requisite test of a conscientious belief under the HR Act, His Honours decision provides some guidance as to how the courts in the ACT will interpret freedom of conscience. The decision also seems to leave open the possibility that a person with a conscientious belief under the HR Act might be able to argue the defence of lawful authority under the Criminal Code.

The decision is at http://www.courts.act.gov.au/supreme/judgments/am.htm.

Sean Costello *is Human Rights & Discrimination Legal Policy Adviser with the ACT Human Rights Commission*

International & Comparative Case Notes

Right to Liberty and Review of Detention

Faulkner, R (on the application of) v Secretary of State for Justice the Parole Board [2010] EWCA Civ 1434 (14 December 2010)

The recent decision in *Faulkner v Secretary of State for Justice* provides guidance concerning the parole board system. In *Faulkner*, the Court concluded that where a prisoner's parole is unjustifiably delayed, they may be entitled to compensation under art 5(4) of the *European Convention on Human Rights*. The decision may have ramifications for Victorian prisoners whose parole is 'unjustifiably delayed'.

Facts

The key facts of *Faulkner* are as follows:

- Faulkner was sentenced to custody for life for the offence of causing grievous bodily harm with intent. The minimum period was set at 2 years and 8.5 months. Faulkner became eligible for parole on 18 April 2004.
- On 26 May 2005, the Parole Board did not direct his release, instead recommending that he be transferred to open conditions. This recommendation was rejected. A second recommendation to the same effect was made on 31 January 2007, but was again rejected. Faulkner then became entitled to a hearing before the Board, the result of which would be known by January 2008.

- In order to achieve the hearing by January 2008, the *'Lifer Review and Recall Section'* ('LRRS') of the prison had to send the Board 'the note' and a skeleton dossier, which would formally refer the case. The oral hearing would not take place until about six months from the date of the receipt of 'the note'.
- The skeleton dossier and 'the note' were sent in September 2007, four months later than they should have. In turn, Faulkner's case was listed for oral hearing in May 2008, five months late. The full dossier was then not received until May 2008, eight months late. All in all, the oral hearing did not take place until January 2009.
- On 23 January 2009, the Board directed Faulkner's release from custody.

Decision at First Instance

Faulkner commenced proceedings against the Board seeking damages for an infringement of his rights under art 5(4) of the ECHR. Faulkner's primary argument was that his hearing, and thus his release, was unduly or unjustifiably delayed by a year. In other words, but for the delay on the part of the Board, his hearing would have taken place in January 2008.

Justice Blair dismissed Faulkner's claim, determining that a breach of art 5(4) would only occur if the detention had become 'arbitrary'. Blair J held that it would only become 'arbitrary' if the system broke down entirely and he deemed that this was not the case here. Blair J held that even if there had been a breach of art 5(4), it was 'not possible to draw the inference from the January 2009 decision that the claimant would have been released earlier' and therefore Faulkner was not entitled to damages.

Faulkner appealed to the England & Wales Court of Appeal.

Decision

The COA allowed the appeal, which concerned two key issues:

- whether there had been a breach of art 5(4) as a result of the delays imposed on Faulkner; and
- whether Faulkner would have been released in January 2008, had his hearing gone ahead at the proper time.

The Secretary of State for Justice, argued that the review of the 'lawfulness of Faulkner's detention was regrettably delayed by reason of events that were unfortunate but in essence were specific to the facts of his individual case and did not involve anything approaching a breakdown of the system.' The Secretary also argued that Faulkner was in a stronger position in January 2009 to be released than he would have been had the hearing taken place in 2008.

By contrast, Mr Faulkner, argued that when the Board report is read it is plain that the position would have been precisely the same in January 2008 had a review taken place at that time. Faulkner also argued that Blair J was wrong in asking whether he would have been released earlier, rather than whether he lost the chance of earlier release.

Having considered the relevant authorities, Lord Justice Hooper agreed that damages may be payable for the loss of a real chance of release. On the issue of whether Faulkner would have been released in January 2008, a number of reports were taken into account. The reports all supported the release of Faulkner in January 2008. Lord Justice Hooper concluded that the 'unjustified delays in the case, for which the Secretary of State for Justice is responsible, prevented the appellant from having the lawfulness of his continued detention decided in accordance with Article 5(4)'.

Faulkner was therefore awarded damages to reflect the fact that, in breach of art 5(4), he 'spent some 10 months in prison when he ought not to have done'.

Relevance to the Victorian *Charter*

The decision in *Faulkner* turned very much on the specific facts of that case. Nonetheless, the decision may have implications for Parole Board hearings in Victorian given the close parallels between provisions of the ECHR and the Victorian *Charter*.

Article 5(4) of the ECHR is similar to s 21 of the Victorian *Charter* (the human right to liberty and security), which states that '(1) Every person has the right to liberty and security...(2) A person must not

be subjected to arbitrary arrest or detention...(3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law'.

Hence, it may possible for Victorian prisoners to invoke s 21 of the Victorian *Charter* where that prisoner's detention becomes 'unjustifiably delayed' and remains in breach until his or her effective release from custody. Determining what will amount to 'arbitrary detention' under s 21, and what constitutes an 'unjustifiable delay', will of course turn of the facts of each particular case. But the decision in *Faulkner* does send a strong signal that unexplained delays by parole boards that result in prisoners being delayed for periods of time they should not have been, may constitute a breach of human rights. It is worth noting, however, that pursuant to s 39(3) of the *Charter*, damages are not payable for a breach of human rights in Victoria.

The decision is at www.bailii.org/ew/cases/EWCA/Civ/2010/1434.html.

Daniel Creasey *is Senior Associate & Pro Bono Coordinator and* ***Aleco Lazaridis*** *is a Summer Clerk with DLA Phillips Foz*

Human Rights Interpretation and Reverse Onus Provisions: Is a Human Rights-Compatible Interpretation 'Possible'?"

Webster v R [2010] EWCA Crim 2819 (01 December 2010)

The recent decision of the England and Wales Court of Appeal in *Webster v R* provides guidance concerning:

- the interpretation of the right to a 'Fair Hearing' under s 24 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic);
- the interpretation of the right to be presumed innocent until proven guilty under s 25(1) of the *Charter*;
- the operation of the requirement that all statutory provisions be interpreted in a manner compatible with human rights under s 32(1) of the *Charter*; and
- when a right can be justifiably limited under s 7 of the *Charter*.

Facts

The applicant, Matthew Webster, was charged with corrupting a public official. Webster sold educational equipment to local schools. Webster offered Cambridge Country Council's educational procurement officer 'Christmas gifts' for helping him throughout the year. Gifts included a DVD player and £100.

Pursuant to s 2 of the *Prevention of Corruption Act 1916* ('*PC Act*') gifts are deemed to be given corruptly, within the meaning of the *Public Bodies Corrupt Practices Act 1989*, unless the contrary is proven.

Webster appealed against the conviction. It was held that the jury would not have found him guilty had the presumption of guilt not arisen on the facts. The appeal proceeded on the ground that s 2 of the *PC Act* was contrary to the applicant's right to a fair trial and that the presumption of innocence had not been applied as required by art 6 of the *European Convention of Human Rights*.

Decision

The Court adopted the following methodology in determining whether the statutory provision was incompatible with the Convention:

1. Does the statute interfere with rights enunciated in the Convention?
2. If so, does the statute pursue a legitimate objective?
3. If so, are the means by which this purpose is pursued necessary, reasonable and proportionate?
4. Where interference with the right is unnecessary, unreasonable or disproportionate, can the provision be read down so that the right is not infringed?

<u>Inconsistency with the European Convention</u>

The Court held that the presumption of innocence is not an absolute right; rather, it is something that is integral to the right to a fair trial. The right is infringed where the defendant is found guilty unless he or she can disprove the prosecution's accusation of guilt.

By presuming guilt in all situations where a gift is made to a public official, the Court held that s 2 of the *PC Act* clearly interfered with the applicant's right to a fair trial and to the presumption of innocence.

Was infringement of the right to a fair trial justified?

The Court held that the Convention does not prohibit factual presumptions, but requires States to place reasonable limitations on them. In determining whether a presumption was reasonable, the Court considered whether the defendant had an opportunity to rebut the presumption, whether the Court retained the power to assess the evidence, the importance of the issues at stake and whether it was 'extremely difficult, if not impossible' for the prosecution to prove its case in the absence of the presumption.

In ascertaining the importance of the issue at stake, the Court considered the legislative history of the provision. The reversal of the presumption of innocence was introduced in order to combat the problem of the corruption of public officials during World War II and the limited State resources available to detect it. The Court found that this justification was no longer necessary and therefore could not justify infringement of the right to a fair trial.

Citing the US Supreme Court decision in *Leary v United States* [1969] 23 L Ed 2d 57 at 82, the Court noted that a presumption of fact will only be justified where it can be said with 'substantial assurance' that it reasonably flows from the fact upon which it depends. That *any* gift given to a person in their role as a public official was necessarily *corrupt* did not have this certainty.

Reading down the infringing provision

While the statutory language unambiguously intended to reverse the presumption of innocence, the Court nonetheless held that the provision could be read down so as not to infringe Webster's rights. The Court emphasised that interpretation in line with the Convention was the primary remedial element of the *Human Rights Act 1998* (UK).

Relevance to the Victorian Charter

This decision provides important guidance when interpreting the Victorian *Charter*.

The decision is useful in outlining the situations in which the right to the presumption of innocence can be justifiably infringed under s 7. The Court emphasised that a presumption of facts can only be relied upon where there is 'substantial assurance' that the fact exists on the evidence provided. The decision also indicates which factors can be weighed in order to determine justification. The inference from these categories is that the State requires strong justification to infringe the right to the presumption of innocence.

In *R v Momcilovic* [2010] VCSA 50, the Victorian Court of Appeal unanimously held that clear, cogent and persuasive evidence must be used to demonstrate any justification to infringe human rights. The Court's decision in *Webster* indicates that evidence such as legislative history can be used.

Webster differs from the Victorian position in that emphasis is placed upon the primacy of interpreting statutes in line with the Convention, even where interpretation contradicts the express language of the provision. By contrast, as held in *Momcilovic*, the Victorian *Charter* does not create a 'special' overarching rule of statutory interpretation.

The decision is at www.bailii.org/ew/cases/EWCA/Crim/2010/2819.html.

***Jessica Simson**, Seasonal Clerk, Mallesons Stephen Jaques*

Enforcing the Right to Vote: UK Government Given Deadline to Reinstate Prisoners' Right to Vote

Greens and MT v United Kingdom [2010] ECHR 1826 (23 November 2010)

The European Court of Human Rights recently considered the United Kingdom's continued failure to amend legislation imposing a blanket ban on voting in national and European elections for convicted

prisoners in detention in the UK. The Court had considered the same issue five years earlier in *Hirst v United Kingdom (No 2)*, but the UK Government had not taken steps to implement the judgment in that case. In *Greens and MT v United Kingdom*, the Court applied its 'pilot judgment' procedure and gave the UK Government six months from the date the decision becomes final to amend its legislation and remove the blanket ban.

Facts

Prisoners have been prohibited from voting in elections in the UK since 1870. This blanket ban is currently set out in s 3 of the *Representation of the People Act 1983* (UK) (the *RP Act*), which provides that '[a] convicted person during the time that he is detained in a penal institution in pursuance of his sentence … is legally incapable of voting at any parliamentary or local election.' Section 8 of the *European Parliamentary Elections Act 2002* (UK) extends this prohibition to elections for the European Parliament.

Article 3 of Protocol No 1 to the *European Convention on Human Rights* states that '[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.'

In 2005, in *Hirst*, the European Court held that the UK's blanket ban on prisoners' voting rights violated Article 3 of Protocol No 1 to the Convention. In 2007, in *Smith v Scott*, the Scottish Registration Appeal Court considered *Hirst* and concluded that s 3 of the RP Act could not be read down in accordance with section 3(1) of the *Human Rights Act 1998* (UK) in a way that would make it compatible with the Convention. The Scottish Registration Appeal Court therefore made a declaration of incompatibility under s 4 of the HR Act in relation to s 3 of the RP Act.

In November 2010, despite formal urging from the Council of Europe's Committee of Ministers in the lead-up to the 2009 European Parliament elections and the 2010 UK general election, the UK Government had not removed the blanket ban on prisoner's voting rights.

The applicants in *Greens and MT* had been detained in prison at the time of the 2009 European election and the 2010 UK election, and had been refused enrolment on the electoral register in respect of both elections. The applicants applied to the European Court, arguing that the UK had violated art 3.

Decision

Unsurprisingly, given that the same rights had been considered in relation to the same legislation in *Hirst* five years earlier, the Court concluded that s 3 of the RP Act violated art 3 of Protocol 1 to the Convention.

The more interesting aspect of the European Court's decision in *Greens and MT* was its treatment of the UK Government's continued failure to amend the RP Act. Under art 46 of the Convention, all Council of Europe member states are obliged to implement appropriate measures to protect rights which the Court finds to have been violated. In order to facilitate this process, the Court may adopt a 'pilot judgment procedure', allowing it to:

- identify the existence of structural problems underlying the violations at issue in a case;
- indicate specific measures or actions to be taken by the responsible state to remedy those violations; and
- resolve large numbers of individual cases arising from the same structural problems at a domestic level.

At the time that *Greens and MT* was decided, there were approximately 2500 applications before the European Court involving complaints about s 3 of the RP Act. At any one time, there are approximately 70,000 serving prisoners in the UK — all of whom could potentially apply to the Court while the blanket ban on prisoner's voting rights remains in force. Given the potential volume of future applications, the Court noted that the UK Government's continued failure to amend the RP Act was not just a contravention of its obligations under the Convention — it also represented a 'threat to the future effectiveness of the Convention machinery'.

The Court did not consider it appropriate to recommend specific measures for the UK Government to take in relation to the violation of art 3, instead noting that:

> The Court's role in this area is a subsidiary one: the national authorities are, in principle, better placed than an international court to evaluate local needs and conditions and, as a result, in matters of general policy, on which opinions within a democratic society may reasonably differ, the role of the domestic policy-maker should be given special weight.

However, while the Court did not consider it appropriate to specify the content of future legislation, it did set out a timetable for compliance — ordering the UK Government to introduce legislative proposals to amend s 3 of the RP Act within six months of the date on which the Court's decision in *Greens and MT* became final. In light of this deadline, the Court concluded that there was no justification for continuing to examine every application asserting that s 3 of the RP Act violated art 3 of Protocol 1 to the Convention. Noting that the only effective remedy in any of those cases was the amendment of s 3 of the RP Act, the ECHR decided to:

- discontinue its examination of pending applications raising arguments similar to those in *Hirst*; and
- suspend the treatment of all applications not yet registered and all future applications raising such arguments.

Relevance to the Victorian *Charter*

Section 18 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) protects the right to vote and the right to participate in the conduct of public affairs. However, following the High Court's decision in *Roach v Electoral Commissioner* (2007) 233 CLR 162 that a blanket ban on prisoner's voting rights is unconstitutional in Australia, it seems unlikely that any Australian jurisdiction would attempt to introduce a provision equivalent to s 3 of the RP Act.

The Charter contains no real equivalent to the European Court's pilot judgment procedure. Sections 33, 36 and 37 of the Charter allow the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and to require the relevant Minister to respond to that declaration. However, the Minister is only required to prepare a written response to the declaration, and is not required to take any other action to remedy the inconsistency. Further, a declaration of inconsistent interpretation does not affect the validity, operation or enforcement of the statutory provision in question.

It is not yet clear what approach the UK Government will take to amending s 3 of the RP Act. Future decisions considering the adequacy of the UK Government's amendments — both from the European Court and the UK courts (under the HR Act) — are likely to be relevant in Australia, particularly given that the High Court in *Roach* left open the possibility of restrictions on prisoner's voting rights which did not amount to a blanket prohibition.

The decision is at www.bailii.org/eu/cases/ECHR/2010/1826.html.

***Mark Hosking** is a Lawyer with Allens Arthur Robinson.*

Ill-Treatment in Custody: Human Rights Committee Considers Prisoners' Rights in Detention

McCallum v South Africa, UN Doc CCPR/C/100/D/1818/2008 (2 November 2010)

The Human Rights Committee has found that South Africa violated a prisoner's rights not to be tortured or treated in a cruel, inhuman or degrading manner and to be treated with humanity and respected when deprived of liberty. South Africa was also found to have violated its obligation to investigate and remedy the violation of those rights.

Facts

Bradley McCallum, the author, submitted a communication to the UN Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights. The author alleged that violent and degrading treatment inflicted upon him and other prisoners by prison warders, and the subsequent refusal to provide him with medical treatment and HIV testing, amounted to a breach of a number of rights under the ICCPR, including the right not to be subjected to torture or inhuman treatment (art 7) and the right to be treated with humanity and respect when deprived of liberty (art 10).

The author is a prisoner at St Albans Maximum Correctional Facility in Port Elizabeth, in the Province of Eastern Cape. On 15 July 2005, the author and other inmates in his cell were informed that a warder had been stabbed to death by another prisoner. On 17 July 2005, they were ordered to leave their cell, strip naked and lie on the floor with their noses in the anus of the inmate in front of them, forming a human chain. The prisoners were taunted, sprayed with water and beaten with batons, shock boards, broomsticks, pool cues and pickaxe handles. At some point one warder inserted a baton into the author's anus. Fear and shock caused the prisoners to defecate and urinate on themselves and others linked to them in the human chain. After the 17 July incident, the author was deprived of contact with his family and deprived of exercise for a month. He repeatedly requested access to medical treatment. He received some form of medical attention in September 2005, but the prison doctor did not continue to treat him because the doctor believed that he was not responsible for treatment of 'internal' injuries. During the incident, the author had been forced down in a way that dislocated his jaw and damaged his teeth. The author's teeth were eventually removed, which detrimentally affected his diet and his health and his request for a teeth prosthesis was ignored. Due to the very high incidence of HIV in South African jails, the author requested that he be tested for HIV because he feared that he may have contracted the virus through his contact with other inmates' bodily fluids. The author's pleas did not result in his being tested for HIV.

The author complained about the incident to prison authorities, to the Office of the Inspecting Judge and to the South African Police Service. No investigation of the matter by these authorities followed. The author brought proceedings in the Magistrate Court, but the State denied the author's allegations. The author withdrew this action and brought proceedings in the High Court, but the State relied on legislation that required proceedings to be brought against the State and its organs within six months of the alleged cause of action. The author argued that this provision would defeat his action in the High Court.

Decision

The Committee considered that the author's claim was admissible, because no other international investigation into the matter was being conducted and because the author had exhausted all available domestic remedies. Notably, South Africa made no response to the Committee's continued requests for input on the admissibility and merits of the matter.

The Human Rights Committee found that South Africa violated the author's rights under arts 7, 10 and 2(3) of the ICCPR.

South Africa breached art 7 of the ICCPR, which provides that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment' by:

- failing to investigate the author's claims of ill-treatment;
- holding the author incommunicado for one month after the 17 July incident; and
- not testing the author for HIV, which he feared that he had contracted on 17 July.

The Committee found that South Africa's failure to investigate the author's complaints constituted a breach of art 2(3) of the ICCPR, which requires state parties to investigate alleged rights violations, and remedy violations if they are found to have occurred.

The Committee also found that South Africa breached art 10 of the ICCPR, which provides that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person', due to the delay in prison authorities' response to the author's request for medical treatment. Consistent with its existing jurisprudence, the Committee found that persons deprived of their liberty must be treated in accordance with the United Nations Standard Minimum Rules for the Treatment of Prisoners.

South Africa is obliged, under art 2(3)(a) of the ICCPR, to investigate claims such as those made in this case, prosecute those responsible, and provide a remedy to the victim. The Committee requested that South Africa provide, within 180 days, information about the measures taken to give effect to the Committee's views.

Relevance to the Victorian *Charter*

The Victorian *Charter* protects and promotes the right not to be subjected to torture or to treatment or punishment that is cruel, inhuman or degrading (s 10), and the right of persons deprived of their liberty

to be treated with humanity and with respect for the inherent dignity of the human person (s 22(1)). The language of these sections of the *Charter* is almost identical to that of arts 7 and 10 of the ICCPR. The Committee's effective incorporation of the United Nations Standard Minimum Rules for the Treatment of Prisoners into Article 10 of the ICCPR is consistent with the interpretation of s 22(1) of the *Charter* with reference to the Victorian rules that are based on the UN Standard Minimum Rules in *Castles v Secretary to the Department of Justice* [2010] VSC 310, [107]. South Africa's violations of the author's rights under the ICCPR provide extreme examples of violations of rights that the *Charter* seeks to protect.

The decision is at
http://66.36.242.93/docs.php/area/jurisprudence/treaty/ccpr/opt/0/node/4/filename/southafrica_iccpr_t5_1818_2008

Natasha McNamara *is a Lawyer at Allens Arthur Robinson*

Racial Vilification and the Balancing of Freedom of Expression with Freedom from Discrimination

Adan v Denmark, UN Doc CERD/C/77/D/43/2008 (21 September 2010)

The Petitioner, Saada Adan, filed a complaint against Denmark with the UN Committee on the Elimination of Racial Discrimination (CERD) alleging violations of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in relation to comments made in political discussion on a radio programme by a politician, Søren Espersen.

CERD considered Denmark in breach of its obligations under the ICERD, specifically arts 2(1)(d), 4 and 6, on the basis of failure to effectively prohibit acts of discrimination and dissemination of discriminatory ideas and a failure to provide effective protections and remedies to those aggrieved.

Facts

Background

In January 2003, a Danish daily newspaper published a letter to the editor written by Danish Peoples' Party (DPP) member and sitting Member of Parliament, Pia Kjærsgaard, on the controversial topic of female genital mutilation. Ms Kjærsgaard stated:

> why should the Danish-Somali Association have any influence on legislation concerning a crime mainly committed by Somalis? And is it the intention that the Somalis are to assess whether the prohibition against female mutilation violates their rights or infringes their culture? To me, this corresponds to asking the association of paedophiles whether they have any objections to a prohibition against child sex or asking rapists whether they have any objections to an increase in the sentence for rape

On 23 August 2006, Mr Espersen, a fellow sitting DPP Member of Parliament, appeared on a Danish radio programme. In the context of the discussion, he agreed with Ms Kjærsgaard's January 2003 comments, stating:

> Why should we then ask the Somalis about what they think about it when the majority of Somalis do it as something quite natural? I totally agree with her. Most precisely said.

Ms Adan, a Somali national living in Denmark, found Mr Espersen's remarks to be offensive on two fronts, submitting that:

1. there is no evidence that Somali parents in Denmark carry out the procedure against their daughters; and
2. his endorsement of Ms Kjærsgaard's comments validated and reinforced her offensive original statement.

Procedural History

In accordance with s 266(b) of the Danish *Criminal Code*, which prohibits public statements that threaten, insult or degrade others by reason of their 'race, colour, national or ethnic origin, religion or sexual orientation', Ms Adan filed a complaint with the Copenhagen Metropolitan Police.

On 14 May 2007, the complaint was dismissed with the Regional Prosecutor's approval on the basis that Mr Espersen's comments occurred in the course of political discussion and mentioned a 'factual circumstance – the tradition for female genital mutilation amongst some Somali people'.

With the help of counsel (the Documentation and Advisory Centre on Racial Discrimination (DRC)), Ms Adan appealed the dismissal to the Director of Public Persecutions. Ms Adan argued that the 14 May 2007 decision made no reference to Somalis as victims of the discriminatory statements, but rather only mentioned 'Muslims' (a group of whom had submitted their own complaint to the Copenhagen Metropolitan Police), and sought to have the complaint returned to the Regional Prosecutor for further consideration.

On 16 January 2007 the appeal was dismissed, the Director of Public Persecutions stating that neither Ms Adan nor her counsel had standing to appeal as she was not considered to have an individual legal interest in the criminal case against Mr Espersen. On this basis of disentitlement to a remedy, Ms Adan lodged a communication with CERD on 15 July 2008.

Decision

Articles 2(1)(d), 4 and 6 of ICERD essentially require States parties to take positive action to condemn, prohibit and eradicate all forms of racial discrimination and provide effective protection and remedies to all – whether committed by individuals or collectives on either another race or ethnicity, or group of people belonging to another race or ethnicity.

Section 266(b) of the *Criminal Code* criminalised Mr Espersen's statements, however the State's failure to properly investigate Ms Adan's complaint made the provision quite hollow practically, even in light of the additional guidelines on investigation of s 266(b) complaints issued by the Director of Public Persecutions post-*Gelle v Denmark* (a decision which concerned the publication of Ms Kjærsgaard's original statements, involved very similar factual circumstances and unfolded procedurally in a very similar manner).

Denmark submitted that the Prosecutor's assessment of Ms Adan's complaint was 'thorough and adequate', concluding that the comments 'did not exceed the particularly extensive freedom of expression enjoyed by politicians on controversial social issues'. While CERD agreed that the practice of the tradition in question is indeed a controversial issue,

> the fact that statements were made in the context of political debate does not absolve the State party from its obligation to investigate whether or not such statements amounted to racial discrimination…exercise of the right of freedom of expression carries special duties and responsibilities, in particular the obligation not to disseminate racist ideas.

CERD considered the State's action fell short of that required under the Convention, as 'it does not suffice…merely to declare acts of racial discrimination punishable on paper…[these laws] must also be effectively implemented by the competent national tribunals and other State institutions.' CERD considered that the failure to properly investigate Ms Adan's complaint violated arts 2(1)(d), 4 and 6 of the ICERD.

CERD recommended that Denmark:

- provide Ms Adan with adequate compensation for the moral injury resultant from the State party's breaches of ICERD;
- ensure that existing legislation be effectively applied; and
- widely disseminate the Committee's opinion.

Relevance to the Victorian *Charter*

Under s 15 of the *Charter*, freedom of expression is guaranteed, but only insofar as it does not infringe on the rights of others, including the right to equality and non-discrimination before the law (s 8) and the right of reputation (s 14). Further, the right to freedom of expression is qualified by s 15(3), which provides that 'special duties and responsibilities are attached to the right of freedom of expression', which may be subject to lawful restrictions to 'respect the rights and reputation of others'.

Currently, violations of the *Charter* are not freestanding actions; absent a concurrent offence for which an action may be brought to the court, judicial remedy for such a violation is not available. This is contrasted to the situation in Denmark, where publication of the discriminatory material is of itself an

offence. Furthermore, rights under the *Charter* are only enforceable against a public authority. While the conduct of Members of Parliament would generally be caught by this definition, the conduct of private entities, for example the head of an organisation advocating racial violence, would likely not be.

This case illustrates the potential vulnerability of rights under a *Charter* model such as Victoria's. Sufficient investigation and enforcement mechanisms must exist to ensure the delicate balance between competing rights.

Liz Austin *is a volunteer with the Human Rights Law Resource Centre*

HRLRC Policy Work

NGOs Call on Australian Government to Make 'Voluntary Commitments' Ahead of UPR

A large coalition of Australian non-government organisations has written a letter to the Australian Government encouraging it to consider making a number of 'voluntary commitments' ahead of the Universal Periodic Review of Australia in January 2011.

As part of the UPR process, states are encouraged to make 'voluntary commitments', which are concrete pledges to take certain action to promote human rights prior to appearing before the UPR. The letter identifies that making voluntary commitments is an opportunity for Australia to demonstrate international human rights leadership through tangible, concrete means.

The NGO coalition has proposed 19 specific, achievable pledges in the following areas:

- Australia's general legal framework;
- equality and non-discrimination laws;
- Aboriginal and Torres Strait Islander rights;
- women's rights;
- immigration and asylum seeker laws;
- people with disability;
- housing and homelessness; and
- Australia's international aid and development assistance.

Ben Schokman *is Director of International Human Rights Advocacy with the Human Rights Law Resource Centre*

A Human Rights-Based Approach to Mental Health: Submission on Mental Health Bill

In November 2010, the Victorian Department of Health released an Exposure Draft of the Mental Health Bill 2010 for public comment. The current *Mental Health Act 1986* (Vic) is more than 20 years old and reflects an outdated and inappropriate approach to the care and treatment of people with mental illness.

The HRLRC has made a submission on the Bill's compliance with the *Charter of Human Rights and Responsibilities 2006* (Vic) and Australia's international human rights obligations, particularly in relation to the United Nations *Convention on the Rights of Persons with Disabilities*.

While welcoming aspects of the Bill, the HRLRC considers that there are a number of significant concerns regarding the Bill's compatibility with human rights obligations. The HRLRC's submission focuses on the following aspects of the Bill:

- the objectives and principles;
- administration of the legislation, including by the Mental Health Commissioner, Mental Health Tribunal and Review Officers;
- compulsory patients;
- treatment orders, restrictive interventions and regulated treatments;
- restraint and seclusion; and
- oversight and accountability mechanisms.

The submission contains 33 recommendations to improve the Bill's compliance with human rights standards and is available at http://www.hrlrc.org.au/content/topics/disability/mental-health-submission-on-mental-health-bill-exposure-draft-vic-dec-2010/.

Ben Schokman *is Director of International Human Rights Advocacy with the Human Rights Law Resource Centre*

UN Committee against Torture Gives Australia a 'Please Explain' on Human Rights

In December 2010, the UN Committee against Torture issued a 'List of Issues Prior to Reporting' for Australia. The purpose of this List is to outline those issues which the Committee would like Australia to address and respond to in its next periodic report to the Committee, due in 2012.

The issues on which the Committee specifically seeks information and responses from Australia include:

- information regarding the legal entrenchment of human rights in Australia, including through a Human Rights Act and constitutional recognition of Indigenous people;
- the human rights compatibility and impacts of counter-terrorism legislation, including in relation to the powers of ASIO and the AFP;
- mechanisms for monitoring and oversight of places of detention, including prisons;
- the right to health and access to adequate health care for detainees, including prisoners and persons detained in immigration facilities;
- trafficking of women and children;
- violence against women;
- the operation and impact of laws that criminalise homelessness and poverty;
- complementary protection and the prohibition against refoulement;
- the operation and impact of Australia's refugee and asylum seeker policies, including in relation to mandatory detention, offshore processing, and the detention of families and children;
- the over-representation of Indigenous people and people with mental illness in the criminal justice and prison systems;
- Australia's extradition law, policy and practice; and
- police use of force, the investigation of police-related deaths and police monitoring and accountability mechanisms.

The List of Issues Prior to Reporting is available at www2.ohchr.org/english/bodies/cat/docs/followup/AdvanceVersion/Australia_AV_en.pdf.

The Centre's submission to the Committee, which significantly informed the Committee's List of Issues, is at www.hrlrc.org.au/content/topics/counter-terrorism/torture-and-ill-treatment-submission-to-un-committee-against-torture-on-australia-24-august-2010/.

Philip Lynch *is Executive Director of the Human Rights Law Resource Centre*

Children's Rights: Centre Supports Establishment of Commonwealth Commissioner for Children and Young People

On 26 October 2010, the Senate referred the Commonwealth Commissioner for Children and Young People Bill 2010 to the Legal and Constitutional Affairs Legislation Committee for inquiry and report in May 2011.

The purpose of the Bill is to establish an independent statutory office of Commonwealth Commissioner for Children and Young People, to advocate at a national level for the needs, rights and views of people below the age of eighteen.

On 15 December 2010, the Centre made a submission to the Senate Committee supporting the establishment of a Children's Commissioner, but recommending that:

- the Children's Commissioner should sit within the Australian Human Rights Commission, rather than being established as a wholly independent and 'stand alone' statutory office;

- the Children's Commissioner should not be responsible for preparation of Australia's reports on its compliance with the CRC, but should instead contribute to the Australian Human Rights Commission's reports under the CRC, together with to relevant UN human rights bodies and mechanisms; and
- the role of the Children's Commissioner could be enhanced by:
    - providing more explicit functions relating to monitoring Australia's compliance with its international obligations;
    - expanding and clarifying the Children's Commissioner's powers to receive and determine complaints and to make inquiries and publish reports; and
    - providing for the demarcation of the roles of the Children's Commissioner *vis-à-vis* the commissioner's in the states and territories and outline how they are to interact.

Further information is at www.hrlrc.org.au/content/news/latest-news/childrens-rights-submission-to-senate-committee-on-commonwealth-commissioner-for-children-and-young-people-bill-2010/.

Ben Schokman *is Director of International Human Rights Advocacy with the Human Rights Law Resource Centre*

Access to Justice: Senate Committee Reports on Civil Dispute Resolution Bill

On 2 December 2010, the Senate Legal and Constitutional Affairs Legislation Committee released its final report on the *Civil Dispute Resolution Bill 2010.*

The overall aims of the Bill, as noted in the Explanatory Memorandum, were to:

- change the adversarial culture often associated with disputes;
- focus on resolution before parties become entrenched in litigation; and
- ensure that, where disputes proceed to court, the issues are properly identified, ultimately reducing the time required for the court to determine the matter.

In its original form, the Bill:

- required civil litigants to take 'genuine steps to resolve disputes' before legal proceedings are instituted in the Federal Court or the Federal Magistrates Court;
- set out the powers of court in relation to the genuine steps requirements and awarding costs; and
- provided that certain categories of legal proceedings are excluded proceedings.

The Centre, together with the PILCH Homeless Persons' Legal Clinic, submitted that these objectives and measures, while worthy, must be balanced against an individual's access to justice and right to a fair hearing.

The HPLC and the Centre regularly assist vulnerable and disadvantaged individuals in proceedings where there is a power imbalance between the parties. Such an imbalance may result from one party having greater resources available to them and a better understanding of the legal system and their legal rights. In our view, there may be some circumstances in which disadvantaged litigants and people with limited access to legal advice and representation may be adversely affected by the Bill.

The major recommendation of the HPLC/Centre's submission was that the provisions contained in the Bill must ensure that right to a fair hearing is afforded to all individuals, including potential parties to a proceeding. The civil justice system must operate in a way that does not exclude individuals from being able to access justice on an equal basis with others. This includes ensuring that no individual is disadvantaged prior to instituting proceedings.

The Committee's report substantially adopts these recommendations, highlighting the essential need for the court to ensure that disadvantaged litigants are afforded a fair hearing when considering whether 'genuine steps' have been taken by the parties to resolve civil disputes. The Committee noted that the genuine steps obligation, in addition to the additional resources the Australian Government intends to provide through its 'Access to Justice Measures', may potentially decrease stress, cost and delay for disadvantaged litigants.

The Committee's recommendations do not limit the objectives of the Bill, but strengthen the protections afforded to vulnerable and disadvantaged individuals in legal proceedings, and should be incorporated into the Bill.

The Committee's report and the HPLC/Centre submission are available at www.aph.gov.au/senate/committee/legcon_ctte/civil_dispute_resolution_43/index.htm.

James Farrell *is Manager/Principal Lawyer of the HPLC.* ***Georgina Rallis*** *was a HPLC intern.*

HRLRC Casework

High Court Recognises that Constitution 'Embeds' a Right to Vote and a 'Fully Inclusive Franchise' in Landmark Constitutional Case

On 15 December 2010, the High Court of Australia published reasons in *Rowe v Electoral Commissioner* [2010] HCA 46, having earlier pronounced orders in the matter on 6 August.

The case, which was heard and determined just prior to the 2010 Federal Election was a constitutional challenge to the validity of changes to the *Commonwealth Electoral Act 1918* made by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006.* The Amendment Act resulted in the electoral roll being closed on the day on which the electoral writ is issued for new or re-enrolling voters, and three days after the writ is issued for voters updating enrolment details. Previously, the electoral roll remained open for a period of seven days after the issue of the writ. The Amendment Act was said to reduce the likelihood of fraudulent voter enrolment and promote electoral integrity.

According to the AEC, historically, the calling of an election has resulted in significant numbers of persons enrolling or changing enrolment during the 7 day period, particularly young Australians. The 7 day period enabled the AEC to advertise and promote enrolment and target particular groups with information campaigns, including Indigenous Australians and people experiencing homelessness. At the 2004 Federal Election, approximately 423,000 people enrolled, re-enrolled or updated enrolment during the 7 day period and it was an agreed fact in the current proceeding that, for the purpose of the 2010 Federal Election, there were 'approximately 100,000 claims for enrolment received after the cut-off deadlines, but before the date for the closing of the Rolls prior to the Amendment Act'.

By a majority of 4 (French CJ, Gummow, Crennan and Bell JJ) to 3 (Hayne, Heydon and Keifel JJ), the High Court found that the relevant provisions of the Amendment Act were unconstitutional in that they were incompatible with the requirements of ss 7 and 24 of the Constitution that the Houses of Parliament comprise of members 'directly chosen by the people'.

The challenge to the early close of the rolls was jointly conceived and coordinated by the Human Rights Law Resource Centre and GetUp! and builds on the previous work of the Centre in establishing constitutional protection of the right to vote in the landmark High Court case of *Roach v The Commonwealth* [2007] HCA 43.

The matter was run pro bono by an outstanding legal team comprising Ron Merkel QC, Kristen Walker, Fiona Forsyth and Neil McAteer of Counsel, together with Mallesons Stephen Jaques.

Set out below are extracts from some of the key paragraphs from the judgments.

Chief Justice French

25. While "common understanding" of the constitutional concept of "the people" has changed as the franchise has evolved, "the people" is not a term the content of which is shaped by laws creating procedures for enrolment and for the conduct of elections. If such a law denies the right to vote to any class of person entitled to be an elector, it denies it to that class of "the people". Such a law may be valid. But the logic of the constitutional scheme for a representative democracy requires that the validity of such a law be tested by reference to the constitutional mandate of direct choice by "the people". Where, as in the present case, the law removes a legally sanctioned opportunity for enrolment, it is the change effected by the law that must be considered. It is not necessary first to determine some baseline of validity. Within the normative framework of a representative democracy based on direct choice by the people, a law effecting such a change causes a detriment. Its justification must be that it is nevertheless, on balance, beneficial because it contributes to the fulfilment of the mandate. If the detriment, in legal effect or practical operation, is disproportionate to that benefit, then the law will be

invalid as inconsistent with that mandate, for its net effect will be antagonistic to it. Applying the terminology adopted in *Roach*, such a law would lack a substantial reason for the detriment it inflicts upon the exercise of the franchise. It is therefore not sufficient for the validity of such a law that an election conducted under its provisions nevertheless results in members of Parliament being "directly chosen by the people".

27. The Commonwealth sought to support the amendments as procedural laws "reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government". The fixing of some cut-off date for enrolment consequent upon the issue of writs for an election was appropriate and adapted to that end.

28. For the reasons already given, the characterisation of an electoral law as procedural, or in the nature of electoral machinery, does not of itself justify collateral damage to the extent of participation by qualified persons in the choice of their parliamentary representatives. The detriment, even if contributed to by the failure of those persons to fulfil their duties under the CEA, is still a detriment "of concern to the whole Commonwealth".

…

75. Importantly, there was nothing to support a proposition, and the Commonwealth did not submit otherwise, that the impugned provisions would avert an existing difficulty of electoral fraud. Nor was there anything to suggest that the AEC had been unable to deal with late enrolments. Indeed, it had used the announcement of an election, coupled with the existence of the statutory grace period, to encourage electors to enrol or apply for transfer of enrolment in a context in which its exhortations were more likely to be attended to and taken seriously than at a time well out from an election.

...

77. The constitutional legitimacy of measures calculated to ensure that people who are not entitled to vote do not vote was, of course, accepted by the plaintiffs. They pointed, however, to the absence of any evidence of the existence prior to the Amendment Act of a significant number of persons voting who were not entitled to vote. They contrasted that absence with the evidence of the effect of the impugned provisions in preventing an estimated 100,000 citizens from being enrolled or transferring their enrolment.

78. The legal effect of the impugned provisions is clear. They diminish the opportunities for enrolment and transfer of enrolment that existed prior to their enactment. These were opportunities that had been in place as a matter of law for eight federal elections since 1983. They were consistent with an established executive practice which provided an effective period of grace for nearly 50 years before 1983. The practical effect of the Amendment Act was that a significant number of persons claiming enrolment or transfer of enrolment after the calling of an election could not have their claims considered until after the election. That practical effect cannot be put to one side with the observation, which is undoubtedly correct, that those persons were so affected because of their own failures to claim enrolment or transfer of enrolment in accordance with their statutory obligations. The reality remains that the barring of consideration of the claims of those persons to enrolment or transfer of enrolment in time to enable them to vote at the election is a significant detriment in terms of the constitutional mandate. That detriment must be considered against the legitimate purposes of the Parliament reflected in the JSCEM Report. Those purposes addressed no compelling practical problem or difficulty in the operation of the electoral system. Rather they were directed to its enhancement and improvement. In my opinion, the heavy price imposed by the Amendment Act in terms of its immediate practical impact upon the fulfilment of the constitutional mandate was disproportionate to the benefits of a smoother and more efficient electoral system to which the amendments were directed.

Justices Gummow and Crennan

160. The position then is reached that the 2006 Act has the practical operation of effecting a legislative disqualification from what otherwise is the popular choice mandated by the Constitution. It is no sufficient answer that *Roach* is not reached because the disqualification does not apply to those who have promptly enrolled or claimed transfer of enrolment and only applies to those who have failed to do so, and this state of affairs is the product of permissible legislative choice. Rather, the relevant starting point is to ask whether, *at the time when the choice is to be made by the people*, persons otherwise eligible and wishing to make their choice are effectively disqualified from doing so.

161. If so, the question then becomes whether, as Gleeson CJ put it in *Roach*, there has been broken the rational connection necessary to reconcile the disqualification with the constitutional imperative, and whether, as Gummow, Kirby and Crennan JJ put it in the same case, "Is the disqualification for a 'substantial' reason?"

…

167. A legislative purpose of preventing such fraud "before it is able to occur", where there has not been previous systemic fraud associated with the operation of the seven day period before the changes made by the 2006 Act, does not supply a substantial reason for the practical operation of the 2006 Act in disqualifying large numbers of electors. That practical operation goes beyond any advantage in preserving the integrity of the electoral process from a hazard which so far has not materialised to any significant degree.

Justice Bell

367. Recalling the remarks of Isaacs J in *Kreglinger*, the constitutional principles which distinguish between oligarchic and democratic government were fully understood at the time of the commencement of the Constitution and were always in consideration in respect of the drafting of ss 7 and 24. Sections 7 and 24 of the Constitution do not prescribe any particular franchise. However, they constrain the Parliament from instituting a franchise which will result in an oligarchic representative government and mandate a franchise which will result in a democratic representative government, the preferable term used by Mason J in *McKinlay* to describe the system of government, prescribed and maintained by the Constitution. What is sufficient to constitute democratic representative government has changed over time, as conceptions of democracy have changed, to require a fully inclusive franchise – that is, a franchise free of arbitrary exclusions based on class, gender or race.

368. To recognise that ss 7 and 24 mandate a democratic franchise, for the purposes of the popular elections which they prescribe, is to recognise the embedding of the right to vote in the constitutional imperative of choice by the people of parliamentary representatives.

…

384. In all those circumstances, the impugned provisions have not been shown to be necessary or appropriate for the protection of the integrity of the Rolls, as that object was advanced by the Commonwealth. First, this is because the Australian Electoral Commission had no difficulty in processing the volume of late enrolments which occurred with the previous seven day cut-off period. Secondly, to seek to discourage a surge of late claims for enrolment by disentitling or excluding those making them constitutes a failure to recognise the centrality of the franchise to a citizen's participation in the political life of the community. Thirdly, the main reason put forward by the Commonwealth as the justification for the impugned provisions – namely, that they will operate to protect the Rolls from the risk of, or potential for, systematic electoral fraud – is to protect the Rolls from a risk or potential which has not been substantiated to date. Accordingly, the justification put forward to support the impugned provisions does not constitute a substantial reason, that is, a reason of real significance, for disentitling a significant number of electors from exercising their right to vote for parliamentary representatives in the State and Subdivision in which they reside. The impugned provisions cannot be reconciled with the constitutional imperative of choice by the people of those representatives.

Justice Hayne (dissenting)

222-3. Neither s 7 nor s 24, with their use of the expression "directly chosen by the people", requires the Parliament to establish or maintain an electoral system which will *maximise* the participation of eligible electors. That is not to say, of course, that maximum participation in the electoral process cannot readily be seen as a desirable civic value and as a worthy legislative objective. But whether and to what extent it is pursued is a choice which the Constitution confides to the Parliament.

…

266. The content of the constitutional expression "directly chosen by the people" neither depends upon, nor is informed by, what are seen from time to time to be the politically accepted or politically acceptable limits to the qualifications that may be made to what is otherwise universal adult suffrage. As I explained in *Roach*, reference to "common understanding" or "generally accepted Australian standards" does not provide a valid premise for consideration of the issues in this matter.

The decision is at www.austlii.edu.au/au/cases/cth/HCA/2010/46.html.

***Philip Lynch** is Executive Director of the Human Rights Law Resource Centre*

Seminars & Events

2011 Constitutional Law Conference and Dinner

18 February 2011, Sydney

A major conference on constitutional law, the tenth in a series, will be held at the Art Gallery of New South Wales on Friday 18 February 2011. The event is organised by the Gilbert + Tobin Centre of Public Law with the support of the Australian Association of Constitutional Law.

The conference will focus on developments in the High Court and other Australian courts in 2010 and beyond. It will be addressed by leading practitioners, government lawyers, judges and academics, including The Hon Justice Patrick Keane (Chief Justice of the Federal Court of Australia), Debbie Mortimer SC (Victorian Bar) and Professor Simon Evans (Melbourne Law School).

Date: Friday, 18 February 2011

Venue: Domain Theatre, Art Gallery of New South Wales, Sydney

Details: http://www.gtcentre.unsw.edu.au/content/2011-constitutional-law-conference-and-dinner

Applying Human Rights – RMIT Graduate Diploma in Applied Human Rights

The Graduate Diploma and Graduate Certificate in Applied Human Rights at RMIT University explore what it means to build a culture and practice of human rights, and how to apply a human rights framework in your professional life.

They will assist you to develop and test tools and approaches and understand the steps necessary to bring about changes in practice, behaviours and structures. You will integrate learning directly into the work you are doing, or gain the skills to enter into work in the human rights field.

The programs are designed for professional development, academic interest and for entry into the rapidly expanding human rights field.

For further details, see www.rmit.edu.au/browse;ID=GD170 or contact liz.branigan@rmit.edu.au.

Resources & Reviews

HRLRC Brings You the Latest Human Rights News and Views

The HRLRC now brings you the latest Australian, regional and international human rights news, views and developments as they happen. To keep informed of the latest developments, and to be a part of the HRLRC community:

- follow us at http://twitter.com/rightsagenda for updates as they occur;
- join us at www.facebook.com/pages/HumanRightsLawResourceCentre; and
- visit www.hrlrc.org.au every Friday for a weekly human rights news summary.

HRLRC in the News

The Centre has featured in the following news reports since the last Bulletin:

- James Eyers, 'High Court Lays Down the Law on the Right to Vote', *Australian Financial Review* (Sydney), 16 December 2010
- Nine News, 'High Court Strengthens Voting Rights', *Nine News,* 15 December 2010
- Emily Howie and Philip Lynch, 'Human Rights Must Not be Party Political', *The Age* (Melbourne) 13 December 2010
- Philip Lynch, 'A Social Justice Legacy', *ABC Online*, 8 December 2010
- Daniel Flitton, 'Baillieu Minister Lowers the Volume on Human Rights', *The Age* (Melbourne) 8 December 2010

- Michael Bachelard, 'Ted's Crime Crackdown May Not be So Tough After All', *Sunday Age* (Melbourne), 5 December 2010
- James Eyers, 'New Government Urged to Review, but Keep, Rights Charter', *Australian Financial Review* (Sydney), 3 December 2010

Human Rights Jobs

Human Rights Officer, International Service for Human Rights, New York

The International Service for Human Rights is a Geneva and New York based human rights NGO that specialises in providing training, information, advice and advocacy on international and regional human rights procedures, for the benefit of human rights defenders worldwide.

ISHR is recruiting a qualified person to work as a Human Rights Officer in its New York Office. The position is a permanent position. Subject to the necessary work permit conditions being met, the successful applicant will commence work at the beginning of March 2011. The position is based in New York and reports to the Manager of the New York Office of ISHR.

Further details at http://www.ishr.ch/vacancies.

Deputy Director, Commonwealth Human Rights Initiative, New Delhi

The Commonwealth Human Rights Initiative (CHRI) is seeking a well-qualified, senior-level professional for the position of Deputy Director. The Deputy Director will be based at its Headquarters in New Delhi, India, and travel as required to its offices in Accra, Ghana and London, United Kingdom.

CHRI is an independent, non-partisan, non-governmental organisation working for the practical realisation of human rights across the Commonwealth. CHRI has developed a focus on access to information and access to justice, police reform and prison reform, in addition to broader human rights advocacy interventions it makes on topical and emergent issues in the Commonwealth.

CHRI researches, monitors, and advocates for accountability and improved systems of governance and makes recommendations to Commonwealth governments.

Further details at
http://humanrightsinitiative.org/index.php?option=com_content&view=article&id=196&Itemid=61.

If I Were Attorney-General…

If I Were Commonwealth Attorney-General, I would Take Australia's International Legal Obligations Seriously

I would end the farcical situation that has prevailed for decades in Australia in which the executive ratifies all sorts of international agreements, making promises to the world at large to abide by the principles in the agreement and to amend our legislation or administrative practices as required to give effect to those principles, only to disown those promises and fail to deliver when it comes to amending the domestic legal framework. This happens in all sorts of areas, not only in the human rights area. However, the government does seem to be able to motivate itself to make the necessary changes in some fields better than in others. For instance, when the Australia-United States Free Trade Agreement mandated changes to intellectual property rules, among a raft of other measures, the legislature promptly responded with amendments to the Copyright Act and other legislation to implement the treaty commitments.

Ever since Australia ratified its first human rights instrument, it has failed to give full effect to the obligation to take whatever legislative or administrative measures might be necessary for the full realisation of the rights Australia has promised to uphold, including a mechanism permitting individuals to complain of a breach and seek a remedy. Indeed, Australia remains the only developed country without comprehensive legislative or constitutional protection of human rights. As Attorney-General, I would push strongly for a constitutionally entrenched system which would require laws to be consistent with human rights and would also establish a cause of action allowing an individual to sue for breach of human rights – effectively a new constitutional writ. No doubt I would meet some opposition to that

model from some of my cabinet colleagues, perhaps on the ground that they doubt a referendum could be successful or perhaps because they fear the model goes too far. I would like to think I could persuade them to embrace a constitutional model, but some compromise might be inevitable. The absolute minimum for Australia to comply with its international obligations would be a statutory model like the one recommended by the National Human Rights Consultation, which was rejected by the government as 'too divisive'.

The exercise of aligning domestic law with international undertakings is broader than just the Bill of Rights question, however. It requires the legislative framework and the administrative practice in all areas affected by the treaty commitments to be consistent. In the human rights field, this extends from immigration to social security, policing to the court system, health and education, and virtually every other service provided by the government. It also extends to services carried out by the states, and it is the responsibility of the Commonwealth to ensure that state services abide by international standards. That therefore makes it my business as Commonwealth Attorney-General to ensure that service provision by state governments is adequately resourced, especially (but not exclusively) those areas critical to human rights outcomes such as housing, Legal Aid, corrections and human services.

Critics will respond that the disconnect between Australia's international commitments and domestic law is entirely proper because of the separation of powers between the executive and the legislature and because Australia is a dualist state (meaning that international law does not automatically have domestic effect but requires separate legislation to be passed). The alignment between international commitment and domestic action that I propose would effectively turn the executive into legislators, they might argue. That need not be the case. The executive is entirely capable of liaising with the legislature about changes to domestic law before treaties are ratified. Indeed, a section of my own Attorney-General's Department is already tasked with advising the government on the implications for domestic law of proposed treaties. If it is apparent that parliamentary support will not be forthcoming, then the executive should have second thoughts about making commitments to the international community that it is in no position to deliver.

In fact, the courts already give the executive the benefit of the doubt when it comes to the intention to deliver on its promises. Courts assume that the executive intends to honour commitments made in treaties, and therefore will interpret legislation in a way that conforms with international obligations in the case of ambiguity. Courts also assume that it is legitimate for the public to expect government agencies to act in accordance with promises the government has made in treaty form, which gives rise to certain, limited procedural rights in the administrative doctrine of 'legitimate expectation'. Assumptions of good intentions are not worth much, though, when the domestic legal reality does not match the international rhetoric. As Attorney-General, I will initiate an audit of all existing international obligations, particularly human rights obligations on which Australia's implementation record is patchy, to assess the extent to which those obligations have been implemented and identify changes that need to be made.

Taking international obligations seriously does not end with domestic legislation. It also extends to taking a stand when other governments apply pressure. Co-operating with foreign police when doing so exposes the suspects to the death penalty, as the Australian Federal Police did in the Bali Nine case, violates Australia's obligations. Failing to defend the presumption of innocence of Australian citizens, as the Prime Minister did in publicly declaring Julian Assange guilty of an unnamed crime relating to the WikiLeaks saga before any crime had been nominated, let alone charges laid, likewise abdicates responsibility, while the statement that Assange 'might not be welcome' back in Australia threatens a violation of the fundamental human right to leave and re-enter one's own country. Australia's recent trigger-happy tendency to cancel passports upon request of foreign law enforcement agencies is also concerning. As Attorney-General, I would insist that government agents adhere to international human rights obligations in the context of international law enforcement co-operation.

The model of international human rights law assumes a certain coherence – agreement on universal standards at the international level, implemented in detail at the domestic level and backed up by meaningful domestic recourse mechanisms. That coherence is currently missing in Australia, where our international commitments are implemented on a hit and miss basis with no comprehensive framework. As Attorney-General, I would make it my priority to address that disconnect.

Adam McBeth *is a Deputy Director of the Castan Centre for Human Rights Law and Senior Lecturer in the Law Faculty at Monash University.*

If I Were Victorian Attorney-General, I Would Strive for a Social Justice Legacy

The defeat of the Brumby Government marked the end of the term of Australia's longest-serving Attorney-General, Rob Hulls. As Victoria's first law officer for eleven years, Hulls was responsible for major justice system reform and significantly elevated the status of the justice portfolio, making it a key plank of the former government's platform for a 'fairer Victoria'.

Under Hulls' leadership, Victoria became the first state to enact a Charter of Human Rights. He oversaw the modernisation of the equal opportunity act and supported and strengthened access to justice through legal aid and community legal centres. Hulls' commitment to addressing 'causes of crime' resulted in the establishment of innovative 'problem-solving' courts – including the Drugs Court and the Koori Court – which have reduced re-offending and promoted rehabilitation.

Hulls did not leave Victoria, however, an access to justice paradise. There are significant delays in Victoria's court system. Prison and police monitoring and oversight mechanisms remain inadequate and weak. Victorian law permits random strip searches of children and people with disability, even in the absence of a parent or independent third person. And discrimination on the grounds of homelessness and irrelevant criminal record remain lawful and widespread.

The nation's newest Attorney-General, the Liberal's Robert Clark, comes to the justice portfolio on a platform well-suited to continuing reform and addressing outstanding injustices. The Premier, Ted Baillieu, has committed to a 'stronger, safer and fairer' Victoria. He has promised that 'transparency and accountability will underpin government'. Clark has previously written and spoken of the need to improve access to justice and the rule of law, 'uphold rights' and remedy 'genuine injustice'.

Working at the coalface of the justice system for the last ten years – five with a homeless person's legal service and five with a human rights law centre – I have some insights as to what this requires in concrete terms. So here is a modest agenda for Victoria's new Attorney-General, the Hon Robert Clark.

First, the Baillieu Government should commit to retaining and strengthening the Charter of Rights and Responsibilities. Respect for human rights is one of the foundations of a community that is fair, just, cohesive and inclusive. While the Charter has not been a panacea for injustice and disadvantage, it has unquestionably increased governmental accountability, improved some public services and catalysed some legislative safeguards. Most significantly, it has been used in individual cases to uphold the rights and dignity of the homeless, the elderly, people with mental illness and children with disability. Four years old now, the Charter is due to be reviewed in 2011. The review presents an opportunity to conduct an evidence-based assessment of the Charter and the ways in which it could be reformed to improve respect for human rights in law and practice.

Second, the Baillieu Government should ensure that Victoria Police are provided with comprehensive training regarding human rights-compliant policing and particularly human rights-compliant use of force. The inquest into the death of 15 year old Tyler Cassidy has heard evidence as to systemic failings in police training, including with respect to engaging with young people and people who are experiencing mental health crises. Better resources and training are required to equip police to ensure the safety and uphold the rights of their members and the broader community.

Third, the Baillieu Government should ensure that Victoria's new integrity and anti-corruption commission is empowered and resourced to investigate police-related deaths. The current system, in which police investigate police, weakens accountability and undermines public confidence. The investigation of police-related deaths should be undertaken by a body that is hierarchically, institutionally and practically independent of Victoria Police. Investigations should be thorough, prompt, open to public scrutiny and involve the family of the deceased.

In the same vein, the Baillieu Government should establish an independent, publicly accountable monitoring and oversight body for places of detention. Victoria's Ombudsman has published a number of recent reports highly critical of detention conditions and practices, including in youth facilities, police cells and the Melbourne Custody Centre. Conditions have been described as 'appalling', 'disgraceful' and incompatible with human rights. An independent inspectorate, similar to that established under Western Australia's *Inspector of Custodial Services Act*, could examine systemic issues in detention, provide expert advice to the government and parliament, and enhance community confidence in the correctional system. The Baillieu Government should also undertake a comprehensive review and

modernisation of correctional laws, policies and practices. The humane treatment of detainees contributes to rehabilitation, social reintegration, reduced recidivism, and safer communities.

Fifth and finally, the Baillieu Government should enhance access to justice by increasing funding to community legal centres, Victoria Legal Aid and interpretative services. The Government should also continue to promote and encourage pro bono service provision, including through governmental legal service procurement arrangements. As Clark has himself written, it is crucial to fairness and the rule of law that the justice system is accessible, efficient and effective. Better funding of, and support to, access to justice services such as community legal centres would, to use Mr Clark's words, 'improve access, reduce costs and waiting times, uphold rights and support the independent, impartial and efficient operation of courts and tribunals'.

Over the coming years, the nation's newest Attorney-General has the opportunity to make his mark on the Victorian justice system. Together, these five modest reforms would strengthen our laws and institutions, deepen our democracy, promote good government, contribute to the alleviation of poverty and disadvantage, and make Victoria a fairer, stronger and safer place.

And that's a legacy to strive for.

Philip Lynch *is Executive Director of the Human Rights Law Resource Centre*