

INDEX

OPINION 1
NEWS..... 2
NATIONAL CHARTER OF RIGHTS DEVELOPMENTS.... 7
VICTORIAN CHARTER OF RIGHTS DEVELOPMENTS.... 7
VICTORIAN CHARTER CASE NOTES 8
COMPARATIVE LAW CASE NOTES 10
HRLRC POLICY WORK..... 23
HRLRC CASEWORK..... 24
SEMINARS AND EVENTS... 25
RESOURCES AND REVIEWS 25
HUMAN RIGHTS JOBS 26
FOREIGN CORRESPONDENT 26
IF I WERE ATTORNEY-GENERAL... 28

Human Rights Law

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The HRLRC aims to:

1. Promote and protect human rights in Australia through litigation, advocacy, research, education and training.
2. Build capacity in the legal and community sectors to use human rights in casework, advocacy and service delivery.
3. Empower people that are disadvantaged or living in poverty by operating within a human rights framework.

The Centre is a registered charity. Donations are gratefully received and fully tax deductible.

Opinion

Australia Should be a Stronger Force for Human Rights in Southeast Asia

‘It’s not our role to tell countries what to do. These are internal affairs of the state.’

These sound like the words of a Chinese official, yet this is what an Australian diplomat told me on a recent visit to Southeast Asia. Geographically on the fringes of Asia and with a different culture and history, Australia is sensitive to being perceived as a big-mouthed bully in the Asia-Pacific region.

This is not to say Australia is silent on human rights. Australia has a good track record of principled diplomacy and implementing targeted sanctions against abusive military governments in Burma and Fiji. Yet, it’s relatively easy for Australia to speak out about countries where it has few economic interests. It takes more courage and principle to turn up the heat on countries where it has significant economic and strategic interests.

Australia has particularly good leverage for raising human rights issues in countries with which it has close military ties. The Rudd Government should use it. Australia should take the lead in protecting rights through strong public statements, private diplomacy, and intelligent aid.

As a major donor and significant provider of military and police training, Australia already strives to improve governance and human rights and professionalize security forces in countries like Cambodia, Indonesia, the Philippines and Thailand. Australia hopes to help these and other nations to be – or become – stable and democratic, rather than authoritarian regimes.

The Rudd Government could start by being more proactive and vocal in addressing issues like extrajudicial killings and impunity in Southeast Asia. For example, in Cambodia, Indonesia, the Philippines, and Thailand, the security forces commit abuses such as extrajudicial killings, enforced disappearances, torture and arbitrary arrest, and detention without fear of punishment. Abusive officials are rarely, if ever, prosecuted for such crimes, while those implicated in abuses remain in the security forces and often are even promoted.

For instance, in Indonesia, human rights violators continue to be promoted within the army and the special forces, Kopassus. A Kopassus soldier convicted of abuse leading to the November 2001 death of a Papuan activist now holds a senior commander position. Of 11 soldiers convicted of kidnapping student activists in the last days of the Suharto regime in 1997 and 1998, seven

were known to be serving in the military as of 2007, and all had received promotions. And those who orchestrated the 1999 massacres in East Timor remain free.

The newly appointed Deputy Defence Minister, Lt. Gen. Sjafrie Sjamsoeddin, is a former military officer with a long history of working with Kopassus. Although he has never been charged with a crime, various witnesses and investigative journalists have implicated him in abuses, including the 1991 Santa Cruz massacre of civilians in East Timor, and widespread violence by Indonesian troops and pro-Indonesia militias at the time of the 1999 East Timor referendum on independence. In 1993, two years after the Santa Cruz massacre, he took a two-week military training course in Perth. As a close military partner, Australia should be concerned enough about this appointment to call for a credible investigation into the persistent allegations against Sjamsoeddin.

In Cambodia, the police and military are littered with notorious rights abusers serving under Prime Minister Hun Sen, himself implicated in atrocities. In Thailand, police officers known to have been involved in abuses during the 2003 'war on drugs' and counter-insurgency operations have been promoted rather than punished. In the Philippines, despite a government commission calling for the investigation of a senior military officer for command responsibility for extrajudicial killings, the retired general is now a congressman.

Australia often claims to be addressing these problems by offering military-to-military training, including training on human rights, international humanitarian law and military rules of engagement. But training without a serious political commitment to end abuses is not enough. Australia should put a mechanism in place to guarantee that military units and personnel participating in Australian-funded programs are carefully vetted to ensure that they haven't been implicated in human rights violations.

Although the Australian Government says it vets individuals, in Cambodia, Australian military instructors have provided training to Royal Cambodian Armed Forces units that have been implicated in gross human rights abuses. This includes live-fire weapons training to the counter-terrorism special forces, a unit refashioned out of Brigade 70 (the Prime Minister's Bodyguard Unit), which has a long and well-documented record of committing politically motivated violence and other serious rights violations with impunity.

Australia should also consider conditioning military and police assistance on progress in prosecuting abuses and reforming security forces. Bilateral security cooperation agreements (such as the Lombok Treaty) should address human rights concerns by including explicit safeguards. Australia could have real impact in pressing countries to bring the perpetrators of abuse to justice, but this means being prepared to raise human rights in meaningful rather than abstract ways, such as publicly raising specific cases with governments. A more cautious approach only bolsters the standing of abusive governments at the expense of their people.

Elaine Pearson is the deputy director of the Asia Division at Human Rights Watch.

The Human Rights Watch World Report 2010 is now available at www.hrw.org/world-report-2010. The Report summarizes human rights conditions in more than 90 countries and territories worldwide and includes a number of thematic essays by leading HRW staff.

News

Australia Rated in World Rule of Law Index – Room for Improvement on Compliance with International Law and Accountability of Police and Prison Officials

In December 2009, the World Justice Project released its World Rule of Law Index and preliminary findings for 2009. The Index is a 'quantitative assessment tool designed to offer a detailed and comprehensive picture of the extent to which countries around the world adhere to the rule of law'.

The Index consists of 16 factors and 68 sub-factors, organized under a set of four principles, being:

- the government and its officials and agents are accountable under the law;
- the laws are clear, publicised, stable and fair, and protect fundamental rights, including the security of persons and property;
- the process by which the laws are enacted, administered and enforced is accessible, fair and efficient; and

- access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

Australia is one of 35 countries indexed in 2009.

Australia's highest scores in the Index were attained in relation to:

- the adequacy of laws protecting security of the person; and
- the impartiality and accountability of Australia's judicial system.

Australia's lowest scores in the Index were received in relation to:

- compliance with international law, including that persons are treated and protected according to international law; and
- the accountability of military, police and prison officials.

In my view, extrapolating from these scores, the Index provides further evidence that:

- Australia should enact a comprehensive Human Rights Act that promotes the accountability of government (in relation to which, in relative terms, Australia rated most weakly). The Act should provide for rights that are justiciable and enforceable (the independence, competence and effectiveness of the judiciary being one of the areas in which Australia rated the highest); and
- Australia should urgently ratify the Optional Protocol to the Convention against Torture, which provides for independent, effective monitoring of places of detention.

The Index is available at <http://www.worldjusticeproject.org/>.

Phil Lynch is Director of the Human Rights Law Resource Centre

Australia Elected to UN Peacebuilding Commission

On 18 December 2009, the Foreign Minister, the Hon Stephen Smith MP, announced that Australia has been elected to the UN Peacebuilding Commission for 2010.

The Commission was established jointly by the UN General Assembly and the UN Security Council in 2005. It is an intergovernmental advisory body that supports countries in post-conflict peace building, recovery, reconstruction and development. It coordinates donors, international financial institutions and national governments to provide strategic advice and harness finances and expertise from around the world to assist countries emerging from conflict.

Welcoming Australia's election, the Foreign Minister stated, 'Australia has a long tradition of assisting governments prevent conflict and promote peace in unstable environments in our region, including in the Solomon Islands and East Timor. Our peace building expertise and experience will be a valuable asset to the work of the Commission.' According to Mr Smith, 'Australia's election further demonstrates our contribution to international peace and security and our commitment to the UN Charter and efforts to resolve disputes through the international system.'

UN Releases Major Report on the States of World's Indigenous Peoples

A major UN report on *The State of the World's Indigenous Peoples* has documented that throughout both the developed and developing world, Indigenous peoples suffer disproportionately from poverty, poor health, inadequate housing, illiteracy, dispossession of land and discrimination.

The report, which was prepared by seven independent experts in conjunction with the UN Permanent Forum on Indigenous Issues, stresses the importance of a human rights-based approach to alleviate disadvantage, founded on the rights to self-determination and substantive equality.

While the report acknowledges a range of positive developments in relation to Australian Aboriginal and Torres Strait Islander peoples – including Australia's endorsement of the UN Declaration on the Rights of Indigenous Peoples, the Apology to the Stolen Generations, the recognition of native title and the commitment to close the gap in Indigenous health and well-being – it also highlights the gross disadvantage and inequality to which Indigenous Australians are subject. For example, there is a far greater discrepancy on the UNDP Human Development Index between Indigenous and non-Indigenous

peoples in Australia than in comparable countries including the United States, Canada and New Zealand, including in relation to life expectancy, health, employment, housing status and education.

The report emphasises the importance of access to and control over land and resources to Indigenous development and well-being.

Welcoming the report, which was launched in New York, Australian Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, stated 'in recent years, as a nation, we have taken some giant steps forward in relation to our Indigenous peoples.' He emphasised, however, that 'Aboriginal and Torres Strait Islander peoples remain marginalised in Australia and face entrenched poverty and ongoing discrimination on a daily basis'. According to Mr Calma, 'we will not have provided solutions to all the challenges we face until Indigenous people have true participation and are real partners in efforts to Close the Gap in health, education, housing and have access to the same human rights protections as other Australians'.

The report is available at <http://www.un.org/esa/socdev/unpfii/en/sowip.html>.

Phil Lynch is Director of the Human Rights Law Resource Centre

Need for Global Declaration to Strike Balance between Privacy and Counter-Terrorism Measures

The UN Special Rapporteur on Human Rights and Counter-Terrorism, Professor Martin Scheinin, has called for the development of an international declaration on data protection and data privacy to balance the 'the current wave of privacy-intrusive measures'. The call comes in the Rapporteur's most recent report to the UN Human Rights Council, which focuses on the 'erosion of the right to privacy in the fight against terrorism'.

The report identifies and critiques a range of counter-terrorism developments that have adversely affected the right to privacy, including racial and ethnic profiling, the creation of privacy-intrusive databases and the use of new technologies, such as body scanners, without proper human rights assessment.

In a statement accompanying the report, the Special Rapporteur was critical of the perception that, 'in an all-encompassing process of "balancing", counter-terrorism always outweighs privacy'. According to the Special Rapporteur:

the most privacy intrusive measures are not always the most effective ones from the perspective of preventing terrorism. As with other fundamental rights, privacy needs to be protected under a rigorous analytical framework that secures that any restrictions are adequately provided for in clear and precise provisions of domestic law, and that they are effective for the purpose they are intended to serve, necessary in a democratic society and proportionate to the real advantage gained.

In addition to calling for the elaboration of a global declaration, the UN Special Rapporteur also called on the Human Rights Committee to draft and adopt a comprehensive general comment on the right to privacy under the ICCPR, including the proper scope of its limitations.

The Special Rapporteur's report, which will be tabled in the UN Human Rights Council in March, is available at http://www2.ohchr.org/english/issues/terrorism/rapporteur/docs/A_HRC_13_37_AEV.pdf.

Expert Consultation on Business, Corporate Law and Human Rights

In November 2009, the Osgoode Hall Law School at York University, Toronto, convened an expert consultation to consider 'Corporate Law and Human Rights: Opportunities and Challenges of Using Corporate Law to Encourage Corporations to Respect Human Rights.' The consultation was in support of the Corporate Law Tools Project of Professor John Ruggie, the Special Representative of the UN Secretary-General on Business and Human Rights.

The Corporate Law Tools Project involves 19 leading corporate law firms from around the world helping Professor Ruggie identify whether corporate and securities laws in over 40 jurisdictions currently foster corporate cultures respectful of human rights.

The consultation provided experts in the field of business and human rights with the opportunity to discuss possible legal and policy reform recommendations which Professor Ruggie might be able to use

in his work. The consultation was split into eight sessions, seven of which considered the topics outlined below with the eighth set aside to brainstorm a list of recommendations.

Understanding the UN Framework and how the Corporate Law Tools Project fits in

Professor Ruggie discussed the UN 'Protect, Respect, Remedy' Framework and highlighted the need for states to foster corporate cultures which are respectful of human rights. He identified substantial legal and policy incoherence amongst governments in this area; particularly in a 'horizontal' sense where economic and business focused departments operate in isolation from human rights focused departments.

Incorporation and Listing

This session considered the potential for linking incorporation and listing rules to respect for human rights, whether that be by returning to the historical notion that incorporation is a privilege bestowed to contribute to the public good or by providing for ambiguities in corporate constitutions to be resolved by adopting the most human rights compatible interpretations. It was noted that such changes could be difficult to enforce and may serve to unduly blur the line between state and corporate responsibilities.

Directors' Duties

This session considered whether directors' duties provide sufficient guidance as to what directors are *allowed* and what they are *required* to do in respect of human rights. Significant consideration was given to s 172(d) of the *Companies Act* (UK) as an example of an enlightened shareholder approach to directors' duties. The enlightened shareholder approach requires consideration of issues such as human rights in determining the company's best interests. A difficulty identified with such provisions is that they are only enforceable by shareholders and not those who suffer corporate-related human rights abuses.

Reporting

It was acknowledged that reporting is an important tool to enable both companies and stakeholders to identify whether policies are effectively implemented. Mandatory human rights related reporting would encourage transparency and enable investors to make more well rounded decisions about the legal or other business risks of a particular corporation. Various international reporting initiatives were also discussed, including the Global Reporting Initiative, the UN Global Compact and the UN Principles for Responsible Investment.

Stakeholder Engagement

Participants in this session considered the role, if any, of corporate and securities law in facilitating dialogue between companies and stakeholders. Such dialogue could be enabled by clearer reporting requirements, improved proxy access for shareholders, bilateral dialogue rather than the more adversarial shareholder proposals and socially responsible investment indices. One speaker argued that those affected by corporate activities should be viewed as *rights* holders rather than *stakeholders*.

Board Composition

Consideration was given to the relationship between human rights-based corporate culture and board composition. This included consideration of whether it would be more effective to have a supervisory board of stakeholders 'above' the managerial board, a dedicated stakeholder representative on the board, or a human rights sub-committee. One participant suggested that all board members be required to undertake human rights training and have to show that they understand the company's human rights-related issues.

Policy Coherence and Other Corporate Governance Tools

Professor Ruggie has found that the policy incoherence previously noted at a domestic level is often replicated at the international level. The session considered examples from the United Kingdom and Denmark where both governments are required to consider the human rights impacts of policy decisions. This provides a positive example when government is doing business with corporate entities.

Although it is difficult to capture the full impact of a two day consultation such as this one, 25 concrete recommendations were made as well as a large number of ideas discussed throughout the sessions. Professor Ruggie has a lot to consider as he continues his work to operationalise the 'Protect, Respect and Remedy' Framework.

Michael Gomm is a lawyer with Allens Arthur Robinson. The report addressing Australian corporate and securities laws was submitted by Allens in September 2009 and can be viewed at www.business-humanrights.org/SpecialRepPortal/Home/CorporateLawTools.

Millennium Development Rights – ACFID Releases Report on Human Rights-Based Approaches to MDGs

The Australian Council for International Development (ACFID) launched its publication *Millennium Development Rights* in the lead-up to the 2009 Human Rights Day at a Melbourne Conference on *Meeting the Millennium Development Goals: Old Problems, New Challenges*.

Millennium Development Rights arose out of a coalition of ACFID members who recognise the need to share experiences of using human rights strategies to meet the Millennium Development Goals (MDGs) and to demonstrate the role human rights, especially economic and social rights, have in underpinning the MDGs.

The MDGs represent an international political commitment to combating global poverty. However, human rights can promote accountability and sustainability for such commitments by reminding governments and communities of state human rights obligations and tackling the root causes of poverty in terms of discrimination and exclusion.

While many development organisations, NGOs, governments and multilateral institutions say they endorse and use rights-based strategies to pursue development objectives, ACFID's human rights consultation report this year, *Rights in Sight*, found that there were difficulties in *implementation* of a human rights-based approach.

ACFID hopes that *Millennium Development Rights* will be useful in furthering knowledge and practice of human rights and development. In 2010, ACFID will work with its membership and draw on international expertise to develop a further resource capturing programmatic tools, processes and practices to implement a human rights-based approach.

Millennium Development Rights and *Rights in Sight* are available at www.acfid.asn.au/what-we-do/human-rights.

For more information or to request a hard copy of the reports, contact Sarah Winter, Human Rights Advisor, ACFID on 02 8306 3486 or swinter@acfid.asn.au.

Sarah Winter is Human Rights Advisor with the Australian Council for International Development

Age Pension Requirements Discriminate Against Indigenous Australians: Complaint to UN CERD

As a signatory to the *Convention on the Elimination of All Forms of Racial Discrimination*, Australia is obliged to eliminate racial discrimination and to ensure the equal enjoyment of human rights across racial groups, including the right to social security.

Currently however, the *Social Security Act 1991* (Cth) provides that a man reaches pension age when he turns between 65 to 67 years old. It is generally recognised that the life expectancy of Indigenous Australians falls well short of the general population. The Prime Minister himself has acknowledged that there is, on average, a 17 year gap in the life expectancy of Indigenous Australians when compared to non-Indigenous Australians. According to one set of statistics released by the Australian Bureau of Statistics, Aboriginal men have a life expectancy of 59 years. Accordingly, the chances of Indigenous Australians satisfying this condition of eligibility for the age pension are slim.

Kenny Moylan, boom-gate operator and member of the Gumbangee Clan, has decided to do something about this issue. In December 2009, Mr Moylan filed a communication with the UN Committee on the Elimination of Racial Discrimination with pro bono assistance from DLA Phillips Fox. The communication alleges that the pension age eligibility requirement indirectly discriminates against Indigenous Australians and is in breach of Australia's obligations under the Convention. If the

communication is successful, the UN Committee may recommend that the eligibility requirements for the age pension be differentiated for Aboriginal Australians.

In its *General Comment 19: The Right to Social Security*, the UN Committee on Economic, Social and Cultural Rights stated 'States parties should take particular care that indigenous peoples and ethnic and linguistic minorities are not excluded from social security systems through direct or indirect discrimination, particularly through the imposition of unreasonable eligibility conditions or lack of adequate access to information.' The *Social Security Act* already provides for different pension ages for men and women.

Alison Ewart is a lawyer with DLA Phillips Fox and acts for Mr Moylan in his complaint to CERD

National Charter of Rights Developments

No Time for Backpedaling or Complacency

ACT NOW on a Human Rights Act for Australia

On 20 January 2010, the *Australian Financial Review* contained a report, entitled 'McClelland Backpedals on Bill of Rights'. The report suggested that the Federal Government 'may not be inclined' to enact a Human Rights Act as it is seen as 'very controversial' within the Labor Party and the broader community. This is notwithstanding that the landmark Report of the National Human Rights Consultation released in October 2009 recommended that Australia enact a comprehensive national Human Rights Act and that 87.4% of submissions to the inquiry supported such an Act.

As well as recommending the adoption of a Human Rights Act, the Committee also recommended a range of other important measures to protect human rights in Australia, including enhancing human rights education, improving parliamentary scrutiny of human rights, strengthening the Australian Human Rights Commission, improving access to justice and addressing Indigenous disadvantage and exclusion. These initiatives would be most effective, however, as complements to – and not substitutes for – human rights legislation. The effective development of a culture of human rights requires a robust enabling framework; namely a comprehensive, national, judicially enforceable Human Rights Act.

The Government has announced that it will respond to the report in the coming months. **For people concerned with improved protection of human rights in Australia, particularly the adoption of a Human Rights Act, the time to act is now!**

You can be part of the campaign for a Human Rights Act by emailing or writing to your local MP, the Prime Minister and the Attorney-General.

In preparing a letter, you may find the following materials helpful:

- Letter to MPs and Senators on a Human Rights Act sent by the HRLRC to all federal MPs and Senators (see www.hrlrc.org.au/files/HRA-for-Australia-Letter-to-all-MPs.pdf); and
- Briefing Paper on a Human Rights Act for Australia sent by the HRLRC to key Ministers and MPs (see www.hrlrc.org.au/files/Briefing-Paper-A-Human-Rights-Act-for-Australia1.pdf).

An Australian Human Rights Act could promote more responsive and accountable government, improve public services and address disadvantage. It could ensure that human rights are taken into account by parliament, the courts and public services when developing and applying law and policy.

The Rudd Government's response to the NHRC Report represents an historic opportunity to honour its commitment to the protection and promotion of human rights. Australians have spoken loudly and clearly on the need for a Human Rights Act. Now is the time for the Rudd Government to show political leadership and vision.

Emily Howie is a Senior Lawyer with the Human Rights Law Resource Centre

Victorian Charter of Rights Developments

Statements of Compatibility under the Victorian Charter

Consumer Affairs Legislation Amendment Bill 2009

The *Consumer Affairs Legislation Amendment Bill 2009* represents the first of a series of state government reforms aimed at facilitating and modernising the way in which consumer affairs are

regulated in Victoria. Among the reforms proposed by the Bill, are amendments to the *Prostitution Control Act 2004* (Vic). Notably, the Bill proposes to clamp down on unlicensed brothel operators by giving inspectors new public questioning powers.

The Hon Tony Robinson MLA, Minister for Consumer Affairs, pointed out in the Bill's Statement of Compatibility, that the Bill engages several rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The Statement of Compatibility notes that the Bill engages the *Charter* rights to equality and privacy. However, there is no discussion of the right of a person charged with a criminal offence to, without discrimination, not be compelled to testify against himself or herself or to confess guilt. That right, enshrined in s 25(2)(k) of the *Charter*, is the focus of this article.

Clause 63 of the Bill proposes to insert a new s 61D into the Act, providing that if an inspector believes on reasonable grounds that premises are being used as an unlicensed brothel, the inspector may request anyone entering or leaving those premises to answer, orally or in writing, any questions put by the inspector in relation to the use of the premises as a brothel. Failure to comply with such a request is an offence which attracts a fine in excess of \$1000.

As it is not only an offence to operate an unlicensed brothel, but also to attend an unlicensed brothel, a person being questioned on the use of the suspected unlicensed brothel (using the powers proposed in the Bill) could foreseeably be charged with attending the brothel. As such, the Scrutiny of Acts and Regulations Committee has expressed concern regarding the interaction between the powers proposed in the Bill and the *Charter* right against compelled self-incrimination. The SARC objects to the Government position that the proposed public questioning technique is appropriate for the investigation of unlicensed brothels and instead:

considers that a less restrictive means reasonably available to achieve the important purpose of investigating unlicensed brothels (including the protection of the rights of sex workers to liberty and security) would be to immunise people questioned upon entering or leaving an apparent unlicensed brothel from prosecutions based on evidence obtained as either the direct result or indirect consequence of their compelled answers.

The SARC noted the Supreme Court decision of *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 where the Court found that s 25(2)(k) of the *Charter* applies regardless of whether a person involved has been charged. SARC is concerned that clause 63 of the Bill allows the circumventing of the usual entitlements of persons suspected of offences: for example, the entitlements to be notified of proceedings brought against the person; to be cautioned about the right to silence; and to be provided with the opportunity to seek legal advice.

Presently, s 61V of the Act regulates various compelled questioning powers. It provides that if a person being questioned by an inspector claims, before answering the question, that the answer might tend to incriminate them, the answer is not admissible in evidence in any criminal proceedings other than in proceedings in respect of the falsity of the answer and the inspector must so inform the person being questioned. However, the SARC has observed the dangers for lay people who may not fully understand when it is appropriate to claim the privilege or even be aware that it is an offence to enter or exit an unlicensed brothel. It is for those reasons that the SARC has written to the Minister expressing concern in relation to the proposed compelled questioning powers at cl 63 of the Bill and inquiring as to whether the existing s 61V of the Act, read in light of the *Charter*, prohibits the use in criminal proceedings of evidence obtained as an indirect consequence of the use of those proposed powers.

Emma Barton, Human Rights Law Group, Mallesons Stephen Jaques

Victorian Charter Case Notes

Does the Creation of a Tenancy or the Making of a Possession Order Engage Human Rights?

Heywood v Director of Housing [2010] R2009/36396 (4 January 2010)

In this case, the Victorian Civil and Administrative Tribunal considered the application of provisions of the *Residential Tenancies Act 1997* (Vic) which provide for the creation of a tenancy and provisions which permit a landlord to apply for possession order where premises have been occupied without

consent. The VCAT Member held that the relevant provisions do not engage the *Charter of Human Rights and Responsibilities Act 2006* (Vic) as these provisions 'enhance' rights rather than limit them.

Facts

The applicant, Shaun Heywood, was residing in Director of Housing premises in Fitzroy although he was not the tenant of the premises. The official tenant of the premises was Mr Heywood's grandmother, Ivy Heywood. Following the death of Ms Heywood in July 2009, the applicant advised the Director that he was residing in the premises and refused to return the keys.

Mr Heywood subsequently applied to VCAT for an order requiring the Tribunal to enter a tenancy agreement with him. In response, the Director issued a cross application seeking to evict the applicant on the basis that the premises were occupied without consent (s 344 of the Act).

Decision

The *Residential Tenancies Act* provides that a person who has been residing in premises as his or her principal residence (but who is not a tenant) may apply for an order requiring the landlord to enter into a tenancy agreement. Section 233 of the Act provides that VCAT may require a landlord to enter a tenancy agreement with an applicant where:

- (a) the applicant could reasonably be expected to comply with the duties of a tenant;
- (b) the applicant would be likely to suffer severe hardship if compelled to leave the premises; and
- (c) the hardship suffered by the applicant would be greater than any hardship suffered by the landlord, if an order were made.

The VCAT Member considered a number of claims made by Mr Heywood in support of his application and held he would not be likely to suffer severe hardship if compelled to leave the premises. Among other things, the Member found that the applicant could not demonstrate a strong connection to the premises nor could he show that the relationship with his family would suffer if he were evicted. As the provisions of s 233 are cumulative, VCAT was not required to consider the issue of hardship incurred by the Director nor was it required to consider the residual discretion that exists once all the provisions have been satisfied.

The applicant made arguments based on s 13(a) (right not to have the home unlawfully or arbitrarily interfered with) and s 17 (protection of families and children) of the *Charter* in support of his application. In response to these arguments, the VCAT Member held that s 233 of the Act neither engaged nor limited human rights. In the Member's view, 's 233 confers a right on Mr Heywood where there would otherwise be no existing right. It does not limit his right not to have his home or family unlawfully or arbitrarily interfered with, *but enhances this right.*' [emphasis added]. In respect of the cross application of the Director, VCAT adopted similar reasoning and held that a person occupying premises without consent has their rights enhanced by being permitted to show cause as to why they should not be evicted pursuant to an order of possession.

Although VCAT found that human rights were neither engaged nor limited by the relevant sections of the Act, the Tribunal nonetheless referred to s 7(2) of the *Charter* and found that the relevant sections were 'justified.' Furthermore, in considering limitations issues the Member adopted the wording of s 13 of the *Charter* in holding that, even if provisions of the Act did limit human rights, the limitation was neither 'unlawful' nor 'arbitrary.'

The application of Mr Heywood was dismissed and the Director was granted a possession order.

Discussion

With respect, this decision represents an overly narrow approach to the construction and engagement of rights. There is a significant body of international caselaw affirming that, at a minimum, an eviction will prima facie engage the right to freedom from unlawful or arbitrary interference with the home, including from the UN Human Rights Committee (see, eg, *Vojnovic v Croatia*, UN Doc CCPR/C/95/D/1510/2006), the European Court of Human Rights (see, eg, *McCann v United Kingdom* [2008] ECHR 19009/04) and the House of Lords (see, eg, *Doherty & Ors v Birmingham City Council* [2008] UKHL 57).

Further, the Member's approach to limitation is inconsistent with the approach of Bell J in the seminal case of *Kracke v MHRB* [2009] VCAT 664, in which his Honour stated [109-110]:

Where rights are expressed in terms that contain a specific limitation, the nature and content of the rights in their plain state are not seen to be reduced by the specific limitation. Rather, the specific limitation is seen as an indication of what might be considered in determining whether any limitations are reasonable and justified under the general limitations provision in s 7(2).

Thus, when identifying the scope of the right at the engagement stage, this is done broadly and purposively, even where the right contains a specific limitation. Such a limitation becomes subsumed in the overall justification which is undertaken in the next stage.

Chris Povey is a senior lawyer and policy officer with the PILCH Homeless Persons' Legal Clinic and Phil Lynch is Director of the Human Rights Law Resource Centre

Comparative Law Case Notes

Safe-Injecting Rooms, Public Health and the Right to Life and Security of Person

PHS Community Services Society v Canada (Attorney General), 2010 BCCA 15 (15 January 2010)

The British Columbia Court of Appeal has held that the denial of access to health care services, including safe injecting facilities, for people with severe drug dependency may violate the rights to life, liberty and security of person.

Facts

Sections 4 and 5 of the *Controlled Drugs and Substances Act 1996* ('CDSA') criminalise possession and trafficking of controlled substances. The respondent, PHS Community Services Society, operates a safe injecting facility in downtown Vancouver, called Insite. The users of the facility are overwhelmingly people who suffer drug dependency and a combination of homelessness, unemployment, chronic illness and poor mental health. PHS, together with two service users, sought a declaration that ss 4 and 5 of the CDSA 'are unconstitutional and should be struck down because they deprive persons addicted to one or more controlled substances of access to health care at Insite and therefore violate the right conferred by s 7 of the *Canadian Charter of Rights and Freedoms*'. Section 7 recognises 'the right to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice'.

Canada opposed the grant of relief, arguing that the impugned provisions of the CDSA do not engage the rights to life, liberty and security but, if s 7 is engaged, the limitations on rights thereby imposed are reasonable and proportionate.

It was accepted as fact by all parties that drug dependency is an illness, that the use of unsanitary equipment and procedures for drug injection is strongly associated with blood borne virus transmission, and that the health risks associated with drug injecting (including mortality, morbidity, overdose and disease transmission) are significantly ameliorated by injecting in a supervised facility. The evidence demonstrated that the supervision and health services provided by Insite 'virtually eliminate the risk of overdose' and 'provide access to counseling and consultation that may lead to abstinence and rehabilitation'.

Decision

The Court of Appeal unanimously held that the relevant provisions of the CDSA engage the rights to life, liberty and security of person with respect to the services provided at Insite.

Right to Life

The Court held that the 'right to life is engaged because Insite's health services and harm reduction policies prevent death by overdose'. It was found, as a matter of fact, that 'an addict's risk of death by injection is reduced when it is undertaken in the presence of Insite's health professionals who are able to ensure that he or she, in the event of an overdose, receives immediate medical treatment'. Conversely, 'the injection of drugs without medical supervision poses a risk of death to the users'. According to Rowles J, 'a law that prevents access to health care services that could prevent death engages the right to life'.

Right to Liberty

The Court held that the right to liberty is engaged because the CDSA provides for prosecution and possible imprisonment of users and health care providers at Insite. The Court noted that the right to liberty is engaged when 'the state impedes the right to make decisions that are of fundamental personal importance through a threat of prosecution'. In the present case, the Court stated that the application of the CDSA 'would have the effect of interfering with the liberty of the personal respondents and those who are similarly situated by foreclosing a choice to minimize the potentially life-threatening hazards of overdose and other serious and life-threatening illnesses through the health services offered at Insite'.

Right to Security of Person

The right to security of person encompasses a notion of personal autonomy and the protection of physical and psychological integrity. The Court held that the right to security of person is engaged because the CDSA has the effect of denying access to a health care facility. The Court stated that the 'nature of addiction is such that denying addicts health care services that would ameliorate the effects of their condition, and therefore management of the harm, engages security of the person'.

Are the Limitations on the Rights to Life, Liberty and Security Permissible?

By a 2:1 majority, the Court of Appeal held that the limitations imposed on the rights to life, liberty and security by the impugned provisions of the CDSA were 'not in accordance with principles of fundamental justice' as required by s 7 of the *Charter* nor reasonable, necessary and proportionate limitations in accordance with s 1.

The majority held that ss 4 and 5 of the CDSA are 'overbroad', in that they go beyond what is necessary to accomplish the state's objective, and 'arbitrary', in that they do not bear a sufficient evidentiary relationship with that objective. According to Rowles J:

by virtue of their long-term addictions to hard drugs combined with their poverty, mental and physical disabilities, histories of sexual and physical abuse, homelessness, genetic, psychological, sociological and familial problems, this very vulnerable population is one where the possession offence provisions of the *CDSA* have no salutary effect and fail to meet the objective of Parliament by its enactment.

...

Without Insite, addicts will be forced back into the alleys and flophouses where they will continue to inject hard drugs, but in squalid conditions, thereby risking illness and death, not only to themselves but also to others in the community who become infected through the sharing of dirty needles or through intimate contact with an infected person.

...

The effect of the application of the *CDSA* provisions to Insite would deny persons with a very serious and chronic illness access to necessary health care and would come without any ameliorating benefit to those persons or to society at large.

Additionally, the majority pointed to evidence that the presence and operation of Insite did not result in any increase in 'loitering, drug dealing or drug-related crime', nor that it in any way normalised drug use.

Relevance to Victorian *Charter*

Legally, this decision is highly relevant to Victoria. Section 9 of the Victorian *Charter* enshrines the right to life, while s 21 protects the rights to liberty and security of person. Further, the limitations analysis undertaken pursuant to s 7 of the Victorian *Charter* is very similar to that undertaken pursuant to its progenitor, s 1 of the Canadian *Charter*: see *R v Oakes* [1986] 1 SCR 103.

Factually, this decision is also highly relevant to Victoria. According to the Commonwealth Department of Health, 'the majority of hepatitis C infections in Australia occur due to unsafe injecting drug-use practices, such as sharing of injecting equipment'. Similarly, the Australian Institute of Health and Welfare has found that 'drug use poses risk in itself through impure or overly-pure content, but also through shared use of injecting equipment and the associated transmission of bloodborne viruses'. Despite this, there are no medically supervised injecting facilities in Victoria. Perhaps even more alarmingly, notwithstanding the very high incidence of blood borne virus transmission among prisoners, Victorian prisons do not provide access to needle and syringe exchange programs, thereby creating a significant risk to both prisoner and community health.

The decision is available at <http://www.courts.gov.bc.ca/jdb-txt/CA/10/00/2010BCCA0015.htm>.

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Australia's Obligation to Protect People from the Death Penalty

Kwok v Australia, CCPR/C/97/D/1442/2005 (23 November 2009)

The United Nations Human Rights Committee has found Australia to be in breach of its obligations under art 9(1) of the *International Covenant on Civil and Political Rights* in relation to mandatory immigration detention. The Committee ruled that 'detention for a period in excess of four years without any chance of substantive judicial review is arbitrary within the meaning of Article 9(1)'. The Committee also found potential breaches of arts 6 and 7 of the ICCPR if Australia returns the author, Ms Kwok, to China where she will likely face the death penalty.

Facts

Kwok arrived in Australia on 10 March 2000 on a valid temporary visitor's visa. Five days prior, Kwok's husband had been detained and held without charge by Chinese authorities. It is understood that he has since been convicted of accepting bribes and sentenced to death. On 5 January 2001 Kwok was interviewed by the Department of Immigration on the basis that she is wanted in China for diverting over 1 million yuan of company funds and on suspicions of bribery. While unaware of the exact nature of the charges against her, Kwok is aware that they are substantially the same allegations upon which her husband was convicted.

Kwok lodged an application for a protection visa in Australia on 8 January 2001. Kwok maintains that if returned to China she will face the same persecution as her husband, combined with further punishment due to her identification in Chinese newspaper articles as an asylum seeker and critic of Chinese authorities.

Kwok's application for a protection visa was rejected in repeated proceedings before the Department of Immigration, the Refugee Review Tribunal and the Federal Court of Australia. Kwok is currently awaiting the decision of the Minister for Immigration as to whether she may remain in Australia under s 417 of the *Migration Act 1958* (Cth).

Claims

Kwok claims that Australia is in breach of arts 6(1), 6(2), 7, 9(1), 9(4) and 14 of the ICCPR. These provisions relate to the right to life, the right not to be subjected to cruel, inhuman or degrading treatment or punishment, the right to liberty and security of person, the right not to be subjected to arbitrary arrest or detention and the right to a fair hearing. Kwok argued that if returned to China there is a 'real and foreseeable risk' that she will:

- be convicted and sentenced to death;
- be subjected to torture or cruel, inhuman or degrading treatment or punishment; and
- not be afforded due process, including the right to a fair hearing by an independent and impartial tribunal.

Kwok also submitted that the Migration Act does not allow her to be released from her prolonged immigration detention in violation of art 9 of the ICCPR.

In response, Australia asserted that:

- while Kwok was likely to face charges in China which carry the death penalty, she may not be found guilty if charged and a sentence of death is not mandatory. It argued that 'a person would have to be sentenced to death to prove a real risk of a violation of the right to life';
- Kwok had made 'no attempt to demonstrate why or how she will be personally subjected to treatment contrary to art 7 if returned to China and how this would constitute torture or cruel, inhuman or degrading treatment or punishment';
- its non-refoulement obligations do not extend to violations under art 14 of the ICCPR; and
- Kwok had failed to demonstrate that her detention was in any way arbitrary or unlawful and that it had occurred in accordance with procedures established by the Migration Act.

Decision

The Committee found the reasons advanced by Australia to justify Kwok's extended detention were not particular to Kwok's case and could therefore not justify her prolonged detention. It found 'the Author's detention for a period in excess of four years without any chance of substantive judicial review was arbitrary within the meaning of Article 9, paragraph 1' of the ICCPR.

The Committee considered whether substantial grounds exist for considering that Kwok's deportation to China would expose her to a real risk of irreparable harm in violation of art 2, read together with arts 6 and/or 7 of the ICCPR. It noted that the danger to Kwok's life would only be confirmed once it is too late for Australia to protect her right to life under art 6 of the ICCPR. The Committee confirmed that it is not necessary for Kwok to prove she 'will' be sentenced to death but simply that there is a 'real risk' that she will receive a death sentence.

The Committee considered the anxiety and distress that the cumulative effect of being exposed to the following factors would cause Kwok:

- the risk of an unfair trial combined with the knowledge that her husband is believed to have been sentenced to death for 'accepting bribes'; and
- that a warrant has been issued for Kwok's arrest for similar offences.

These factors were considered in conjunction with Australia's assertion 'that it currently has no plans to remove her from Australia'. Ultimately the Committee found that 'an enforced return of the Author to the Peoples' Republic of China, without adequate assurances, would constitute violations by Australia, as a State party which has abolished the death penalty, of the Author's rights under arts 6 and 7 of the ICCPR'.

Relevance to the Victorian *Charter* and Australia's Legal Obligations

This decision does not fall within the jurisdiction of the Victorian *Charter of Human Rights*. However, it may be useful in the interpretation of s 21 of the *Charter* which ensures the right to liberty and security of person and is based on art 9 of the ICCPR. It can also be considered in light of ss 9 and 10 of the *Charter* which are non-derogable rights based on arts 6 and 7 of the ICCPR and which ensure the right to life and the protection from torture, cruel, inhuman or degrading treatment.

Importantly, this decision confirms that it is not necessary for a country to establish that a person 'will' be sentenced to death if returned to a country which may impose a death sentence but simply that there is a 'real risk' that a person will receive a death sentence in order to breach its obligations under the ICCPR. Australia should be conscious of this decision when complying with other domestic and international obligations relating to the death penalty such as the Australian Federal Police Guidelines governing police to police assistance in possible death penalty cases, the discretion of the Attorney General to extradite an eligible person to a country which has the death penalty under s 22 of the *Extradition Act 1988* (Cth) and its obligations under the Second Optional Protocol to the ICCPR.

The decision is available at <http://www2.ohchr.org/tbru/ccpr/CCPR-C-97-D-1442-2005.pdf>.

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European Court Delivers Judgment in Landmark Human Trafficking Case

Rantsev v Cyprus and Russia [2010] ECHR 25965/04 (7 January 2010)

In a landmark judgment the European Court of Human Rights unanimously ruled that human trafficking fell within the scope of art 4 (prohibiting slavery, servitude and forced labour) of the *European Convention*. The Court clarified the positive obligations upon States to investigate allegations of trafficking and to implement measures to prevent and protect people from human trafficking.

Facts

The applicant, a Russian national, brought a complaint against the Republic of Cyprus and Russia in the European Court of Human Rights in relation to the death of his 20 year old daughter.

The applicant's daughter, Oxana Rantseva, went to Cyprus to work as a cabaret artiste. It is well known that cabaret artistes in Cyprus are sexually exploited and often work as prostitutes. After only a couple

of weeks Rantseva wanted to return to Russia. The manager of the cabaret took her to the local police station claiming she was illegally residing in Cyprus. The police advised that Rantseva had a valid working visa and asked the manager to bring her back to the police station the next morning for further questioning. The manager took her to an apartment for that night. Rantseva tried to escape through the balcony, however, fell to her death.

The District Court in Cyprus held that Rantseva died in 'strange circumstances' while attempting to escape but there was no evidence to suggest any criminal liability. Rantseva's body was returned to Russia and upon the applicant's request a separate autopsy was conducted. The forensic examination and the Russian authorities concluded the circumstances surrounding the death were unestablished and requested the Cypriot government to conduct further investigations.

In October 2006, after numerous communications between the countries, the Cypriot Ministry of Justice confirmed that further investigations would not be undertaken. They stated that the inquest into Rantseva's death was completed in December 2001 and that this verdict was final.

The applicant alleged violations of the *European Convention* arising from:

- the failure of the Cypriot authorities to investigate his daughter's death and to protect her while she was living in Cyprus; and
- the failure of the Russian authorities to investigate the alleged trafficking and subsequent death and to protect her from the risks.

Decision

Article 4 of the *European Convention* provides that no one shall be held in slavery or servitude or be required to perform forced or compulsory labour.

Trafficking is not expressly referred to in the *European Convention* and has only ever been considered by the Court on one prior occasion (see *Siliadin v France* [2005] ECHR 73316/01). In this case, the Court unanimously found that trafficking fell within the scope of art 4:

There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes 'slavery', 'servitude' or 'forced and compulsory labour'. Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention. [282]

Significantly, the Court went on to outline three positive obligations that arise under art 4:

- Firstly, States must have in place a legislative and administrative framework to prohibit and punish trafficking.
- Secondly, States are required to take measures to protect victims or potential victims of trafficking where circumstances give rise to a credible suspicion of trafficking.
- Thirdly, States have a procedural obligation to investigate situations of potential trafficking not only domestically but to cooperate effectively with other States concerned.

The Court noted that these positive obligations apply to all States implicated in trafficking:

Trafficking is a problem which is not often confined to the domestic arena. When a person is trafficked from one State to another, trafficking offences may occur in the State of origin, any State of transit and the State of destination. [289]

The Court found that the Cypriot immigration policy and specifically the artiste visa regime contained a number of weaknesses that failed to afford Rantseva practical and effective protection against trafficking. Furthermore, it was found that the Cypriot police failed to make inquiries into whether Rantseva had been trafficked where they ought to in light of the well known issues regarding cabaret artistes and trafficking. Accordingly, the Court held that Cyprus had violated art 4. The Court found a number of deficiencies in the police investigation, including the lack of further inquiries despite the inconsistencies surrounding Rantseva's death. Further, it was found that the Cypriot authorities ignored numerous requests by Russia to conduct further investigations and failed to seek assistance from Russia to enable adequate investigations to occur. Accordingly, the Court found that Cyprus violated art 2 (right to life) by failing to conduct an effective investigation.

In relation to Russia, the Court found that Russian authorities had violated their procedural obligations under art 4 due to the failure to investigate the alleged trafficking of Rantseva.

Relevance to the Victorian Charter

Section 11 of the Victorian *Charter* mirrors art 4 of the *European Convention*, prohibiting slavery, servitude and forced labour. Accordingly this case has direct relevance for the interpretation of s 11, particularly in relation to the scope of the right and the positive obligations upon the government that may arise.

The decision is available at <http://www.bailii.org/eu/cases/ECHR/2010/22.html>.

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UK Supreme Court Considers whether the Right to a Fair Hearing Requires the Availability and Examination of Witnesses

R v Horncastle & Ors [2009] UKSC 14 (9 December 2009)

The new UK Supreme Court (replacing the House of Lords) has delivered an important judgment concerning the role of hearsay evidence; in particular, evidence adduced from witnesses who were unable to attend court either because they were dead or out of fear for their safety. The Court held that where the evidence before a court is that of an identified but absent witness, there is no reason for imposing an absolute rule that such evidence should be excluded where it is the 'sole or decisive evidence' against a defendant, provided appropriate counter-balancing measures had been adhered to.

Facts

Horncastle concerned two sets of appeals heard together:

- In the first case, Mr Horncastle & Mr Blackmore were convicted of causing grievous bodily harm, with intent, to Mr Rice. Mr Rice provided a statement to police. However, he died before trial. His statement was admitted into evidence at trial pursuant to the *Criminal Justice Act 2003* (UK) ('CJA'), which makes admissible (subject to conditions), the statement of a witness who cannot give evidence because he or she has died. The defendants appealed their convictions, but the Court of Appeal rejected their appeals.
- In the second case, Mr Marquis & Mr Graham were convicted of kidnapping a young woman, Ms Miles. Ms Miles provided a statement to police. The day before trial, Ms Miles disappeared, citing her fear of attending Court. Her statement was admitted into evidence pursuant to the CJA, which makes admissible (subject to conditions), the statement of a witness who is unable to give evidence out of fear. The defendants appealed their convictions too, which were also rejected by the Court of Appeal.

All appellants then appealed to the UK Supreme Court on the basis that they did not receive a fair trial, contrary to art 6 of the *European Convention on Human Rights*. The central issue on appeal was whether a conviction based 'solely on or to a decisive extent' on the statement of a witness whom the defendant had not had the opportunity to cross-examine at trial, infringed the right to a fair trial under arts 6(1) and 6(3)(d) of the Convention.

Decision

The Court dismissed the appeals. In a unanimous decision, the Court concluded that, provided the safeguards enshrined in the CJA are properly adhered to, there will be no breach of art 6 of the Convention if a conviction is based solely, or decisively, on hearsay evidence.

The words 'solely' or 'decisively' were considered at length because the appellants sought to rely on the decision of the European Court of Human Rights in *Al-Khawaja & Tahery v United Kingdom* (2009) 49 EHRR 1. In that case, the European Court found that 'where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to re-examine or to have examined...the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6'.

However, in *Horncastle*, the UK Supreme Court differed from that approach, noting that hearsay evidence leading to a conviction is not 'unsafe' and can be justified where 'counter-balancing factors' have been strictly followed, but that this must be assessed on a case by case basis. Those factors are numerous and include: the overall unfairness to any party to the proceeding; alternative special measures for the protection of a witness; the credibility of the unavailable witness; and whether the evidence would be admissible if the witness were to give it orally. The Court also said that imposing 'the sole or decisive test produces a paradox', adding 'it will often be impossible to decide whether a particular statement was the sole or decisive basis of a conviction'. In the case of a jury trial, the Court suggested that the test would require 'mental gymnastics that few would be well equipped to perform'. All in all, the Court held that it would not be right to hold that the 'sole or decisive test' should override the provisions of the CJA, stating:

[We] believe that those provisions strike the right balance between the imperative that a trial must be fair and the interests of victims...and society...that a criminal should not be immune from conviction where a witness...dies or cannot be called to give evidence for some other reason.

Relevance to the Victorian Charter

The decision in *Horncastle* appears to be consistent with the trend in international and comparative jurisprudence to allow hearsay evidence in criminal proceedings, particularly in circumstances where a key witness is too fearful for their safety to attend court. In Australia, hearsay evidence is generally excluded, although there are some exceptions. Interestingly, in *Horncastle*, the Court noted that the approach by Australian courts to such evidence is 'nuanced and circumscribed, with a view to ensuring the overall fairness of the proceedings'. This often means that hearsay evidence will only be permissible as a last resort, where all other options (such as witness protection, remote facilities, suppression of names, etc) have been exhausted.

Finally, the Court's approach to art 6 of the Convention may inform the interpretation of s 24 (right to fair hearing) and s 25 (rights in criminal proceedings) of the Victorian *Charter*, in particular, s 25(g) (right to examine witnesses against him or her). Given international trends, it seems likely that Victorian courts would take a similar approach to that in *Horncastle* and look at the admissibility of hearsay evidence on a case by case basis and where the right balance can be struck.

The decision is available at <http://www.bailii.org/uk/cases/UKSC/2009/14.html>.

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The Right to Free Expression and the Protection of Journalistic Sources: When Can a Journalist be Compelled to Reveal their Source?

Financial Times Ltd & Ors v United Kingdom [2009] ECHR 2065 (15 December 2009)

This decision explores the right to freedom of expression as it applies to the protection of journalists' sources. The Court's finding of a violation in this case shows that, at least in Europe, compelling circumstances will be required before limitations on this protection will be considered necessary and justified in a democratic society.

Facts

In October 2001, Interbrew, a Belgian brewing company, retained investment bank Goldman Sachs to investigate an association with, and potential takeover of, South African Breweries ('SAB'). Goldman Sachs prepared a report and presentation on its findings, both of which contained confidential and market-sensitive information, and delivered these to Interbrew in November 2001.

In late November 2001, an unknown person (referred to in the judgment as 'X') sent copies of the Goldman Sachs presentation to a number of UK news organisations, including the applicants in the case. Interbrew claims that the version of the presentation sent to those news organisations had been altered slightly from the version submitted to Interbrew. It claims the alterations were (1) a change in the offer price proposed for SAB shares and (2) the insertion of a timetable for the offer to purchase SAB.

Upon receiving the presentation, the applicants published stories about it, with some reporting the timetable and offer price. Prior to publication, one journalist contacted a representative of Goldman Sachs, who informed Interbrew of the leak. Shortly after the stories were published, Interbrew issued

press releases stating that the leaked document contained false information. The news coverage led to what the Court described as 'significant' movement in the share prices of Interbrew and SAB.

Interbrew asked a security consulting firm to identify X, but its investigation failed. The firm advised Interbrew that it would be more likely to succeed in identifying X if it had access to the original leaked document. Interbrew applied to the UK High Court for injunctive relief against the news organisations accordingly.

Under UK law, a Court has jurisdiction to require delivery of relevant documents from a person if they have, through no fault of their own, become mixed up in the tortious acts of another. However, despite this, the law also says that a journalist cannot be compelled to reveal their source unless this is shown to be 'necessary in the interests of justice or national security or for the prevention of disorder or crime'.

Applying these principles, the UK High Court granted Interbrew an injunction requiring the news outlets to deliver up the leaked document to Interbrew's solicitors. The injunction was upheld on appeal.

Decision

The news outlets complained to the European Court that the decision of the UK courts to grant the injunction to Interbrew violated their right to freedom of expression, as protected by art 10 of the *European Convention on Human Rights*.

Article 10 provides that everyone has the right to freedom of expression. It further says that this freedom may only be subject to such restrictions as are prescribed by law and necessary in a democratic society for, relevantly, the prevention of crime or the disclosure of confidential information. The only question for the Court here was whether the restriction imposed by the UK Courts was 'necessary in a democratic society'.

The Court had found in an earlier case that the protection of journalistic sources is an essential part of press freedom, and cannot be limited compatibly with art 10 unless justified by an overriding public interest. It notes that disclosure orders generally not only affect the source in question but also potential future sources. Accordingly, the Court reminds us that the 'necessity' of a restriction must be 'convincingly established', and where falsification or a harmful purpose is alleged, 'courts should be slow to assume, in the absence of compelling evidence, that these factors are present'.

Applying these principles to the facts, the Court found that the restriction on press freedom imposed by the injunction could not be justified. Although the 'harmful purpose' of a source may amount to a public interest sufficient to justify a restriction, in this case the Court did not think the legal proceedings, which were conducted in haste, allowed this to be established with any certainty. Likewise, the falsification or otherwise of the presentation could not have been known by the UK courts, dependent as this allegation was on the evidence of Interbrew. In light of these uncertainties, the Court held that the resultant public interest here, namely, the interest of Interbrew in preventing future leaks and obtaining compensation from X, could not outweigh the public interest in protecting the media's sources.

Thus the Court found there had been a breach of art 10 of the Convention.

Relevance to the Victorian *Charter*

Freedom of expression is protected in Victoria through s 15 of the *Charter of Human Rights*. This case is a useful reminder that freedom of expression protects not just a journalist's right to protect their sources, but also their right to protect documents that might identify their sources.

The Supreme Court has a broad discretion to order discovery of particular documents by parties to litigation (*Supreme Court (General Civil Procedure) Rules 2005* (Vic) rr 29.07-29.09). Unlike equivalent Commonwealth legislation, the *Evidence Act 2008* (Vic) does not contain any provisions which a journalist can rely on to protect his or her sources. In the absence of such express protection, a journalist would need to argue that the court's power should be interpreted consistently with the journalist's right to freedom of expression, and therefore circumscribed so that it does not allow the disclosure order to be made (*Charter* s 32(1)). However, as courts are not public authorities, and therefore are not required to act compatibly with human rights, there may be limits to this argument (*Charter* ss 4(1)(j) and 38(1)).

The decision is available at <http://www.bailii.org/eu/cases/ECHR/2009/2065.html>.

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Balancing the Right to Religious Observance with the Right to Non-Discrimination

Ladele v London Borough of Islington [2009] EWCA Civ 1357 (15 December 2009)

The England and Wales Court of Appeal has confirmed that a local council can compel its employee to register civil partnerships, even though this conflicts with the employee's religious beliefs.

Facts

The *Civil Partnership Act 2004* (UK) came into force on 5 December 2005, introducing civil partnership between same sex partners. Lillian Ladele was employed by the London Borough of Islington ('Islington') as a registrar. She is an orthodox Christian, and objected to enabling same sex unions to be formed. Ms Ladele swapped assignments with colleagues to avoid officiating at civil partnerships. Islington considered this to be a breach of its 'Dignity for All' equality and diversity policy. It required all registrars assigned to officiate at civil partnerships, including Ms Ladele, to register same sex unions.

Ms Ladele argued that Islington discriminated against her on the ground of her religious belief by compelling her to do this, contrary to the *Employment Equality (Religion or Belief) Regulations 2003* ('Regulations'). She also made a related complaint of harassment.

Decision

The Court held that Islington did not directly discriminate against Ms Ladele because she was not treated differently to any of the other Islington employees, who were also required to register civil partnerships.

The Court then considered whether Islington had indirectly discriminated against Ms Ladele by requiring all registrars to officiate at civil partnerships ('Requirement'). Under the Regulations, indirect discrimination occurs if:

- (a) a requirement or practice disadvantages persons of a particular belief or activity when compared with other persons; and
- (b) the requirement or practice is not a proportionate means of achieving a legitimate aim.

The Court found that the Requirement disadvantaged Ms Ladele because she believed that civil partnerships were contrary to the will of God, compared with other persons who did not share her beliefs.

The key issue then was whether Islington could demonstrate that the Requirement was a 'proportionate means of achieving a legitimate aim'. Ms Ladele argued that the Requirement was not proportionate to Islington's aim of providing the public with an effective civil partnership registration service. This is because Islington could arguably have accommodated Ms Ladele's wish not to register civil partnerships and still provide the same quality of registry services.

However, the Court found that this was an incorrect articulation of Islington's aim. Islington aimed to provide registry services that were not only practical and efficient, but which also complied with its overriding 'Dignity for All' policy, which requires 'its employees to act in a way which does not discriminate against others'. This is consistent with Islington's strong commitment to fighting discrimination.

The Court held that this aim was legitimate, and that Islington was justified in requiring all its registrars to conduct civil registrations. Otherwise Islington's commitment to non-discrimination would be undermined. The Court found that:

The aim of the Dignity for All Policy was of general, indeed overarching, policy significance to Islington, and it also had fundamental human rights, equality and diversity implications, whereas the effect on Ms Ladele of implementing the policy did not impinge on her religious beliefs: she remained free to hold those beliefs and free to worship as she wishes.

The Court held that the importance of acting consistently with the 'Dignity for All' policy of itself justified the Requirement, which was a proportionate means of achieving this aim. However, it also found that a range of other factors justified the Requirement, including the fact that Ms Ladele was employed by a public authority to do a purely secular task and that her refusal to perform this task resulted in discrimination against gay people, which undermined Islington's 'Dignity for All Policy' and caused offence to at least two of her gay colleagues. Further, the Court did not consider Ms Ladele's views of

marriage to be 'a core part of her religion: and Islington's requirement in no way prevented her from worshipping as she wished'.

The Court considered the case in light of art 9 of the *European Convention on Human Rights*, which protects the right to freedom of thought, conscience and religion and the right to manifest that religion. However, these rights are subject to such limitations as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others. As a result, art 9 does not afford the right 'to manifest one's religion at any time and place of one's choosing': *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100.

The Court further held that the requirement was necessary to ensure that Islington complied with laws prohibiting discrimination against persons based on their sexual orientation.

Relevance to the Victorian Charter

Indirect discrimination is unlawful in Victoria under the *Equal Opportunity Act 1995* (Vic) ('EO Act'). There are a number of exceptions under the EO Act relating to religious beliefs. As a result, in many instances, it is lawful to discriminate on prohibited grounds if such discrimination is consistent with the discriminator's religious beliefs. This case suggests that such exceptions may be incompatible with the right to equality under s 8 of the *Charter*.

Additionally, this case suggests that it may be lawful and reasonable for a public authority employer to compel an employee to comply with its non-discriminatory practices, even if this would offend the religious beliefs of the individual employee.

The decision is available at <http://www.bailii.org/ew/cases/EWCA/Civ/2009/1357.html>.

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Fox Hunting and the Right to Private Life

Friend and Countryside Alliance v United Kingdom [2009] ECHR 2068 (17 December 2009)

In this case, the European Court of Human Rights unanimously held that a ban on fox hunting with dogs in the United Kingdom does not impinge upon the human rights enshrined in the *European Convention on Human Rights*. The Court's analysis focused on the rights to respect for private life, freedom of peaceful assembly and peaceful enjoyment of possessions.

Facts

The first application was lodged by Captain Brian Friend, a resident of Devon, England. The second application was lodged by the Countryside Alliance and ten other applicants. The Countryside Alliance is a non-governmental organisation which seeks to influence legislation and public policy that has an impact on the countryside, rural people and their activities.

The Court traced the history of hunting with hounds in rural Britain from the protection of farm stock through to the 'modern hunt': a socially regulated activity with various customs and practices, including codes, dress, etiquette and hierarchy. The modern hunt usually involves a pack of hounds, horseback riders and others who follow the hounds on foot.

The ban is imposed by two pieces of legislation. In England and Wales, s 1 of the *Hunting Act 2004* (the *2004 Act*) provides that a person commits an offence if a person hunts a wild mammal with a dog unless the hunting is exempt. Further, s 5 of the 2004 Act bans hare coursing, which is defined as 'a competition in which dogs are, by the use of live hares, assessed as to skill in hunting hares'. In Scotland, s 1 of the *Protection of Wild Mammals (Scotland) Act 2002* (the *2002 Act*) provides that it is an offence to deliberately hunt a wild mammal with a dog.

Decision

Despite the applicants' claims that a number of Convention rights were impinged by the bans, the Court only gave detailed consideration to the rights to respect for private life, freedom of peaceful assembly and peaceful enjoyment of possessions.

The right to respect for private life

Article 8 of the Convention provides that '[e]veryone has the right to respect for his private and family life, his home and his correspondence.' The Court did not accept that the hunting bans amount to an interference with the applicants' rights under art 8 despite acknowledging that hunting had become part of the fabric and heritage of some rural communities as well as forming a core part of the individual applicants' lives.

While recognizing that Convention rights must be broadly construed, the Court rejected the argument that the personal autonomy of the applicants, and so the right to private life, was impinged by the ban. In particular, the Court considered that, by its nature, hunting is a public activity and there is no relevant authority which suggests that the scope of private life extends to activities which are of an essentially public nature. Further, the Court did not accept the applicants' argument that hunting amounts to a particular lifestyle which is so inextricably linked to their identity that to ban hunting would be to jeopardise the very essence of their identity.

The second applicants also argued that the ban impinged upon their right to respect for their home because the inability to hunt on a person's land amounts to an interference with that person's home. The Court was unpersuaded by this argument because 'the concept of home does not include land over which the owner permits or causes a sport to be conducted.'

The right to freedom of peaceful assembly

Article 11 of the Convention provides that '[e]veryone has the right to freedom of peaceful assembly and to freedom of association with others.' The first applicant submitted that although the bans did not prohibit the Hunt from gathering, they did emasculate the right by prohibiting the *raison d'être* of the gatherings. The Court recognised that although the original purpose of art 11 was to guarantee peaceful demonstration and participation in the democratic process, its present scope is much broader. However, the Court was not prepared to read the right so as to protect the hunt because the ban only prohibits gathering for the purpose of killing a wild mammal with hounds, not gathering *per se*.

The right to peaceful enjoyment of possessions

Article 1 of Protocol No 1 of the Convention provides that:

[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions.... The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest...

The Court deemed that it was unnecessary to establish the full extent of this right because even if the ban did interfere with the property rights of the applicants, the Court considered that it served a legitimate aim and was proportionate for the purpose of art 1. Further, the Court identified authority which stated that the Court will respect the legislature's judgment as to what is 'in the public interest' unless that judgment is manifestly without reasonable foundation. The 'extensive public debate' and 'extensive debate in Parliament' about the content of the bans meant that the Court decided that the two legislatures were entitled to create the 2004 and 2002 Acts.

Relevance to the Victorian *Charter*

This decision provides useful guidance for the interpretation of ss 13 (right to privacy) and 16 (right to peaceful assembly and freedom of association) of the Victorian *Charter*. Although the applications were ultimately dismissed as inadmissible because they were manifestly ill-founded, the Court provided some useful analysis in relation to these two rights. The utility of the general principles discussed is not diminished by the difference in the wording of the rights in the Victorian *Charter* and the Convention.

The decision is available at <http://www.bailii.org/eu/cases/ECHR/2009/2068.html>.

Michael Gomm is a lawyer with Allens Arthur Robinson

Freedom of Expression and Protection from Defamation: Striking the Right Balance

Grant v Torstar Corp, 2009 SCC 61 (22 December 2009)

This Canadian Supreme Court decision draws on the freedom of expression guarantee in the Canadian Charter to establish a new common law defence of 'responsible public interest journalism' to an action

for defamation. The scope of this defence is similar to the expanded statutory defence of qualified privilege contained in the *Defamation Act 2005 (Vic)* s 30.

Facts

Peter Grant and his company brought a defamation (libel) action against the owners of the Toronto Star Newspaper. The action pertained to a newspaper article published by the Star that aired the views of residents critical of a proposed development by Mr Grant of a golf course on his lakeside property. The residents were suspicious that Grant was using his political influence to secure the necessary government approvals (the article quoted one resident as saying 'everyone thinks it's a done deal' because of Grant's influence). The reporter attempted to verify the allegations, and asked Grant for a comment, which Grant declined to provide.

The trial judge instructed the jury to consider the defences of fair comment and qualified privilege, but did not instruct it to consider a defence based on a concept of responsible communication in the public interest. The jury rejected the defences and awarded the plaintiff damages. The Court of Appeal held the trial judge erred in withholding the public interest defence from the jury and ordered a new trial.

Decision

The Canadian Supreme Court dismissed Grant's appeal and ordered a new trial. The Court held that the existing common law defences to defamation gave insufficient weight to the freedom of expression, enshrined in the *Canadian Charter of Rights and Freedoms*, in matters of public interest. The Court drew on comparative jurisprudence to establish a new defence of responsible communication in the public interest. The impugned publication must pertain to a matter of public interest, and the publisher must show that he or she was responsible in the circumstances, including by taking steps to verify the defamatory allegations.

Relevance to the Victorian Charter

Constitutional democracies have long grappled with the challenge of balancing the competing goals of promoting free expression and protecting the reputations of individuals. *Grant v Torstar* represents a tipping of that balance further in the direction of freedom of expression when it comes to the reporting of matters in the public interest. Beyond this general significance, however, the differences in existing defamation laws between the two jurisdictions mean the Canadian decision is likely to have minimal influence on the evolution of Victorian law, notwithstanding the existence of the Victorian *Charter*.

Both the Victorian (s 15) and the Canadian (s 2(b)) Charters contain protections of the freedom of expression. The Canadian Charter explicitly recognises the 'freedom of the press and other media of communication', whereas the Victorian *Charter* makes no specific mention of the freedom of the press. The Victorian *Charter* also protects the right of a person 'not to have his or her reputation unlawfully attacked' (s 13(b)); the Canadian Charter contains no equivalent protection. These superficial differences would suggest that Canadian defamation law would give greater weight to press freedom than Victorian law – yet, prior to *Grant v Torstar*, the opposite was the case.

The Canadian Court justified its establishment of the responsible communication defence on the basis that the common law defences of fair comment and qualified privilege gave inadequate protection to media outlets that responsibly published material in the public interest. To establish a common law defence of qualified privilege, for example, a defendant publisher must establish that it had a *duty* to the recipient to publish that information. This requirement of reciprocal duty/interest made the defence difficult to apply in matters involving mass media publications. As such, it did not assist the newspaper publishers in *Grant's* case.

But had the case occurred in Victoria, the need to establish such a defence would probably not have arisen at all. Following a national process of defamation law reform in Australia, the Victorian Government legislated a broader qualified privilege defence which abolished the reciprocity requirement (*Defamation Act 2005 (Vic)* s 30). To establish the Victorian statutory qualified privilege defence, the publisher need only establish that: (a) the recipient had an interest in having information on the subject; (b) the matter was published in the course of giving the recipient information on that subject; and (c) the conduct of the defendant in publishing the material was reasonable in all the circumstances.

In determining the reasonableness of the publisher's conduct, the statute enables the Court to take into account a range of factors, including the extent to which the publication is in the public interest, the seriousness of the defamatory imputation, the nature of the business environment in which the defendant operates, the steps taken by the publisher to verify the information, and the integrity of the sources relied upon. The legislature thus clearly contemplated the application of the qualified privilege defence to mass media publications, preferring to let the court decide whether the publisher acted reasonably in publishing the defamatory publication by balancing a range of factors sensitive to both the right of free expression and the protection of reputation.

Recalling that Victoria's *Defamation Act* must be interpreted in a way that is compatible with the human rights enshrined in the Victorian *Charter* (s 32), *Grant's* case could potentially be cited in support of an argument that the 'public interest' considerations be given greater weight by courts than the 'reputation' safeguards when conducting the reasonableness analysis – such a weighting being consistent with a broad conception of the freedom of expression. But the similarity of the Victorian statutory qualified privilege defence to the new defence developed by the Canadian Court in *Grant* means that much of the celebrated enlargement of press freedoms articulated in the Canadian case are of limited practical application in Victoria.

Looks like this time it's the *Canadians* playing human rights catch-up.

The decision is available at <http://www.canlii.org/en/ca/scc/doc/2009/2009scc61/2009scc61.html>.

Fergus Green is a lawyer at Allens Arthur Robinson

Freedom from Discrimination against Same-Sex Couples in Provision of Housing

Rodriguez v Minister of Housing & Anor (Gibraltar) [2009] UKPC 52 (14 December 2009)

The Privy Council has held that a Gibraltar Housing Allocation Committee policy to effectively grant government housing joint tenancies only to heterosexual couples was indirectly discriminatory and unconstitutional.

Facts

The Gibraltar Housing Allocation Committee's policy was to grant joint tenancies only to married partners or to common law partners who had children in common. Nadine Rodriguez, the appellant, lived with her same-sex partner in a Government flat. In 2006, Ms Rodriguez applied unsuccessfully to the Committee for a joint tenancy with her partner.

She then sought a declaration, first from the Supreme Court of Gibraltar and ultimately from the Privy Council, that the decision breached her rights under the Gibraltar Constitution to respect for private and family life and freedom from discrimination on the basis of sexual orientation.

Decision

In allowing the appeal, the Privy Council held that Ms Rodriguez had not been directly discriminated against. As unmarried heterosexual couples without children would also have been denied a joint tenancy, the policy applied equally to all sexual orientations. However, the Privy Council determined that the policy was indirectly discriminatory; given that same-sex couples could never get married or have children in common, it was impossible for same-sex couples to ever meet the criteria.

The Privy Council further held that this discriminatory treatment was not justifiable as a 'legitimate aim'. While distinctions between married and unmarried couples can sometimes be justified, in these circumstances it was determined that no legitimate aim was served. Any possible aim of discouraging homosexual relationships was clearly impermissible, as it would contravene the right to respect for private life. Also, it was held that the policy did not aim to protect children, and it did not cover all couples who had undertaken parental responsibility. Ultimately, there was no justification for excluding same-sex partners in a stable, long term, committed and inter-dependent relationship from the protection afforded by a joint tenancy.

Relevance to the Victorian *Charter*

The rights of non-discrimination, equality and freedom from arbitrary interference with family and privacy are enshrined in ss 8 and 13 respectively of the Victorian *Charter of Human Rights*.

This case could have ramifications for legislation in areas such as adoption, access to a partner's superannuation benefits and recognition of non-biological co-parents, traditionally areas in which same-sex couples have been accorded differential treatment. While many of these fall within the Commonwealth legislative ambit, the push for a national Human Rights Act could mean that this case has relevance beyond state borders.

The decision is available at <http://www.bailii.org/uk/cases/UKPC/2009/52.html>.

Christine Georgy, Summer Clerk, Mallesons Stephen Jaques Human Rights Law Group

HRLRC Policy Work

Centre Calls for Additional Safeguards under Severe Substance Dependence Treatment Bill 2009 (Vic)

The *Severe Substance Dependence Treatment Bill 2009* (Vic), currently before Victorian Parliament, proposes to introduce short-term involuntary detention and treatment for persons with severe substance dependence in circumstances where it is necessary as a matter of urgency to save a person's life or prevent serious damage to a person's health.

The Human Rights Law Resource Centre has made a submission to the Scrutiny of Acts and Regulations expressing concern that aspects of the Bill are incompatible with the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

The Centre makes a series of recommendations aimed at ensuring that the limitations on human rights imposed by the Bill are reasonable and proportionate, including that:

- if the Bill is to be compatible with the Charter, the Minister must provide strong empirical evidence to support the effectiveness of involuntary detention and treatment;
- the Government should substantially improve access to voluntary drug treatment programs;
- individuals must not be made subject to a detention and treatment order in instances where they retain legal capacity and choose to refuse treatment;
- all persons subject to a detention and treatment order must have effective access to legal representation and advocacy support; and
- the Bill should be amended to guarantee that persons made subject to a detention and treatment order can access voluntary treatment services once the order has expired.

The Centre's submission is available at <http://www.hrlrc.org.au/content/topics/health/human-rights-safeguards-needed-under-severe-substance-dependence-treatment-bill-jan-2010/>.

Rachel Ball is a lawyer with the Human Rights Law Resource Centre

Australian Government Responds to Paper on Human Rights Leadership

On September 2009, the Centre submitted a paper to the Federal Government entitled *Human Rights Leadership: Initiatives to Promote Human Rights at Home and Abroad*. The paper proposed a range of initiatives to strengthen the normative and institutional protection of human rights at the local, regional and international levels.

Since then, the Centre has had cooperative discussions with the Office of the Minister for Foreign Affairs about the paper covering a range of issues, including that:

- Australia is looking at ways to better integrate human rights in all areas of foreign policy. The Centre has suggested that an Australian Human Rights Ambassador could be instrumental in this.
- The Government is conscious of the human rights opportunities and challenges associated with its candidacy for a non-permanent seat on the UN Security Council.
- Australia has identified a number of areas of priority for human rights advocacy and action, including achieving progress in gender equality and non-discrimination and the universal abolition of the death penalty. The Government is also actively engaged in advocacy of R2P. The Centre has suggested the advancement of the business and human rights agenda as another potential priority area.

- Australia has not ruled out ratification of OP-ICESCR.
- Australia is acutely aware of the human rights challenges in the South Pacific and will continue to devote considerable energy and funding in promoting human rights observance in the South Pacific, including through Australia's bilateral development program.

The Centre's paper is available at www.hrlrc.org.au/content/topics/asia-pacific/australia-and-human-rights-leadership-initiatives-to-promote-human-rights-at-home-and-abroad/.

Philip Lynch is Director of the Human Rights Law Resource Centre

Human Rights and Foreign Policy: How Australia could become a 'AAA' State

In the course of the 2009 periodic review of Australia by the UN Human Rights Committee, one of the independent experts called on Australia to grasp its opportunity – and fulfil its obligation – to become a 'AAA' human rights state. In January 2010, the Centre published a paper, entitled 'Australia, Human Rights and Foreign Policy' (2009) 34(4) *Alternative Law Journal* 218, which responds to three issues raised by that call:

- First, why should Australia strive to be a 'AAA human rights state'?
- Second, does Australia have the necessary characteristics and satisfy the preconditions to become such a state?
- Third, what are some of the steps and measures that Australia should take, including particularly at the international and regional levels, to pursue this path if, indeed, it is a path worth pursuing?

The paper argues for a human rights-based approach to foreign policy, contending that Australia's international, regional and bilateral approach to human rights should be persistent and principled, fearless and forceful.

It contends that Australia should strategically position itself as an outstanding international citizen and human rights promoter, including by developing a consistent and comprehensive strategy on human rights and foreign policy. That policy should seek to mainstream and integrate human rights across all areas of Australian foreign policy, including aid, development, trade, investment, migration, environment, business and security. It should contain concrete measures and commitments to promote and protect human rights in the region and internationally. Such a policy could enhance Australia's international credibility as a human rights leader and build significant diplomatic capital.

The paper is available at <http://www.hrlrc.org.au/content/topics/asia-pacific/human-rights-and-foreign-policy-australia-could-become-a-aaa-state-jan-2010/>.

Philip Lynch is Director of the Human Rights Law Resource Centre

HRLRC Casework

Centre Advocates for Health of Immigration Detainees

The Centre is acting for a long term immigration detainee awaiting removal from Australia.

The Centre is advocating for the health needs of the detainee to be properly addressed, so as to minimise any adverse health consequences as a result of the detainee's removal from Australia.

Emily Howie is a Senior Lawyer with the Human Rights Law Resource Centre

Centre Applies to Intervene in Coronial Inquest

In early February, the Centre will apply to become an 'interested party' in the coronial inquest into the death of 15 year old Tyler Cassidy, who was shot by the Victoria Police in a Northcote park in December 2008. The Centre is seeking to participate in the coronial hearing in order to provide the coroner with submissions on the relevance of the *Victorian Charter of Human Rights* to Tyler's death.

If granted leave to be an interested party, the HRLRC proposes to provide submissions on the obligations of the Victoria Police and the Coroner in terms of protecting and promoting the right to life

and the rights of children to protection under the *Charter*. The Centre is being assisted in this matter by Allens Arthur Robinson, together with Brian Walters SC and Sam Ure of Counsel.

Emily Howie is a Senior Lawyer with the Human Rights Law Resource Centre

Seminars and Events

Fundraiser for Indigenous Barristers' Fund – 4 February 2010

The Indigenous Lawyers Committee presents a fundraising screening of 'Bran Nue Dae'. A coming-of-age musical comedy that celebrates the adventure of finding home, Rachel Perkins' third feature is based on Jimmy Chi's 1990 landmark Aboriginal stage musical.

Date: 7pm, 4 February 2010

Venue: Cinema Nova, 380 Lygon Street, Carlton

Cost: \$20

RSVP: Elizabeth Bennett at Elizabeth.Bennett@vicbar.com.au or (03) 9225 6722.

All funds raised will support the Indigenous Barristers' Fund – a trust established to help bring talented Indigenous lawyers into the mainstream of legal practice in Victoria by assisting Indigenous persons at the Victorian Bar. Ongoing financial support for the fund is needed.

Resources and Reviews

Deena Hurwitz and Margaret L Satterthwaite (eds), *Human Rights Advocacy Stories* Foundation Press / Thomson Reuters, 2009, 590 pp, paperback

More than any other legal discipline, human rights law is about context. A human rights lawyer who launches into an advocacy campaign armed with legal doctrine alone is as imprudent as a manufacturer who begins production of a new product without any understanding of the market. Most human rights texts discuss the law; *Human Rights Advocacy Stories* considers the market.

Human Rights Advocacy Stories contains 15 stories of human rights cases, norms and enforcement mechanisms. The stories are told by people who were actively engaged in the cases and issues and are able to offer unique insights into the story behind the judgments and laws.

Many of the stories are simply good tales. If you happened to find yourself dining with Sir Nigel Rodley, he might well tell you about 'Amnesty International's Efforts to Shape the UN Convention against Torture' (Chapter 1). The conversation would be decidedly less engaging if he were to recite the text of the Convention.

The stories are also a rare and valuable resource for human rights advocates interested in critical analysis of their work. They question the role of the law in human rights struggles, acknowledging the vital importance of informal forms of protest. For example, 'The Story of the TAC Case: The Potential and Limits of Socio-Economic Rights Litigation in South Africa' (Chapter 2) discusses how civil disobedience, community education and constitutional litigation all played a role in the Treatment Action Campaign's efforts to increase access to drugs which limit mother to child HIV transmission. It also provides an honest account of the limits of the law to create change in this area.

Other stories include the banning of religious symbols in France's public schools, the recognition of the concept of genocidal rape in the *Akayesu* Case and the efforts of community-based organisations in India to oppose the World Bank-backed damming of the Namada River. The stories gain their power from their sophisticated consideration of the interplay of the political, social, economic and highly personal factors in the development and application of human rights law.

It is sometimes said that human rights suffers from a crisis of relevance; that despite its claim to reflect an essential and universal humanity, the framework is so mired in law that it has become meaningless to ordinary individuals and communities. *Human Rights Advocacy Stories* undermines that accusation by anchoring the human rights movement in the realities and challenges of attempts to effect positive change.

Rachel Ball is a lawyer at the Human Rights Law Resource Centre

New Issue of *Alternative Law Journal* – ‘When Laws Fail to Protect’

The *Alternative Law Journal* is a quarterly refereed journal which focuses on social justice, human rights, access to justice, progressive law reform and legal education. The *Journal* has a diverse readership among legal practitioners, judges, policy makers, law students and legal studies students.

The latest issue, themed *When Laws Fail to Protect*, contains articles on highly topical issues such as human rights and foreign policy, homelessness, hate crime laws, anti-terrorism laws and powers, access to legal aid, and the case of Stern Hu.

For further information, including subscription and submission details, see www.altlj.org.

Human Rights Jobs

Community Legal Centre Graduate Scheme

Applications are now open for the Federation of Community Legal Centres (Victoria) Community Legal Centre Graduate Scheme for 2011. The program provides a training and employment opportunity for law students who will commence the final semester of their law degree in 2010 or who have recently graduated but not been admitted to practice. The program includes payment of PLT course and admission fees and a 12-month post-admission employment rotation through three community legal centres. The Scheme is funded through a Legal Services Board grant. Applications close 29 January 2010.

For further information see www.communitylaw.org.au/cb_pages/jobs_and_getting_involved.php#law.

Foreign Correspondent

Human Rights Developments under International Law and at the UN

Happy new year to all you Australian human rights lawyers and advocates from the expat human rights lawyers and advocates in Geneva!

Haitian earthquake

I've found it very hard to sit down to write this month's foreign correspondent column, and not just because it has been a while since I've been able to contribute a regular update on the latest news from the international scene. Each time I think about what to update you on regarding the international human rights community, I am reminded again of the one big painful thing that is overwhelming many people's thoughts and actions – Haiti. The UN and the international human rights community are really a small global family, and no more so at times like this – I struggle to identify a single friend or colleague in our UN/human rights family who is not grieving for a friend or colleague who is missing or dead as a result of the earthquake in Haiti. It has hit the UN very hard. All day every day we see Facebook updates memorialising the courageousness of friends who have devoted years to the development efforts in Haiti, postings questioning if anyone has seen or heard from a colleague who is still unaccounted for, up-to-the-minute messages from friends who dropped everything to go and coordinate the relief efforts, etc ... Many constant reminders of the tragedy that is unfolding and will continue to unfold for many years to come. The UN community has confirmed 40 dead, including the head of the UN in Haiti, the Special Representative of the Secretary-General. Over 300 UN staff are still missing – the biggest ever loss of life for a UN operation. Some international aid organizations, such as the Red Cross, have lost or are still missing up to three quarters of their staff, which severely hampers the humanitarian response.

So many are grieving the immense loss of life and long-term damage caused to the people of Haiti, a country already suffering disproportionately from many decades of underdevelopment. It has been reported that in Port-au-Prince, a city about double the size of Canberra, eight hospitals were destroyed or damaged. One million people have been left homeless. The World Food Program hopes within the next couple of weeks to be able to feed 1 million people a day in Haiti – if they are unable to do this the consequences will be devastating and violence fuelled by fear and starvation will erupt. One of the most distressing thoughts is that so many educated and motivated Haitians had been returning in recent years to help their country – many of them are now dead. Recovery is going to be slow; it will take years to rebuild schools, hospitals, and society. Just today as I write this, 3 more amazing advocates in

the women's rights movement, all leaders of important NGOs in Haiti, have been confirmed dead. The country has lost a lot of leaders who were at the heart of the development efforts.

UN Secretary General Ban Ki Moon has described the aftermath that Haiti now faces as 'one of the most serious crises in decades'. UN human rights bodies and experts have been calling on the international community to ensure a human rights-based approach to the disaster. For example, both the Committee on the Rights of the Child and the Committee on the Elimination of all forms of Discrimination Against Women, which have been in session this week in Geneva, have urged special measures be taken to protect children and women against violence.

The needs are so great – it is hard to say more.

Human Rights Council begins a year of preparing for its 5 year review

In other news from the global human rights community, 2010 will be a very important year for the Human Rights Council as we prepare for the 5-year review due in 2011. Most delegations (governments and NGOs) are spending a lot of time discussing and strategising about the successes and failures of the Human Rights Council during the first few years of its existence, and preparing for what may be some further institution building changes next year. The Universal Periodic Review continues, reviewing over the course of the next year the second half of the world's countries on their international human rights records and achievements. Australia will be reviewed in 2011, which means that domestic preparations are already well underway, and as it will be towards the tail end of countries under review there will be many lessons learned from the other countries that go before.

Human Rights Council Advisory Committee begins fourth session

The UN Human Rights Council's Advisory Committee will hold its fourth session in Geneva next week. One of the main items on its agenda is a study on non-discrimination and the right to food. The Advisory Committee also continues its important work on a Declaration on Human Rights Education.

'Anti-homosexuality' legislation in Uganda

In other global human rights news, many parts of the international human rights community are watching and actively advocating against the so-called 'Anti-Homosexuality Bill' tabled recently by one member of parliament in Uganda. The Bill prohibits any form of sexual relations between people of the same sex. The UN High Commissioner for Human Rights, Navi Pillay, has labeled the Bill as 'draconian' and has urged the Ugandan government to shelve it, saying it would bring the country into a direct collision with established international human rights standards aimed at preventing discrimination.

Alston calls for war crimes investigation in Sri Lanka

One of Australia's finest human rights exports, Professor Philip Alston, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, began 2010 by announcing that he had commissioned a detailed analysis of video released on British TV showing the summary execution of a number of Tamils by Sri Lankan soldiers. Recently, he found that the video was authentic and called for an independent investigation into war crimes and other grave violations of international humanitarian and human rights law.

The global economy and government responses to the economic crisis

One of the recent interesting events in Geneva was an expert workshop last week organised by the International Council on Human Rights Policy on the global economy and human rights, which brought together a mix of practitioners from economics, law and development. For many human rights advocates, having to talk about and listen to detailed presentations on macroeconomic policy was a challenge (albeit an important one) as the human rights community grapples with how to analyse the effects of the global financial crisis, and address the worst of its impacts from a human rights perspective. Learning the language of economics, and likewise teaching the economists the language of human rights, was a vital first step in this process. The ICHRP will be doing further work on this, so watch this space.

On a related note, ESCR-Net, together with the Center of Concern, the Center for Economic and Social Rights and the Center for Women's Global Leadership – is conducting a worldwide inquiry into

governments' responses to the economic crisis and would like to hear from any individuals and organizations willing to answer their online questionnaire on this topic. According to ESCR-Net, your answers will help them to understand how governments' actions worldwide have lived up to, or let down, their human rights obligations, and to help determine what policy responses are needed at the national and global levels to confront this enduring crisis and prevent another collapse. The responses will be integrated into a collective report analyzing government responses to the crisis from a human rights perspective, serving as the foundation upon which to provide views and recommendations during a high-level panel discussion on the topic at the UN Human Rights Council. Check out the ESCR-Net website for more info.

Claire Mahon is an Australian international human rights lawyer based in Geneva, where she works as a consultant for NGOs and the UN. She is the Coordinator of the Project on Economic, Social and Cultural Rights at the Geneva Academy of International Humanitarian Law and Human Rights, Special Advisor to Mary Robinson, and an Adjunct Clinical Professor of Law at the University of Michigan.

If I Were Attorney-General...

Answering the Call for Economic and Social Rights in Australia

If I were the Attorney-General, I would take seriously the call by Australians for economic and social rights to be better protected and promoted in this country. I would be pleased that over 35 000 Australians took time to participate in the National Human Rights Consultation that I launched in December 2008. Yet I would not accept the praise of many – that the process stands as a leading example of how national governments should consult communities about human rights – until I had issued a genuine response.

In preparing this response, I would attend to the community's call for giving priority to rights to health care, housing and education. These would be addressed constructively with the Rudd Government's reform agenda of social inclusion, access to justice, and national security. I would also recall the Australian Labor Party's historic role in the creation of Australia's social welfare architecture, in legislation dealing with labour, health care and education.

The drafters of the Universal Declaration of Human Rights understood that human rights cannot be protected without catering for the material needs of the most vulnerable. The fundamental rights that accord with being human do not only involve civil and political rights. States must also respect, protect and fulfil the rights of everyone to have access to food, clothing, housing, health care, and education.

And as those drafters made clear, this realization is as important to peace and national security as it is to inclusion and access to justice. I would recommend, in this spirit, that Australia ratify the Optional Protocol of the International Covenant on Economic, Social and Cultural Rights and encourage the Minister for Foreign Affairs, Stephen Smith, to persuade other countries to do so in order to bolster the post-Cold War economic and social rights framework as well as the human rights institutions of our region.

Closer to home, I would engage with some of the National Human Rights Consultation Committee's excellent recommendations, such as the adoption of a federal Human Rights Act, and supplement others, such as its institutionally timid exploration of how economic and social rights correspond with judicially manageable standards. I would ask my Department, the Australian Law Reform Commission and other experts, to assist me in understanding the rich international and comparative examples that indicate how economic and social rights work in advanced legal systems. I would compare this advice with earlier white papers and reports on Indigenous health and well-being, housing, water and legal services, and get advice on implementing the recommendations which support human rights in institutionally creative and targeted ways.

I would work hard to understand the hurdles and opportunities presented by recognizing economic and social rights as, on the one hand, a frame of political discourse in Australia and on the other, a legally robust category. It may be that as a frame of discourse, claims of 'rights' help particular groups to communicate, and my colleagues in government and others to understand, how hunger, indigence, medical neglect, or barriers to schooling are public injustices in Australia, rather than private misfortunes. This frame may even unite political minorities that are grappling with a systemic problem from different perspectives. I would remind my colleagues in Cabinet that Australians who participated

in the consultation described serious failings in access to health care, education and housing in rural and urban communities.

In approaching the legal category of economic and social rights, I would consider how one can exert legal pressure on decision-makers in diverse scenarios. First, I would survey the ways in which the duties to respect, protect and fulfil economic and social rights would alter the role of parliamentary committees and the drafting and preparation of legislation. This would also require me to investigate current approaches to measuring and monitoring economic and social rights.

Second, I would examine the obligations that would be placed on policy-makers and bureaucrats. An apt example is offered by South Africa: where administrative decision-makers must now act 'reasonably' in matters of economic and social rights. This standard involves measures of procedural fairness, familiar to Australian administrative law, but also includes an explicit requirement that decision-makers do not ignore the interests of the most vulnerable in devising and implementing policies around housing or health care.

Third, I would explore the ways in which adjudication would be altered by legislated economic and social rights. I would reject the Committee's recommendations that such rights should, without further study, be taken off the adjudicative agenda. I would instead get advice on how such rights may translate to a justiciable complaint, or otherwise figure as subjective entitlements to certain procedural protections, or as a principle to inform the interpretation of legislation and the common law.

All of these issues will provoke more thinking and more action. If my study finds that a change is needed in the prevailing judicial culture in Australia, I would increase the resources for ongoing judicial education, encourage the use of international and comparative materials by Australian courts and advocates, and perhaps think about the trajectory of judicial appointments in Australia in a more expansive way.

In all of my endeavours as Attorney-General, I would be encouraged by the view of many that the protection of economic and social rights leads to a renewal of democracy, rather than a restriction of it.

Dr Katharine Young is a recent graduate of Harvard University and a research fellow at ANU's Regulatory Institutions Network