human rights law resource centre

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The Human Rights Law Resource Centre Ltd 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

'Making Equality Real' in Australia

When the *Sex Discrimination Act* was introduced into parliament in 1983 it was derided as the brainchild of radical feminists and a death knell to functioning society. A quarter of a century later much of the smoke blown on the debate has cleared and the SDA has emerged a constructive, but flawed document.

In its current form, the SDA is only capable of addressing some forms of discrimination, some of the time. It employs a narrow definition of discrimination, applies to limited areas of public life and fails to provide the tools necessary to address systemic discrimination and promote substantive equality.

The current parliamentary inquiry into the SDA affords an opportunity to address the legislation's shortcomings. If we are to move towards real and effective equality, our laws must offer a more progressive and robust vision for Australian women and men.

This vision is not amorphous or imaginary. It already exists at the international level and is encapsulated in the *Convention on the Elimination of All Forms of Discrimination against Women*. CEDAW requires equal outcomes and the elimination of the structural causes of inequality.

The disparity between CEDAW and the SDA is disappointing given that the SDA was Australia's legislative response to the ratification of CEDAW and should therefore have reflected the convention's expansive aims. The SDA sits in contrast to the *Racial Discrimination Act*, which aims to give full effect to the *International Convention on the Elimination of All Forms of Racial Discrimination* and closely follows the language of that convention.

There are many examples that demonstrate the gaps in the SDA. Consider the broad failure to recognise the parental caring responsibilities of both women and men. When combined with the dominant cultural assumption that women bear the primary responsibility to care for children, the result is that women do not enjoy equality in the workforce. Flow-on effects include women's financial disadvantage and under-representation in public and political life.

The SDA stares blankly at this problem. The individual complaints process that is the SDA's main weapon against discrimination serves an important function, but is not designed to address entrenched discrimination. The SDA's individualised approach needs to be supplemented by mechanisms that can respond to systemic issues. These mechanisms should include a free-standing provision guaranteeing equality before the law. Such a guarantee would allow women to challenge laws, procedures and

practices that create or perpetuate inequality. It is a protection exists in every Western, industrialised country except Australia.

The SDA should also adopt a general prohibition of discrimination. The SDA's current aim of prohibiting narrowly defined acts of discrimination in specified fields of public life is inadequate. The fact is that much of the discrimination experienced by women finds its source outside the SDA's defined spheres of activity. The SDA needs to reach issues such as the undervaluation of women's work and women's susceptibility to male violence.

Finally, for the SDA to realise its full practical and symbolic potential, the permanent exemptions must be removed. Currently the SDA permits discrimination in certain areas, including within sporting clubs, religious bodies and charities. Discrimination should only be permissible when it can be shown to be a necessary and proportionate response to a legitimate need. Absent this analysis, exemptions perpetuate traditional social structures that discriminate disproportionately against women.

These recommendations are not novel – they have appeared in a stream of high-level calls for reform that have been largely ignored by successive Australian governments. It's time to confront the forces that have stunted the evolution of the SDA. The Labor Party's own policy platform compels them to 'make equality real' for women and to harmonise domestic law with international human rights standards. To achieve these goals the SDA must be strengthened so that it has the capacity to address discrimination, in all its guises.

Rachel Ball is a lawyer at the Human Rights Law Resource Centre and the lead author of the Centre's submission to the Senate inquiry into the SDA, available at www.hrlrc.org.au under Policy Work>Domestic Submissions>Women's Rights: Submission to Senate Review of SDA calls for Focus on Substantive Equality and Systemic Discrimination (Aug 2008).

News

Attorney-General Addresses Human Rights Law Resource Centre on 'Strengthening Human Rights and the Rule of Law' and Announces Major Human Rights Initiatives

On 7 August 2008, the Human Rights Law Resource Centre hosted a major seminar with the federal Attorney-General, the Hon Rob McClelland MP, on the topic of 'Strengthening Human Rights and the Rule of Law'. The Attorney used the seminar, held at Mallesons Stephen Jaques, to make a number of significant human rights announcements including that the Government:

- is issuing a standing open invitation to the Special Procedures of the UN Human Rights Council;
- proposes to ratify OP-CAT, OP-CEDAW and the OP to the Disability Convention;
- proposes to enact a new federal offence of torture, with extraterritorial effect; and
- has appointed Justice Catherine Branson as the new President of the Human Rights and Equal Opportunity Commission.

Commenting on the decision to issue a standing invitation to UN Special Procedures, the Attorney stated:

> The Government supports both the promotion of human rights internationally and the development of international standards and mechanisms for the protection and enforcement of these rights. That's why we have agreed to issue a standing invitation to UN human rights experts to come to Australia.
>
> The decision underscores the Rudd Government's commitment to strengthen Australia's engagement with the United Nations and to be a leader in international human rights.

This announcement has been very warmly welcomed by UN human rights bodies, including members of the UN Human Rights Committee and UN Special Rapporteurs on human rights.

The Attorney's speech is available at www.hrlrc.org.au under Seminars and Events.

Centre Receives Major Grant from Legal Services Board to Assist Socially and Economically Disadvantaged Australians

The Centre has received a Major Grant from the Victorian Legal Services Board to assist us to build Victorian legal and community sector capacity to use domestic human rights instruments, particularly the

Victorian Charter of Human Rights and Responsibilities, together with appropriate international human rights monitoring and complaints mechanisms, in casework and advocacy for and on behalf of socially and economically disadvantaged Victorians.

This significant capacity boost will enable the Centre to better provide accessible and practical human rights publications and resources, training, seminars, technical expertise and logistical support to the community and legal sectors.

For further information about Legal Services Board grants, see www.lsb.vic.gov.au/Grants.htm.

DLA Phillips Fox Continues Major Secondment to Human Rights Law Resource Centre

DLA Phillips Fox, a leading international law firm and major sponsor of the Human Rights Law Resource Centre, has confirmed the extension of its full-time secondment to the Centre to February 2010.

The DLA Phillips Fox Human Rights Lawyer, Ben Schokman, started with the Centre in February 2007. Since that time, he has made a very significant contribution to our work, including conducting human rights test cases and making major submissions to domestic and international legal bodies.

Mallesons Extends Support to Human Rights Law Resource Centre

Another of the Centre's key partners, Mallesons Stephen Jaques, has made a significant contribution to our work, offering a secondee lawyer for six months to assist with research, education and advocacy regarding the legislative protection of human rights. The Mallesons Human Rights Law Group also provides substantial pro bono assistance to the Centre through our litigation and policy programs, together with providing financial support.

Victorian Charter of Rights Developments

Victorian *Charter of Human Rights* Train-the-Trainer Materials Online

With the support of the Victoria Law Foundation, the Centre has developed an online package of materials to equip lawyers to educate workers in community organisations about the *Charter* to:

- understand human rights and how they are protected in the *Charter*;
- identify relevant human rights in real life scenarios;
- understand how the *Charter* can be used as an advocacy tool for the empowerment of clients and the achievement of social justice; and
- understand what organisations must do to comply with the *Charter*.

The materials include:

- Presenters' Manual
- PowerPoint Presentation
- 14 case studies (with answer guides included in the Presenters' Manual)
- 2 page fact sheet on the rights in the *Charter*
- 20 rights specific fact sheets (which consider, in relation to each right: What does the right mean?; and How is the right relevant to my work?)
- 11 themed fact sheets on: disability services; drug users; education; homelessness; mental health; older people; prisoners; public housing; rights in relation to the police; young people in the criminal justice system; and young people in care.

The materials are available at www.hrlrc.org.au under Victorian Charter of Human Rights and Responsibilities>Train-the-Trainer Program.

'Your Rights, Your Stories'

The Victorian Equal Opportunity & Human Rights Commission has launched a web-based campaign to collect stories about working and living with Victoria's *Charter of Human Rights and Responsibilities*. VEOHRC is seeking stories about:

- implementing human rights in organisations;
- using the *Charter* as an advocacy tool; and
- human rights issues for children and young people.

Stories will be published on VEOHRC's website and will provide a valuable source of information for the public, advocates and government. 'Your Rights, Your Stories' can be accessed at: http://www.humanrightscommission.vic.gov.au/human%20rights/your%20rights%20your%20stories/.

Statements of Compatibility under the Victorian *Charter*

Section 28 of the *Charter of Human Rights and Responsibilities* requires a Statement of Compatibility to be issued for every Bill that is introduced into a House of Parliament.

Below is an analysis of recent significant Statements.

Corrections Amendment Bill will Limit Rights of Victims and Prisoners

The *Corrections Amendment Bill 2008* (Vic), introduced to Victorian parliament in July 2008, seeks to:

- quarantine damages and awards payments to prisoners received as a result of a successful claim against the state of Victoria or a private prison operator;
- publicise successful claims by prisoners for the benefit of anyone who wishes to consider civil action to recover funds from the prisoner; and
- provide for the payment out of the fund to victims and creditors.

The Statement of Compatibility acknowledges that the right to equality, the right to privacy and property rights are relevant to the Bill. However, the Statement concludes that these rights are not engaged because:

- the status of being a prisoner is not a protected attribute under the *Equal Opportunity Act 2004* (Vic) (to which the right to equality under the *Charter* is referable);
- the privacy of prisoners would not be unlawfully or arbitrarily interfered with; and
- no deprivation of property occurs.

However, the Centre considers that the Bill both engages and is incompatible with these rights. In addition, the Bill engages and may infringe various other human rights set out in the *Charter*. The connection that the Bill makes between the mistreatment of prisoners and the compensation of their victim is of considerable concern. The Centre has made a submission to SARC about the detrimental impact that the Bill would have on the following human rights.

- *The right to recognition and equality before the* law – the Bill would diminish protection of prisoners against discrimination and reinforce existing structural barriers to equality for prisoners, particularly those from disadvantaged minority groups.
- *The right to privacy and reputation* – the Bill would sanction publication of very personal information about prisoners and prevent prisoners from being able to reach private out of court settlements.
- *The right to protection of families and children* – prisoners would be prevented by the Bill from providing their families and children with money received as compensation.
- *Property rights* – the Bill would confiscate compensation belonging to prisoners for up to one year and 45 days, and permanently deprive prisoners who have received compensation of a portion of that money to pay for the administration of the quarantine fund.
- *The right to humane treatment when deprived of liberty* – the Bill restricts numerous human rights, even though these restrictions are not an unavoidable adjunct to imprisonment, resulting in an additional punishment to that intended by imprisonment (being the deprivation of liberty).
- *The right to fair hearing, including the right to equal access to courts* – the Bill greatly increases the power of the State and private prisons in litigation against prisoners, resulting in inequality before the courts. The Bill would also reduce the cost-benefit of litigation for prisoners, despite merit.

- *The right to an effective remedy* – the Bill significantly dilutes the ability of prisoners to access real and effective compensation and redress for their mistreatment by the State or private prison operators.

The human rights limitations imposed by the Bill are not reasonable or proportionate to the aim of the Bill, which is purportedly to assist debtors (including victims of crime) to recover funds from prisoners. The effectiveness of the Bill is highly questionable, as it seems more likely to deter prisoners from claiming compensation (regardless of the legitimacy of their claim), rather than to assist debtors to recover compensation. This will impact detrimentally both on prisoners and any victims.

The Centre's submission to SARC on the Bill is available at www.hrlrc.org.au under Policy Work>Domestic Submissions>Prisoners' Rights: Compensation Bill Violates Human Rights.

Melanie Schleiger is on secondment to the Human Rights Law Resource Centre from Lander & Rogers

Family Violence Protection Bill 2008

The Family Violence Protection Bill 2008 replaces the *Crimes (Family Violence) Act 1987*. The Bill seeks to improve the family violence civil intervention order and safety notices system.

The Statement of Compatibility identifies a number of rights contained in the *Charter* that are engaged by the Bill. Noteworthy provisions of the Bill in the human rights context include:

- compulsory counselling of persons subject to an intervention order;
- admissibility of third party statements into court despite rules of evidence to the contrary;
- restrictions on the cross-examination of protected witnesses by respondents to an intervention order application without legal representation; and
- allowing for interim order applications to be determined without the respondent being notified or given an opportunity to present their case.

Each of these issues is discussed further below.

Compulsory counselling of persons the subject of a final intervention order

Clause 130 of the Bill requires the Magistrates' Court to order a person subject to an intervention order to attend counselling in certain circumstances. This provision engages the right not to be subjected to medical treatment without consent (s 10(c) of the *Charter*). The Statement acknowledges this right is limited by this clause of the Bill, but does not analyse whether the extent of the limitation is appropriate in light of its purpose. Rather, it merely asserts that the provision is reasonable and justified given the importance of the purpose. This importance, the Statement argues, derives from the potential of counselling to modify violent behaviour, and thereby indirectly promotes the right to life (s 9 of the *Charter*) and the right to protection of families and children (s 17 of the *Charter*).

Admissibility of statements despite rules of evidence to the contrary

Clause 65 of the Bill provides that in an application for a family violence intervention order the Court may 'inform itself in any way it thinks fit', despite any rules of evidence to the contrary. This provision allows the Court to consider statements made by a victim to friends, family or doctors, which would otherwise be considered hearsay, in situations where there are no other witnesses to alleged violence against this person. The provision engages the right to a fair hearing (s 24(1) of the *Charter*).

The Statement concludes that while the right is engaged by clause 65 of the Bill, it is not limited, as there are a number of safeguards to ensure a person will still have the proceeding decided by a competent, independent and impartial court after a fair and public hearing. For example, the Court must be satisfied that it is just and equitable to admit evidence normally excluded by evidence laws, and that the probative value of the evidence is not outweighed by the danger the evidence may be unfairly prejudicial, misleading or confusing.

Restrictions on respondents' ability to cross-examine without legal representation

Clause 70(3) of the Bill prevents respondents to an application for a family violence intervention order from personally cross-examining protected witnesses. Protected witnesses include persons affected by the family violence, any child, and any family member of a party to the proceedings. Such persons may

only be cross-examined by the respondent's lawyer. If the respondent does not obtain legal representation, the Court must order Victoria Legal Aid to offer representation for the purpose of cross-examination, although VLA may apply conditions to the provision of its services.

The Statement does not discuss whether this clause limits any rights contained in the *Charter*. However, the Report of the Scrutiny of Acts and Regulations Committee into the Bill questions whether this provision, by preventing a respondent from challenging evidence put against them, limits the rights of a respondent to a fair hearing (s 24(1) of the *Charter*). Likewise, as the clause requires respondents generally to pay for legal representation, the Report queries whether the clause may cause them to be deprived of property other than in accordance with law (s 20 of the Charter).

Determination of interim order applications without prior notification or hearing

Clause 54 of the Bill engages and limits the right to a fair hearing (s 24 of the *Charter*). It provides that the Court may determine an application for an interim order, whether or not a respondent has been given notice of the application and whether or not the respondent is present at the time the order is granted.

The Statement contends that while the right to a fair trial is limited by this provision, the limitation is justified given its purpose is to protect victims of family violence 'as swiftly as possible', which is said to indirectly promote the right to life in s 9 of the Charter. It is further argued that extent of the limitation is proportionate because an interim order ceases upon determination of a final order, which often occurs within a short timeframe.

Michelle Le, Winter Clerk and Sharyn Broomhead, Articled Clerk, Human Rights Law Group, Mallesons Stephen Jaques

Evidence Bill 2008

The Evidence Bill 2008 seeks to introduce in Victoria the uniform evidence laws which already apply at a Commonwealth level and in NSW, the ACT and Tasmania (Uniform Evidence Acts (the 'UEAs')). The Bill is the first of two bills which aim to bring the UEA into effect in Victoria. The UEA model arose out of a comprehensive review of evidence laws by the Australian Law Reform Commission in the 1980s and is part of a broad scheme to provide a uniform, codified law of evidence that applies across all Australian jurisdictions.

The Bill sets out evidence laws which will apply to all proceedings in Victorian courts. In particular, the Bill intends that:

- all evidence of an appropriate probative value is admissible in court proceedings, unless it would cause unfair prejudice;
- broad judicial discretions are available to exclude or limit the use of evidence in certain circumstances; and
- the rules of evidence will ensure a fair hearing for all persons appearing before the courts.

Human rights issues are raised by a number of provisions of the Bill, including (among many):

- the court's ability to compel extended families of, and people with kinship ties to, a defendant to give evidence, even if it harms their relationship with the defendant;
- the widening of admissible evidence to include categories currently inadmissible under Victorian law; and
- the court's ability to admit evidence which has been illegally or improperly obtained if it finds that the desirability of admitting it outweighs the undesirability of admitting it.

Compulsory giving of evidence

Clause 18 of the Bill provides that the court may exercise its discretion to excuse a person from the requirement to give evidence against a spouse, de facto partner, parent or child, where:

- there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person or to the relationship between the person and the defendant; and
- the nature and extent of that harm outweighs the desirability of such evidence.

The discretion does not apply to all persons who have a relationship with the defendant, such as extended family members or those with kinship ties in Aboriginal communities.

The Statement of Compatibility tabled with the Bill acknowledges that this provision engages with cultural rights protected by the *Charter,* which states that Aboriginal persons hold distinct cultural rights which must not be denied, including the right to maintain kinship ties with other members of their community (s 19(2)). Where a person has kinship ties with the defendant, other than as a spouse, de facto partner, parent or child, they may be compelled to give evidence against the defendant. This may cause harm to the kinship relationship and therefore the right in section 19(2) may be limited.

However the Statement asserts that the limitation is directly and rationally connected to the desirability of ensuring that all relevant and reliable probative evidence is admissible. Broadening the class of people to which clause 18 applies would undermine the court's ability to obtain important evidence.

In addition, the report of the Scrutiny of Acts and Regulations Committee regards clause 18 as a potential limitation on the right of families to be protected by the State (s17(1) of the *Charter*) and questions whether it falls beyond the parameters of a 'reasonable' limitation on human rights (s7(2)). The Committee observes that if clause 18 were extended to a wider range of relationships, extended families and Aboriginal persons with kinship ties to defendants would still be required to testify if the desirability of doing so outweighed the extent of any harm caused to their relationship with the defendant. The Committee referred these matters to Parliament for consideration.

Hearsay, opinion and admissible evidence

Chapter 3 of the Bill sets out when evidence can and cannot be used in legal proceedings.

The Committee observes that the Bill generally widens the categories of admissible evidence to include evidence currently inadmissible under the Victorian *Evidence Act 1958*, including various forms of hearsay evidence, opinions and admissions prompted by threats or promises by a person in a position of authority. The Bill also includes provisions that potentially exclude evidence of a criminal defendant's innocence, such as evidence relating to matters of state where the public interest favours exclusion (clause 130).

The Statement does not deal with these issues in detail. The broader judicial discretions are said to be justified on the basis that what amounts to a 'fair' hearing takes account of all relevant interests including those of the accused, the victim, witnesses and society, applied to the circumstances of the individual case. The Statement also cites clause 11 of the Bill, which expressly preserves the powers of a court with respect to abuse of process, as providing additional protection.

The Committee observes that the admissibility provisions of the Bill are drawn from UEA legislation developed in other Australian jurisdictions, and with reference to recent law reform commission reports that predate the adoption of the *Charter*. In attempting to achieve uniformity with other jurisdictions, all of which lack a *Charter*-like statute, the Committee states that the *Charter* may have little impact on the Bill. The Committee also cites recent High Court decisions which have held that neither the remedy of abuse of process nor the discretions contained in the UEAs (and thus carried over into this Bill) can be used to undermine statutory rules of evidence and exceptions to them: *Papakosmas v R* [1999] HCA 37.

Power to exclude improperly or illegally obtained evidence

Clause 138 of the Bill provides for the exclusion of evidence obtained illegally or improperly. However, it also allows the admission of such evidence if a court finds that the desirability of admitting it outweighs the undesirability of admitting it. This involves a balancing exercise which takes into account a non-exhaustive list of factors set out in clause 138(3).

The Statement acknowledges that improperly obtained evidence could include evidence obtained in breach of a *Charter* right. However, the potential for such evidence to be admitted is again said to be justified on the basis that a fair hearing involves a balancing of all interests. The Statement notes that this approach is similar to the approach set out in the New Zealand *Bill of Rights Act 1990*.

The Committee observes that s7(2) of the *Charter* already provides for the balancing of interests for a fair trial, and considers that a further purported balancing exercise may 'double-count' the competing interests, especially in relation to trials of serious offences. The Committee points out the difference between the New Zealand courts, which expressly require that a breach of human rights be given 'considerable weight' in the balancing exercise, as opposed to clause 138(f) of the Bill which simply

requires the breach be 'taken into account'. It is also noted that in the United States evidence obtained in breach of the US Bill of Rights must be excluded, in order to deter future breaches.

Caroline Wong, Winter Clerk and Charlotte Beeny, Articled Clerk, Human Rights Law Group, Mallesons Stephen Jaques

Other Charter of Rights Developments

National Human Rights Consultation to be Broad, Participatory and Announced Soon

In a major speech at Melbourne Law School, the federal Attorney-General, the Hon Rob McClelland MP, has confirmed that the Rudd Government will soon commence 'an Australia-wide inquiry to determine how best to recognise and protect human rights and responsibilities in Australia'. The Attorney 'noted with interest comments by the Federal Opposition outlining their objection to a charter of rights' and responded that 'the Government's view is that how best to protect and recognise human rights and responsibilities is a question of such national importance that it's appropriate that we first seek the views of the Australian people. Our consultation will have no outcome pre-supposed'.

The Attorney encouraged all present to 'use this opportunity to contribute your views, thoughts and experiences to the range of ways in which human rights may be protected nationally and into the future'. He foreshadowed that 'the timing of the national consultation will be announced in due course' and committed to the consultation being 'widely advertised to encourage the best and broadest level of participation possible'.

The speech is available at http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches_2008_21August2008-MelbourneLawSchoolFunction.

High Court Judge Answers Charter of Rights Critics

As part of the LIV's Leadership Lunches, Justice Kirby addressed the topic *Answering the Critics – Human Rights and the Constitution*. The lunch, held on 21 August 2008, was a sell-out event as over four hundreds members of Victoria's legal and commercial community greeted the 'rock star of the bench'. Reflecting on his two earlier LIV speeches in which he called for first, a law reform commission and second, a court of appeal, Justice Kirby mused whether in time he would reflect on his hat trick of recommendations. Justice Kirby addressed the 'aspirations of our liberal democracy' and argued 'we need always to be on the lookout for defects in our institutions and ways in which we can make them respond more effectively to contemporary challenges.' In this search, Justice Kirby addressed many of the current myths raised by anti-Charter opponents. For example, in answer to the claim that there is no need for a Charter, Justice Kirby noted that 'those who enjoy unbridled power generally resist any attempt to impose bridles.' A model which reflected the Victorian Charter would 'enhance the operation of the elected legislature. It seems to improve responsiveness to concerns about injustice, inequality and departure from fundamental rights.' Further, as Australia has seen many injustices (to women, Aboriginals, Asian people, homosexuals and religious minorities), we can hardly say that there is no need for 'the democratic lawmakers to have an occasional stimulus based upon fundamental principles of human equality and basic rights'. In closing, Justice Kirby called on us all to be involved in the debate and rise to the challenge with determination, enthusiasm and grace. The speech will be available on the Centre's website shortly.

Phoebe Knowles is on secondment to the Human Rights Law Resource Centre from Minter Ellison

National Charter Campaign Update

The Centre is currently involved in the campaign for a federal Charter of Human Rights. In particular, the Centre has welcomed the Federal Government's commitment to a national consultation regarding the legal recognition and protection of human rights. As we approach the 60th anniversary of the *Universal Declaration of Human Rights* on 10 December 2008, it is timely that we consider whether and if so how human rights should be protected in Australia. Is it time to bring rights home? What are our shared valued? In regards to the proposed consultation, the Centre is working with the Australian Human Rights Group – a network of organizations – to call for a consultation which is open and fair and

ensures that all Australians are given the opportunity to participate and contribute, including particularly those who are marginalised and disadvantaged. The consultation should identify what human rights need to be protected and how this might best occur. Further, the panel undertaking the inquiry should include people from different walks of life and be independent of parliament and the government. The panel should include people with substantial and practical human rights expertise.

If you are interested in being involved in the campaign or would like to endorse the consultation in the above terms, please contact Phoebe Knowles on secondee1@pilch.org.au. Materials on the campaign will be regularly posted at www.hrlrc.org.au.

Phoebe Knowles is on secondment to the Human Rights Law Resource Centre from Minter Ellison

Victorian Charter Case Notes

Application of the *Charter* to Guardianship and Disability

MM (Guardianship) [2008] VCAT 1282 (26 June 2008)

VCAT has imposed a supervised treatment order on a man with an intellectual disability, requiring him to be kept in detention to ensure his compliance with a treatment plan – despite his willingness to consent to the plan – to reduce the risk that he could cause harm to others. The Tribunal referred to, but undertook scant analysis of, the interpretative provisions of the *Charter* and the requirement that any limitation on a right be demonstrably justified in a free and democratic society.

Facts

MM, a 35 year old man with a mild intellectual disability, has a history of sexual assault against male children. He has been the subject of an interim supervised treatment order under the *Disability Act 2006* (Vic) since July 2007 (granted on the basis of the material accompanying the application for an order, prior to a full hearing), which required his detention due to the risk of him seriously harming others.

The central issue faced by VCAT in the hearing to decide whether a permanent treatment order should be made was whether MM was capable of giving consent to voluntarily complying with a treatment plan, or whether his continued enforced detention was necessary to ensure compliance.

Since the order was first imposed 12 months ago, MM has progressed from the most restrictive stage 1 to a less restrictive stage 3 of a treatment plan. On the facts before the Tribunal, MM actually wanted (generally) the requisite treatment to continue, but under the *least* restrictive stage 4 of a treatment plan, not under an order imposed on him.

Decision

VCAT's power to make a supervised treatment order requires the satisfaction of five elements:

1. there is a pattern of violent or dangerous behaviour causing serious harm;
2. there is a significant risk of serious harm to others which cannot be reduced with less restrictive means;
3. the services to be provided under the treatment plan will benefit the person and substantially decrease the risk of serious harm;
4. the person is unwilling or unable to consent to voluntary compliance with a treatment plan; and
5. detention is necessary to ensure compliance with the treatment plan and prevent the significant risk of serious harm to others.

In considering the fourth element in some detail, VCAT found that although MM was *willing* to consent to the comply with a treatment plan to substantially reduce the significant risk of serious harm to another person, he was in fact *unable* to do so. In support of this finding the Tribunal relied heavily on the evidence of a psychologist who expressed the opinion that although MM could understand the aspects of the treatment plan at an intellectual level, his 'limited emotional insight' would prevent him from analysing the emotional costs and consequences of treatment.

After reaching the conclusion that MM was unable to make a sufficiently informed decision to consent to treatment, and that the other four elements were also satisfied on the evidence, the Tribunal then turned to consider the 'only brief' submissions made in relation to the *Charter*.

Application of the *Charter*

The Tribunal referred to s 32 of the *Charter*, which requires that so far as possible statutory provisions are to be interpreted in a way that is compatible with human rights. Identifying relevant rights in this case as including freedom of movement (s 12), freedom of association (s 16), the right to liberty (s 21) and the right not to be punished more than once (s 26), the Tribunal noted that some of the rights are qualified (for example the right to liberty restricting *arbitrary* arrest or detention).

Although the rights guaranteed under the *Charter* must be protected, the Tribunal referred to s 7(2) of the *Charter* which allows for reasonable limitations on rights in circumstances where those limitations can be demonstrably justified (based on certain factors set out in s 7(2)).

In referring simply to the balancing of MM's rights with the benefits provided to him by the treatment order and the risk of serious harm to the community, the Tribunal disposed of *Charter* issues with the simple statement that 'on that basis [the balancing act], to the extent that MM's human rights would on the face of it be limited by a supervised treatment order, the *Charter* would permit those limits'.

However, consideration of s 7(2) of the *Charter* requires a proper analysis of each of the factors set out in the section, rather than a throw-away conclusion based on either hidden or no reasoning. Of particular relevance in this case would have been the relationship between the limitation on the particular right(s) and the object of the limitation, and whether any less restrictive means was available to achieve the same purpose as that sought to be achieved by the limitation.

While the Tribunal did refer to the requirement under the *Disability Act* that there must not be any less restrictive means of reducing the significant risk of serious harm (akin to the less restrictive means factor in s 7(2) of the *Charter*), the analysis did not in fact identify whether any potentially less restrictive options existed, but instead focused exclusively on the potential seriousness of harm to others. In the context of s 7(2) of the *Charter*, a limitation on a right is not justified if *any* less restrictive option for achieving the purpose of the limitation is reasonably available — the seriousness of the harm is not relevant, nor is that factor of s 7(2) dealt with by conducting a balancing exercise.

Further, it is disappointing to see the assessment of whether s 32(1) of the *Charter* is satisfied relegated to an afterthought. Where analysis of the statutory provision has led to a firm conclusion as to its proper interpretation, it is not surprising that subsequent consideration of s 32(1) of the *Charter* results in a finding that the *Charter*'s provisions would not make any difference to the conclusion already reached.

The decision is available at http://www.austlii.edu.au/au/cases/vic/VCAT/2008/1282.html.

Jonathan Kelp, Human Rights Law Group, Mallesons Stephen Jaques

Comparative Law Case Notes

Access to Medical Care and the Prohibition against Cruel, Inhuman or Degrading Treatment

RS (Zimbabwe) v Secretary of State for the Home Department [2008] EWCA Civ 839 (18 July 2008)

The Court of Appeal of England and Wales has allowed an appeal by RS, a Zimbabwean national, against a decision of the Immigration Appeal Tribunal to dismiss her appeal against a decision of the Secretary of State for the Home Department to refuse to allow RS to remain in the United Kingdom for medical treatment and health.

The case involves the application of art 3 of the *European Convention on Human Rights*, which provides that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

Facts

RS was born in Zimbabwe and arrived in the United Kingdom in February 2001 with six months leave as a visitor. In August 2001 she was diagnosed with HIV. She was granted leave to remain as a student until September 2002, but an extension of that leave was refused by the Secretary of State.

RS appealed against the decision of the Secretary of State. An Adjudicator upheld this appeal, finding that that 'in the peculiar circumstances of this case it would be contrary to the obligations of the United Kingdom under art 3 of the *European Convention on Human Rights* to remove the appellant to Zimbabwe.' The Secretary of State then appealed to the Tribunal. The Tribunal found that the

Adjudicator had made a material error of law and upheld the appeal. RS appealed to the Court of Appeal.

Decision

The Court of Appeal allowed the appeal by RS against the Tribunal's decision and held that the matter should be remitted to a freshly constituted Tribunal.

The Court of Appeal held that RS was not at the present time critically ill and was fit to travel. Following the majority decision of the Grand Chamber of the European Court of Human Rights in *N v United Kingdom* (Application No 26565/05), the likely consequences of RS being returned to Zimbabwe, being lack of medical treatment leading to ill-health followed by an early death, do not normally impose an art 3 duty on the authorities of the United Kingdom.

In *N v United Kingdom* it was held that there would be no violation of art 3 of the *Convention* to remove N (who was HIV positive) from the United Kingdom to Uganda where N would not be able to receive adequate medical treatment unless there were exceptional circumstances.

In *N v United Kingdom* the Grand Chamber of the European Court of Human Rights set out the general principles regarding art 3 of the *Convention*. It stated:

> Article 3 principally applies to prevent a deportation or expulsion where the risk of ill-treatment in the receiving country emanated from intentionally inflicted acts of the public authorities there or from non-State bodies when the authorities are unable to afford the applicant appropriate protection…
>
> The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling…
>
> Whether the harm reaches the threshold required to violate article 3 cannot depend on whether the 'lack of sufficient resources' in the receiving State occurs as a consequence of some malign influence by that State or because of benign matters.

The Court of Appeal held that, in light of the statements of the Grand Chamber in *N v United Kingdom* accepting a broader approach to 'humanitarian considerations', the approach of the Tribunal, supported by the Secretary of State, could not be justified. There was material which required analysis. It was held that a fresh consideration by the Tribunal was required.

The Court of Appeal allowed the appeal, and directed a fresh consideration of the art 3 issue by a differently constituted Tribunal.

Relevance to the Victorian Charter

This decision will assist in the interpretation of s 10 of the Victorian *Charter*. Section 10(a) recognises that a person must not be treated or punished in a cruel, inhuman or degrading way. This decision provides guidance as to what actions may be in violation of the *Charter* when a person with a medical condition is refused or is unable to access necessary medical treatment.

The decision is available at http://www.bailii.org/ew/cases/EWCA/Civ/2008/839.html.

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Court of Appeal Reads Words into Statute to Ensure Human Rights Compliance

JT (Cameroon) v Secretary of State for the Home Department [2008] EWCA Civ 878 (28 July 2008)

In a recent decision informed by the interpretive principle in s 3 of the *Human Rights Act 1998* (UK), the England and Wales Court of Appeal has read an additional word into a provision of the *Asylum & Immigration (Treatment of Claimants etc) Act 2004* (UK) to ensure human rights compatibility. Despite there being no ambiguity in the provision, the court was willing to read in the additional word so that the provision would not offend the separation of powers doctrine and, implicitly, the right to a fair hearing.

Facts

JT, a citizen of Cameroon, appealed against the Secretary of State's refusal of his application for asylum in the UK.

JT argued that, in assessing the credibility of his claims of persecution if he was returned to Cameroon, the Immigration Appeal Tribunal gave too much weight to a number of facts which were required to be taken into account by s 8 of the *Asylum & Immigration Act*. This section provides that, 'in determining

whether to believe a statement made by… a person who makes an asylum claim…, a deciding authority *shall take account, as damaging the claimant's credibility*, *of* any behaviour to which this section applies' (emphasis added). The behaviours relied upon under s 8 in the refusal of JT's claim were his use of false travel documentation and two false identities, and the unexplained delay between his entry into the UK and the making of an asylum claim.

Decision

The court considered that s 8 may offend the right to a fair hearing and the doctrine of separation of powers, as it could be seen as Parliament dictating to the Tribunal how it should carry out a judicial function. In particular, the court was concerned that application of s 8 could distort the fact-finding exercise by requiring the listed matters to be given weight at the expense of other facts relevant to the assessment of an asylum application, and found that there was a real risk that such a distortion had occurred in JT's case.

In interpreting s 8, the court cited two cases regarding the construction of legislation under s 3 of the *Human Rights Act*: *Ghaidan v Godin-Mendoza* [2004] AC 557 (in which the House of Lords held that, under the *Human Rights Act*, a court can construe a provision consistently with human rights provided it does not adopt a meaning 'inconsistent with a fundamental feature of legislation') and *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115.

The court refused to read s 8 as providing that the authority 'may' (rather than 'shall') take account of the behaviours listed in the section. The court referred to the need to respect the Parliament's sovereignty, and the fact that s 8 was enacted to ensure that the listed matters would be considered in a systematic and transparent fashion when determining an applicant's credibility.

However, the court found that s 8 could be read as requiring an authority to take account of the listed behaviours as *potentially* damaging the claimant's credibility. On this reading, the court considered that the section would not offend constitutional principles, as the decision-maker could decide for itself the weight that should be given to the s 8 matters in assessing the claimant's credibility. Section 8 would not, on this construction, dictate the damage to the applicant's credibility resulting from one of the listed behaviours having occurred.

Relevance to the Victorian *Charter*

Although in this case the court did not apply the interpretive principle in s 3 of the *Human Rights Act*, it was informed by case law applying that principle. The court did not explicitly refer to any human rights with which s 8 of the *Asylum & Immigration Act* may have been incompatible, although arguably such a provision may be incompatible with the right to a fair trial.

This decision is an example of a legal principle being used to construe legislation even where there is no apparent ambiguity in the provision. It adds to existing UK authority favouring a broad approach to interpreting statutes so that they are compatible with human rights. A similar approach was also taken by the ACT Court of Appeal in *Capital Property Projects (ACT) Pty Ltd v ACTPLA* [2008] ACTCA 9.

Arguably the approach in Victoria may be narrower than this UK approach. In Victoria, legislation need only be 'interpreted' consistently with human rights, whereas the UK legislation uses the potentially broader 'read and given effect to' (although 'interpreted' is also used in the ACT). In the absence of clear Victorian authority to date, it remains unclear how far courts will be willing to go in applying s 32 of the *Charter* and whether they will be willing to read in additional words where the provision does not appear to be ambiguous on its face.

The decision is available at http://www.bailii.org/ew/cases/EWCA/Civ/2008/878.html.

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Use of Force and Restraint against Child Detainees

R(C) v Secretary of State for Justice [2008] EWCA Civ 882 (28 July 2008)

In this case, the England and Wales Court of Appeal held that rules introduced to maintain good order and discipline in children detained in Secure Training Centres ('STCs') should be quashed for breach of art 3 of the *European Convention on Human Rights*, which prohibits torture and other ill-treatment.

Facts

Four STCs were established in the UK to accommodate vulnerable teenagers in custody. All are presently run by private contractors under agreements with the Secretary of State, and are operated in accordance with the terms of the operators' contracts, the *Prison Act 1952* and STC Rules.

Until July 2007, physical restraint could only be used as a form of discipline in situations where it was necessary to prevent escape, damage to property or injury. However, in June 2007, the *Secure Training Centre (Amendment) Rules* ('Amendment Rules') expanded the permissible use of restraint to cases in which it was necessary to maintain good order and discipline. This form of restraint was referred to as physical control in care ('PCC'), and had two elements:

- Restraint: a number of specific holds to prevent damage or injury and also to restrict offences against good order and discipline until the offender agrees to comply.
- Distraction technique: infliction of a momentary burst of pain to the nose, rib or thumb. The technique is intended to distract a person in dangerous or violent situations in which there is a serious risk of injury to him or herself or to others.

On 19 April 2004, fifteen year old Gareth Myatt died as a result of asphyxiation while he was restrained by three members of staff. He was three days into his six-month sentence.

On 8 August 2004, fourteen year old Adam Rickwood hanged himself by his shoelaces after being subjected to 'nose distraction.' He had been a model trainee and the episode just prior to his death was the first incident of non-compliance.

Their cases were brought before the Divisional Court in an attempt to quash the Amendment Rules.

Decision

Divisional Court

The Divisional Court failed to quash the Amendment Rules because:

- Parliament was aware and had held substantial debate about the limited consultation that had taken place about the Amendment Rules;
- the Children's Commissioner and others had concerns that were overridden, and Parliament was aware of this; and
- the Secretary of State intended to conduct a wide-ranging review of the issues involved with the Amendment Rules which was due to result in a report in April 2008 which would give any arising issues further consideration.

Court of Appeal

The Court of Appeal identified a number of errors in the lower court's reasoning:

- With regard to the parliamentary debate, it is hazardous to draw on the conclusions of various speakers in a parliamentary debate, particularly when that debate has not passed to a vote. Because parliament would be unaware of any procedural impropriety in the Amendment Rules, 'it is therefore to courts, by way of judicial review, that recourse must be had to seek a remedy' (Taylor LJ in *R v Secretary of State ex p US Tobacco* [1992] QB 353).
- The Divisional Court also erred in its reliance on a prospective wide-ranging review as a reason for failure to intervene. This reasoning suffered from the same problem identified by Taylor LJ in relation to the parliamentary process; review does not account for the *process* by which PCC was extended to good order and discipline.
- The Divisional Court erred in failing to view the omission of the Race Equality Impact Assessment, an important instrument in guarding against racial discrimination, as serious. 'Inattention to [REIAs] is both unlawful and bad government' (Sedley LJ in *R (BAPIO) v SSHD* [2007] EWCA Civ 1139). This failure was made all the more troubling by the fact that the majority of children detained in STCs come from a wide range of ethnic backgrounds.

The state's obligations under art 3 to detainees in STCs

Buxton LJ noted that although there is a tendency to view a state's obligations under art 3 as applicable only to situations of extreme violence, deprivation or humiliation, jurisprudence from the European Court

of Human Rights clearly states that it can be engaged by conduct falling below this level. Circumstances imposing such obligations on the state are:

- when the subject is dependent on the state because s/he has been deprived of liberty; and
- if s/he is young and vulnerable.

In support of this conclusion Buxton LJ referred with approval to the decision in *Selmouni v France* (1999) 29 EHRR 403 at 99-100: 'the minimum severity required for the application of article 3 is, in the nature of things, relative; it depends on all the circumstances of the case…the duration of the treatment, its physical and mental effects and, in some cases, the age and state of health of the victim.'

The state's obligations to children

In outlining the state's obligations to children, Buxton LJ relied on several judgments by Baroness Hale of Richmond:

- In *R (R) v Durham Constabulary* [2005] 1 WLR 1184, she noted that European jurisprudence requires art 3, as it applies to children, to be interpreted in light of international conventions. In particular, interpretation must take into account art 37(c) of the *Convention on the Rights of the Child*, which provides that every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her own age.
- In *R(Williamson) v Secretary of State for Education* [2005] 2 AC 246, she emphasized that the UN Committee on the Rights of the Child is charged with monitoring compliance with obligations undertaken to respect the rights of children. Further, General Comment 8 of the UN Committee states that the deliberate infliction of pain is not permitted as a form of control of juveniles.

PCC viewed in relation to art 3 of the ECHR

The court had little hesitation in saying that any system that involves physical intervention against another's will is, 'in any normal understanding of language degrading and an infringement of human dignity.'

Because the Secretary of State could not establish that PCC is necessary to establish good order and discipline, the Amendment Rules which brought PCC into effect were in breach of art 3 and should be quashed.

Relevance to the Victorian *Charter*

This case could potentially engage at least three rights in the *Charter*:

- s 10, which recognizes a person's right not to be treated or punished in a cruel, inhuman or degrading way;
- s 22, which recognizes a person's right to be treated humanely when deprived of liberty; and
- s 23, which recognizes the rights of children in the criminal process.

However, it is most clearly applicable as an example of rules that would be in breach of the s 10 rights of children living in custody. The prohibition on cruel, inhuman or degrading treatment under s 10 is modeled on art 7 of the *International Covenant on Civil and Political Rights*, one of the few absolute rights in the ICCPR. The Human Rights Committee affirmed in *General Comment No 20* that no justification or extenuating circumstances may be invoked to excuse a violation of art 7.

The decision is available at http://www.bailii.org/ew/cases/EWCA/Civ/2008/882.html.

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Obligations of Police to Protect Life

Hertfordshire Police v Van Colle [2008] UKHL 50 (30 July 2008)

In this case, the House of Lords considered the applicability of the leading right to life case, *Osman v United Kingdom* (1998) 29 EHRR 245, in which the European Court set out the obligations on member states in relation to the right to life.

Pursuant to the European Court decision, states have a positive obligation to, in certain circumstances, take preventative measures to protect an identified individual whose life is at risk from the criminal acts of a third party. Under this test, the facts must be examined objectively at the time of the existence of the threat, and the positive obligation is breached only if the authorities knew, or ought to have known at that time, about the threat to life which was both real and immediate and failed to act.

Facts

This case concerned an employee, Brougham, who murdered his former employer, Van Colle, after being charged with theft from Van Colle's business and other businesses. Brougham contacted Van Colle and other persons whose property he had allegedly stolen and offered bribes and made threats. Van Colle's car, and a car and premises of another witness were set on fire over the next few months, and Van Colle received more threatening phone calls from Brougham. Van Colle was shot dead soon after and Brougham was convicted of his murder.

A disciplinary tribunal found the police officer responsible for investigating the thefts guilty of failing to perform his duties conscientiously and diligently in connection with the improper approaches to witnesses.

Van Colle's parents issued proceedings relying on the UK *Human Rights Act* and the *European Convention*, arguing that the police acted unlawfully in violation of the right to life by failing to discharge a positive obligation to protect the life of their son.

Decision

Court of Appeal

The case was pleaded in a way that sought to escape from the very high threshold that was laid down in *Osman*. The Van Colles argued that the police, through their conduct in involving their son as a prosecution witness, placed him at a special and distinctive risk of harm, which gave rise to a greater obligation to protect Van Colle's life.

Finding for Van Colle, the Court of Appeal had held that a test lower than the ordinary *Osman* test was appropriate where a threat to life of an individual derives from the state's decision to call that individual as a witness.

House of Lords

There were two key issues before the House of Lords:

- whether the *Osman* test sets different thresholds depending on the type of person whose life was at risk; and
- whether, according to the facts, there existed a real and immediate risk of which the police were aware or ought to have been aware at the time.

Rejecting the Court of Appeal's test, and finding that the lower courts misdirected themselves by attaching undue significance to Van Colle's status as a witness and treating the *Osman* threshold as lowered on that account, the Court noted that while the *Osman* test is applied to a variety of different situations, the test remains invariable and must be applied to all the circumstances of a particular case.

Applying the *Osman* test to the facts, the Court found no violation of the right to life. The fact that Van Colle was to be a witness in a criminal prosecution, while a relevant fact, did not place him in a special category to which a threshold test lower than *Osman* applied. The facts did not reveal that Brougham had a propensity towards violence. The Court opined that if a comparison was be made with *Osman*, the warning signs in relation to Van Colle were very much less clear and obvious than those in *Osman*, which were themselves found inadequate to meet the threshold for breach of the right to life.

Relevance for the Victorian *Charter*

Section 9 of the *Charter* provides that every person has the right to life and has the right not to be arbitrarily deprived of life. This case is a useful elucidation by the House of Lords of the invariability of the *Osman* test and the importance of assessing, on all the facts and circumstances of the case, whether there existed a real and immediate risk to an individual's life and what the authorities knew or ought to have known at the time the risk arose.

It should be noted that under the UK *Human Rights Act*, litigants may bring proceedings solely on the basis of a breach of one of the rights set out in the Act. Under the *Charter*, one may not bring a case relying solely on the *Charter* and must rely on another cause of actions, such as tort law. Also, the UK Act permits the awarding of damages where a violation has been found, while litigants in Victoria currently do not have this opportunity.

The decision is available at http://www.bailii.org/uk/cases/UKHL/2008/50.html.

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Right to Family and Private Life requires Maintenance of Family Bonds

X v Croatia [2008] ECHR 11223/04 (17 July 2008)

The European Court of Human Rights has held that, by allowing an individual to be excluded from participating in their child's adoption proceedings, Croatia violated its obligation to ensure the right to respect for private and family life under art 8 of the *European Convention on Human Rights*.

Facts

The case concerned a complaint made by the applicant, X, that her daughter, A, had been adopted without X's knowledge or consent.

X was diagnosed with schizophrenia in 1998 and, in 1999, gave birth to A. In 2000, a Croatian court divested X of her capacity to act, on the grounds that she was not capable of taking care of her personal needs, interests and rights.

A was ultimately placed into the State's care and her adoption authorised in late 2003. While A was in the State's care, there was evidence that X had continued to exercise her parental rights (given that her access rights were preserved, and that she had exercised those rights). However, under Croatian domestic law, a parent divested of capacity cannot participate in adoption proceedings, so X was unable to participate in A's adoption proceedings. In the circumstances, X's consent was not required for the adoption.

Decision

The Court found that the bond existing between the applicant and her daughter was sufficient to amount to a 'family life' and therefore attracted the application of art 8. Although there was no doubt that the adoption had disrupted the applicant's relationship with her daughter, the 'interference' had a basis in national law and pursued the legitimate aim of protecting the best interests of the child. The central issue in the case was therefore whether the procedures followed properly respected the applicant's rights under art 8.

The Court noted that applicant's relationship with her child was never assessed in any of the proceedings and no separate decision was ever taken about the applicant's parental rights — her exclusion from the adoption proceedings was merely an incident of the 2000 decision about X's capacity.

The Court did not accept that anyone divested of the capacity to act should be automatically excluded from adoption proceedings concerning his or her child, and concluded that X should have been given the opportunity to express her views about the potential adoption, considering:

- the crucial impact of the proceedings upon A's and X's relationship; and
- that, apart from X's inability to participate in the adoption proceedings, her parental rights (eg access) remained intact.

In the circumstances, by excluding the applicant from proceedings, which resulted in her daughter's adoption, Croatia had violated art 8 in failing to ensure the applicant's right to respect for her private and family life.

Relevance to the Victorian *Charter*

This case may prove relevant to the interpretation of s 17 of the Victorian *Charter*.

Section 17 recognises families as the fundamental group unit of society and their entitlement to protection by society and the State. It entitles every child to the right, without discrimination, to such

protection as is in his or her best interests and is needed by him or her by reason of being a child. This decision of the European Court of Human Rights provides further recognition of the significance of the family unit and that any restrictions placed upon family life will be strictly construed.

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Right to Privacy Requires Strict Controls, Safeguards and Protection of Health Information

I v Finland [2008] ECHR 20511/03 (17 July 2008)

The European Court of Human Rights has held that the measures taken by a Finnish hospital to safeguard the right to respect for private life of an HIV-positive patient of the hospital, who was also employed by the hospital from time to time as a nurse, were inadequate and in violation of art 8 (the right to respect for private life) of the *European Convention on Human Rights*.

Facts

Between 1989 and 1994, the applicant worked on fixed-term contracts as a nurse in the polyclinic for eye diseases in a public hospital in Finland. From 1987 she paid regular visits to the polyclinic for infectious diseases of the same hospital, having been diagnosed as HIV-positive. At that time, hospital staff had free access to the patient register which contained information on patients' diagnoses and treating doctors. Following her insistence, the hospital's register was amended so that only the treating clinic's personnel had access to its patients' records.

In November 1996, the applicant lodged a complaint regarding misuse of her personal records with the County Administrative Board, requesting it to examine who had accessed her confidential patient record. The hospital's archives director filed a statement explaining it was not possible to find out who, if anyone, had accessed the applicant's patient record as the data system revealed only the five most recent consultations (by working unit and not by person) and even this information was deleted once the file was returned to the archives. Consequently, the applicant's complaint was dismissed. However, the hospital's register management process was amended so that it became possible retrospectively to identify any person who had accessed a patient record.

A series of civil appeals brought by the applicant in the District Court and Court of Appeal against the district health authority administering the hospital were also dismissed, again because of the applicant's inability to provide firm evidence that her patient record had been unlawfully consulted. Leave to appeal to the Finnish Supreme Court was refused and the applicant filed proceedings in the European Court of Human Rights.

Decision

The applicant complained that the district health authority had failed in its duties to establish a register from which her confidential patient information could not be improperly disclosed, in breach of art 8 of the *Convention*, and that the requirement that the register be capable of 'retrospective control' (i.e. access accountability) was critical.

The Finnish Government contended that domestic legislation adequately protected patient records, and that 'a hospital's system for recording and retrieving patient information could only be based on detailed instructions and their observance, the high moral standards of the personnel, and a statutory secrecy obligation…. [and that it] … would not have been possible for the hospital to create a system verifying in advance the authenticity of each request for information as patient records were often needed urgently and immediately.'

The European Court confirmed that medical records were within the scope of art 8 of the *Convention*, and that '[t]he protection of personal data, in particular medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life.'

In acknowledging that the primary — negative — object of art 8 'is essentially that of protecting the individual against arbitrary interference by the public authorities', the Court emphasised that there may in addition 'be positive obligations inherent in an effective respect for private or family life', and that 'these obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves…'.

The European Court noted that it was 'crucial not only to respect the … privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general … especially … as regards protection of the confidentiality of information about a person's HIV infection, given the sensitive issues surrounding this disease.' It found that 'the applicant lost her civil action because she was unable to prove on the facts a causal connection between the deficiencies in the access security rules and the dissemination of information about her medical condition.' It continued: 'However, to place such a burden of proof on the applicant is [unfair]…. [H]ad the hospital provided a greater control over access to health records by restricting access to health professionals directly involved in the applicant's treatment or by maintaining a log of all persons who had accessed the applicant's medical file, the applicant would have been placed in a less disadvantaged position before the domestic courts.'

Finally, the European Court noted 'that the mere fact that the domestic legislation provided the applicant with an opportunity to claim compensation … was not sufficient to protect her private life. What is required in this connection is practical and effective protection to exclude any possibility of unauthorised access occurring in the first place. Such protection was not given here.'

Relevance to the Victorian *Charter*

A fundamental question will arise as to whether the language of s 13 (privacy and reputation) of the Victorian *Charter* is capable of supporting the 'positive obligations' referred to by the European Court in *I v Finland*.

Section 13(a) provides relevantly that '[a] person has the right not to have his or her privacy … unlawfully or arbitrarily interfered with', an expression to be contrasted with the more positive language of art 8 of the *Convention*, which provides that 'everyone has the right to respect for his private … life'.

Given the expression of the rights in the *Charter* and the operation of s 38, and assuming that the European Court's view that medical records will fall within the scope of what constitutes the 'privacy' of an individual, the application of s 13, in respect of medical records, may be limited to a restriction on the use of such records by public authorities which would constitute unlawful or arbitrary interference. This would mean that the *Charter* would impose less onerous obligations on Victorian public authorities in respect of the protection of medical records from non-public authority third parties than would be the case under the *Convention*.

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Right to Privacy and Protection from Eviction

Doherty & Ors v Birmingham City Council [2008] UKHL 57 (30 July 2008)

The UK House of Lords has considered the procedural safeguards against eviction established by the right to respect for privacy and the home under art 8 of the *European Convention on Human Rights*.

Facts

The appellant had a licence to situate his caravan on a plot of land owned by the respondent, Birmingham City Council. The land was known as the 'Traveller's Site' and comprised sixteen concrete slabs for caravans and four toilet blocks. On 4 March 2004, the respondent served on the appellant and his family a notice to quit. At this stage the appellant and his family had resided at the site for approximately 17 years (the first licence was granted in 1987). The respondent required vacant possession in order to conduct improvement works at the site which, when complete, would enable it to be managed as a temporary accommodation site for travellers.

The issuance of the notice to quit was not based on any allegation of misconduct on the part of the appellant or his family, nor was it alleged that the licence had been breached. Rather, the notice to quit was issued by the respondent based on its judgment as to the appropriate use of the site for travellers. The regulatory scheme for the management of caravan sites did not provide the appellant with any protection from the execution of the eviction notice (although, since 2004 the relevant legislation has been amended to improve protection of tenants' rights). Consequently, the common law applied which gave the respondent an unqualified right to recover possession on the expiry of the period of notice. On 27 May 2004 the respondent commenced proceedings for possession.

The appellant defended the respondent's claim for possession, arguing that the respondent was only entitled to possession if it was proportionate in all the circumstances of the case. The appellant argued that the proportionality test was not satisfied in these circumstances, having regard to his right to respect for his home under art 8 of the *European Convention* and based on the respondent's duty to act in way that is compatible with a *Convention* right under s 6(1) of the *Human Rights Act 1998* (UK).

The appellant was unsuccessful in raising the provisions of the *HRA* or art 8 of the *European Convention*, and the High Court gave summary judgment in favour of the respondent. The matter went on appeal to the Court of Appeal and was dismissed. An appeal was then heard by the House of Lords.

Decision

The Court applied its decision in *Kay and others v Lambeth London Borough Council* [2006] UKHL 10, which held that where the public authority landlord's right to recover possession is unqualified there were only two situations in which it would be open to a court to refrain from proceeding to summary judgment and making the possession order. They are:

(a) if a seriously arguable point is raised that the law which enables the court to make the possession order is incompatible with art 8 the court can, in accordance with the *HRA*, deal with the argument by either:
    - giving effect to the law, so far as it is possible for it to do so under s 3, in a way that is compatible with art 8; or
    - adjourning the proceedings to enable the issue of compatibility to be dealt with in the High Court.

(b) if a seriously arguable point is raised, the decision of a public authority to recover possession can be challenged as an improper exercise of its powers at common law on the ground that it was a decision that no reasonable person would consider justifiable.

The court refers to these options as 'gateways'.

Based on the circumstances of the case the court stated that 'there was no arguable basis for asserting that the incompatibility of the respondent's decision could be dealt with under gateway (a).' However, their Lordships unanimously held that it may be open to the appellant to argue under gateway (b) that the possession order should not be made unless the court is satisfied upon reviewing the respondent's decision and the grounds for seeking the order that its decision to evict was, in the *Wednesbury* sense, not unreasonable. There was general consensus that a defence under gateway (b) may provide the appellant with the protection he was seeking against a violation of his right to home under art 8. The court noted that it would be unduly formalistic to confine the review strictly to traditional *Wednesbury* grounds, indicating that the interests of the Doherty family, and any other long term occupants of plots on the site, would need to be taken into account. On this basis, the court remitted the matter to the High Court for review of the reasons that the respondent had given for serving the notice to quit.

Their Lordships also discussed the scope and application of s 6(2), particularly s 6(2)(b) of the *HRA*, which resulted in conflicting observations and revealed the uncertainty surrounding the proper application of s 6(2)(b). Under s 6(1) it is unlawful for a public authority to act in a way that is incompatible with a *Convention* right. However, the effect of s 6(2)(b) is that s 6(1) does not apply where a 'decision to exercise or not exercise a power that is given by primary legislation would inevitably give rise to an incompatibility'. On one view, it was suggested that s 6(2)(b) extends to protect a decision to exercise or not to exercise a discretion that is available to it under statute. The application of this view to the appellant's case would have the effect of enabling the respondent to apply for a possession order. At the opposite end of the spectrum, it was suggested that it was possible to read and give effect to the statutory scheme in a way that takes into account *Convention* rights. This view indicated that 'a local authority which failed to take into account *Convention* values when deciding whether or not to give any and if so what length of notice to quit cannot… be said to be 'acting as to give effect to or enforce' statutory provisions which are incompatible with the *Convention* rights.'

The discussion of s 6(2)(b) was *obiter* and there was no clear or consistent reasoning from the views expressed. There was also a tension within the facts of this case as to the interaction of the regulatory scheme for the management of caravan sites and the common law relating to possession proceedings, which was not discussed or resolved in any sense. This shows that the scope and operation of

s 6(2)(b), and the proper application of the *HRA* to the common law, is yet to be resolved and requires further analysis.

Relevance for the Victorian *Charter*

This decision is significant for the interpretation and application of s 13(a) of the *Charter*, which provides that 'a person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with', particularly as that provision relates to eviction notices that are issued by public authorities.

Importantly, the discussion relating to the operational provisions of the *HRA* also provides some guidance as to the options or 'gateways' that are available under the *Charter* for individual's seeking redress where their rights have been violated by public authorities. Although, in considering this discussion, one must be aware of the differences between the *HRA* and the *Charter*.

The decision also suggests that the proper application of s 38(2) of the *Charter* may be uncertain. However, the discussion of the relevant provision in the *HRA* may be distinguishable from s 38(2) under the *Charter*, which seems relatively clear in its terms. On its face, s 38(2) applies where a provision is incompatible (and cannot be read otherwise under s 32) and the public authority has no choice but to act so as to give effect to that provision. This operation of s 38(2) requires that there must first be a finding that the relevant provision is incompatible with the *Charter*. If the provision is able to be read compatibly, or if a power or discretion could be reasonably exercised in a way that is compatible, with the *Charter* then s 38(2) would not apply.

The decision is available at http://www.bailii.org/uk/cases/UKHL/2008/57.html.

Amy Barry-Macaulay is a lawyer with the PILCH Homeless Persons' Legal Clinic

Right to Equality and Exceptions and Exemptions

Raytheon Australia Pty Ltd & Ors v ACT Human Rights Commission [2008] ACTAAT 19 (24 July 2008)

The ACT Administrative Appeals Tribunal has considered the interpretative principle and permissible limitations on human rights under the *Human Rights Act 2004* (ACT) in a case concerning exemptions from anti-discrimination legislation.

Facts

This case was an application to the Administrative Appeals Tribunal, heard by President Peedom, to review a decision of the ACT Human Rights Commission refusing to grant Raytheon Australia Pty Ltd ('Raytheon') an exemption under s 109 of the *Discrimination Act 1991*. The exemption was sought from provisions of the *Discrimination Act* which make it unlawful for Raytheon to discriminate against current and prospective employees (including contract employees) on the grounds of national origin.

Raytheon is an Australian subsidiary of a major US company, which designs defence systems. Under a US law, the *International Traffic in Arms Regulations* (ITAR), contracts relating to certain defence data and material (ITAR controlled material) are required to contain restrictions about the transfer of such material to nationals of certain countries. Mr Peedom accepted that Raytheon was contractually bound not to transfer ITAR controlled materials to employees who are 'nationals of a third country,' which includes dual citizens, and those who have previously held or are entitled to dual citizenship. Access to the ITAR controlled materials was necessary for the employees in its deep space facility in the ACT and for many employees in its ACT head office.

The exemption was sought to the extent needed to permit Raytheon to meet the specific requirements imposed by the ITAR, and on conditions which would require it to minimise the adverse effect on employees.

Decision

The Tribunal set aside the decision of the Human Rights Commissioner not to grant the exemption to Raytheon.

Mr Peedom began by considering the purpose of s 109 of the *Discrimination Act*, which permits the HRC to exempt an applicant from the operation of specified provisions of the Act. He considered that in doing so

> it is necessary to avoid fixing upon the statement of objectives…and to have regard to the broader operation of the Act as a whole [para 43]

He noted that similar exemption provisions in anti-discrimination legislation in other States had been construed broadly, and not limited by the stated objects of the legislation. He was minded to accept such reasoning, 'in the interests of comity and uniformity.' [48]

However, he went on to consider the arguments submitted on behalf of the Human Rights Commissioner that the situation was different in the ACT because of the particular wording of the exemption clause in the *Discrimination Act*, and because of the ACT *Human Rights Act 2004*.

Unlike exemption provisions in other Acts, s 109(3) of the *Discrimination Act* provides that the Human Rights Commissioner must have regard to:

- the need to promote an acceptance of, and compliance with, this Act; and
- the desirability, if relevant, of certain discriminatory actions being permitted for the purpose of redressing the effects of past discrimination.

The Human Rights Commissioner argued that the wording of s 109 suggested that the kind of exemptions which might be granted under s 109 would be, for example, to allow a transitional situation under which discrimination would be phased out. However, Mr Peedom found nothing in s 109 which would limit the operation of the exemption provision by reference to the broader objectives of the *Discrimination Act*. He considered that the matters in s 109(3) must be considered but could be balanced against other issues of public interest.

Section 28 of the HRA

Mr Peedom went on to consider s 28 of the *HRA*, which provides that

> Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

This provision had been amended with effect from 18 March 2008 to provide a list of criteria for assessing proportionality of restrictions on human rights.

Mr Peedom applied this proportionality analysis to the particular exemption sought by Raytheon, rather than to the effect of the exemption clause in s 109 more generally. He found that in all the circumstances, the restrictions that would be imposed on the right to equality as a result of the exemption were proportionate, primarily because of the importance of national defence and security: [at 63]

> It is, in my view, arguable that in assessing the importance of the purpose of the limitation that would be placed on that right by the grant of the exemption sought, as required by s 28(2)(b), the potential impact of the limitation proposed by the exemption sought by the applicants upon the employment opportunities that the applicants' operations in the ACT afford as well as the commercial viability of those operations may not, by themselves, be sufficient to outweigh the harmful affects that would result from the grant of an exemption. It may be that those are consequences which the applicants and the community are required to accept as a cost of ensuring that human rights are protected.
>
> More difficult, however, is the balance to be struck against issues affecting national defence and security. The elimination of discrimination based upon race and nationality may make a significant contribution to the avoidance of conflict and the requirement for security measures in consequence of it. National defence and security is, however, likely to be a more complex issue and unlikely to be addressed solely by that means. The measures adopted by the government of Australia for the defence of the nation and for securing the security of its citizens and the need for those measures are not, of necessity, matters about which informed findings can be made by the Tribunal so as to enable a balancing of those issues against the erosion of the human rights which the exemption sought would permit. ...Clearly, any significant compromising of the defence and security of the nation is a matter of paramount importance. The fact that the ACT is a small component of the national community does not, in my view, enable it to ignore issues which affect the nation as a whole.

Section 30 of the HRA

Mr Peedom then considered the effect of the interpretive provision, s 30 of the *ACT HRA*, which was amended with effect from 18 March 2008 to provide that

> So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.

Mr Peedom noted that the Explanatory Statement to the amendment had stated that

> unless the law is intended to operate in a way that is inconsistent with the right in question, the interpretation that is most consistent with human rights must prevail. This is consistent with the Victorian approach contained in subsection 32(1) of the *Charter of Human Rights and Responsibilities Act* 2006. It also draws on jurisprudence from the United Kingdom such as the case of *Ghaidan v Godin-Mendoza* (2004) 2 AC 557.

He considered the decision in *Ghaidan,* which took an expansive view of the scope of the equivalent interpretive provision, s 3 of the UK *Human Rights Act.* He found that while the decision is relevant, the amended ACT interpretive provision differs significantly from the UK as it is subject to the qualification that any interpretation of legislation must be consistent with its purpose. He stated [at 77]:

> That is, it seems to me, a matter of some significance having regard to the fact that s 3 of the *UK HRA* was clearly under active consideration in the drafting of s 30 and the Legislative Assembly chose to adopt a formula that contained a qualification not included in the equivalent United Kingdom provision.
>
> The consequence of the difference in formulation is that, whereas s 3 of the *UK HRA* enables a court to modify the meaning of the legislation to which it is being applied bounded 'only by what is possible' (to use the language of Lords Nicholls), there is an additional requirement imposed in the interpretation of legislation to which s 30 of the *ACT HRA* is being applied, ie, the interpretation must be consistent with the purpose of the legislation.

As he had already concluded that the purpose of the exemption clause was not to limit the scope of matters which might be considered in granting an exemption, Mr Peedom found that s 30 could not be applied to reach a different interpretation.

The Tribunal concluded that the matters relied on by Raytheon in seeking an exemption could be considered under the exemption provision, and that an exemption was justified in this case.

Comment and Analysis

This case is significant, as the first to consider the operation of the amended limitation and interpretive provisions of the *ACT HRA*. It goes into greater depth on the application of the interpretive provision than previous decisions, and gives detailed consideration to comparative jurisprudence, particularly the UK case of *Ghaidan*. Overall, however, it seems disappointing that in a case which raises such fundamental human rights issues as an application to discriminate against workers purely on the grounds of their national origin, the right to equality in the *ACT HRA* was found to make no difference to the interpretation of the *Discrimination Act* or to the outcome.

It appears that the conclusion reached by the Tribunal distinguishing the approach in *Ghaidan* on the basis of the additional constraint in the interpretive provision in the *ACT HRA* (and the *Victorian Charter*) is a reasonable one. Under s 30 of the *ACT HRA*, a Territory law must be interpreted in a way that is compatible with human rights, only so far as it is possible to do so *consistently with its purpose*. This qualification, which is not present in s 3 of the *UK HRA*, limits the applicability of the approach in *Ghaidan* which clearly contemplates judicial re-writing of legislation in ways which may not be consistent with the legislative purpose.

Nevertheless, the interpretive approach taken by the Tribunal in this case appears unnecessarily narrow. Although Mr Peedom began by considering the apparent purpose of the exemption provision of the *Discrimination Act*, he did not clearly articulate an underlying purpose, rather, he simply adopted the unfettered interpretation of similar provisions in other States, despite the additional factors for consideration in s 109(3), which point towards the ACT exemption having the ultimate purpose of furthering equality rights. It is also arguable that the legislative purpose referred to in s 30 of the *ACT HRA* is the purpose of the legislation *as a whole*, rather than the purpose of a provision in isolation. In this regard, it is questionable whether the Tribunal should so readily have dismissed the stated objectives of the *Discrimination Act*, which would also support a reading of the exemption provision more consistent with human rights.

The decision also raises the issue of the relationship between the limitation provision in s 28 of the *HRA*, and the interpretation provision in s 30, even though in this case Mr Peedom addressed these as independent questions. Two competing approaches have emerged in this regard, based on the New Zealand cases of *Moonen v Film and Literature Board of Review* [1999] NZCA 3 and *Hansen v The Queen* [2007] NZSC 7.

In simple terms, following the *Moonen* approach, the decision-maker would firstly consider possible interpretations of the relevant provision, and ascertain which is most consistent with human rights. This interpretation would be adopted unless it was inconsistent with the purpose of the legislation.

By contrast, under the *Hansen* approach, the decision-maker begins by ascertaining the ordinary meaning of the legislation, and then determining whether this would limit any human rights. If so, the decision-maker must consider whether such limitations are justifiable under the reasonable limits provision (eg s 28 of the *ACT HRA*). Only if the limitations cannot be justified would the decision maker proceed to consider other interpretations of the provision which might be more consistent with human rights.

In our view, the *Moonen* approach has the advantage of placing human rights at the centre of the interpretive process, rather than bringing them into play only if a limitation on a right is unreasonable. The *Hansen* approach seems to start from the assumption that a legislative provision is not intended to be consistent with human rights, and focuses on limitations. This approach seems inconsistent with international approaches to interpretation of rights and limitations upon rights which construe rights generously and limitations narrowly.

In some respects the approach taken by the Tribunal follows *Hansen*, however Mr Peedom applied the s 28 analysis to the particular case for an exemption presented by Raytheon, rather than to the ordinary interpretation of s 109, which may confuse the issue. Despite his finding of justification under s 28, Mr Peedom also went on to consider (and reject) alternative interpretations of s 109 under the interpretive provision.

Another interesting question is whether the new public authority provisions in Part 5A of the *ACT HRA*, which will come into effect on 1 January 2009, will make any difference where similar applications are made in the future. Under these provisions, both the Human Rights Commissioner and the Tribunal will assume the obligations of public authorities, and will be required to act consistently with human rights unless explicitly required by legislation to act otherwise.

The decision is available at http://www.austlii.edu.au/au/cases/act/ACTAAT/2008/19.html.

Gabrielle McKinnon is Director of the ACT Human Rights Act Research Project

Use of a Totalitarian Symbol and the Right to Freedom of Expression

Vajnai v Hungary [2008] ECHR 33629/06 (8 July 2008)

The European Court of Human Rights held that there was a violation of art 10 of the *European Convention on Human Rights* when criminal proceedings were instituted against the applicant for having worn a totalitarian symbol in public.

Facts

The applicant, a Hungarian national, was the Vice-President of a registered left-wing Worker's Party. On 21 February 2003, the applicant was a speaker at a lawful demonstration in central Budapest. On his jacket, the applicant wore a five-pointed red star as a symbol of the international workers' movement. A police patrol called on the applicant to remove the red star, which he did. The request for the removal of the red star was made pursuant to section 269/B(1) of the Hungarian Criminal Code. Subsequently, criminal proceedings were instituted against the applicant for having worn a 'totalitarian symbol'.

On 11 March 2004, the District Court convicted the applicant of the offence of using a totalitarian symbol, whereupon a sanction was imposed for a probationary period of one year.

The applicant appealed to the Budapest Regional Court which upheld the conviction.

In May 2006, the applicant lodged a complaint with the European Court of Human Rights. He alleged that his conviction for having worn the symbol of the international workers' movement constituted an unjustified interference with his right to freedom of expression, in breach of art 10 of the *Convention*.

Decision

The European Court of Human Rights held that the imposition of a criminal sanction for using a totalitarian symbol constituted an interference with the applicant's rights enshrined in art 10(1) of the *Convention*.

It reasoned, inter alia, that at the material time, the applicant was an official of a registered left-wing party and wore the contested red star at a lawful demonstration. The Court could not, therefore, conclude that its display was intended to justify or propagate totalitarian oppression serving totalitarian groups and was unrelated to racist propaganda. Furthermore, the Court held that the registered political party had no known intention of participating in Hungarian political life in defiance of the rule of law and the Government failed to refer to any instance where an actual or even remote danger of disorder triggered by the public display of the red star had arisen in Hungary.

The Court also held that the test of 'necessity in a democratic society' requires the Court to determine the interference complained of corresponded to a 'pressing social need'. It also affirmed that, although freedom of expression may be subject to exceptions, they 'must be narrowly interpreted' and 'the necessity for any restrictions must be convincingly established'.

In the Court's view, 'when freedom of expression is exercised as political speech – as in the present case – limitations are justified only in so far as there exists a clear, pressing and specific social need'. Consequently, utmost care and caution must be observed in applying any restrictions, particularly when the case involves symbols, which have multiple meanings. In the present case, the Court held that the ban in question was too broad in view of the multiple meanings of the red star.

The Court also recognised that the systematic terror applied to consolidate Communist rule in several countries, including Hungary. The Court accepted that 'the display of the symbol…was ubiquitous during the reign of those regimes may create uneasiness amongst past victims and their relatives, who might rightly find such displays disrespectful'. The Court, nevertheless, considered that such sentiments, however understandable, cannot and could not set the limits of freedom of expression.

In the Court's view, a 'legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginery – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgment'. To hold otherwise, the Court asserted, would mean that freedom of speech and opinion is subjected to the 'heckler's veto'.

Relevance to the Victorian *Charter*

The Victorian *Charter* includes a provision relating to the right to freedom of expression, in similar terms to the *European Convention of Human Rights*.

Under s 15(2), 'Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds' in a range of media. Under s 15(3), the right to free expression may be 'subject to lawful restrictions reasonably necessary to respect the rights and reputation of other persons or for the protection of national security or public order'.

In addition to being protected by the *Charter*, the right to freedom of political communication is a constitutionally implied right in Australia (see, eg, *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 6). Any restrictions of the kind sought to be imposed in this case would therefore not only need to be consistent with s 7 of the *Charter*, but also compatible with the system of representative and responsible government and reasonably appropriate and adapted (or proportionate) to achieving a legitimate aim.

Carolina Riveros Soto is a lawyer and recently returned from an internship with the UN Office of the High Commissioner for Human Rights in Geneva, Switzerland

Common Law Should Evolve to Protect Human Rights and Freedoms

WIC Radio Ltd v Simpson, 2008 SCC 40 (27 June 2008)

The Supreme Court of Canada has again emphasised the importance of the common law evolving in a manner that is consistent with *Charter* values.

This was a private law defamation case involving a controversial radio talk show host, 'M', and a social activist opposed to any positive portrayal of a gay lifestyle, 'S'. M publicly likened S to Hitler, the Ku Klux Klan and skinheads and S claimed defamation because she had never advocated violence against homosexuals. The trial judge dismissed the action on the basis that, while statements complained of in the editorial were defamatory, the defence of fair comment applied and provided a complete defence.

The Supreme Court upheld the trial judge's finding, and affirmed the importance of protecting freedom of speech as well as respect for others, in light of the *Charter*. Justice Binnie held that the law of defamation may require modification to better accommodate the value of freedom of expression and noted that:

> There is concern that matters of public interest go unreported because publishers fear the ballooning cost and disruption of defending a defamation action... Of course 'chilling' false and defamatory speech is not a bad thing in itself, but chilling debate on matters of legitimate public interest raises issues of inappropriate censorship and self-censorship. Public controversy can be a rough trade, and the law needs to accommodate its requirements.

Justice Binnie favourably quoted the following statement of Cory J in *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130 regarding the need to develop the common law in accordance with *Charter* values.

> Historically, the common law evolved as a result of the courts making those incremental changes which were necessary in order to make the law comply with current societal values. The Charter represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the Charter.

The decision is available at http://www.canlii.org/en/ca/scc/doc/2008/2008scc40/2008scc40.html.

Melanie Schleiger is on secondment to the Human Rights Law Resource Centre from Lander & Rogers

Double Jeopardy does not Prohibit Disciplinary Proceedings

Z v Dental Complaints Assessment Committee [2008] NZSC 55 (25 July 2008)

This case involved a dentist who was criminally charged with the indecent assault of three patients. He was acquitted of these charges but was then subjected to professional disciplinary action. The dentist claimed that the subsequent charges by the Dental Complaints Assessment Committee were contrary to the common law principle against double jeopardy and in breach of s 26(2) of the New Zealand *Bill of Rights Act*. The Supreme Court considered the principal issue to be whether the decision to initiate disciplinary proceedings, insofar as they concerned allegations that were the subject of acquittal by the jury, amounted to an abuse of process. Particular consideration was given to the standard of proof that applies to disciplinary proceedings under the *Dental Act*. A majority of the Supreme Court held that there was no abuse of process and the Disciplinary Tribunal could properly consider the alleged indecent assaults.

The decision is available at http://www.nzlii.org/nz/cases/NZSC/2008/55.html.

Melanie Schleiger is on secondment to the Human Rights Law Resource Centre from Lander & Rogers

HRLRC Policy Work

New Approach Needed to Eliminate Gender Discrimination and Promote Substantive Equality

On 26 June 2008, the Senate referred to the Legal and Constitutional Affairs Committee the matter of the effectiveness of the *Sex Discrimination Act 1984* (Cth) (SDA) in eliminating discrimination and promoting gender equality.

The Centre's submission focuses on the extent to which the SDA implements the non-discrimination obligations contained in international human rights law.

The recommendations set out in the submission are aimed at ensuring the full implementation of Australia's obligations under international human rights law, including the *Convention on the Elimination of All Forms of Discrimination against Women*, the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights*.

The Centre's submission is available at www.hrlrc.org.au under Policy Work>Domestic Submissions>Women's Rights: Submission to Senate Review of SDA calls for Focus on Substantive Equality and Systemic Discrimination (Aug 2008).

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

Centre calls for Human Rights Approach to Immigration Detention

On 29 May 2008, the Joint Standing Committee on Migration announced an inquiry into immigration detention in Australia.

The Centre's Submission to the Committee focuses on the need for Australia's immigration detention regime to comply fully with Australia's obligations under international human rights law.

The Centre congratulates the Australian Government on its proposed reforms to Australia's immigration detention scheme as detailed on 29 July 2008. These reforms signal a significant and positive departure from the previous government's immigration detention policies which constituted grave breaches of Australia's obligations under international human rights law. However, despite considerable improvements, the proposed immigration detention regime falls short of Australia's international obligations in a number of respects.

As Australia celebrates the 60th anniversary of the UDHR, the Government must commit to the full implementation of its international obligations through comprehensive and robust domestic legislation that reflects a human rights approach to immigration detention. Further, the Centre considers that compliance with human rights standards should not be a matter of policy subject to the discretion of the Minister and departmental officers, but should be enshrined in legislation.

The Centre would like to thank the Mallesons Stephen Jaques Human Rights Law Group for its pro bono assistance with this submission.

The Centre's submission is available at www.hrlrc.org.au under Policy Work>Domestic Submissions>Refugee Rights: Submission to Inquiry into Immigration Detention (Aug 2008).

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

Northern Territory Emergency Response must be Reformed to Respect Human Rights

In August 2008, the Centre made a Submission to the Northern Territory Emergency Response Review Board in relation to the practical implications of the Northern Territory Emergency Response legislative package and related implementation measures.

The submission identifies particular human rights issues arising from the NTER and recommends that a human rights approach be taken in the review and reform of the NTER. In particular, the submission urges the Australian Government to reinstate the *Racial Discrimination Act 1975* (Cth) and to comply with its obligations under international human rights law, including the *UN Declaration on the Rights of Indigenous Peoples*.

The Centre would like to thank the Mallesons Stephen Jaques Human Rights Law Group for its pro bono assistance with this submission.

The Centre's submission is available at www.hrlrc.org.au under Policy Work>Domestic Submissions>Indigenous Rights: Submission on Review of Northern Territory Emergency Response (Aug 2008).

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

Victorian Government Reform to Mental Health

In May 2008, the Victorian Government Department of Human Services commenced a broad review of mental health services. People with mental illness in Victoria experience discrimination within society and the health care system which causes significant social disadvantage. The review aims to shift focus from a response based on illness and acute intervention to one emphasising wellness, early intervention and recovery. The consultation paper, *Because mental health matters: a new focus for mental health and wellbeing in Victoria*, invited submissions on areas such as prevention, early intervention and access.

The Centre's submission focuses on first, the application of the *Charter* to mental health law, policy and practice and second, issues and policy suggestions raised in the consultation paper which engage human rights such as suicide prevention and age-appropriate treatment. The submission also considers the application of the *Charter* to the Mental Health Review Board, involuntary treatment, detention without consent and restraint and seclusion. The submission recommends that a human rights

approach to mental health reform is necessary to ensure that rights of those experiencing mental illness are protected and promoted in a meaningful way.

The Centre's submission is available at www.hrlrc.org.au under Policy Work>Domestic Submissions>Mental Health: A Human Rights Approach to Mental Health Strategy (July 2008).

Phoebe Knowles is on secondment with the Human Rights Law Resource Centre from Minter Ellison

HRLRC Casework

Centre Intervenes as Amicus Curiae in *Charter* Test Case regarding Mental Health

The Human Rights Law Resource Centre has been given leave to intervene as amicus curiae in a significant test case for the Victorian *Charter of Human Rights*.

The matter is being heard by the President of VCAT, Justice Bell, on appeal from the Mental Health Review Board. The case, which concerns the failure of the Board to conduct a review of the involuntary treatment of a patient under the *Mental Health Act*, raises a number of very significant *Charter* issues, including: the meanings of 'public authority' and 'court or tribunal acting in an administrative capacity'; the scope of the right to a fair hearing; the *Charter* rights engaged by involuntary mental health treatment; the scope of the *Charter* obligation to interpret legislation consistently with human rights; and the interpretation of the *Mental Health Act* in light of the *Charter*.

The Centre is being provided with significant pro bono assistance in this matter by Mark Moshinksy SC and Chris Young of Counsel, together with Allens Arthur Robinson.

Prison Conditions must Respect Human Dignity and Promote Wellbeing

The Centre and Freehills are currently working to improve conditions for a prisoner held within a discipline regime in a Tasmanian prison. The conditions may breach the common law duty of care, the *Corrections Act 1997* (Tas) and various human rights recognised by international law. The Centre and Freehills have requested a review and improvement of the conditions. On our instructions, the length of detention within the disciplinary regime is unfair, inequitable and lacks proper regard to the dignity of the prisoner. It is also arguably cruel, inhuman and degrading and fails to fulfil the State Government's obligation to promote the well-being, development, reformation and social rehabilitation of the prisoner. The regime includes limited food, inadequate access to physical training and other recreation material, poor cell conditions, continuous disruption to sleep, unnecessary and regular seizure and destruction of property, unfair punishment, inadequate access to information, unnecessary use of restraints and an overall adverse impact on the emotional and mental wellbeing of the prisoner. In combination, the regime fails to acknowledge that the deprivation of prisoners' liberty is sufficient punishment and the additional punishment imposed in this case is unnecessary, inhuman and degrading and does not satisfy any perceived security risk or other purpose.

Phoebe Knowles is on secondment with the Human Rights Law Resource Centre from Minter Ellison

Seminars and Events

National Indigenous Legal Conference and Ball

Date: 12 and 13 September 2008

Venue: RACV Club, Melbourne

The 2008 National Indigenous Legal Conference will bring together lawyers, law students, barristers, solicitors, judges, community workers, Elders, public servants, land councils and academics. The Conference will focus on topical issues such as the Northern Territory Intervention and Native Title. Keynote speakers include Commissioner Tom Calma (HREOC), and the Hon Justice Michael Kirby.

For program and registration details, see http://www.liv.asn.au/events/calendar/TarwirriProgram.pdf.

After the Apology: A Dialogue on Reconciliation

Date: 6pm, 12 September 2008

Venue: Village Roadshow Theatrette, State Library of Victoria, 328 Swanston St, Melbourne

Cost: Free. RSVP to human-rights@unimelb.edu.au with 'reconciliation' in the subject line

The recent Rudd Government apology to the Stolen Generations has been viewed by many as a significant step in the reconciliation process. To what extent does the apology mark the beginning of a new relationship between Indigenous and non-Indigenous Australians? Where do we need to go from here? This dialogue, brought to you by the University of Melbourne Human Rights Forum, will provide an opportunity to engage with leading indigenous thinkers on these issues.

Speakers include: Larissa Behrendt (Professor of Law and Director of Research, Jumbanna Indigenous House of Learning, University of Technology, Sydney); Tom Calma (Aboriginal and Torres Strait Islander Social Justice Commissioner and Race Discrimination Commissioner); Ian Anderson (Director, Onemda VicHealth Koori Health Unit and Centre for Health & Society, University of Melbourne) and Kylie Belling (Artistic Director for Ilbijerri Aboriginal & Torres Strait Islanders Theatre Cooperative).

2008 Protecting Human Rights Conference

Date: 3 October 2008

Venue: Melbourne Law School, 185 Pelham Street, Carlton

Cost: $150 / $75 concession

This conference will focus on developments in relation to legislative protection of human rights at state and territory and national levels in Australia, in particular, the recently enacted Victorian *Charter of Human Rights and Responsibilities 2006*, and the Australian Capital Territory's *Human Rights Act 2004* and also the draft Bills being considered in Tasmania and Western Australia. It will include discussion of similar Acts in other countries.

Key confirmed speakers include: the Hon Rob McClelland MP, Attorney-General for Australia; the Right Hon Chief Justice Dame Sian Elias, New Zealand; and the Hon Justice Marcia Neave, Victorian Court of Appeal.

For further information, see http://acthra.anu.edu.au/news/Conference2008.htm or http://cccs.law.unimelb.edu.au/.

National Access to Justice and Pro Bono Conference

Date: 14-15 November 2008

Venue: Sydney Masonic Centre, 66 Goulbourn St, Sydney

Cost: $380 for community organisations, $440 (early bird before 30 Sept), $660 (after 30 Sept)

This conference, jointly convened by the Law Council of Australia and the National Pro Bono Resource Centre, will discuss issues relating to access to justice, human rights, the rule of law and pro bono practice.

Key confirmed speakers include: the Hon Rob McClelland MP, Attorney-General for Australia; Robin Knowles CBE QC, Chairman of the England and Wales Bar Pro Bono Unit; Ron Merkel QC; and the Hon Jelena Popovic, Deputy Chief Magistrate of Victoria.

For further information, see http://www.a2j08.com.au/index.html.

Everyday People, Everyday Rights: Human Rights Conference 2009

Date: 16-17 March 2009

Venue: Melbourne Park Function Centre, Batman Ave, Melbourne

The Victorian Equal Opportunity and Human Rights Commission encourages you to submit an abstract for presentation at its Human Rights Conference – *Everyday people, everyday rights* – to be held on 16 & 17 March 2009.

Abstracts are encouraged in the following categories:

- The Achievement of Human Rights: A review of the Victorian Charter of Human Rights & Responsibilities and what it has achieved considering Victoria's current state of affairs

- The Experience of Human Rights: Sharing the knowledge and insight of everyday people and their advocates. How do we progress a human rights culture?
- The Business of Human Rights: Moving towards the quadruple bottom line; corporations that are leading the way in corporate social responsibility relating to human rights principles

For more information about submitting an abstract, see http://www.humanrightscommission.vic.gov.au/conference/.

Human Rights Resources

What's New on the HRLRC Website?

The following full-text articles have been posted to the Centre's website over the last month:

- Philip Lynch, 'Charters of Rights Bring Benefits, Even Save Lives', *Australian Financial Review* (Sydney), 25 July 2008
- The Hon Robert McClelland MP, Attorney General of Australia, 'Strengthening Human Rights and the Rule of Law', Speech to Human Rights Law Resource Centre, 7 August 2008
- The Rt Hon Malcolm Fraser AC, 'Torture Team: Human Rights, Lawyers and the War on Terror', Speech to Human Rights Law Resource Centre, 19 August 2008
- Rachel Ball, 'Time for Thorough Revamp', *Australian Financial Review* (Sydney), 22 August 2008

Human Rights Law, Advocacy and Campaigning Program Materials

In July and August 2008, the Human Rights Law Resource Centre ran a *Human Rights Law, Advocacy and Campaigning Program*.

The training was intended for lawyers, advocates and workers in community legal centres, private law firms, Victoria Legal Aid, community organisations and NGOs with an interest in using human rights law in casework, advocacy and campaigning.

The training covered the following topics:

- Human Rights Principles, Sources and Frameworks
- Domestic Tools and Strategies to Promote Human Rights and Address Disadvantage
- International Tools and Strategies to Promote Human Rights and Address Disadvantage
- Human Rights Campaigning
- Victorian Charter of Rights Train-the-Trainer Program for Community Organisations

Materials on each of these topics are now available online at www.hrlrc.org.au under Seminars and Events>Past Events and Papers> Human Rights Law, Advocacy and Campaigning Program – Materials.

Right Now Radio – New Human Rights Radio Show

Right Now Radio is a new radio program broadcast live on Melbourne's 3CR 855AM at 6pm every Thursday beginning 18 September 2008. Right Now Radio is an initiative of *Right Now*, the non-profit human rights law media organisation which also publishes *Right Now Magazine*.

Tune in to *Right Now Radio* for:

- discussion of current human rights issues relevant to Australians today;
- interviews with people 'on the ground' in human rights; and
- inspiring human rights music.

Right Now Radio is motivated to give human rights a louder voice in Australian society. It aims to ensure that human rights talk is characterised by equity, inclusion, respect and diversity. *Right Now Radio* believes that enabling human rights discussion across a range of media and in varying formats is essential to achieving this aim.

Right Now Radio, hosted by human rights advocates, works in partnership with the community to promote and protect for the human rights of all people.

Human Rights Jobs

Annual Human Rights and Diplomacy Training Program

The Diplomacy Training Program (DTP) is calling for applications for its '18th Annual Human Rights and Peoples' Diplomacy Training Program for Human Rights Defenders from the Asia-Pacific Region and Indigenous Australia'.

This annual three week comprehensive human rights and advocacy training course is the oldest established such program in the region. It provides participants with a solid knowledge of the international human rights framework and the UN system, as well as building practical advocacy, media and internet skills. The course will take place in Sydney and Canberra from 24 November to 12 December and coincides with the 60th anniversary of the *Universal Declaration of Human Rights*.

For further information see www.dtp.unsw.edu.au. All applications must be received by DTP by 5 September.

Foreign Correspondent

One World, One Human Rights Dream

Human Rights and the Beijing Olympics

Olympics, Olympics, Olympics. I'm not sure about you, but I'm pretty over it, yet I keep watching! We've all read the news reports about the human rights concerns – lack of press freedom, internet censorship, violent repression of the Falun Gung, use of the death penalty, little freedom to protest, no independence for Tibet, etc. I'm presuming that most readers of a Bulletin like this are familiar with the concerns when it comes to China and its human rights record. Most of us would have read or at least be aware of the many reports on these issues, such as through the work being done by Amnesty International, Human Rights Watch, FIDH, Human Rights in China, and others. If not, I'd strongly encourage you to check out their informative websites – since we can access these we should spend a few minutes educating ourselves about issues that many people don't even get the opportunity to read about.

Why do we link the Olympic Games and human rights? Is it just because this is an opportune moment to highlight the human rights record of a country placing itself under the world's media spotlight for 3 weeks? Indeed it is, and people who would previously never have stopped to read about China or human rights, now probably know a lot more about both than they ever would have otherwise. But there's more to it than that. The *Guardian* newspaper recently reported the IOC's director of communications, Giselle Davies, responding to human rights concerns by saying: 'The Olympics are about sport. We are aware of the wider issues but opening the door through the Olympics is a catalyst for development here. That catalytic effect is happening. But the Olympics are not a panacea for all ills.' The oft-touted assumption that the Olympic Games, being about sport, don't have anything to do with human rights, is difficult to maintain. First, as Ms Davies recognizes, events like these can be a catalyst for positive change and opportunities to leave sustainable social and environmental legacies, yet the reality is they are much more likely to be used as catalysts for negative downturns in the standard of living and dignity of the local inhabitants. Second, the spirit and ideals of the Olympic Movement, which aims to foster peace, solidarity and respect for universal fundamental principles, are, at heart, congruent with human rights obligations, and one could say that the Principles of the Olympic Movement really can't be achieved at the expense of human rights, or built on a foundation of human rights violations.

How can the Olympic Movement (including the IOC) *not* be concerned about human rights when various human rights violations are committed *just because* of the Olympics? For example, cleaning the streets of undesirable people and taking them to 'Re-Education Through Labour' camps, the eviction of 1.5 million people due to the construction of Games venues or other Olympic-related development, and the imprisonment of political dissidents. These are human rights violations occurring *directly* because of the Olympic Games, and in fact the Chinese are not the first and certainly not the only ones to violate rights

in this way in the lead-up to the world's most celebrated sporting event. The USA issued more than 9,000 arrest citations, mostly to African-Americans, during the weeks leading up to the Atlanta Games in 1996, in operations to clean the streets of homeless people. In Seoul 750,000 people were forcibly evicted from their homes in 1988. Even in London people are being evicted from public housing to build the 2012 Games venues. Local residents are being punished and pushed into poverty – this is not their dream.

While ideas abound for how to turn the hosting of the Olympics into a positive opportunity to further human rights, the IOC does little to encourage this – sticking with the line that the Games are just about sport. Proposals such as COHRE's *Multi-Stakeholder Guidelines on Mega-Events and the Protection and Promotion of Housing Rights* provide solutions for creating positive Olympic legacies, yet no incentives are given by the IOC to ensure Host Cities comply. So many lost opportunities, which could easily be fixed by the IOC accepting that sport and human rights are, and should be, linked.

One of the reasons why the Olympics should be a moment for us to stop and consider human rights is because, like human rights should, it engages all of us. Sports participants, spectators, sponsors, governments, heads of state, volunteers, media, suppliers – everyone sees, hears, talks Olympics, and many people make a lot of money from it. We are concerned about what our athletes are doing, saying, eating, how they're sleeping, how they are being treated by the authorities, what they think of the way they are being treated, and how they are being punished or sanctioned if they break the rules. We should be equally concerned about the same things for those who live under the shadow of the Olympics just because they happen to be the local residents in the Host City. More importantly, we should be concerned about how hosting the Olympics changes their situation, and show to the IOC, host countries, Olympic sponsors, and others, that our support is behind a sporting event that embraces positive developments in the lives of the non-sports people it directly affects. This is one time when we all have a role to play – we are not merely armchair spectators, and this is not just about China and its human rights record.

First Meeting of Human Rights Council Advisory Committee

Last week the Human Rights Council's Advisory Committee finished its first meeting. This new body is comprised of 18 experts and has been established as the 'think-tank' for the Council. It replaces the former Sub-Commission on the Promotion and Protection of Human Rights. Although it was expected that this first session would focus mostly on establishing working methods, the Advisory Committee has already shown that it intends to do a lot of serious work – it adopted by consensus 13 recommendations to go to the Council when that body next meets in September. One of the key outcomes was the establishment of a drafting group to work on human rights education and training. Another focus was the right to food, with the Advisory Committee establishing a working group to study the right to food and the current food crisis, including its causes and consequences, State obligations, and recommendations on measures. The Advisory Committee also made recommendations about extending the right of non-refoulement to hunger refugees, and increasing voluntary contributions to the UNHCR. The Advisory Committee also mandated two experts to draft guidelines on methods to operationalize gender mainstreaming at all levels of the UN.

Time will tell whether or not the Advisory Committee will be a strong influence in the work of the Human Rights Council, for example in human rights standard setting, but it seems to be off to a productive start on some issues.

Conflict in Georgia

It would be remiss not mention the conflict in Georgia at this time. NGOs, UN agencies, and governments around the world have all been expressing their concern about the situation, in particular the need to protect civilians from humanitarian and human rights abuses. The reported use of cluster bombs, displacement of many people from their homes, ethnic discrimination and violence – all these human rights concerns need to be addressed by both Russia and Georgia and other members of the international community, and as quickly as possible. Earlier this month, the OHCHR issued a plea to both sides 'to take concrete steps to prevent further civilian casualties … [and] show utmost restraint and -- under any circumstances -- to ensure full respect for international humanitarian and human rights law, in particular the right to life, liberty and security of the person'. The UN human rights body further requested that both sides protect displaced people and refugees, including through creating safe

passages for them to leave.

Claire Mahon is an Australian international human rights lawyer based in Geneva, Switzerland, 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, and an Adjunct Clinical Professor of Law at the University of Michigan Law School in the USA.

If I Were Attorney-General…

Human Rights and Business in Australia and Beyond

If I were Attorney-General, I would thank my predecessor, the Hon Rob McClelland MP, for a job well-started – the job of getting Australia back on track in terms of our commitment to human rights nationally and internationally. Of course, it goes without saying that I would also thank my predecessor (in anticipation at this stage!) for starting the ball rolling on a National Charter of Human Rights.

So let us assume for the moment that a National Human Rights Charter is firmly entrenched and well supported. Needless to say, laws that had been passed to circumvent human rights would have been amended or repealed and replaced with fairer legislation. This would include laws such as the *Native Title Amendment Act* for which Australia has been roundly condemned by the United Nations Committee on the Elimination of Racial Discrimination, and the Northern Territory intervention legislation which suspended the operation of the *Racial Discrimination Act*.

Having contributed to the important process of fulfilling human rights within Australia, I would look towards ensuring Australia's human rights obligations were also being realised in the international context. I would immediately endorse the United Nations Declaration on the Rights of Indigenous Peoples and, in collaboration with other relevant departments, work with Aboriginal and Torres Strait Islander peoples to design programmes to put the Declaration into practice.

I would also take a proactive role in developing both a national and an international response to what is essentially a transnational issue – the impact of multinational businesses on human rights. Australia is home to a large number of transnational companies (TNCs), in particular mining, oil and gas companies which have significant influence on human rights abroad. Australia has obligations not only to ensure the protection of human rights within our country but also to take steps to protect human rights where Australian companies operate outside the country. These responsibilities have been reaffirmed recently in the report of the UN Special Representative to the Secretary General on Business and Human Rights, and are consistent with the general obligations that all states accept in joining the United Nations; the obligation to engage in international cooperation for the realisation of human rights contained in the *UN Charter*.

I would seek to elaborate a three-part system; first, it would require Australian TNCs to take steps to ensure compliance with their responsibility to respect human rights; second, it would elaborate a mechanism in Australia accessible to communities affected by Australian companies overseas who have not been able to resolve their complaints locally; and third it would seek to work with and build regulatory capacity in countries where Australian companies operate.

Despite acceptance by some in industry of the need to respect human rights and operate in a way that contributes to sustainable development, there are not presently any established standards on how to address community complaints of human rights violations. By establishing procedures to ensure that community grievances are addressed at the earliest opportunity, companies can be proactive in both resolving grievances and in preventing circumstances from arising that result in human rights being violated.

Regulatory requirements within Australia could compel Australian companies to ensure they, their subsidiaries and suppliers over which they have significant influence undertake human rights impact assessments (HRIAs) prior to commencing operations and establish company level complaints mechanisms. Complaints mechanisms should be rights-compliant, transparent and participatory. Reporting on HRIAs and on the functioning of complaints mechanisms could be linked with ASX listing rules.

To assist Australian companies, I would establish an agency whose role would be to work with our TNCs to provide advice in the establishment of HRIA processes and company level complaints

mechanisms. The agency would also be available to work with host State agencies to increase local capacity to investigate and resolve disputes between communities and corporations.

In addition, however, it is important to recognise that some of the most egregious circumstances that result in community complaints may not be resolved by having a company-established grievance process. Through my experience as the Mining Ombudsman at Oxfam Australia, I have seen how a third party that is independent of the mining industry and trusted by communities can facilitate positive tangible change. In Papua New Guinea, for example, the Tolukuma Gold Mine, which for years was operated by an Australian-based company, dumps thousands of tonnes of toxic waste directly into the river. Appalled by the desecration of their river, clean water has been a demand of affected communities since the mine started operations in 1996, but had been consistently ignored. As a third party intervenor, I was able to facilitate local non-government organizations, community members and the company to come to the table and propose new means of resolving issues. Clean water is now flowing in two villages for the first time in 12 years, with more villages to be addressed soon. The company also committed to having zero impact on the river within three years.

Given the many examples in which companies have failed to respect the human rights of women and men in local communities, there is a need to ensure that, where required, communities have access to a body independent of the company. With input from industry and other stakeholders, I would seek to establish an independent complaints body capable of investigating grievances and assisting communities whose human rights are affected by Australian companies abroad. The independent body would be available where local communities have not been able to resolve their complaints through company level or host state mechanisms in a timely manner. Parent companies would be encouraged to incorporate a condition to cooperate in investigations by this complaints body into contractual relationships with subsidiaries or suppliers, as well as in agreements with the host State.

In creating this complaints mechanism, I would work with the Minister for Foreign Affairs and his peers abroad to encourage support for the initiative in other countries and to allow the independent complaints body to engage in investigations of corporate activity. In particular, I would seek to encourage states that are host to Australian and other transnational corporations to build into local laws, regulations and permit conditions, the need for large businesses to undertake HRIAs and establish complaints mechanisms. Consistent with Australia's obligation to engage in international cooperation for the protection of human rights, I would also work with my colleagues in the aid program to look at means of improving the availability and capacity of host state independent investigative mechanisms to resolve community concerns – including human rights commissions and ombudsman bodies.

With these systems in place, I would look back on this 60th anniversary of the *Universal Declaration of Human Rights* and recall just how much Attorneys-General can contribute to the realisation of human rights both in Australia and overseas. I would then look forward … to establishing a truly international system of transnational corporate responsibility for human rights.

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