human rights law resource centre

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The HRLRC aims to:

1. Promote and protect human rights in Australia through litigation, advocacy, research, education and training.

2. Build capacity in the legal and community sectors to use human rights in casework, advocacy and service delivery.

3. Empower people that are disadvantaged or living in poverty by operating within a human rights framework.

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Opinion

Australia Can Impact on Human Rights in Burma

As intractable as the situation in Burma may seem, Australia has policy options for making a positive impact on human rights there.

Burma remains one of the most repressive countries in the world. There are strict limits on basic freedoms of expression, association and assembly. The intelligence and security services are omnipresent. Censorship is draconian. More than 2,100 political prisoners suffer in Burma's squalid prisons, including many members of the political opposition, courageous protestors who peacefully took to the streets in August and September 2007, and individuals who criticised the government for its poor response to Cyclone Nargis in May 2008. All have been sentenced after sham trials that often take place in the prisons themselves.

Military abuses connected to armed conflicts in ethnic minority areas continue. Corruption and mismanagement have made Burma one of the poorest countries in Asia.

There is no mystery in the military's long-term intentions. The ruling junta, the State Peace and Development Council (SPDC), has been totally open about its plans to stage-manage an electoral process in 2010 that will ensure continued military rule with a civilian face. The SPDC clearly hopes that this will mollify Australia, the United States, and other countries that oppose military rule.

Following the reprehensible verdict against Daw Aung San Suu Kyi in August, Foreign Minister Stephen Smith committed Australia to a stronger approach to Burma: 'Australia will now consult closely with the international community – including the United Nations and Australia's ASEAN partners – on the need to put even more pressure on the Burmese regime to move down the path of democracy.'

In fact, all three prongs of Australia's engagement approach – diplomacy, sanctions and humanitarian aid – can be made more effective.

The Australian government should try to speak to the Burmese government at the highest levels. But a couple of cautions. First, it is important that more intensive diplomacy does not lead into the trap of making improved relations the primary goal of Australian policy. The protection of the rights of Burmese and a genuine and credible political reform process need to be the primary goals for Australia's policy.

Second, Australia should keep in mind that the Burmese officials who normally speak to foreigners – whether the foreign minister or

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the functionaries involved in the post-Nargis reconstruction – have no real authority in the government and are probably as scared of Than Shwe and other senior leaders as anyone else. Many foreign diplomats and others who have invested a great deal of time and energy in pursuing relations with the second tier of leadership have told Human Rights Watch that it was time largely wasted. Those who do have the authority – Senior General Than Shwe, Vice-Senior General Maung Aye, Lt. General Thura Shwe Mann, Prime Minister Thein Sein, and key regional commanders – usually don't engage with outsiders.

Human Rights Watch strongly recommends that Australia appoint its own special envoy, with a direct line to the Foreign Minister. Vigorous diplomacy is needed with China, India, Thailand, Japan, Indonesia, Malaysia, and other influential actors, to ensure that new revenue streams are not made available to the Burmese government.

Australia might also consider supporting the establishment of a Burma Contact Group or some form of multilateral grouping to meet and regularly discuss diplomatic engagement with the Burmese government on a range of issues. This could have the effect of converging the views and policies of China, India, Thailand, Indonesia, Japan, Australia, the EU and UN, and gradually minimise the ability of the SPDC to play states off against each other. As the United Nations has long been the focal point for diplomacy on Burma, Australia should also support the continuation of a special envoy of the secretary-general.

Australia imposed financial sanctions on Burma on 24 October 2007, under the *Banking (Foreign Exchange) Regulations 1959*. It prohibits the transfer of funds to 463 members of the SPDC or their close business associates or family members, without approval from the Reserve Bank. Those sanctions were reviewed and modified in October 2008.

At the same time, Australia has measures it is not yet using – for example, denying foreign banks access to the Australian financial system if they are holding targeted Burmese accounts or otherwise undermining Australian measures. EU states have been noticeably slow to implement full financial sanctions; Australia should continue to set a good example and then press European countries to follow suit. Slow implementation and poor coordination internationally have kept financial sanctions from realising their potential.

Australia recently gave AUD$3.2 million to assist Rohingya Muslims in Western Burma, a deplorable human rights situation which gained international media attention early in 2009 when thousands of Rohingya men and boys washed up on the shores of Thailand, Malaysia, and Indonesia. Australia's provision of AUD$55 million to assist the survivors of Cyclone Nargis is also generous and urgently needed, as is the 2009 AusAID budget of AUD$29 million to fund health, livelihoods and protection programs in Burma. However, Australian funding could and should increase, especially in assisting communities in conflict zones in Eastern Burma, something Australia is not doing now.

But, again, some cautions. First, the cause of Burma's humanitarian problems is not a lack of available resources. Burma has made gas deals with Thailand that provide the government its largest source of revenue, worth approximately US$2 billion annually. A new deal to supply natural gas to China via an overland pipeline will significantly add to that sum. Burma's leaders also count on large earnings from sales of gems and timber, and ongoing hydroelectric projects are expected to generate additional lucrative export revenue.

Despite these large revenue sources, the military government spends next to nothing on the welfare of its people. The largest share of the state budget is allocated to the military, as much as 40 percent, while combined social spending is estimated to be a paltry 0.8 per cent of GDP for 2008/09. Donor discussions with the SPDC over the provision of humanitarian assistance should not neglect the government's ability to contribute substantially to such assistance.

Humanitarian aid is different from development aid. Australia, like other countries, should not provide development aid until there is significant political reform, progress on human rights, better governance, and the possibility of consulting civil society and local communities in setting development goals.

Helping the Burmese people is one of the most difficult and intractable problems the world has faced in recent decades. Strong Australian leadership can make a significant difference in the years ahead.

Carroll Bogert is Associate Director of Human Rights Watch (www.hrw.org)

News

Optional Protocol to the Disabilities Convention Enters into Force for Australia

On 20 September 2009, the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* entered into force for Australia. The Optional Protocol establishes a 'communication procedure', which enables people to submit a complaint to the UN Committee on the Rights of Persons with Disabilities alleging that their human rights have been breached. It also establishes an 'inquiry procedure', which enables the Committee itself to inquire into alleged grave or systemic violations of disability rights.

According to the Attorney-General, the Hon Rob McClelland MP, 'the entry into force of the Optional Protocol is an important milestone for people with a disability in Australia and further demonstrates the Government's leadership at an international level.'

The Attorney-General has also declared the Convention under the *Australian Human Rights Commission Act 1986* (Cth), thereby enabling the Australian Human Rights Commission to conciliate complaints based on breaches of the Convention.

Australia Fails to Show Leadership on Economic, Social and Cultural Rights

Australia has missed an important opportunity to demonstrate international human rights leadership and to affirm the indivisibility and interdependence of all human rights by failing to sign the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* at the official signing ceremony for that instrument in New York on 24 September 2009. The HRLRC urges the Government to continue to consider the Optional Protocol and to prioritise its signature and ratification. The HRLRC's submissions to the Australian Government as to why ratification of the OP-ICESCR is in the national interest are at http://www.hrlrc.org.au/content/topics/esc-rights/op-icescr-australia-can-provide-international-leadership-and-ratify-op-icescr-july-2009/.

UN Special Rapporter on the Right to Health to Visit Australia

The UN Special Rapporteur on the Right to Health, Anand Grover, will undertake an official country mission to Australia from 23 November to 5 December 2009. The purpose of the visit is to identify best practice and areas for reform in the promotion and protection of the right to health. The Special Rapporteur's visit will include a particular focus on Indigenous health, and access to adequate health care for disadvantaged and vulnerable groups.

The Human Rights Law Resource Centre has prepared a Briefing Paper for the Special Rapporteur in advance of his mission, available at http://www.hrlrc.org.au/content/topics/esc-rights/right-to-health-briefing-paper-on-australia-to-un-special-rapporteur-on-the-right-to-health-sept-2009/.

UN Special Rapporteur on Indigenous Rights Concludes Visits Australia

The UN Special Rapporteur on the Rights of Indigenous People, Professor James Anaya, conducted an official country mission to Australia in August 2009. Below is an edited extract of his statement at the conclusion of the visit. A full report of the visit will be presented to the next session of the UN Human Rights Council.

Extract of Statement of Professor James Anaya:

'The Government of Australia is to be commended for taking significant steps to improve the human rights and socio-economic conditions of the Aboriginal and Torres Strait Islander peoples of Australia, as well as for its recent expression of support for *UN Declaration on the Rights of Indigenous Peoples* and for its apology to the victims of the Stolen Generation. After several days in Australia listening and learning, however, I have observed a need to develop new initiatives and reform existing ones – in consultation and in real partnership with indigenous peoples – to conform with international standards requiring genuine respect for cultural integrity and self-determination.

During my time in Australia, I have been impressed with demonstrations of strong and vibrant Indigenous cultures and have been inspired by the strength, resilience and vision of Indigenous

communities determined to move toward a better future despite having endured tremendous suffering at the hands of historical forces and entrenched racism. It is clear that these historical forces continue to make their presence known today, manifesting themselves in serious disparities between Indigenous and non-Indigenous parts of society, including in terms of life expectancy, basic health, education, unemployment, incarceration, children placed under care and protection orders, and access to basic services.

Given these disparities, the Government has developed and implemented a number of important initiatives in order to 'close the gap' of Indigenous disadvantage within a wide range of social and economic areas, with a stated emphasis on women and children. These programs must continue to be improved and strengthened. I would also like to stress that I have learned of numerous programs in place by Indigenous authorities and organisations at the local, regional and national levels that have been working effectively to address the many problems that their communities face.

Aspects of the Government's initiatives to remedy situations of indigenous disadvantage, however, raise concerns. Of particular concern is the Northern Territory Emergency Response, which by the Government's own account is an extraordinary measure, especially in its income management regime, imposition of compulsory leases, and community-wide bans on alcohol consumption and pornography. These measures overtly discriminate against aboriginal peoples, infringe their right of self-determination and stigmatize already stigmatized communities.

I would like to stress that affirmative measures by the Government to address the extreme disadvantage faced by Indigenous peoples and issues of safety for children and women are not only justified, but they are in fact required under Australia's international human rights obligations. However, any such measure must be devised and carried out with due regard of the rights of Indigenous peoples to self-determination and to be free from racial discrimination and indignity.

In this connection, any special measure that infringes on the basic rights of Indigenous peoples must be narrowly tailored, proportional, and necessary to achieve the legitimate objectives being pursued. In my view, the Northern Territory Emergency Response is not. In my opinion, as currently configured and carried out, the Emergency Response is incompatible with Australia's obligations under the *Convention on the Elimination of All Forms of Racial Discrimination* and the *International Covenant on Civil and Political Rights*, treaties to which Australia is a party.

I note with satisfaction that a process to reform the Emergency Response is currently underway and that the Government has initiated consultations with Indigenous groups in the Northern Territory in this connection. I hope that amendments to the Emergency Response will diminish or remove its discriminatory aspects and adequately take into account the rights of aboriginal peoples to self determination and cultural integrity, in order to bring this Government initiative in line with Australia's international obligations. Furthermore, I urge the Government to act swiftly to reinstate the protections of the *Racial Discrimination Act*.

Beyond the Northern Territory Emergency Response, I am concerned that there is a need to incorporate into government programs a more holistic approach to addressing Indigenous disadvantage across the country, one that is compatible with the objective of the United Nations Declaration of securing for Indigenous peoples, not just social and economic wellbeing, but also the integrity of Indigenous communities and cultures, and their self-determination.

This approach must involve a real partnership between the Government and the Indigenous peoples of Australia, to move towards a future, as described by Prime Minister Rudd in his apology to Indigenous peoples last year, that is 'based on mutual respect, mutual resolve and mutual responsibility,' and that is also fully respectful of the rights of Aboriginal and Torres Straight Islander peoples to maintain their distinct cultural identities, languages, and connections with traditional lands, and to be in control of their own destinies under conditions of equality.

Given what I have learned thus far, it would seem to me that the objectives of the closing the gap campaign, the Emergency Response, and other current initiatives and proposed efforts of the Government will be best achieved in partnership with Indigenous peoples' own institutions and decision-making bodies, which are those that are most familiar with the local situations.

It is also necessary to ensure the meaningful, direct participation of Aboriginal and Torres Straight Islander peoples in the design of programs and policies at the national level, within a forum that is genuinely representative of the rights and interests of Indigenous peoples. In this regard, I welcome the

initiative that is supported by the Government to move towards development of a model for a new national Indigenous representative body and emphasise that Indigenous participation in the development of this body is fundamental.

At the same time, I would like to echo the statements I have heard from Indigenous leaders of the need for Indigenous peoples themselves to continue to strengthen their own organisational and local governance capacity, in order to meet the challenges faced by their communities. I note the importance of restoring or building strong and healthy relationships within families and communities.

I would also note a need to move deliberately to adopt genuine reconciliation measures, such as the proposed recognition of the rights of Aboriginal and Torres Straight Islander peoples in a charter of rights to be included in the Constitution. I am pleased that the Government has expressed its willingness in this regard, and I urge it to provide a high priority to this initiative. As has been stressed to me by the Indigenous representatives with whom I have met, constitutional recognition and protection of the rights of Aboriginal and Torres Straight Islander peoples would provide a measure of long-term security for these rights, and provide an important building block for reconciliation and a future of harmonious relations between Indigenous and non-Indigenous parts of Australian society.

Furthermore, it is important to note that securing the rights of Indigenous peoples to their lands is of central importance to Indigenous peoples' socio-economic development, self-determination, and cultural integrity. Continued efforts to resolve, clarify, and strengthen the protection of Indigenous lands and resources should be made. In this regard, government initiatives to address the housing needs of Indigenous peoples, should avoid imposing leasing or other arrangements that would undermine Indigenous peoples' control over their lands.

Finally, I would like to reiterate the importance of the *Declaration on the Rights of Indigenous Peoples* for framing and evaluating legislation, policies, and actions that affect Aboriginal and Torres Strait Islanders peoples. The Declaration expresses the global consensus on the rights of Indigenous peoples and corresponding state obligations on the basis of universal human rights. I recommend that the Government undertake a comprehensive review of all its legislation, policies, and programs that affect Aboriginal and Torres Strait Islanders in light of the Declaration.

Human Rights Law Resource Centre Annual Report Online

The Centre's 2008/09 Annual Report is now online at http://www.hrlrc.org.au/about-us/annual-reports/.

The Report provides an overview of the Centre's operations, outputs, impacts, governance and finances. It also provides an in-depth analysis of the Centre's work and developments in the areas of the National Human Rights Consultation, the Victorian Charter of Human Rights, equality rights, the rights of people in detention, NGO reports to UN treaty bodies, and human rights in the Asia-Pacific.

National Charter of Rights Developments

Release of National Human Rights Consultation Committee Report Imminent

The Report of the National Human Rights Consultation is due to be delivered to Government on 30 September 2009. It has been reported in the media that the NHRC Report will be publicly released, together with a government response, on or around 8 October 2009 (*Australian Financial Review*, 18 September 2009).

On 14 October 2009, Fr Frank Brennan SJ AO, Chair of the National Human Rights Consultation Committee, will give a major speech on 'The Findings of the National Human Rights Consultation' at the National Press Club in Canberra. For further information and to register, see http://www.npc.org.au/assets/files/FrankBrennan141009.pdf.

Victorian Charter of Rights Developments

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.

Justice Legislation Further Amendment Bill 2009

The *Justice Legislation Further Amendment Bill* 2009 is an omnibus bill which makes various changes to Acts regulating crime and public order.

Of the clauses in the Bill that engage human rights under the *Charter of Human Rights and Responsibilities Act 2006*, clause 42, which amends the *Sex Offenders Registration Act 2004* (Vic) ('SORA'), merits special comment.

The SORA establishes a regime for the registration of persons convicted of sex offences. Individuals falling within its ambit must register certain details with the Chief Commissioner of Police, including their address, contact details, car registration and other personal information.

Clause 42 of the Bill proposes to expand the range of personal information that is required to be notified to the Commissioner. Relevantly, it adds any internet user names, instant messaging user names, chat room user names, and other user names or identifiers used or intended to be used by the individual through the internet or other electronic communication service.

The Minister's Second Reading Speech explains that this clause was drafted 'having regard to the ever burgeoning contact opportunities that may be afforded by the internet environment or through other means of remote communication'.

The Statement of Compatibility for the Bill concludes that clause 42 engages s 13(a) of the *Charter*, which states that a person must not be subject to unlawful or arbitrary interference with their privacy, including their personal information. The Statement acknowledges that to comply with the *Charter*, a measure which interferes with privacy needs to be proportionate to the end sought, and necessary in the circumstances. On the basis that the 'societal concerns' involved are 'pressing and substantial', the Statement concludes that the measure is necessary, and therefore a reasonable limit on the right to privacy.

As the Report of the Scrutiny of Acts and Regulations Committee points out, this analysis is somewhat lacking. Firstly, the SARC Report notes that although clause 42 extends an existing scheme, the extension proposed is of such a different character to that employed previously (ie, it requires reporting of a large set of details which may change frequently, rather than a more limited set of mostly permanent details), the Statement should have considered the *Charter* compatibility of the scheme as a whole.

The SARC Report also highlights that the scope of the details required to be reported is arbitrary, and appears to go beyond the end sought to be achieved. It points to various 'internet user names' and 'other identifiers' which would need to be reported, but appear unrelated to a sex offender's use of the internet as a 'means of remote communication', such as log in details for online newspapers and internet banking details.

Moreover, while the Statement concludes that the limit on the right to privacy is 'reasonable', it does not engage in the kind of rigorous analysis required to fully consider the application of s 7(2) of the *Charter* (see, in this regard, the recent decision of Warren CJ in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 (7 September 2009)). The Statement merely asserts, but does not fully explain, why the measure is 'necessary'.

Sharyn Broomhead, Human Rights Law Group, Mallesons Stephen Jaques

Victorian Charter Case Notes

The Right to a Fair Hearing and the Privilege Against Self-Incrimination under the Victorian Charter

Re an application under the Major Crime (Investigative Powers) Act 2004 [2009] VSC 381 (7 September 2009)

In a landmark decision for the operation of the *Charter of Human Rights and Responsibilities*, Warren CJ of the Supreme Court of Victoria, has found that a provision of the *Major Crime (Investigative Powers) Act 2004* (Vic), which provides for the abrogation of the privilege against self-incrimination, must be interpreted as extending derivative use immunity to a person, so as to be compatible with human rights.

Facts

The case involved an application by a Detective of Victoria Police for a coercive powers order under the *Major Crime (Investigative Powers) Act 2004*. Under the Act, if a member of the police force successfully applies to the Supreme Court for a coercive powers order in relation to an individual, that individual may be compelled by witness summons to attend before the Chief Examiner to provide evidence. Relevantly, s 39 of the Act expressly abrogates the privilege against self-incrimination. At the request of the Court, the Victorian Equal Opportunity and Human Rights Commission intervened in the matter to make submissions on the interpretation of s 39 of the Act in accordance with the *Charter*, specifically, the right to a fair trial (s 24(1)) and the right not be compelled to testify against oneself (s 25(2)(k)). The Commission submitted that the rights in s 24(1) and s 25(2)(k) of the *Charter* include a right not to be required to incriminate oneself such that, where that right is abrogated, the abrogation must be accompanied by both a direct use immunity and a derivative use immunity. The Commission submitted that s 39 of the Act can be reinterpreted pursuant to the interpretive obligation in s 32 of the *Charter*, consistently with its purpose, so as to be compatible with the rights in ss 24(1) and 25(2)(k). To this end, it is possible to read derivative use immunity into s 39 of the Act.

Decision

In short, Her Honour found that in interpreting s 39 of the Act, derivative use immunity must be extended to a witness interrogated pursuant to the terms of the Act, where the evidence elicited from the interrogation could not have been obtained, or the significance of which could not have been appreciated, but for the evidence of the witness. Derivative use of the evidence obtained pursuant to compelled testimony must not be admissible against any person affected by s 39 of the Act unless the evidence is discoverable through alternative means.

Nature and Scope of the Rights

In her judgement, Warren CJ considered at length the scope and nature of the fair hearing right (s 24(1)) and the right against self-incrimination (s 24(2)(k)). Her Honour emphasised the fundamental nature of both of these rights and accepted the Commission's submission that the Court should have regard to the common law in interpreting the scope of the right against self-incrimination, in particular where the privilege is recognised as including both direct and derivative use immunity. Her Honour noted that the Commission's submissions were fortified by jurisprudence from Canada, where the self-incrimination privilege is understood to extend to both direct and derivative use immunity.

Interpretive Exercise

As to the interpretive exercise in s 32 of the *Charter*, Warren CJ made some helpful observations. Her Honour noted that the interpretive obligation in s 32 creates a new dynamic for the interpretation of legislation in Victoria. Her Honour followed the direction provided by the Court of Appeal in *RJE v Secretary, Dept of Justice* [2008] VSCA 265, (which endorsed the approach of Mason NPJ in *HKSAR v Lam Kwong Wai* [2006] HKCFA 84) and set out the following steps for interpreting legislation in accordance with the principles set out in the *Charter*:

1. Ascertain the ordinary meaning of the legislation according to normal principles of statutory construction and determine whether a human rights compatible result may be reached without recourse to the *Charter*;
2. Where a human rights compatible result cannot be achieved in the usual course of interpretation, and recourse to the *Charter* is necessary, ask whether the Act limits rights;
3. If the Act does limit rights, is the limitation on rights demonstrably justified by reference to s 7 of the *Charter*?
4. If the limitation is not demonstrably justified by reference to s 7, can the Act be re-interpreted by recourse to s 32?

1. Ordinary meaning of s 39

Her Honour adopted the construction of the Act proffered in *C v Chief Commissioner of Police* (2008) 20 VR 174, in which Smith J held that the privilege is effectively removed by s 39 in light of the fact that the

evidence, information or documents produced in an examination conducted pursuant to the Act, can be used to gather evidence to use against the person giving the evidence. To this end, notwithstanding the Act's silence on the derivative use of evidence, Smith J points out that derivative evidence is inferentially permitted, consistent with Parliament's intention as evinced in the Second Reading Speech.

Accordingly, under the ordinary meaning of the Act, the common law privilege is removed entirely (including direct and derivative use immunity) and is replaced by a limited immunity provided for in s 39(3) of the Act. The applicant submitted that the ordinary meaning of s 39 was human rights compatible and that the Court need not refer to the *Charter* in its decision because: (1) the Court has an inherent power to prevent interferences with the course of justice; and (2) the trial judge has an inherent discretion to exclude prejudicial or unfair evidence in the interests of ensuring that a trial is not unfair. Chief Justice Warren rejected these arguments. Her Honour observed that these discretions do not focus on the way in which the evidence was obtained, but rather on whether the use of the evidence is prejudicial or unfair, for example because the evidence is unreliable. Moreover, there is no guarantee that the evidence will be excluded, as is required by the right in s 25(2)(k) of the *Charter*. Further, Her Honour found that the residual discretion of a trial judge to exclude evidence is an insufficient mechanism for upholding the rights contemplated by the *Charter,* stating that 'the focus of the common law discretion is on ensuring that a trial is not unfair, which is not coextensive with the right to a fair hearing that is protected by the *Charter*'. In conclusion, Warren CJ found that on the ordinary meaning of the statute, the relevant provision was not compatible with human rights and therefore the *Charter* had some work to do.

2. Does the Act limit rights?

Chief Justice Warren emphasised that human rights should be construed in their broadest possible way before consideration is given to whether they should be limited in accordance with s 7(2) of the *Charter*. In this context, Her Honour found that the way the Act is currently applied is in breach of ss 24(1) and 25(2)(k) of the *Charter* because no distinction can meaningfully be drawn between the harm that may flow from incriminating information provided directly, and incriminating evidence derived from such information. From the witness's perspective, derivative information can present consequences as damaging as the original self-incriminating information. Her Honour considered and posed examples in order to work through the implications in hypothetical scenarios of the application of s 39 in practice. These examples highlighted that the *Charter* rights were engaged and were limited.

In finding that the Act limits the relevant *Charter* rights, Her Honour relied upon s 32(2) of the *Charter*, having regard to international jurisprudence in relation to the nature and scope of the right to a fair hearing and the right against self-incrimination. In particular, Her Honour observed that in Canada and the United States, derivative use immunity is required for consistency with protected rights. Her Honour accepted the Canadian position which recognises the existence of derivative use immunity in a similar manner to the common law of Australia, and also applies a purposive approach to the interpretation of human rights in a manner similar to the *Charter*.

3. Is the limitation on rights demonstrably justifiable by reference to s 7 of the Charter?

Chief Justice Warren observed that human rights as guaranteed by the *Charter* are not absolute and in some instances, it is necessary to limit rights in circumstances where the exercise of the right would interfere with the operation of a free and democratic society. Her Honour noted that the causal links between an individual's compelled evidence and the use that may be made of evidence that derives from it are essential to understanding whether any limitations in the Act on the right against self-incrimination may be justified in a free and democratic society. Her Honour stated, 'It is the causal link that will determine in each case whether the right has in fact been limited'.

Her Honour observed that the right to a fair hearing and the privilege against self-incrimination are

> rights which define the relationship between the individual and the state and protect people against aggressive behaviour of those in authority. They reflect the philosophy that the state must prove its case without recourse to the suspect. They are fundamental to the criminal justice system and their importance should not be underestimated.

Chief Justice Warren stated that the onus of demonstrably justifying a limitation rests with the party seeking to uphold the limitation, and the standard of proof is high. Her Honour helpfully provided the following guidance: 'the evidence required to prove the elements contained in s 7 should be 'cogent and

persuasive and make clear to the Court the consequences of imposing or not imposing the limit'. In this case, Her Honour recognised that a balance must be struck between the principle against self-incrimination and the state's interest in investigating organised crime offences. Her Honour systematically considered the factors in s 7(2) of the *Charter* in the context of this case. Her Honour noted that the 'more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justifiable'. While noting the important purpose of the abrogation of the privilege, which is to respond to perceived difficulties in investigating organised crime in circumstances where derivative evidence cannot be used, Her Honour posed the important question of whether this abrogation achieves the purpose in the least restrictive way possible.

After considering the factors in s 7, Warren CJ found that the limitation contained in s 39 is more drastic than justified, and importantly, the purpose of the limitation may still be achieved whilst retaining a form of derivative use immunity. Her Honour's approach (in adopting the Canadian case of *S(RJ)*) [1995] 1 SCR 451), allows investigations to take place under the Act and will not exclude the Crown from using evidence that was discovered as a result of witness testimony but could have been discovered without the testimony; and evidence that was discovered after the testimony was given, but independently of the testimony. Importantly, Her Honour's decision means that a person cannot be compelled to incriminate themselves from their own testimony in circumstances where the evidence could only have been discovered as a result of that testimony. Her Honour stated that the Crown bears the onus of establishing which evidence is derivative in this regard. Her Honour observed that in Canada, it has been possible to effectively investigate offences as serious as terrorism while respecting derivative use immunity. Her Honour noted that the applicant has shown 'no real reason why this should not be the case in Victoria ... This is a less restrictive means of achieving the purpose of the limitation, but which also gives effect to a reasonable limitation on the right against self-incrimination'.

Her Honour held that the application of the *Charter* should not be limited to persons who have already been charged, 'but should include, more generally, the compulsion of persons to give evidence on oath and then to have that evidence subsequently used against them in a derivative way'.

4. Is re-interpretation possible?

Chief Justice Warren accepted the Commission's submission that the Act can be re-interpreted pursuant to s 32 to be compatible with the right to a fair hearing and the self-incrimination right. In this regard, Her Honour accepted the Commission's submission that the words providing for derivative use immunity may be read into s 39 to ensure that such immunity always operates in relation to compelled testimony. Her Honour found convergence between the Act and the *Charter* and held that the re-interpretation is the most appropriate means of ensuring the right against self-incrimination is protected and that a fair hearing is guaranteed.

Summary and Analysis

This is a powerful and progressive decision for the *Charter*. It is the first decision that squarely and comprehensively deals with the role of the *Charter* in statutory interpretation in Victoria. In particular, the judgment shows the significance of s 32 in construing statutory provisions (so far as it is possible to do so consistently with the purpose of the section) in a way that is compatible with human rights, subject to the reasonable limits demonstrably justifiable in a free and democratic society. Further, Her Honour's decision provides significant guidance to courts and tribunals as to the methodology to be used in the application of s 32, and provides a comprehensive analysis of the reasonable limitations test in s 7(2).

The decision is available at http://www.austlii.edu.au/au/cases/vic/VSC/2009/381.html.

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Supreme Court Considers Relevance of Conditions of Detention to Sentencing

R v Kent [2009] VSC 375 (2 September 2009)

On 2 September 2009, Bongiorno J of the Victorian Supreme Court handed down a decision which considered the application of the *Charter* to sentences of imprisonment imposed on individuals with mental health conditions.

Facts

Shane Kent was indicted with 12 other men on a number of counts of terrorism offences under Part 5.3 of the *Commonwealth Criminal Code*. Mr Kent faced two counts – one count relating to membership of a terrorist organisation and one count of making a document connected with the preparation for a terrorist act, being reckless as to that connection.

Mr Kent was arrested on 8 November 2005 and remained in custody until he was granted bail in September 2008.

At trial, Mr Kent pleaded guilty to the two offences, each of which carries a maximum penalty of imprisonment for ten years.

In his plea, considerable evidence was presented to the court about Mr Kent's mental health. Medical reports submitted by Mr Kent's counsel revealed that Mr Kent was diagnosed with major depression which had been severely exacerbated when he was incarcerated in the Acacia Unit of Barwon Prison leading up to his trial.

At the sentencing hearing, evidence was presented that Mr Kent was still suffering significant, enduring and severe psychological disturbance that needed intense treatment, without which there was a high risk of relapse to even more severe depressive symptoms after sentencing.

Decision

Based on the sentences given to Mr Kent's co-accused (who are being held in the Acacia Unit of Barwon Prison), the Court was required to consider, in determining Mr Kent's sentence, that Mr Kent would be subjected to these, or similar, conditions after he is sentenced.

In sentencing Mr Kent to imprisonment for a period of four and a half years with a non-parole period of three years and nine months, Bongiorno J considered the obligation to treat persons deprived of their liberty with humanity and with respect for their inherent dignity as human beings (provided for in section 22(1) of the *Charter*).

Justice Bongiorno held (at para 32):

> The Victorian *Charter of Human Rights and Responsibilities* provides that persons deprived of their liberty by law must be treated with humanity, and with respect for their inherent dignity as human beings. To place people in a custodial environment which is able to be foreseen as likely to result in their suffering a major psychiatric illness can hardly be said to be treating them with humanity. This is particularly so if, as here, no cogent grounds have ever been put forward as justifying such conditions for these prisoners. The relevance of the conditions of incarceration to sentencing has been referred to in the sentencing remarks with respect to Kent's co-accused to which reference has been made. The law requires that, if the conditions of incarceration of a prisoner are so harsh as to produce the kind of consequence referred to by Mr Newton, that must be taken into account in determining the length of any appropriate sentence.

Justice Bongiorno thought it appropriate to take into account the probable conditions under which Mr Kent will serve his sentence and the effect of those conditions on his psychological state. However, even after taking these factors into account, the Court was satisfied that immediate imprisonment was the only appropriate sentence in all of the circumstances of Mr Kent's case. This was because of the nature and gravity of the offences to which Mr Kent had pleaded guilty, the circumstances in which they were committed and his personal circumstances.

The decision is available at http://www.austlii.edu.au/au/cases/vic/VSC/2009/375.html.

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Supreme Court Considers Relevance of Conditions of Detention to Bail

Dale v DPP [2009] VSCA 212 (21 September 2009)

In considering whether a former police officer should be granted bail, the Court of Appeal accepted that the circumstances of his custody constituted 'exceptional circumstances' as defined by the *Bail Act 1977* (Vic). Unless the appellant was granted bail, he would likely be remanded into custody for over two years. While in remand, the appellant was kept in solitary confinement for six months 'for his own protection' not because he was a risk to others. As a result, he suffered mental illness.

Facts

The appellant, a former police officer, was charged with murder and remanded into custody.

Due to the safety risks posed by the appellant's status as a former police officer, the appellant was kept in solitary confinement in the Acacia Unit of Barwon Prison from 27 February 2009 to 2 September 2009. The appellant's Committal hearing was listed for March 2010 and, if committed, his trial was unlikely to be heard until 2011.

As a result of the conditions of his confinement, the appellant suffered from a 'moderate to severe' mental illness, with symptoms including depression, anxiety, and diminished grasp on reality.

On 13 March 2009, the appellant applied for bail in the Trial Division of the Supreme Court. The *Bail Act 1977* (Vic) requires that a court reject an application for bail on a murder charge, unless exceptional circumstances exist that justify bail. Warren CJ refused the application on the basis that she was not satisfied that exceptional circumstances existed.

A fresh application was made on 6 August 2009. On this occasion, Byrne J found that delay and the conditions of the appellant's detention were exceptional circumstances, but not such as to justify a grant of bail. His Honour held that the appellant was also required by s 4(2)(d) of the Act to demonstrate that there was no unacceptable risk associated with the granting of bail and that the applicant had failed to do so. Mr Dale appealed to the Court of Appeal.

Decision

Byrne J's decision was reversed by the Court of Appeal, and the appellant was granted bail conditional on compliance with the Court's other orders.

The Court of Appeal held that Byrne J misconstrued the relevant sections of the *Bail Act*. The Court of Appeal found that the *Bail Act* imposed a two stage enquiry. First, the appellant must establish exceptional circumstances which justify the grant of bail. The onus then shifts to the Crown to demonstrate that there is an unacceptable risk warranting the refusal of the application.

Exceptional circumstances

Mr Dale's counsel argued that the likely delay before his trial, the conditions of his imprisonment and the financial hardship caused to himself and his family, combined to create exceptional circumstances justifying the granting of bail. The Court placed particular emphasis on the conditions of his imprisonment and their relationship with the deterioration in his mental health, noting that 'what makes [the delay] much more significant, however, is that the conditions in which the appellant was imprisoned following his arrest in February have severely affected his mental health'.

The Court opined that once a prison identifies risk of significant psychological harm, it must take great care to prevent harm from eventuating. Repressive conditions should only be maintained if there is a 'compelling need' for them.

The Court approved Byrne J's finding that the heavily onerous conditions imposed on the appellant were 'entirely unrelated to the appellant's protection', and that particular care must be taken in the treatment of unconvicted members of society who:

> must be provided with accommodation which suits the requirements of their detention... [because] unlike a sentenced prisoner, they are not undergoing punishment. It is for this reason not appropriate that they be detained with prisoners undergoing sentence.

Without determining the matter, the Court of Appeal questioned 'whether such treatment can be reconciled with the requirement under s 22(1) of the *Charter of Human Rights Act and Responsibilities Act 2006* (Vic), that "all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person"'.

Finally, the Court considered that the risk of the loss of the appellant's business and family home as a result of his incarceration was of 'substantial significance' in reaching the conclusion that exceptional circumstances existed.

Unacceptable risk

Finally, the Court of Appeal considered whether there was an unacceptable risk in granting bail. The Court looked at the relevant matters including the appellant's past behaviour, the potential for the

appellant to contact Crown witnesses and the strength of the case against him. The Court was not satisfied the Crown had established that the appellant posed an unacceptable risk if bail was granted.

The decision is available at http://www.austlii.edu.au/au/cases/vic/VSCA/2009/212.html.

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Interpretation and Limitation of Rights in relation to Extended Supervision of Sex Offender

Secretary to the Department of Justice v AB [2009] VCC 1132 (28 August 2009)

The Victorian County Court has handed down a decision which considers in some detail the application of the interpretative obligation in the *Victorian Charter of Human Rights and Responsibilities Act*. Significantly, Judge Ross held that the proper construction of s 11 of the *Serious Sex Offenders Monitoring Act* 2005, as amended by legislation passed following the Court of Appeal's decision in *RJE v Secretary to the Department of Justice*, was not compatible with human rights.

Facts

AB was convicted for indecent assault (among other offences) and imprisoned for five years. Since his prison sentence ended in October 2008, AB has been subject to an Interim Extended Supervision Orders under the *Serious Sex Offenders Monitoring Act 2005*.

The Secretary to the Department applied for a 15 year Extended Supervision Order ('ESO') for AB, on the basis of an alleged high degree of probability that AB will commit another sexual offence.

Section 11 of the Act provides that an ESO may only be made in respect of an offender if the Court is satisfied, to a high degree of probability, that the offender is likely to commit a 'relevant offence' (as defined in the Act; broadly speaking, a sexual offence) if released into the community and not made subject to an ESO (a discretionary, not mandatory, power).

Amendments were made to s 11 following the Court of Appeal's decision in *RJE v Secretary to the Department of Justice* [2008] VSCA 265, so that the 'likelihood' threshold accommodates a lower level of risk than 'more likely than not'. Accordingly, s 11(2A) provides that the 'likelihood' threshold is satisfied if 'there is a real risk of the offender committing a relevant offence', such risk being real and ongoing and which cannot sensibly be ignored given the nature and gravity of the possible offence. This allows for a lower threshold than 'more likely than not' (s 11(2B)).

Decision

Consideration of the *Charter*

Judge Ross considered the relevance of the *Charter* to a proper construction of this provision of the Act. His Honour held that the proper approach to interpreting s 11 of the Act, in compliance with the interpretative obligation in s 32 of the *Charter*, was to:

- ascertain the meaning of the provision on ordinary statutory construction principles;
- consider whether the meaning of the provision is compatible with the human rights specified in the *Charter*, which necessarily requires reference to s 7(2) of the *Charter* (the general limitations provision); and
- if the answer is no, then consider whether it is otherwise possible to interpret the statutory provision, consistent with its purpose, in a way that *is* compatible with human rights.

His Honour held that the making of an ESO has an effect on a person's human rights, including 'the offender's right to freedom of movement, privacy, freedom of association, liberty and the right not to be subject to medical treatment without his or her full, free and informed consent' (the same conclusion reached by Nettle JA in *RJE*), thus making a human rights focussed interpretation of the statutory provision relevant.

In considering whether the limitation on human rights occasioned by s 11 of the Act was reasonable and demonstrably justified (required by s 7(2) of the *Charter*), Judge Ross took into account, among other things, the Statement of Compatibility in respect of the legislation introducing ss 11(2A) and (2B) of the Act.

His Honour identified various safeguards which exist in relation to ESOs, such as that they are imposed by a Court independent of the executive, they are subject to mandatory periodic reviews, and the offender may seek a review of the ESO by the Court. However, his Honour held that, after taking into account all relevant factors, an ordinary construction of s 11 of the Act was not compatible with human rights (as set out in section 32(1) of the *Charter*), as he was not satisfied that the limitations on rights imposed by s 11 are reasonable and demonstrably justified.

His Honour further held that there was no alternative construction which would be compatible with human rights and tenable. Given the County Court does not have the power to make a declaration of inconsistent interpretation, this was the end of the *Charter* issue so far as his Honour was concerned. The consequence was that Judge Ross applied the construction of s 11 which flowed from the application of standard statutory construction principles, notwithstanding his view that such a construction was incompatible with human rights.

Outcome of the application

After considering the assessment reports before the Court (both of which concluded there was a high risk of re-offending), Judge Ross held that he was satisfied, to a high degree of probability, that there was a risk of AB committing a relevant offence, and that the risk satisfied the threshold requirements in s 11 of the Act. His Honour therefore allowed the application for an ESO, but only for a period of 5 years (rather than 15 years as sought by the Secretary). He held that it was necessary to limit the impact on the human rights of the person subject to the order by setting a duration which was the minimum necessary.

Jonathan Kelp, Human Rights Law Group, Mallesons Stephen Jaques

Access to Court Fundamental to Right to Fair Hearing

Materials Fabrication Pty Ltd v Baulderstone Pty Ltd [2009] VSC 405 (8 September 2009)

On 8 September 2009, Vickery J of the Victorian Supreme Court handed down a decision which considered the right to commence a civil proceeding. In the decision, Vickery J noted that the common law enshrines a right to commence legal proceedings and that this right is re-inforced by of s 24(1) of the Victorian *Charter*. A dispute resolution clause in a commercial contract which aimed to limit parties' access to the court was held inconsistent with this right and therefore invalid.

Facts

In December 2008, Materials Fabrication Pty Ltd ('MF') commenced proceedings against Baulderstone Pty Ltd, claiming that Baulderstone had wrongfully terminated its building subcontracts. By consent, proceedings were stayed in February 2009. MF sought leave of the Court to lift the stay order to enable it to prosecute its claims against Baulderstone.

The building contracts in question specified a dispute resolution procedure. Relevantly, it provided that certain preconditions must be met before the commencement of litigation, including the provision of security for costs to the builder's solicitor (ten per cent of the amount being claimed) (cl 20.3).

Decision

In deciding to lift the stay granted in February 2009, Vickery J considered whether the dispute resolution clauses were legally valid, and if so, whether they had been complied with.

Justice Vickery was particularly concerned with the validity of clause 20.3 – the requirement for MF to provide security to Baulderstone to the value of ten per cent of MF's claim *before* commencing litigation. His Honour stated that the common law enshrines the right to commence civil proceedings and that this right is re-inforced by s 24 of the *Charter*, which enshrines the right to a fair hearing.

It is well established in international and comparative law that the right to a fair hearing subsumes a positive right to access the courts (see, eg, *Kijewska v Poland* [2007] ECHR 73002/01 (6 September 2007)). Justice Vickery expressed concern that clause 20.3 may 'severely inhibit, if not preclude, the exercise of a legitimate right for a party to a dispute to conduct a trial of its cause before a court' (para 43). The Court acknowledged that a prospective litigant will most likely have already expended legal fees on commencing its action, thus the contractual requirement to pay ten per cent of its claim *prior* to

commencing litigation may act as a deterrent or a disincentive to pursuing the full quantum to which the party may be entitled. On this basis, the Supreme Court of Victoria held clause 20.3 to be void, on the grounds that it offended public policy.

The decision is available at http://www.austlii.edu.au/au/cases/vic/VICSC/2009/405.html.

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Comparative Law Case Notes

Governmental Obligations in Foreign Affairs and to Citizens Abroad

Canada (Prime Minister) v Khadr, 2009 FCA 246 (14 August 2009)

A majority of the Canadian Federal Court of Appeal recently held that Canada's discretion to decide whether and when to request the return of a Canadian citizen detained in a foreign country, a matter within its exclusive authority to conduct foreign affairs, was fettered by the application of the *Canadian Charter of Rights and Freedoms*. The Court ordered Canada to request the repatriation of Omar Ahmed Khadr from the United States, by whom he was detained in Guantanamo Bay on terrorism-related charges.

Facts

The respondent, a Canadian citizen, had moved to Pakistan with his family as a child. Several of his family members attended training camps associated with Al-Qaeda. In 2002, aged fifteen, the respondent was taken into custody by the US following a firefight in Afghanistan in which he allegedly threw a grenade that killed a US soldier.

The respondent was detained at Guantanamo Bay, where he remained at the date of judgment, awaiting trial before a US military commission or federal court. During his incarceration, Canada made various diplomatic efforts on the respondent's behalf, including seeking assurances that the death penalty would not be imposed, requesting that the US take special notice of his status as a minor, and requesting that he be given access to Canadian medical practitioners. Most of these were unsuccessful.

During his detention the respondent was subjected to sleep-deprivation techniques to make him 'more amenable' to interrogation. In 2004, Canadian intelligence officials, aware of this mistreatment, interviewed the respondent at Guantanamo Bay and shared the information they obtained as a result with US authorities.

In 2008, the respondent successfully applied for judicial review in the Federal Court, challenging a decision by Canada not to seek his repatriation from the US. Justice O'Reilly held that Canada had breached the respondent's right to liberty and security under s 7 of the Canadian Charter, and ordered that Canada request his repatriation. Canada appealed.

Decision

Section 7 of the Charter provides that 'everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'.

The majority affirmed that the Charter applies to constrain the conduct of Canadian authorities when they knowingly participate in a foreign legal process that is contrary to Canada's international human rights obligations, as the Canadian officials did when they interviewed the respondent. For that reason, the Charter was engaged by their conduct.

The majority held that Canada had clearly accepted that the prohibition on cruel and abusive treatment was a principle of fundamental justice. They inferred this from the fact that Canadian legislation prohibits torture by public officials and that Canada is a party to the *Convention against Torture*.

The majority also considered O'Reilly J's remedy to be appropriate. It was 'the most obvious' remedy. Despite the fact that it was uncertain that the US would accede to a request for repatriation, it had complied with similar requests from all other western countries. There was no evidence that the request would harm the relations between the two countries. The court also rejected suggestions by Canada that such a remedy amounted to an improper judicial intrusion into the Crown's foreign affairs prerogative, given that the royal prerogative is subject to Charter review.

Nadon JA dissented. He considered that Canada had sufficiently discharged its duty to the respondent by the (unsuccessful) diplomatic representations it had made on his behalf.

Relevance to the Victorian *Charter*

Section 10 of the *Victorian Charter of Human Rights and Responsibilities* provides for protection from torture and cruel, inhuman or degrading treatment.

While foreign affairs is a matter of Commonwealth jurisdiction, *Canada v Khadr* could provide useful precedent for Victorian courts in cases of Victorians detained interstate.

There have been numerous high-profile instances of Australian citizens detained overseas in similar circumstances to the respondent. While there is no Commonwealth equivalent to the Canadian Charter yet, it is arguable that a duty to request repatriation could be similarly placed on Australia in circumstances where its executive agencies knowingly participate in human rights breaches abroad. Like Canada, Australia is a party to *Convention against Torture*. The Commonwealth has also enacted legislation prohibiting torture, including the *Crimes (Torture) Act 1988* and the *Geneva Conventions Act 1957*.

The decision is available at http://www.canlii.org/en/ca/fca/doc/2009/2009fca246/2009fca246.html.

Sachini Mandawala, Human Rights Law Group, Mallesons Stephen Jaques

The Right to Life, Use of Force and Policing Protests

Giuliani and Gaggio v Italy [2009] ECHR 23458/02 (25 August 2009)

The European Court of Human Rights has found that Italy failed to adequately investigate the death of a protestor by a member of the military police, or carabinieri, and this failure to investigate breached Italy's obligations to safeguard the right to life. The Court was, however, not satisfied that the death itself involved a breach of human rights.

Facts

The application was brought by family members of Carlo Giuliani, who died as a result of a gun shot wound inflicted by a carabiniere at the G8 summit in Genoa in July 2001.

During the protests, a vehicle with three injured carabinieri was surrounded by violent protestors, including Mr Giuliani. A melee ensued, and Mr Giuliani was shot by a carabiniere. The driver of the vehicle, attempting to move the vehicle away, drove over Mr Giuliani's body. Mr Giuliani died at the scene.

Italian authorities conducted investigations to determine the precise cause of death, and the liability of the driver and of the officer who fired the shots. The investigating judge discontinued criminal proceedings against the two carabiniere. The judge found it likely that the carabiniere had 'fired the shot knowing that there was a risk that someone would be killed', but had acted in self-defence; that the driver could not see Mr Giuliani; and that Mr Giuliani's death was caused solely by the gunshot.

Mr Giuliani's family brought this claim to the European Court of Human Rights, claiming that:

- the shots were a disproportionate and unnecessary use of force in breach of the right to life (protected by art 2 of the *European Convention on Human Rights*);
- the failure of the Italian Government to adequately plan for the protest violated Italy's positive obligations to protect life; and
- the investigations were inadequate to fulfil Italy's obligations to safeguard the right to life, because they were flawed, biased and did not consider the overall planning and coordination of the carabinieri operations.

Decision

Article 2 of the Convention provides that 'everyone's right to life shall be protected by law'. The right is qualified, under art 2(2), where a death occurs from a use of force 'which is no more than absolutely necessary' for self-defence or in law-enforcement situations.

Use of force

The Court noted that art 2 'ranks as one of the most fundamental provisions in the Convention' and 'the circumstances in which deprivation of life may be justified must therefore be strictly construed'. Nevertheless, the Court found that the carabiniere had acted in response to an 'honestly perceived danger to his life'. His actions were therefore protected by art 2(2).

Positive obligation to protect life

The majority of the Court (by five votes to two) found that Italy had *not* violated its obligation under art 2 to implement 'an appropriate legal and administrative framework to deter the commission of offences against the person' and thus safeguard the right to life. The majority recognised management of public protests necessitates a difficult balance between freedom of expression and assembly, on the one hand, and security measures to protect other human rights, on the other. Nevertheless, the Court was critical of the Italian Government's failure to investigate the conduct and planning of the police operation. Absent any such investigation, however, the majority of the Court was not satisfied of any link between the conduct of the operation, broadly, and the specific situation leading to Mr Giuliani's death.

Judges Brazta and Šikuta dissented on this point, finding that even without an investigation, there was plainly a 'disturbing lack of coordination and effective control over the security operations' which resulted in the injured carabineri being in a vulnerable situation and needing to resort to lethal force. If an investigation had occurred, which would have provided the Court with greater evidence, it seems quite possible that the majority of the Court would have adopted a similar analysis of the security situation.

Procedural obligations to protect life

A bare majority of the Court (four votes to three) accepted that Italy had failed to comply with the 'procedural obligations' inherent in art 2: namely, the duty to provide an 'effective official investigation when individuals have been killed as a result of the use of force'. The majority was critical of various aspects of the investigation into the death, finding that:

- the autopsy left 'too many crucial questions unanswered', and the public prosecutor allowed the body to be cremated before the autopsy report had been concluded, preventing an adequate forensic investigation; and
- the subsequent investigations were limited to the specific question of whether either of the two carabinieri present at the scene were responsible for the death. The Italian Government failed to investigate the planning and management of the protest more broadly.

Judges Casadevall and Galicki dissented on this point. In their view, the prosecutors had 'no compelling actual or foreseeable reason' to refuse the request to have the body cremated, and the death was a 'specific, one-off incident of short duration', such that an inquiry into the management of the protests would be irrelevant. Judge Zagrebelsky similarly found that the investigation 'did everything that could be done to shed light on the events in question'.

Relevance to the Victorian *Charter*

The management of protests whilst protecting human rights is a significant issue in many democratic societies. The UK Joint Parliamentary Committee on Human Rights has, for example, released two reports this year addressing the issue of human rights-based policing in protest, recommending that UK police adopt various operational changes. The issue is clearly pertinent to Victoria, given the violence at the World Economic Forum protests of 2000 and the G20 protests of 2006.

In Victoria, s 9 of the *Charter of Human Rights and Responsibilities* provides that 'every person has the right to life and has the right not to be arbitrarily deprived of life.' The right may be subject, under s 7, to such 'reasonable limits as can be demonstrably justified in a free and democratic society'. The European Court of Human Rights' decision in *Giuliani and Gaggio v Italy* may persuade Victorian courts to interpret s 9 as involving 'positive' and 'procedural' obligations. Such an approach would enable the courts to carefully scrutinise the operational decisions made by police to manage protests, and subsequent government reviews and inquiries into those operational decisions.

Such an approach also has broader ramifications, and may well require the government to ensure *any* death from the use of force (regardless of the context in which it occurs) is adequately and impartially

investigated – both with regard to the immediate context of the use of force and also, where appropriate, the broader context which allowed that use of force to occur.

Zach Meyers, Human Rights Law Group, Mallesons Stephen Jaques

Freedom of Information and Access to the Courts

Brümmer v Minister for Social Development and Others (CCT 25/09) [2009] ZACC 21 (13 August 2009)

On 13 August 2009, the Constitutional Court of South Africa handed down a decision regarding the rights of access to court and access to information. The Court determined that, in certain circumstances, statutory time limitations for the filing of appeals may be unconstitutional.

Facts

Mr Brümmer, a journalist, applied under the *Promotion of Access to Information Act 2000* (PAIA) for access to certain records held by the Department of Social Development. The documents related to a government tender, the award of which was the subject of litigation. The Department of Social Development refused access to these documents. Mr Brümmer appealed this decision to the Minister for Social Development, but his appeal was also rejected.

Section 78(2) of the PAIA provides for a further appeal to the courts, but specifies that such application must be made within 30 days.

Mr Brümmer instituted review proceedings in the High Court well after the 30 day time bar had expired. He sought, among other things, an order setting aside the decision to refuse access to the records, and an order condoning his non-compliance with the 30 day time bar for filing appeals to the court.

The High Court held that it had the power to condone non-compliance with the statutory time frame for appeals, but declined to do so, on the basis that Mr Brümmer had not provided an adequate explanation for the delay.

Mr Brümmer appealed to the Constitutional Court of South Africa and challenged the constitutional validity of the 30 day time limitation on the basis that it limited his right of access to the court (s 34 of the South African Bill of Rights) and also limited his right of access to information (s 32 of the Bill of Rights).

Decision

Justice Ngcobo delivered a judgement with which the other Constitutional Court judges concurred.

His Honour noted that time bars limit the right to seek judicial redress, but said that they serve an important purpose in preventing inordinate delays that may be detrimental to the interests of justice. As such, he noted that not all time bars would be inconsistent with the Constitution.

Justice Ngcobo set out a two stage test for determining the constitutional validity of time bars, namely that the time bar:

1. must provide the potential litigant an adequate and fair opportunity to seek judicial redress for a wrong allegedly committed; and
2. must allow sufficient and adequate time between the cause of action coming to the knowledge of the claimant and the time during which the litigation may be launched.

Further, he noted that the existence of the power to condone non-compliance with a time bar would not necessarily save a provision from being deemed unconstitutional where the time bar did not provide the potential litigant with sufficient opportunity to launch an appeal.

His Honour said that, in determining if the provision allows a potential litigant a sufficient and adequate time within to launch their court action, it is necessary to consider the steps that the potential litigant must take prior to launching their application in court. Justice Ngcobo said that, in PAIA applications, these steps include:

1. assessing the reasons for refusing access to the information requested;
2. seeking legal advice on the prospects of success of court action; and
3. raising funds for litigation.

Justice Ngcobo referred to the submissions of the South African History Archives Trust (SAHA), which had intervened in the Brümmer proceeding as amicus, and noted that SAHA had made over 1000 PAIA

applications for information from various government departments. From these, SAHA made 11 applications to court, and each of these were filed outside the 30 day time bar.

His Honour considered the evidence of SAHA to be illustrative of the circumstances that would confront the ordinary litigant and, in the circumstances, he held that the PAIA's 30 day time bar did not afford potential litigants a sufficient and adequate time within which to launch their court action. Justice Ngcobo did not consider that the power of a court to condone non-compliance with the time bar saved the provision.

Accordingly, he held that the 30 day time bar limited the right of access to the court and also limited the right to access information.

His Honour considered the justification for the time bar to determine if it provided a reasonable and justifiable limit on the right to access the court and the right to access information. Justice Ngcobo noted that, 'where justification rests on factual or policy considerations, the party contending for justification must put such material before the court'. He said that the benefits of the time bar must then be balanced against the importance of the relevant right.

Justice Ngcobo said:

> …access to information is fundamental to the realisation of rights guaranteed in the Bill of Rights …Mr Brümmer, a journalist, requires the information in order to report accurately on the story he is writing. The role of the media in society cannot be gainsaid. Its role includes informing the public about how our government is run, and this information may very well have a bearing on elections. … But at the same time the importance of time bar provisions cannot be denied. Delays in ligation hamper the interest of justice. Documents may be lost. Witnesses may disappear. Memories of witnesses may fade.

However, on the facts of this case, Ngcobo J considered that the limitations on the right to access the court and to access information were not reasonable. His Honour noted that the documents in question were held by a public body and that in such cases it would be uncommon for a witness to be called. His Honour did not see any financial or other burdens on the government department arising from the imposition of a more reasonable time limit for the filing of court proceedings, and noted that other statutes granted a potential litigant more time to consider their options.

Accordingly, His Honour held that the time bar in the PAIA imposed an unreasonable limit on the right to access the courts and to access information. The Court imposed a 180 day time bar as an interim measure whilst the Parliament re-considered the appropriate time bar to be imposed.

Relevance to the Victorian *Charter*

Section 24 of the Victorian *Charter of Human Rights and Responsibilities* protects the right to a fair hearing, while s 15 enshrines the right to freedom of expression, including the right to receive and impart information. The South African Constitutional Court's discussion on how statutory time bars may limit the right of access to the court may be relevant Victorian statutes which prescribe a time limitation for the filing of proceedings, particularly cases which relate to freedom of and access to information.

The decision is available at http://www.saflii.org/za/cases/ZACC/2009/21.html

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HRLRC Policy Work

Housing Rights: Submission to Federal Parliament on a Homelessness Act

On 28 August 2009, the Centre made a submission to the House of Representatives Standing Committee on Family, Community, Housing and Youth inquiry into proposed homelessness legislation for Australia.

Homelessness is a human rights issue and is both a cause and a consequence of poverty and other human rights violations. Therefore, the Centre submitted that the Australian Government's response to homelessness should adopt a human rights-based approach in order to address the complex human rights issues that homelessness raises. In particular, any homelessness legislation should guarantee the right to adequate housing in Australia.

The Centre submitted that homelessness legislation should include the following features:

- the guarantee of a justiciable right to adequate housing;

- a requirement for the Australian Government to take reasonable legislative and other measures to progressively realise the right to adequate housing, as defined in international law;
- the provision of priority to vulnerable groups through an immediately enforceable right of access to emergency accommodation. Within a 10 year period, this right should be progressively expanded to apply to all persons in need;
- adequate protection of persons from forced evictions, including providing for necessary procedural protection and effective remedies;
- a requirement for meaningful participation by persons experiencing homelessness during policy development and in the delivery of homelessness services;
- a requirement for the Australian Government to adopt a comprehensive national housing strategy;
- clear provision for the right to adequate housing to be protected and provided on a non-discriminatory basis, ensuring equal access to housing;
- the establishment of an independent Housing Commissioner appointed to investigate and conciliate complaints relating to the right to adequate housing, and to investigate systemic issue;
- provision for a range of remedies for breaches of the right to adequate housing, including judicially enforceable remedies; and
- appropriate structural, process and outcome indicators to monitor the progressive realisation of the right to adequate housing, in particular the enjoyment of the right by vulnerable groups.

The Centre was provided with substantial research, drafting and editorial assistance in the preparation of the submission by the Mallesons Human Rights Law Group.

The submission is available at http://www.hrlrc.org.au/content/topics/esc-rights/housing-rights-submission-to-australian-parliament-on-homelessness-legislation-aug-2009/.

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Torture, Ill-Treatment and the Death Penalty: Centre Makes Submission on Extradition, Mutual Assistance and Foreign Evidence Reforms

In July 2009, the Australian Government released exposure draft legislation on proposed reforms to Australia's extradition and mutual assistance in criminal matters laws.

In August 2009, the Centre made a Submission to the Attorney-General's Department regarding the proposed reforms. The submission considers the compatibility of proposed amendments to the *Extradition Act 1988* (Cth) and the *Mutual Assistance in Criminal Matters Act 1987* (Cth), as set out in the draft Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2009, with international human rights standards and Australia's obligations in this regard.

After first outlining the utility and importance of assessing the Bill in a human rights framework, the submission identifies those provisions which will better harmonise the Extradition Act and Mutual Assistance Act with human rights standards. It also makes concrete recommendations for reform where there is an incompatibility or where the Bill affords inadequate consideration to, or protection of, human rights.

The Human Rights Law Resource Centre acknowledges the substantial contribution of Prabha Nandagopal and Joanna Obbink of leading Australian law firm DLA Phillips Fox in the research and drafting of this submission.

The submission is available at http://www.hrlrc.org.au/content/topics/torture/submission-regarding-proposed-extradition-and-mutual-assistance-reforms-aug-2009/.

Ben Schokman is the Centre's DLA Phillips Fox Human Rights Lawyer

Rights in Public Space: Centre Submission to Alice Springs Town Council regarding Draft Bylaws on Management of Public Space

In August 2009, the Human Rights Law Resource Centre made a Submission to the Alice Springs Town Council in relation to the draft *Alice Springs (Management of Public Places) Bylaws 2009.*

The HRLRC considers that the following provisions contained within the Proposed Bylaws raise serious human rights concerns for persons in the Alice Springs community:

1. the provision relating to controlled demonstrations, protest and other speech (cl 34);
2. the requirement to remove graffiti and the ban on 'offensive' displays (cl 44 and 58);
3. the provisions creating a number of public space offences (cl 49-50, 52-56);
4. the provisions that criminalise begging (cl 57);
5. the provisions that expand police powers, and extend them to council officers (cl 80 and 81); and
6. the provisions that allow authorised officers to dispose of 'abandoned' items (cl 71)

(collectively referred to as the 'Provisions of Concern').

The HRLRC is concerned about the impact of the Provisions of Concern on particularly vulnerable groups in Alice Springs such as homeless people, young people and Aboriginal people.

Some of the Provisions of Concern contravene Australian human rights law, and infringe upon the implied constitutional right to freedom of political communication and the Commonwealth statutory right to freedom from race discrimination. Many of the bylaws also contravene other human rights, including the right to freedom of expression, the right to peaceful assembly, the right to freedom of association, the right to non-discrimination, the right to privacy, the right to be free from cruel, inhuman or degrading treatment or punishment, the right to life and the right to enjoy one's culture.

Australia (including all levels of government in Australia) is obliged to respect, protect and fulfil these rights as a party to both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

The submission concludes that, to the extent possible, the Provisions of Concern should be amended so as not to infringe the implied rights of political communication, the statutory rights to non-discrimination, and human rights contained in international human rights instruments. However, in many cases the purpose of the Provisions of Concern fundamentally infringes human rights, and the provisions are not capable of being passed in any form.

The submission is available at http://www.hrlrc.org.au/content/topics/equality/equality-and-indigenous-rights-submission-on-draft-alice-springs-management-of-public-space-bylaws-aug-2009/.

Emily Howie is a Senior Lawyer with the Human Rights Law Resource Centre. Melissa Gundrill is on secondment to the Centre from Clayton Utz.

Equality Rights: Centre Makes Submission to Senate Committee on Marriage Equality

On 24 June 2009, the Marriage Equality Amendment Bill 2009 was lodged in the Senate by Greens Senator Sarah Hanson-Young. The Bill seeks to amend the *Marriage Act 1961* (Cth) so that:

- same-sex partners are able to marry; and
- same-sex marriages legally entered into in other jurisdictions are recognised in Australia.

The Senate voted to send the Bill to an inquiry. The inquiry is being conducted by the Senate's Legal and Constitutional Affairs Committee and is due to report by 26 November 2009.

On 27 August 2009, the HRLRC made a submission to the inquiry which focuses on the need to remove all forms of sexual-orientation discrimination from the Marriage Act. The HRLRC considers that the most effective way to do this is through a human rights framework.

In its current form, the Marriage Act legalises and entrenches unacceptable discrimination against lesbian, gay, bisexual and transgender ('LGBT') people. The exclusion of LGBT people from the Marriage Act denies them a right that is afforded to all other Australians. The Marriage Act is underpinned by the view that the relationships and commitments of LGBT people are somehow different and inferior, and that they can never be full and equal members of Australian society. This view is out of step with human rights norms and principles. Furthermore, it fails to reflect the reality of contemporary relationships and values in Australian society. Recent evidence indicates that the majority of Australians now support same-sex marriage. These developments should be taken into account by the inquiry in its assessment of the Marriage Act. The HRLRC considers that the Marriage Act should reflect an inclusive approach to marriage that upholds the human rights of *all* Australians – regardless of sexual identity and orientation.

The submission is available at http://www.hrlrc.org.au/content/topics/equality/equality-rights-submission-to-senate-legal-and-constitutional-committee-on-marriage-equality-aug-2009/.

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

UN CERD Adopts General Recommendation on 'Special Measures'

At the conclusion of its recent session in Geneva, the Committee on the Elimination of Racial Discrimination released its *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*. The purpose of the General Recommendation is to provide an authoritative statement on the meaning of 'special measures' under the Convention, as well as to provide practical guidance to assist States parties in the discharge of their obligations under the Convention.

The adoption of temporary special measures is designed to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms. 'Special measures' are provided for in arts 1(4) and 2(2) of the Convention, however there is limited jurisprudence of the Committee on the obligation to adopt special measures and the nature and scope of such measures.

General Recommendation No 32 is therefore particularly useful and provides authoritative guidance on issues such as:

- the objective of special measures;
- clarification on terminology associated with special measures and an indication that contradictory terms such as 'positive discrimination' should be avoided;
- conditions required for the adoption of special measures, including that the measures be:
    - necessary, appropriate and proportionate to the situation to be remedied;
    - designed and implemented on the basis of need and accurate appraisals carried out on the basis of data;
    - designed and implemented on the basis of prior consultation with and the active participation of affected communities;
- the essential characteristics of special measures, including that the measures:
    - are taken for the sole purpose of ensuring the equal enjoyment of human rights and fundamental freedoms;
    - have the objective of securing the adequate advancement of a particular group;
    - should not lead to the maintenance of separate rights for different racial groups;
    - are temporary and shall not be continued after the objectives for which they have been taken have been achieved;
- the distinction between special measures and other general positive obligations that belong to the realisation of specific rights, such as minority, cultural and land rights.

The *International Convention on the Elimination of Racial Discrimination* is incorporated into Australia's domestic law by the *Racial Discrimination Act 1975* (Cth). The General Recommendation is therefore particularly relevant to the interpretation of the meaning of 'special measures' as provided for in the *Racial Discrimination Act*.

Ben Schokman is the Centre's DLA Phillips Fox Human Rights Lawyer

Centre has Substantial Impact on Report on National Security Legislation Monitor Bill

On 27 July 2009, the Human Rights Law Resource Centre and the Public Interest Law Clearing House made a Joint Submission to the Senate Standing Committee on Finance and Public Administration in relation to the National Security Legislation Monitor Bill 2009. The Bill establishes the National Security Legislation Monitor to review the operation, effectiveness and implications of counter-terrorism and national security legislation and report such findings and recommendations annually. The Joint Submission strongly supported the establishment of the Monitor, while proposing a number of recommendations focussed on ensuring a transparent, independent and holistic framework of review, compliant with international human rights obligations.

In September 2009 the Committee released their report, expressing 'wide spread' support for the Bill and recommending it be passed subject to a number of recommendations. The Centre is delighted with the substantive impact the Joint Submission had on the Committee's report. The Joint Submission was referred to at least 5 times in the report and informed a number of its recommendations. The following recommendations made by the Committee were in line with recommendations from the Joint Submission:

- the Bill be amended to require the Monitor to assess whether the legislation is consistent with Australia's international human rights obligations;
- the Bill be amended to state clearly that the Monitor has the power to conduct inquiries on his or her own initiative on subjects which are within the functions of the Monitor; and
- the Bill be amended to ensure the Monitor can review 'any other law of the Commonwealth, the States or the Territories to the extent that it relates to Australia's counter-terrorism and national security legislation', not just national security legislation as defined in the Bill.

Other noteworthy recommendations of the Committee include:

- that the Bill be amended to require the Monitor to assess whether the legislation being reviewed remains a proportionate response to the threat posed to national security;
- that the Government actively and regularly assess the adequacy of the resources and staff allocated to the Monitor's office; and
- amendments to the title of the Bill and the name of the Monitor to include the term 'independent' to assist the public's understanding of the role of the Monitor as an independent reviewer of national security legislation.

The Committee's report is available at http://www.aph.gov.au/Senate/committee/fapa_ctte/national_security_leg/report/index.htm.

Prabha Nandagopal is seconded to the Human Rights Law Resource Centre from DLA Phillips Fox

Right to Health: Briefing Paper on Australia to UN Special Rapporteur on the Right to Health

In September 2009, the HRLRC prepared a Briefing Paper on Health and Human Rights in Australia for the UN Special Rapporteur on the Right to Health, Anand Grover, in advance of his country mission to Australia in November and December 2009.

The Briefing Paper considers a range of issues regarding the realisation of the right to health in Australia, including the legal protection of the right in Australia and relevant findings and recommendations from recent reviews of Australia by UN treaty monitoring bodies. The Paper also discusses realisation of the right to health in a number of areas, including in relation to public health, Indigenous health, mental health, asylum seekers, homeless people, prisoners, women and children. Finally, the Paper considers the health issues and implications associated with climate change in Australia.

The Briefing Paper is available at http://www.hrlrc.org.au/content/topics/esc-rights/right-to-health-briefing-paper-on-australia-to-un-special-rapporteur-on-the-right-to-health-sept-2009/.

Counter-Terrorism: Submission on Anti-Terrorism Laws Reform Bill

On 11 September 2009, eight years after the terrorist attacks that took place in the United States, the HRLRC made a Submission to the Senate Legal and Constitutional Affairs Committee regarding the Anti-Terrorism Laws Reform Bill 2009 (Cth).

The submission notes that, in the past eight years, the Australian Government has introduced 44 pieces of 'anti terrorism' legislation. It further notes that, in the absence of a federal charter of rights, many of these laws have not been adequately assessed against, or counterbalanced by, human rights considerations and obligations.

It is important that, in establishing a legislative framework that seeks to ensure the security of individuals, the State does not legislate or exercise powers in a manner that unnecessarily or disproportionately infringes upon fundamental human rights.

In this regard, the submission strongly welcomes the introduction of the Anti-Terrorism Laws Reform Bill. The Bill contains the most progressive amendments of Australian counter-terror laws to date, removing or ameliorating many of the draconian aspects of Australia's counter-terrorism legislative framework. It also incorporates many important recommendations adopted by recent review committees, in particular the Security Legislation Review Committee.

Finally, the submission makes an important recommendation regarding the definition of 'terrorist act', which the Centre considers would strengthen the Bill.

The submission is available at http://www.hrlrc.org.au/content/topics/counter-terrorism/counter-terrorism-submission-on-anti-terrorism-laws-reform-bill-sept-2009/.

Prabha Nandagopal is seconded to the Human Rights Law Resource Centre from DLA Phillips Fox

HRLRC Casework

Indigenous Rights: Northern Territory Bilingual Education Policy

The Centre is examining the compatibility of the Northern Territory's bilingual education policy with the *Racial Discrimination Act 1975* (Cth).

In October 2008, the Northern Territory Government introduced an education policy requiring that the first four hours of schooling be taught in English. This policy leaves only one hour in the afternoon for teaching Indigenous language and culture.

A recent report by the United National Educational, Scientific and Cultural Organization (UNESCO) has found that more than 100 Indigenous languages in Australia are in danger of extinction. Given the central importance of language to the maintenance of Indigenous culture and customs, the Northern Territory's bilingual policy has the potential to further threaten the existence of many Indigenous languages.

Seminars and Events

The Responsibility to Protect: Prevention and Intervention in Response to Mass Atrocity Crimes

27 and 28 November 2009, Melbourne

The Human Rights Law Resource Centre and the Institute of Legal Studies at the Australian Catholic University are holding a major conference on 'The Responsibility to Protect: Prevention and Intervention in Response to Mass Atrocity Crimes' on 27 and 28 November 2009 in Melbourne.

Confirmed speakers include the Hon Gareth Evans AO AC, the Rt Hon Malcolm Fraser AO AC, the Hon Bob McMullan (Parliamentary Secretary on International Development Assistance), Prof Ramesh Thakur (Canadian Commission on Intervention and State Sovereignty), Prof Alex Bellamy (Director of the Asia-Pacific Centre for the Responsibility to Protect), Prof Joseph Camilleri, Prof Spencer Zifcak and Dr Phoebe Wynne. Further details will be available shortly at www.hrlrc.org.au.

Protecting Human Rights Conference

2 October 2009, Sydney

The 2009 Protecting Human Rights Conference will be held at the Art Gallery of NSW in Sydney on 2 October 2009. Program and registration details are available at: www.gtcentre.unsw.edu.au.

Confirmed speakers include Father Frank Brennan AO (Chair of the National Human Rights Consultation Committee), the Hon Catherine Branson QC (President, Australian Human Rights Commission) and Professor Stephen Gardbaum (University of California, Los Angeles).

Human Rights Policy and Practice Forum 2009

20 and 21 October 2009, InterContinental, The Rialto, Melbourne

The Human Rights Policy & Practice Forum aims to critically explore the human rights policy and practice in Australia in an open and interactive format, allowing for a robust discussion between all

participants. This event is addressing challenging content and is a must attend event for all policy makers and practitioners who are seeking a broad understanding of the most pressing issues today.

Featured speakers include: the Rt Hon Malcolm Fraser, Geoffrey Robertson QC, Mick Palmer (National Human Rights Consultation Committee), Graeme Innes (Race and Disability Discrimination Commissioner) and Emily Howie and Rachel Ball (Human Rights Law Resource Centre).

For further information and registration, see: http://liquidlearning.com.au/llg08/October/human-rights-policy-and-practice-forum-2009.html.

Resources and Reviews

International Protection of Human Rights: A Textbook

Catarina Krause and Martin Scheinin (eds), *International Protection of Human Rights: A Textbook* (Turku/Abo: Abo Akademi University Institute for Human Rights, 2009)

This textbook presents the main universal and regional systems and standards for the international protection of human rights. The text takes note of recent changes in procedure and substantive developments in the field of human rights law. In addition to outlining the role played by the United Nations at an international level, the text outlines the existing regional protection systems in Europe, Africa, the Americas Asia and the Middle East.

The text covers the various means for domestic implementation of human rights and attention is drawn to the role of non-governmental organisations in the protection of human rights. The volume is not limited to human rights in the strict sense, but rather places human rights within a wider context of public international law as well as philosophy. The primary target group for the text is Masters level students in international law or human rights law, but the book may also have appeal to more advanced human rights researchers and professors teaching human rights topics.

Simone Cusack is a Public Interest Lawyer with PILCH and the co-author of a chapter in the book entitled 'Combating Discrimination Based on Sex and Gender'

Pertinent, Progressive, Provocative – Subscribe to the *Alternative Law Journal*

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

The latest issue, themed *Embracing and Protecting Rights*, contains articles on highly topical issues such as the role of a Human Rights Act (by Lord Thomas Bingham), discrimination against women, human rights advocacy, the limits of the Apology to the Stolen Generations, the powers of ASIO, trying tyrants for mass atrocities, and the Chinese criminal justice system.

For further information and to subscribe for the very low rate of $77.00 per year (for individuals), go to www.altlj.org.

Human Rights Jobs

UN OHCHR: Human Rights and Gender Officer in the Pacific

The United Nations Office of the High Commissioner for Human Rights is seeking a Human Rights Officer to work in its Pacific regional office in Suva, Fiji. The Officer will work in the Rule of Law, Equality and Non-Discrimination Branch. The position will work under the direct supervision of the Regional Representative of the Regional Office for the Pacific and the Coordinator of the Women's Human Rights and Gender Unit. The deadline for applications is 7 November 2009.

For further information, see http://jobs.un.org (Vacancy Announcement: 09-HRI-OHCHR-421376-R-SUVA).

Foreign Correspondent

Developments at the United Nations and in International Human Rights Law

12th Session of the UN Human Rights Council Begins in Geneva

The 12th session of the UN Human Rights Council began in Geneva on 14 September 2009. The session will last for three weeks. The highlight of the first week was the presentation of the report of the High Commissioner for Human Rights, Navi Pillay, who has just completed her first year in the post. She emphasised the main priority areas for her Office, including eliminating discrimination, combating impunity, protecting the rights of migrants, and fighting arbitrary detention, torture and extra-judicial killings of human rights defenders. She also highlighted the need to protect economic, social and cultural rights and encouraged governments to promptly sign and ratify the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*. The official signing ceremony for the OP-ICESCR will take place in New York on 24 September 2009. Ms Pillay also spoke about the role of the Office in strengthening the human rights system, in particular the treaty bodies, the Special Procedures and the Council itself.

During the first week of the session, the Council also held a special panel on the human rights of migrants in detention centres (more on this in next months' column), and heard from several of the Special Rapporteurs and Independent Experts. One such expert was Catarina de Albuquerque, Independent Expert on human rights obligations related to safe drinking water and sanitation. She presented a report which focused on sanitation, pointing out that sanitation is absolutely essential for realizing the rights to health and education and many other human rights. She explained how each year, it is estimated that 1.6 million people die and 443 million school days are lost due to water and sanitation related diseases, and how, in many parts of the world, girls do not go to school because of a lack of toilets, or lack of sex separated toilets. She called on the Council to address the issue by recognising sanitation as a distinct right: 'One of the biggest obstacles we face in tackling the sanitation crisis is the taboo surrounding the issue. Defecation and faeces are generally not considered appropriate topics for public gatherings, conferences and debates. We must break the taboo – too many children are dying, too many people are seriously ill, 40 per cent of the world's population is suffering, and we cannot allow this to continue simply because it makes us uncomfortable to talk about such an intimate and private matter.'

In the coming days it is expected that the Council will take action to follow up on the report of the fact finding mission on the Gaza conflict, released on 15 September. This UN Fact-Finding Mission, led by Justice Richard Goldstone, found evidence of serious violations of international human rights and humanitarian law during the Gaza conflict. The report concluded that both Israel and Palestinian armed groups committed war crimes and possibly crimes against humanity during the conflict. This lengthy report, 574 pages, was submitted in accordance with a mandate granted in April, to investigate all violations of international human rights law and international humanitarian law that might have been committed in the context of the military operations in the Gaza during late December 2008 and mid-January 2009. The Fact Finding Mission conducted 188 individual interviews, reviewed more than 10,000 pages of documentation, and viewed some 1,200 photographs, including satellite imagery, as well as 30 videos, in preparing the report. They heard 38 testimonies during two separate public hearings held in Gaza and Geneva, which were webcast in their entirety. The decision to hear participants from Israel and the West Bank in Geneva rather than *in situ* was taken after Israel denied the Mission access to both locations.

Later in this session the Council is expected to extend the mandates of Special Rapporteurs on Somalia and Cambodia, and discuss, at least informally, the situation of human rights in Honduras. It is also anticipated that the Council will appoint an Independent Expert on human rights in the Sudan.

The OHCHR continue to implement innovations to assist people outside of Geneva to keep up with what is happening at the Council – in addition to the live webcast, you can now also follow updates on the 12th session via Twitter at http://www.twitter.com/hrc12, and you can follow the Civil Society Unit at http://www.twitter.com/unrightswire.

General Assembly Opening in New York

The 64th session of the General Assembly opened on 15 September 2009. During the next two weeks many high level diplomats, including our own Prime Minister and Minister of Foreign Affairs, will descend

on New York for the General Debate, which will take place from 23 to 26 and 28 to 30 September 2009. Libyan diplomat, Ali Treki, is the President of the General Assembly for this year, and in his welcoming speech last week he called for a focus on peace in the Middle East, and urged stronger efforts by member states to close the widening gap between rich and poor and eliminate nuclear weapons. He also raised the need to work together to find solutions to the economic crisis, to address the roots of terrorism, and to keep working to reform the United Nations.

Prime Minister Kevin Rudd will deliver a statement to the plenary of the General Assembly, and it will also be the first time US President Barack Obama attends this forum. This week is of course also Climate Week and thousands of global events are being held to commemorate this, so it is timely that UN Secretary-General Ban Ki-Moon has asked that diplomats focus their discussions on climate change and the preparations for the Copenhagen talks at the end of this year. Another focus for the week will be global health, with a number of side events taking place addressing this topic, including the Clinton Global Initiative meeting, where Mr Rudd will also chair a panel.

A New UN Agency for Women

In the final days of the 63rd session of the General Assembly last week, it was agreed, after three years of protracted negotiations, that the GA would establish a new UN agency dedicated to advancing the rights and well-being of women. Thanks to GA Resolution 63/311 of 14 September 2009, the UN's four separate women's entities will be merged into a single, fully-fledged UN agency. This will mean the end to the separation of women's issues dealt with by the UN Development Fund for Women, the Office of the Special Adviser on Gender Issues, the UN Division for the Advancement of Women, and the International Research and Training Institute for the Advancement of Women. The new merged entity will be headed by an Under Secretary-General (US-G), the third highest ranking position within the UN hierarchy. This heralds a much enhanced status for women's rights, and it is hoped that it will be matched by increased funding. UN Secretary-General Ban Ki-moon is now charged with appointing a new US-G, and although he must consult with Member States before making the appointment, he has a relatively free hand in the decision. He is also tasked with developing a 'comprehensive proposal' for how the new agency will work, in terms of governance, funding and oversight mechanisms. Many Member States and NGOs hope the agency will be operational by March 2010 to coincide with the Beijing +15 Review, although this will be no small task to achieve in such a short time.

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, Special Advisor to Mary Robinson, and an Adjunct Clinical Professor of Law at the University of Michigan Law School.

If I Were Attorney-General…

Law as a Conversation with Community

In a 2004 paper on 'The Evolution of the Role of the Attorney-General', Alana McCarthy observes that the 'role of the contemporary Australian Attorney-General is very much open to interpretation by its office holder'. She notes the development of the office from its origins as the King's Attorney in Medieval England. She reviews many of the controversies surrounding the office; from suspicion in England in the 15th century that the Attorney General was a 'tool of the Crown and the Lords' to our more recent debates in Australia as to whether the Attorney General should defend the judiciary from political attack.

Most often today the position is interpreted in terms of its relationship with (and within) government or with the legal profession. As a community lawyer and advocate, I would interpret the role in terms of its relationship with the Australian community. I'm interested to find out more about what the community expects from the law. As Australians, what is our vision of justice? And how can the Attorney General make justice a reality for the Australian community?

In the closing pages of *Dreams From My Father*, Barack Obama talks about the relationship between community and the law. He describes the law unromantically as 'a sort of glorified accounting that

serves to regulate the affairs of those who have power – and that all too often seeks to explain, to those who do not, the ultimate wisdom and justness of their condition.'

These words may resonate for many Australians, particularly Indigenous Australians. However the man who has become the first African-American President of the United States of America still gives hope for those of us who work with the law. 'The law is also memory; the law also records a long-running conversation, a nation arguing with its conscience,' he says.

What does that conversation look like for Australians? And for those of us who work with the law, are we helping or hindering that conversation with the Australian community?

The Law and Justice Foundation of New South Wales has as its objects to contribute to the development of a fair and equitable justice system which addresses the legal needs of the community and to improve access to justice by the community (in particular, by economically and socially disadvantaged people). Since 2002 it has conducted an Access to Justice and Legal Needs Research Program. In 2006 it published 'Justice Made to Measure' which included some challenging findings for many of us.

Research participants were drawn from a number of communities that experience social and economic disadvantage. The participants were asked to identify the types of advisers that they had approached for help, advice and information in response to legal issues. In only 25 per cent of situations, was assistance sought from a legal adviser. In other words these community members were more likely to seek assistance *for legal issues* from non-lawyers than lawyers.

In the area that I work in, the evidence is mixed as well. Working with children does give you a fresh perspective on the law. It is clear that the legal system is built for adults. Generally the legal system fails to provide appropriate mechanisms for the voices of children to be heard. Further, the inherent disadvantage experienced by children in dealing with the law is often compounded by the barriers that exist as a result of their circumstances – poverty, family conflict and/or violence, discrimination, disability, and distance (both geographic and cultural).

But the news is not all grim. Even though we don't see children lining up to litigate to enforce their rights, their thirst for knowledge about the law is strong. Children do want to know their rights. Each year the National Children's and Youth Law Centre's Lawstuff website (www.lawstuff.org.au) attracts between 4 and 5 million hits. For those children who can't find the answer they want on the site, many send us emails asking specific questions – around 1000 a year. Many other services that provide legal information that is designed specifically for children will tell you similar stories.

We do need to rethink some of our assumptions about how we provide access to justice for children. We need to develop new models of advocacy, innovative ways to hear complaints, to remind duty bearers of their responsibilities to respect rights and to resolve disputes. And although children have specific needs, many of the lessons that we can learn if we listen to those who stand outside our existing legal system can enhance access to justice for everyone in our community.

We need renewed effort to make the law easier to understand. We need to recommit to the development of resources that help communities resolve issues and disputes for themselves. As advocates, we need to put communities in control of solutions; and to put clients in control of their own cases.

In terms of our Australian version of the law as 'a nation arguing with its conscience', I see the current National Human Rights Consultation as a renewed start to such a conversation. But that conversation must continue and must extend beyond the lawyers and the politicians – the elites that have power – to include ordinary Australians. To paraphrase Obama's words, we must stop using the law to explain to others the justness of their condition and listen to what others expect of the law.

James McDougall is Director of the National Children's & Youth Law Centre