human rights law resource centre

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The Human Rights Law Resource Centre Ltd aims to:

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

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

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

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

Opinion

Rights in Rough Times

About 4 years ago, I was involved in consultations with more than 100 homeless or formerly homeless people across Melbourne about whether a Charter of Rights could make Victoria a more inclusive and rights-respecting community. The terms of reference for that consultation were limited to considering civil and political rights and not economic and social rights. While this may have made some (limited) sense to me as a lawyer, I was struck by how little sense it made to the homeless, to the rights-holders. "Having freedom of movement and expression without the right to health and housing is like having icing without a cake," said Bill, an elderly homeless man in his submission to the consultative committee.

I was struck again by the day-to-day importance and fragility of economic and social rights when a high-level United Nations committee released its report on Australia on 25 May. The report was prepared after 2 days of dialogue and the exchange of extensive written reports between an Australian government delegation and the Committee on Economic, Social and Cultural Rights. The Committee also received submissions and heard from a non-government delegation, which provided them not only with statistical information and data, but also relayed stories like Bill's.

The result of this consultation process is a report, adopted by a Committee of 18 independent experts from across the world, which reflects the human rights situation 'on the ground' in Australia, but also makes practical, evidence-based recommendations as to how we can improve our human rights performance. The report is balanced and constructive, commending Australia on recent initiatives and advances, including the commitment to 'close the gap' in Indigenous inequality, efforts to combat violence against women, and the Apology to the Stolen Generations.

The Committee also made 26 recommendations for improvement and expressed concern that, despite 'the absence of any significant factors impeding the effective implementation of economic and social rights' in Australia, substantial problems persist in areas such as mental health, poverty and homelessness.

Mental health care services are chronically under-resourced in Australia. There are widespread problems with access to care, quality of care and adequate accommodation for people with mental illness. People with mental illness are significantly over-represented in key measures of disadvantage such as homelessness, unemployment, poverty and substance abuse.

The Committee was particularly critical of the 'high rate of incarceration of people with mental diseases' and called on Australia to 'ensure all prisoners receive adequate and appropriate mental health treatment when needed'.

Despite previous UN recommendations, the Committee was told that Australia has not developed an official poverty line. Without such a measure, it is very difficult to monitor progress and evaluate the effectiveness of poverty reduction policies and programs. The Committee urged Australia to 'to develop a comprehensive poverty reduction and social inclusion strategy'. In a related recommendation, the Committee also called on Australia to ensure universal and adequate social security coverage and review potentially discriminatory and punitive measures, including the 'quarantining' of payments under the Northern Territory Intervention.

While the Committee welcomed the Rudd Government's significant commitment to halve homelessness by 2020, it noted that homelessness has increased over the last decade, a period of unprecedented prosperity. The fact that 105,000 people experience homelessness every night is evidence that Australia needs to take further and urgent action to ensure an adequate standard of living for all. Even during the good times, many disadvantaged groups did not have equal access to basic services. Now that we are in tougher times, sustained investment in basic human rights is critical. Human rights must be made recession-proof. The Australian Government has an obligation to ensure that basic entitlements, such as health care, education and adequate social security, are equally available to all.

The Committee also made a series of recommendations to address inequality at both the local and international levels. At the local level, the Committee recommended the enactment of comprehensive federal anti-discrimination laws, strengthened efforts to improve gender equality, and special measures to improve workforce participation among disadvantaged groups. Recognising that our human rights obligations do not end at home, the Committee requested that Australia take action to address the human rights implications of climate change and increase aid to developing countries; the first time that a UN treaty body has included recommendations on these issues in a country report.

While welcoming the current National Human Rights Consultation, the Committee reiterated that Australia should enact comprehensive national human rights legislation. A national Human Rights Act would not, of course, be a panacea to disadvantage and poverty. It could, however, promote more responsive and accountable government, improve public services, and enshrine fundamental values such as freedom, dignity, respect and a fair go. Critically, the Committee said that any Human Rights Act should protect the full range of economic and social rights, such as the right to adequate healthcare and housing.

It is now imperative the Australian Government act promptly and positively on the UN report. Human rights must be a priority at a time when the global financial crisis threatens the dignity and equality of many poor and vulnerable groups, particularly given the expanding body of research which demonstrates a strong correlation between equitable social policy on the one hand, and economic development and growth on the other. In any event, our obligation to protect basic social and economic rights doesn't recede during tough times. On the contrary, human rights protections are more important now than ever, because it is the most disadvantaged groups – the unemployed, the homeless, people with mental illness, single mothers and their children – who are most adversely affected.

Philip Lynch is Director of the Human Rights Law Resource Centre

News

UK Equality and Human Rights Commission Releases Major Human Rights Inquiry Report

On 15 June 2009, the United Kingdom Equality and Human Rights Commission released a major report on the impact of the UK *Human Rights Act 1998* in its first 10 years of operation. The report was informed by submissions and detailed evidence from almost 3,000 individuals and organisations including service providers, service users and advocacy groups, inspectorates, academics and legal experts, politicians, the media and Government Ministers. It represents the most comprehensive research on the *Human Rights Act* to date.

Key findings from the report include:

- The *Human Rights Act* can have a very positive impact on individuals' lives. The Inquiry received evidence showing a positive effect in, among others, the following public areas of public life: health, local authority services, policing, schools, and regulatory authorities.
- A human rights approach can deliver real improvements and drive systemic change in public services. The evidence received by the Inquiry shows that the human rights framework, backed by the legal underpinning of the *Human Rights Act*, has had a positive impact in the delivery of public services. A human rights approach can provide an ethical framework for the actions of public authorities. Properly understood and applied, it can have a transformative function, transforming the organisation itself, the services delivered, and ultimately the lives of the people receiving these services.
- The evidence clearly shows that a human rights approach has facilitated organisational effectiveness, enhanced staff morale and contributed to a better quality of life for many people.
- Although much has been achieved in the 11 years since the passing of the *Human Rights Act*, the evidence also shows that the effective implementation of the human rights framework in England and Wales depends on: political and organisational leadership; increased knowledge and understanding of what human rights are and are not; and the mainstreaming of human rights principles in strategic and business planning, where appropriate.

The report contains a series of recommendations for the Government, for the Commission, and for public authorities. According to the report, if these recommendations are implemented they will facilitate significant improvements in the provision and delivery of services to individuals.

The report is available at http://www.equalityhumanrights.com/fairer-britain/human-rights/human-rights-inquiry/.

Integrating Human Rights and Australian Business Practice

Ever-increasing numbers of Australian companies recognise that respecting human rights is good business. It is about managing business risks and creating new business opportunities.

However, it is not always clear what it takes to make human rights part of core business practices.

The Australian Human Rights Commission has developed four short fact sheets setting out five basic steps towards integrating human rights into everyday business practices.

The fact sheets provide guidance and links to tools that can help Australian businesses meet their responsibility to respect the human rights of those people impacted by their activities.

Fact sheet 1 explains how human rights are relevant to Australian companies and the business case for integrating human rights. It also provides links to practical tools.

Fact sheets 2 - 4 focus on the specific human rights issues and practical tools relevant to:

- the Australian finance sector (Fact Sheet 2)
- the Australian mining and resources sector (Fact Sheet 3)
- the Australian retail and manufacturing sector (Fact Sheet 4).

To download these fact sheets and for further information and speeches on Corporate Social Responsibility see: www.humanrights.gov.au/human_rights/corporate_social_responsibility/index.html.

National Charter of Rights Developments

HRLRC Supplementary Submission on Religious Beliefs and Freedoms under a National Human Rights Act

On 3 June 2009, the Human Rights Law Resource Centre made a supplementary submission to the National Human Rights Consultation.

The submission is in the form of a Memorandum of Advice from Brian Walters SC and Alastair Pound of Counsel commissioned by the Centre in relation to the relationship between a national Human Rights Act and a range of religious beliefs and freedoms.

The Advice considers, among other matters:

- Would a federal charter of rights result in a transfer of political power to the courts?
- What are the potential cultural impacts of a federal charter of rights?
- What impact might a federal charter of rights have on freedom of religious speech and expression?
- What impact might the recognition of a right to life in a federal charter of rights have on issues such as abortion and euthanasia?
- What impact might the recognition of a right to equality and protection from discrimination in a federal charter of rights have on the ability of religious bodies to discriminate on the basis of religion?

The supplementary submission is available at:

www.hrlrc.org.au/content/topics/national-human-rights-consultation/supplementary-submission-on-religious-freedoms-and-a-human-rights-act-june-2009/

Key Submissions to National Human Rights Consultation

Over the last month, there have been a number of high quality submissions to the National Human Rights Consultation calling for the enactment of a comprehensive Human Rights Act. The following submissions are available at or via http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/key-submissions-to-the-national-human-rights-consultation-june-2009/:

- Amnesty International Australia;
- Anglican Church of Australia;
- Australian Centre for Human Rights Education at RMIT;
- Australian Human Rights Commission;
- Australian Human Rights Group;
- Australian Lawyers Alliance;
- Australian Lawyers for Human Rights, International Section;
- Australian Network of Environmental Defenders Offices;
- Castan Centre for Human Rights Law;
- Federation of Community Legal Centres (Vic);
- Human Rights Act for Australia Campaign;
- Human Rights Council of Australia;
- Law Council of Australia;
- Law Institute of Victoria;
- Liberty Victoria;
- Mallesons Stephen Jaques Human Rights Law Group;
- Ron Merkel QC and Alastair Pound of Counsel;
- PILCH Homeless Persons' Legal Clinic;
- Public Interest Law Clearing House (Vic);
- Edward Santow, Director of the Charter of Human Rights Project at the Gilbert + Tobin Centre of Public Law, UNSW;
- Uniting Church in Australia;
- University of Oxford Pro Bono Publico;
- UN Office of the High Commissioner for Human Rights;
- UN Special Representative on Business and Human Rights;
- Victorian Bar;
- Victorian Equal Opportunity and Human Rights Commission;
- Victorian Government;

- Professor George Williams, Foundation Director of the Gilbert + Tobin Centre of Public Law, UNSW; and
- Professor Spencer Zifcak and Alison King.

National Human Rights Consultation to Hold Public Hearings from 1-3 July 2009

As part of the National Human Rights Consultation, the National Human Rights Committee will be holding three days of Public Hearings from 1 to 3 July 2009 in the Great Hall of Parliament House in Canberra.

The Public Hearings provide a forum for key commentators on human rights issues to present information to the Committee. This will include addresses from public figures and notable speakers, both at home and overseas.

The Hearings will also provide an opportunity for the Committee to invite groups and individuals who have made substantive submissions as part of the Consultation, to expand upon or clarify elements of their submission.

For further details, see: http://www.humanrightsconsultation.gov.au/www/nhrcc/hearings.nsf/calendar.

UN Office of the High Commissioner for Human Rights Makes Submission to NHRC

On 29 May 2009, the Regional Office for the Pacific of the United Nations Office of the High Commissioner for Human Rights (OHCHR) lodged a public submission to the National Human Rights Consultation Committee. The submission makes ten key recommendations, including that Australia fully incorporate its international human rights obligations into domestic legislation.

In a statement accompanying the submission, Matilda Bogner, Regional Representative of OHCHR for the Pacific, stated that 'Internationally Australia has promised to uphold human rights for its people and it needs to guarantee this through domestic legislation.'

The OHCHR submission contends that Australia is obliged to advance human rights in the full spectrum covered, including civil, political, economic, social and cultural rights. It also reiterates the recommendations of a number of international human rights experts in the United Nations system, who have repeatedly advised Australia to incorporate these human rights into domestic legislation and to ensure that these rights are enforceable before a court of law.

The submission also highlights findings of international human rights experts that there is a low level of awareness of human rights in Australia, including among officials. The submission recommends that human rights education programmes be offered to officials, including judges and members of parliament, as well as included in the formal education system.

The submission goes on to look at Australia's advancement of human rights overseas. According to Ms Bogner, 'Australia has an interest in seeing that its neighbours respect human rights. Australia's foreign policies, including aid delivery, do not sufficiently address the issue of human rights. Successive Australian governments have seemingly shied away from being explicit in the area of human rights and foreign policy, somehow on the assumption that it is too controversial.'

The submission recommends that Australia formally incorporate a human right-based approach to its aid policies and programmes. It also recommends that Australia systematically develop policies to promote human rights at the political level with countries in Asia and the Pacific with which Australia has significant political engagement.

The submission is available at http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/key-submissions-to-the-national-human-rights-consultation-june-2009/.

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.

Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009

The *Energy Legislation Amendment (Australian Energy Market Operator) Bill* 2009 aims to facilitate the creation of a new national energy market operator for both electricity and gas – the Australian Energy Market Operator (AEMO). The Bill amends the *National Electricity (Victoria) Act* 2005, the *National Gas (Victoria) Act* 2008, the *Electricity Industry Act* 2000 and the *Gas Industry Act* 2001 to provide for the transfer of the powers, functions, rights, responsibilities, assets and liabilities of the Victorian Energy Networks Corporation (VENCorp) to the AEMO.

The Bill is a response to the April 2007 Council of Australian Governments decision to establish a national energy market operator for both electricity and gas, which would assume the powers and functions of the existing market operators in the State jurisdictions. The texts of the existing schemes are provided in the National Gas Law (NGL) and National Electricity Law (NEL), part of the South Australian legislation, which will accordingly be modified to provide for the transfer of powers and functions. The NGL and NEL amendments will apply automatically in all participating jurisdictions by virtue of application legislation. .

The Scrutiny of Acts and Regulations Committee has raised concerns about the sufficiency of the Statement of Compatibility prepared in relation to the Bill. While the Statement of Compatibility does look at the rights potentially engaged by the amendments to the NEL and NGL, the Committee noted that the enactment of the amendments is a matter for the South Australian Parliament. Specifically, the Committee is concerned that the Statement of Compatibility fails to consider how the passage (or non-passage) of the Victorian Bill would alter the human rights impact of the proposed changes in South Australia.

The Committee also noted it has previously expressed concern about the application of the Victorian *Charter* to national cooperative schemes, such as the schemes for electricity and gas markets addressed by this Bill.

Clause 34 of the Bill has the effect of transferring functions (including public functions) from VENCorp to the AEMO. The Committee is also concerned that the effect of the Victorian Bill will be such that public functions exercisable in Victoria will be transferred from a body subject to the *Charter* (VENCorp) to one that is arguably not (AEMO). Accordingly the Committee has sought clarification of this issue from the Minister for Energy and Resources.

Emma Barton, Human Rights Law Group, Mallesons Stephen Jaques

Victorian Charter Case Notes

Referral of Question of Law under Victorian *Charter*

De Simone v Bevnol Constructions & Developments Pty Ltd & Ors (Domestic Building) [2009] VCAT 888 (13 May 2009)

For the first time, VCAT has referred a question of law arising under the *Charter* for determination by the Supreme Court, by way of s 33 of the *Charter*. The referred question is whether VCAT's implied statutory power to stay a civil proceeding (in particular, the *McMahon v Gould* guidelines applicable to that power) should be revised in light of ss 24 and 25 of the *Charter*, and if so, how.

Facts

In previous proceedings before VCAT, De Simone had applied for a stay of a civil counterclaim against him on the basis that a police investigation was on foot. He argued that a failure to stay the civil proceeding would prejudice his defence of the anticipated criminal proceeding and would constitute a violation of the right to a fair hearing under s 24(1) of the *Charter* and the rights in criminal proceedings under s 25 of the *Charter*. VCAT refused to stay the civil claim, finding that:

- the rights in ss 24 and 25 did not modify the existing common law test for determining whether a matter should be stayed (as set out in *McMahon v Gould*); and
- the rights under ss 24 and 25 only apply to persons *charged* with a criminal offence and as De Simone had not yet been charged, these rights were not engaged.

De Simone appealed to the Court of Appeal, arguing that the *McMahon v Gould* test required modification in light of ss 24 and 25 of the *Charter*. Before the decision was handed down, he was charged with eight offences. The Court of Appeal refused leave to appeal, finding that the refusal of leave would not grant substantial injustice to De Simone because of sufficient suppression orders already in place at VCAT. However, the Court also commented that:

- De Simone had 'a real argument' that the *McMahon v Gould* principles should be modified in light of ss 24 and 25 of the *Charter*; and
- it was open to De Simone to make a fresh stay application given that the charges had now been laid, since part of VCAT's reasoning relied on the *Charter* rights not being engaged for persons under investigation but not charged.

De Simone made a fresh application to VCAT for a stay and also applied for a referral on a question of law to the Supreme Court under s 33 of the *Charter*. Section 33 provides that a court or tribunal may refer to the Supreme Court a question of law that arises that relates to the application of the *Charter*, provided a party has made an application for referral and the court or tribunal considers that the question is appropriate for determination by the Supreme Court.

Decision

Vice President Ross decided to refer the following question of law arising under the *Charter* to the Supreme Court:

> Given that the Tribunal has an implied statutory power to stay a civil proceeding, whether the *McMahon v Gould* guidelines applicable to that power should be revised in light of the *Charter of Human Rights and Responsibilities Act 2006*, and in particular ss 24 and 25 of that Act and, if so, how.

In so deciding, he noted that the question had not been the subject of prior determination and raised important issues of general application.

Relevance to the Victorian *Charter*

This is the first time VCAT has referred a question of law to the Supreme Court under s 33 of the *Charter* and it highlights the importance of the s 33 mechanism. The case also highlights the potential impact of the Charter on the development of the common law and the exercise of judicial discretion and the *Charter*'s capacity to align decision making processes with human rights norms.

The decision is available at http://www.austlii.edu.au/au/cases/vic/VCAT/2009/888.html.

Jessica Zikman is a lawyer with Lander & Rogers

Application of the *Charter* in Planning Disputes

Swancom Pty Ltd v Yarra CC [2009] VCAT 923 (10 June 2009)

On 10 June 2009, Deputy President Dwyer and Member Bensz of the Victorian Civil and Administrative Tribunal handed down a decision which discussed the application of the *Charter of Human Rights and Responsibilities Act 2006* to local government planning decisions.

Facts

The operators of the Corner Hotel, Swancom Pty Ltd ('Swancom'), applied to the Yarra City Council ('Council') to amend an existing planning permit to, among other things, extend trading hours in its beer garden from 11:30pm until 3am, and to increase patron numbers from 750 to 1300.

The Corner Hotel is located within the Swan Street 'major activity centre', with a large number of licensed premises in the immediate area. To the immediate north and northwest of the Corner Hotel are a number of warehouses within a Mixed Use Zone. Several have been converted for residential use, and there is other residential infill in the immediate area. The area to the north and northeast is predominantly residential, within a Residential 1 Zone.

The Council refused to amend the permit and/or authorise the building works because:

- the proposal would adversely affect the residential amenity of the surrounding area; and
- the proposal was inconsistent with principles of orderly and proper planning.

Swancom applied to the Tribunal to review the Council's decision.

In defending its decision to refuse an amendment to Swancom's current planning permit, the Council highlighted its obligations under the *Charter*. The Council submitted that it, as a public authority, is bound by the *Charter* to take human rights into consideration when making decisions, developing local laws and policies, and providing services. The Council submitted that, before reaching the decision to deny an amendment to Swancom's planning permit, it considered the following human rights:

- the right to privacy, under s 13 of the *Charter* – in particular, the right of residents living near to the Corner Hotel to privacy from the impacts of excessive noise; and
- property rights under s 20 of the *Charter* – in particular, the right of Swancom not to be deprived of its property rights.

The Council also submitted that the Tribunal is bound by the *Charter* to consider human rights when exercising its review jurisdiction.

Decision

Deputy President Dwyer and Member Bensz held that the application to extend hours and patron numbers should fail, after balancing various competing policies and objectives against considerations of net community benefit and sustainable development.

The Tribunal agreed with the Council that they were bound by the *Charter* in exercising their review jurisdiction on planning applications. In light of this obligation, the Tribunal specifically considered ss 13 and 20 of the *Charter* and found that the refusal to approve Swancom's planning application had not resulted in a breach of rights under the *Charter*.

The right to privacy

Section 13 of the *Charter* states:

> **Privacy and reputation**
>
> A person has the right –
>
> (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
>
> (b) not to have his or her reputation unlawfully attacked.

The Tribunal held that whilst excessive noise from the hotel *might* amount to a breach of the privacy of nearby residents under s 13 of the *Charter*, the planning regulatory framework and associated guidelines for assessing sleep disturbance caused by noise, in combination, are sufficient to create an ambit of intended regulatory discretion within which some interference with the right to privacy is not unlawful. Additionally, the Tribunal was satisfied that the opportunity to implement reasonable sound attenuation measures as part of a conditional approval provides a proportionate and reasonable response, so that the interference with the right to privacy is not arbitrary.

Property rights

Section 20 of the *Charter* provides:

> **Property rights**
>
> A person must not be deprived of his or her property other than in accordance with law.

The Tribunal held that whilst the refusal of the application *might* arguably interfere with Swancom's broader property rights, s 20 of the *Charter* only provides that a person must not be deprived of property 'other than in accordance with law'. The Tribunal held that Swancom was not deprived of any legal or proprietary interest in the land, or the ability to use or develop its land in accordance with the relevant planning framework. Importantly, the Tribunal was of the opinion that the imposition of reasonable restrictions on the use or development of the land under the regulatory framework is in accordance with the law, and therefore is not unlawful or arbitrary.

Consideration of the Victorian *Charter*

The *Swancom* decision clearly identifies the vertical human rights obligations created by the *Charter* – that is, the obligations that local governments' have to consider human rights when making decisions, developing local laws and policies, and providing services. The *Swancom* decision establishes that where planning regulatory frameworks and associated guidelines are complied with, subsequent

interference with a person's right to privacy will not be considered unlawful or arbitrary, particularly where sound attenuation measures can be implemented as part of the Council approval process.

Interestingly, both the Council and the Tribunal considered the property rights of Swancom, in assessing whether ss 13 and 20 of the *Charter* imposed an impediment to the decision to deny an amendment to Swancom's planning permit. This consideration was given despite Swancom's status as a company, not as a natural person.

Regardless of the status of a land owner (whether a company or a natural person), this decision indicates that from a planning perspective, the imposition of reasonable restrictions on the use or development of land in accordance with relevant planning frameworks is neither unlawful nor arbitrary, under s 20 the *Charter*.

The decision is available at http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2009/923.html.

Melissa Gundrill is on secondment to the Human Rights Law Resource Centre from Clayton Utz

Comparative Law Case Notes

Detailed and Individualised Risk Assessment Required Prior to any Handcuffing of Prisoner During Hospital Visits

Faizovas, R (on the application of) v Secretary of State for Justice [2009] EWCA Civ 373 (13 May 2009)

This case sets out a requirement for prisons to undertake detailed risk assessments if they deem it necessary for handcuffs to be used on a prisoner during hospital visits. The England and Wales Court of Appeal found that the risk assessments carried out in this case demonstrated that the prisoner posed a realistic risk of absconding. In light of this security risk, the use of handcuffs did not constitute degrading treatment. Nonetheless, the prison was instructed to revise its policy on handcuffing, which was deemed to fall short of current human rights standards.

Facts

Mr Faizovas, a prisoner in the United Kingdom, was undergoing treatment for cancer in hospital. Whilst attending these hospital appointments, Mr Faizovas was handcuffed and guarded by two prison officers. Mr Faizovas said that the handcuffing was humiliating and deprived him of the right to dignity. He brought a claim in the Administrative Court in the United Kingdom contending that the use of handcuffs during hospital visits violated art 3 of the *European Convention on Human Rights,* which deems that no person shall be subjected to inhuman or degrading treatment or punishment. Mr Faizovas' claim was dismissed and an appeal was lodged in the England and Wales Court of Appeal (the Court).

Decision

Protection against degrading treatment

The Court held that art 3 contains an important safeguard against the ill treatment of prisoners. In her leading judgment, Lady Justice Arden confirmed art 3 guarantees that prisoners must not be subjected to inhuman or degrading treatment. She advised that it is not necessary for ill treatment to be at the level of 'extreme violence, deprivation or humiliation' for it to constitute a breach of art 3. In fact prisoners, because they have been deprived of their liberty, impose special obligations on the state. The dependency of prisoners on the state is a circumstance that must be taken into account when assessing whether treatment is 'degrading' within the meaning of art 3. In Arden LJ's opinion, humiliation and distress on the part of a prisoner could be an indication of degrading treatment. However in order to determine whether there had in fact been a breach of art 3, it was necessary to examine the particular circumstances of the case at hand. In this case, the Court deemed that the risk assessments carried out by the prison were the key factor in determining whether the use of handcuffs on Mr Faizovas constituted degrading treatment.

Risk assessments

The prison authorities had completed detailed risk assessments for each visit to the hospital made by Mr Faizovas. The risks of Mr Faizovas absconding and causing harm to the public were assessed for each visit. On each occasion, the prison authorities found that the prisoner posed a realistic risk of absconding and a risk of harm to the public if he did escape. The question of whether the handcuffs

were to remain on during medical treatment was also expressly considered for each visit. Each risk assessment found that it was necessary to handcuff Mr Faizovas during medical treatment to prevent him from absconding. There was no evidence before the Court which indicated that Mr Faizovas' treatment or recovery was impeded by the use of handcuffs. Likewise, there was no evidence of practical alternatives that could be used to secure the room in which Mr Faizovas was being treated. Under these circumstances, the Court found that Mr Faizovas' sense of humiliation was not sufficient to displace the security risk that was identified in the risk assessments. For these reasons, the Court found that the handcuffing of Mr Faizovas was not degrading within the meaning of art 3.

Policy changes

Although the Court found no breach of art 3 in this instance, it was careful to emphasise that it was not appropriate for prisons to adopt a rigid or blanket policy with regards to the handcuffing of prisoners. In this case, the handcuffing of Mr Faizovas during medical treatment was only justified in light of the individualised risk assessments that were carried out for each hospital visit. These assessments required the prison authorities to undertake a detailed analysis of the security risks posed by the prisoner and, if a risk was identified, to consider whether there were suitable alternatives to handcuffing.

Nonetheless, having examined the prison's handcuffing policy in detail, the Court declared it to be out of step with *Convention* jurisprudence. Of particular concern was the fact that the policy only contemplated the removal of handcuffs if the prisoner's life was endangered or if medical staff requested the handcuffs' removal. The policy did not address the possibility of the particular medical treatment making it disproportionate to use handcuffs if there was some practical alternative available. Although the shortcomings of the prison's policy did not affect the outcome in this case, the Court deemed that the policy fell short of *Convention* standards. The prison was instructed to review its policy on handcuffing in light of the Court's jurisprudence on this issue.

Relevance to the Victorian *Charter*

Section 10 of the *Charter* protects the right of all people, including prisoners, to be free from inhuman and degrading treatment in similar terms to art 3 of the *Convention*. The decision in this case indicates that the handcuffing of a prisoner during medical treatment may constitute degrading treatment if the prison is unable to demonstrate, by way of a detailed risk assessment, that the prisoner posed a realistic security threat at the time of the handcuffs being used and that there were no viable alternatives to handcuffing. In addition, s 22 of the *Charter* raises a point of differentiation in the Victorian context. Section 22 of the *Charter* protects the right to humane treatment when deprived of liberty. This right is not included in the *Convention*. Therefore, read together, ss 10 and 22 would imply that the *Charter* is more rigorous than the *Convention* in its protection of the welfare and dignity of prisoners.

The decision is available at http://www.bailii.org/ew/cases/EWCA/Civ/2009/373.html.

Magdalena McGuire is a volunteer with the Human Rights Law Resource Centre

Extraterritoriality and the Right to Life

Secretary of State for Defence v Smith, R (on the application of) [2009] EWCA Civ 441 (18 May 2009)

The Court of Appeal of England and Wales held that a soldier in the British Army serving in Iraq was within the jurisdiction of the United Kingdom for the purposes of the *Human Rights Act 1998* (UK) even when not on a British military base. The United Kingdom is therefore obliged to extend protection under the Act to its soldiers serving overseas even when they are not on military bases.

The Court also held that where a soldier on active service dies in circumstances that suggest a possible infringement of the right to life under the Act, the authorities must conduct an inquest that investigates not only the immediate circumstances of the death, but also the possibility of systemic failure on the part of the authorities to protect life.

Facts

Private Jason Smith was a soldier in the British Territorial Army. He was mobilised for service in Iraq in 2003, spending a few days in Kuwait to acclimatise. He then moved to a base in Iraq, which was not air-conditioned. In August 2003 temperatures were over 50ºC in the shade. Private Smith reported sick on 9 August 2003, but carried out various duties over the next few days. On 13 August 2003 at around

7pm he was found at the base lying face down, confused and short of breath. He was taken to hospital but died of cardiac arrest at 8.10pm.

These circumstances raised questions as to whether Private Smith's right to life under the Act had been adequately protected. In particular, there were questions as to whether the Army provided him with proper training and equipment, and whether the particular circumstances of his death by heatstroke could have been prevented.

The initial coronial inquest into the death of Private Smith was quashed by the English High Court due to legal errors made during the course of the inquest. The Court ordered a new inquest, and in doing so decided that:

- Private Smith was entitled to the protection of the Act at all times while serving in Iraq, and not only when located on a British military base; and
- any inquest into the death of Private Smith would need to investigate the broader circumstances of his death, including whether any Army policies played a part in it.

The Secretary of State for Defence appealed to the Court of Appeal. The Equality and Human Rights Commission was granted permission to intervene in the appeal.

Decision

The Court of Appeal (Sir Anthony Clarke MR, Keene and Dyson LJJ) dismissed the appeal.

Application of Act to armed forces in Iraq

Article 1 of the *European Convention on Human Rights* obliges the United Kingdom to secure human rights 'to everyone within [its] jurisdiction'. The Court observed that 'jurisdiction' had an established meaning in public international law – the exercise of legal authority over persons owing allegiance to a nation or under that nation's control.

Nations generally exercise jurisdiction within their own territories, so the 'jurisdiction' referred to in the Act is 'essentially territorial' in all but exceptional cases. It was conceded that British military bases in foreign countries were one such exceptional case; the question was whether the United Kingdom's obligations extended outside military bases.

The Court of Appeal found that human rights under the Act extended to all soldiers on active service in foreign countries for two reasons. First, British soldiers are subject to United Kingdom military and civil law while on active service, and may be tried and punished for breaching that law. Secondly, it would be arbitrary to extend the full complement of human rights to British soldiers while inside their bases, only to withdraw them at the moment the same soldiers stepped outside those bases.

The Court therefore held that British soldiers serving in Iraq, both on and off their bases, were within 'the jurisdiction' of the United Kingdom for the purposes of the Act.

Scope of inquest

Observance of the right to life requires a full and effective investigation into deaths where it appears the right to life may have been infringed. The Court of Appeal referred to 'article 2 inquests', these being inquests designed to comply with art 2 of the *European Convention* (which sets out the right to life) and to overcome some of the limitations of 'traditional' inquests. In particular, art 2 inquests are intended to investigate and address whether there has been systemic failure on the part of the authorities to protect the right to life, through, for example, the failure to adopt or implement policies which adequately protect human life. In the United Kingdom, these so-called art 2 inquests are the primary means by which the State discharges its procedural obligation to investigate deaths which may engage the right to life.

An issue in this case concerned the standard of investigation required for the death of a soldier on active service: whether the United Kingdom was obliged to conduct its own investigation into the death of Private Smith (which would take the form of a full art 2 inquest) or whether it was only obliged to facilitate *an* investigation, which might include a 'traditional' inquest together with other means of redress such as civil proceedings.

The Court of Appeal held that a full art 2 investigation was required in this case. It drew on European cases which held that a government investigation was required into the deaths of army conscripts. Private Smith was a regular soldier, but he was under the control of army discipline, and could not

disobey a lawful order. Although he was not as vulnerable as a conscript, his rights should be afforded the same protection.

Relevance to the Victorian *Charter*

This case confirms that a narrow view should not be taken of the concept of 'jurisdiction' in human rights legislation. The Court of Appeal's approach seems consistent with the intention expressed in s 1(2)(c) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) to impose on *all* public authorities an obligation to act in a way compatible with human rights. It is likely similar arguments will be raised if an issue arises as to the activities of Victorian public authorities outside the State.

This case also reinforces the importance of a full and adequate investigation into deaths where a violation of the right to life may have occurred. Similarly to the United Kingdom, the primary means by which deaths are investigated in Victoria is by way of a coronial inquest. A question remains as to whether there may need to be changes to the way inquests are conducted in Victoria in order to comply with the procedural obligation on the State to investigate deaths which may engage the right to life.

The decision is available at http://www.bailii.org/ew/cases/EWCA/Civ/2009/441.html.

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Deportation and Non-Refoulement

X v Australia, UN Doc CAT/C/42/D/324/2007 (5 May 2009)

Mr X, a Palestinian born in Lebanon in 1960, was detained at the Villawood Detention Centre in Australia. He sought political asylum in Australia, however, his request was rejected and he risked forcible removal to Lebanon. He claimed, inter alia, that by deporting him, Australia would violate his rights under art 3 of the *Convention against Torture* (CAT).

Facts

The complainant was a former member of the Lebanese armed forces. In 1975, he joined the Christian Democrats militia. In 1982, his unit participated in the Sabra and Chatila massacre.

Shortly thereafter, he became a close assistant to the militia's leader, Mr Z, and became aware of a number of illegal acts. In 1984, the militia party chanced allegiance from Israel to Syria. The party then split into two factions, one headed by Mr Z and a second which the complainant supported. The complainant feared that Mr Z would begin to threaten him.

In 1988, the complainant travelled to Germany and was granted asylum there. Whilst there, he learned that members of the militia that participated in the Sabra and Chatila massacre had been attacked and killed by other groups.

In 1998, Mr Z located the complainant in Germany and began to threaten him. The complainant paid several German police officers to protect himself and his family from Mr. Z. He was subsequently arrested and charged with attempting to bribe police officers and was sentenced to 4 years and 3 months imprisonment.

After his release, he obtained a false Slovenian passport and an Australian tourist visa and travelled to Australia in March 2002. On 7 October 2002, the complainant applied for asylum. His application was rejected by the Department of Immigration and Citizenship on 20 August 2003.

The Department found that he was not a refugee as Article 1F(a) and (b) of the 1951 Convention which excludes, inter alia, protection for those for whom there are serious reasons for considering that they have committed:

- crimes against peace, war crimes, or crimes against humanity;
- a serious non-political crime.

The Department found that the complainant's involvement in the massacre of Sabra and Chatila constituted a war crime and a crime against humanity. The complainant appealed the Department's decision and on 29 April 2005, the Administrative Appeals' Tribunal (AAT) reversed the Department's findings in relation to Article 1F(a), holding that there was insufficient evidence to support the conclusions. The AAT, however, found that article 1F(b) applied, due to the bribery allegation against German police officers.

On 9 November 2005, the complainant requested the Minister for Immigration and Citizenship to exercise his discretion to substitute a more favourable decision under section 501J of the Migration Act. The Minister declined to intervene. By 2007, after another unsuccessful discretionary application to the Minister, the complainant had exhausted all available domestic remedies.

Decision

The issue before the Committee was whether the complainant's removal to Lebanon would constitute a violation of Australia's obligation, under art 3 of the CAT, not to expel or return a person to a State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture.

Article 3 of the Convention against Torture

Article 3 enshrines an absolute obligation not to return a person to a State where there are serious grounds to believe that he/she would be a danger of being subjected to torture.

The definition of torture makes it clear that suffering constituting torture must be inflicted by/at the instigation of or with the consent/acquiescence of a public official or a person acting in an official capacity.

The CAT reiterated that each case must be assessed individually. That is, whether conduct amounts torture depends on the nature of the alleged act and must involve a degree of severity beyond cruel, inhuman or degrading treatment or punishment.

The Risk of Torture

In assessing the risk of torture in this case, the Committee took into account all relevant considerations, including the existence in the relevant State of a consistent pattern of gross, flagrant or mass violations. The absences of a consistent pattern of gross violations of human rights, the Committee reasoned, did not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

The risk of torture must be assessed on grounds that go beyond mere theory or suspicion. The risk need not be highly probable, but it must be personal, present and foreseeable.

The Committee noted that the complainant's allegations relating to his possible persecution or torture by Palestinian groups (due to his past activities) provided insufficient evidence to substantiate his claims. Therefore, the Committee considered that the complainant failed to demonstrate that he would face a *foreseeable, real* and *personal* risk of being subjected to torture in Lebanon.

The Committee, therefore, concluded that the complainant's removal to Lebanon would not constitute a breach of art 3 of the CAT.

Relevance to the Victorian *Charter*

The CAT's decision has implications for the interpretation of s 10(a) of the *Charter* which provides that a person must not be subjected to torture; or (b) treated or punished in a cruel, inhuman or degrading way.

The decision highlights the inherent requirement of providing substantiated evidence to confirm and establish that the person may be subjected to torture upon returning to a country. That is, that the complainant has an onus of proof of establishing that he/she would be in danger of being tortured and that the grounds for so believing are substantial in the way described, and that such danger is *personal* and *present.*

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Right of Access to Court Imposes Positive Obligation on Courts to Inform Litigants of Rights and Entitlements

Kulikowski v Poland [2009] ECHR 18353/03 (19 May 2009)

The European Court of Human Rights has held that the right to access courts imposes positive obligations on courts to inform individuals of their entitlements, that delays in obtaining expert evidence

will not justify extended pre-trial detention, and that prohibition of contact with family members who are witnesses may be a permissible limitation on the right to family.

Facts

Adam Kulikowski was arrested in March 2000 and charged with murdering his mother. Following a series of delays, he was brought to trial in August 2002, was found guilty, and was sentenced to 12 years imprisonment.

Mr Kulikowski argued that the period of remand was excessive and in breach of his right to be brought to trial in a 'reasonable time' (art 5 of the *European Convention on Human Rights*). Domestic courts in Poland had justified his detention on the basis that the offence was serious, the sentence would be long and prosecutors needed time to gather evidence.

Following an unsuccessful first appeal, Mr Kulikowski sought to launch a final appeal to the Supreme Court. His legal aid lawyer refused to file the appeal, on the basis that it lacked merit. The Supreme Court did not appoint alternative legal counsel, and failed to inform Mr Kulikowski that he was entitled to an extension of time to file an appeal. Mr Kulikowski argued that this breached his right to access the courts (ECHR art 6).

As Mr Kulikowski's wife and sons were witnesses in the case, he was prohibited from communicating with his family while on remand. He argued that this breached his right to family life (ECHR art 8).

Decision

Right to be tried within a reasonable time

The Court held that the reasons given by domestic courts for Mr Kulikowski's detention were 'valid grounds for the applicant's initial detention'. However, the seriousness of the offence and the need to gather evidence became less relevant as time passed and 'the gravity of the charges cannot by itself justify long periods of detention pending trial'.

It was relevant that this was not a complex case, and much of the delay related to obtaining expert evidence. The Court held that difficulties related to obtaining expert opinion 'cannot justify the lengthy period of the applicant's detention'.

The extended remand was not justifiable and was in violation of art 5. Domestic courts should have considered alternative means of guaranteeing Mr Kulikowski's appearance at trial.

Right to access the courts

The Court stated that the right of access to the courts is not absolute. States must balance the need to ensure effective access to the legal system for those who have been convicted of crimes against other factors such as the independence of the legal profession.

In this case, Mr Kulikowski had been given legal aid assistance, but this ceased when his lawyer gave a negative merits advice and refused to endorse the appeal papers. The assistance of this first legal aid lawyer satisfied the requirements of art 6, and the court did not have to guarantee alternative legal aid assistance.

In contrast, it was a breach of art 6 for the court to fail to inform Mr Kulikowski of his right to an extension of time to file an appeal. According to Polish law, an applicant is entitled to an extension of time to file an appeal where a lawyer refuses to endorse a final appeal. This is designed to give the applicant time to find another lawyer. In this case, the Supreme Court's failure to inform Mr Kulikowski of his right to an extension was in breach of his rights under art 6. It did not matter that Mr Kulikowski could not have afforded to pay a lawyer. He should still have been given the opportunity to try to find one.

Right to family

The Court held that while 'it is an essential part of a detainee's right to respect for family life that the authorities enable him or, if need be, assist him in maintaining contact with his close family', States may restrict the right to respect of family life in order to achieve legitimate aims, and where the State can demonstrate that there is a 'pressing social need motivating the interference'.

In this case, the measures that interfered with Mr Kulikowski's rights under art 8 were justifiable limitations directed towards 'the prevention of disorder and crime'. That is, the measures were in place because his family were witnesses in his criminal case and therefore were not in breach of art 8.

Relevance to the Victorian *Charter*

Right to be tried without unreasonable delay

This case provides further guidance on what might amount to 'unreasonable delay' under s 25(2)(c) of the Victorian *Charter.* Delay is more likely to be unreasonable where the facts of a case are relatively straight forward or where delay is associated with obtaining expert evidence rather than other forms of evidence, such as witness statements.

Right to a fair hearing and right to legal aid

This case confirms that access to the courts and to legal aid is a key component of the right to a fair hearing, protected by ss 24 and 25 of the Victorian *Charter*, but this is not an absolute right. The case highlights the importance of providing legal aid, especially in cases where an individual has been found guilty of a criminal offence. However, it also illustrates that this right to legal aid-funded assistance does not extend to a right to dictate the lawyer's actions.

Here, Mr Kulikowski wanted legal aid representation for a final appeal. However, it was important that his legal aid lawyer had the freedom to make a professional judgment and provide an unfavourable merits assessment which, according to Polish law, prevented the lawyer from launching a final appeal in accordance with Mr Kulikowski's wishes. Thus, Mr Kulikowski's right to legal representation and desire to run a final appeal did not outweigh the need to ensure that his lawyer could exercise independence. In the Australian context, this accords with the accepted position that a lawyer's obligations to the court outweighs their obligation to their client in the event of conflict, even when the client is being provided with legal assistance pursuant to a state's human rights obligations.

It is important to note that if Mr Kulikowski had not been provided with legal aid to at least obtain a merits assessment on his final appeal, it is likely that his right to access the courts would have been breached.

Right to protection of families (s 17)

This case confirms that the right to family imposes obligations on public authorities to consider various options before taking steps which negatively impact a person's right to family, protected by s 17 of the Victorian *Charter*. The right to family is not an absolute right, and may be tempered by other factors (for example, the need to limit contact between an accused and family members who are witnesses). However, the Court in this case emphasised that authorities should explore alternatives (such as supervised visits with children) before cutting off all family contact.

Helen Conrad, Human Rights Law Group, Mallesons Stephen Jaques

Surveillance of Protests and the Right to Privacy

Wood v Commissioner of Police for the Metropolis [2009] EWCA Civ 414 (21 May 2009)

The England and Wales Court of Appeal has held that the police taking photographs of an individual in a public space (and retaining those photographs) breached that individual's right to privacy under art 8(1) of the *European Convention on Human Rights,* which states that every person has the right to respect for their private and family life, their home and his correspondence.

Facts

Andrew Wood was a media co-ordinator of an organisation known as the Campaign against Arms Trade ('CAAT'). He had never been arrested and had no previous criminal convictions. As a shareholder, he had attended the annual general meeting of a company whose subsidiary organised a trade fair for the arms industry. He asked a question at the meeting and then left once formal business was over.

As he left, Wood was photographed outside by the police. He and other members of CAAT were spoken to by the police. Wood declined to identify himself or answer any questions about the meeting.

The police took the photographs in order to be able to identify possible offenders at the AGM or the trade fair, in case offences had been, or would be, committed. The police kept a database of images for intelligence purposes, although Wood's image was not added to the database.

Decision

The police submitted that art 8(1) of the ECHR was not engaged by the mere taking and retention of the photographs, because the circumstances did not elevate the case to the necessary level of seriousness. They submitted that the photographs had been taken in a public street where people could have taken photographs at any time, which meant that there was no expectation that Wood would not be photographed.

However, Wood submitted that art 8(1) was engaged and that the police action was not in accordance with the law for the purposes of art 8(2), because any legal justification the police offered was not sufficiently clear or precise, and the police's actions were disproportionate to their aim.

The Court noted that the bare act of taking a photograph in a public place was not of itself generally capable of engaging art 8(1) of the ECHR. However, taking the photograph had to be considered in the particular context. Here, the police action in taking photographs with no explanation carried with it the implication that the images would be kept and used. This amounted to a sufficient intrusion by the state into the individual's own space and integrity to amount to a prima facie violation of article 8(1) of the ECHR. The appellant enjoyed a reasonable expectation that his privacy would not be invaded in the way it was.

Even though the police's actions were in the pursuit of a legitimate aim (for the prevention of crime and in the interests of public safety), the interference could not be justified under art 8(2). The police's justification for retaining the photographs for more than a few days after the AGM did not bear scrutiny. Once it had become clear that the appellant had not committed any offence at the AGM, there was no reasonable basis for fearing that, if he went to the trade fair, he might commit an offence there. It was for the police to justify as proportionate their interference with Wood's art 8 rights, and they had failed to do so. Therefore it was not necessary to decide whether the interference was in accordance with the law, as it was not proportionate in any event.

Lord Justice Laws dissented on the issue of proportionality. In contrast to the other judges, his Lordship believed that the police's actions were legitimate and proportionate. His Lordship believed it was impossible to categorise what was done as outside the margin of operational discretion the police possess in such circumstances.

Relevance to the Victorian *Charter*

Wood suggests that the bare act of taking a photograph in a public place will not of itself offend s 13 of the Victorian *Charter*, which protects individual privacy and reputation. However, where the circumstances are such that taking photographs may amount to a state invasion of an individual's own space and integrity, a lack of proportionality means that those actions are likely to violate s 13 of the Victorian *Charter*. This is particularly likely to arise where no explanation is offered for the photographs being taken, in circumstances which convey an impression that the images will be kept and later used. As the Court found in *Wood*, such behaviour can intimidate or cause fear, and where it is not proportionate to a legitimate aim, can amount to an unjustified and arbitrary interference with a person's right to privacy and reputation.

The decision is available at http://www.bailii.org/ew/cases/EWCA/Civ/2009/414.html.

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Monitoring and Confidentiality of Prisoner Correspondence

Szuluk v United Kingdom [2009] ECHR 36936/05 (2 June 2009)

The European Court of Human Rights has held that it is a disproportionate interference with an individual's right to privacy to monitor their confidential medical correspondence with their specialist. The prison governor had directed that the applicant's correspondence with his specialist be opened and inspected by the prison medical officer to ensure that there were no illicit enclosures. The applicant had sought to correspond confidentially with his specialist to ensure that he was receiving appropriate care and supervision with respect to his potentially life-threatening condition. The applicant, who had lost before the UK Court of Appeal, successfully argued that, by analogy with legal correspondence, the risk of his abusing the confidentiality of his correspondence for illicit purposes was outweighed by the

likelihood that inspecting his correspondence would inhibit what he conveyed to the specialist, thereby harming the quality of advice that he received.

Facts

Following his return to prison after having sustained a brain haemorrhage, the applicant sought to correspond confidentially with his specialist in order to ensure that he received the necessary medical treatment and supervision in prison. The applicant applied to the prison governor for a direction that his correspondence be accorded confidentiality. Although the request was initially granted, the prison governor subsequently reversed his decision and informed the applicant that all correspondence would be directed to the prison medical officer, who would examine the content of the envelope to ascertain its medical status and ensure that there were no illicit enclosures, before resealing it and forwarding it on to the intended recipient.

Decision

The applicant successfully sought judicial review of the prison governor's decision, and the decision was quashed by a single judge of the High Court. On appeal to the Court of Appeal, the High Court's decision was reversed. The applicant then appealed to the ECHR claiming that the monitoring of the applicant's correspondence breached his right 'to respect for his…correspondence', as protected by art 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*.

The Government conceded that the monitoring of the applicant's correspondence did amount to an interference with his Article 8 right, but argued that this interference was justified and proportionate under art 8 § 2 of the *Convention*. The Government argued:

- the applicable legal framework provided clear and structured guidance;
- the procedure devised was tailored to the applicant's circumstances; and
- disclosure was limited to the prison medical officer, who was himself bound by duties of medical confidentiality.

The ECHR disagreed, noting that the issue of whether the monitoring was disproportionate centred upon whether it pursued one or more of the legitimate aims referred to in art 8 § 2 of the *Convention* and was 'necessary in a democratic society'. . Whilst conceding that some measure of control over prisoners' correspondence was compatible with the *Convention*, the ECHR observed that stringent standards exist for the confidentiality of legal correspondence. These standards, set out in *Petrov v Bulgaria* (No 15197/02 (22 August 2008)), require exceptional circumstances before a prisoner's correspondence with their lawyer may be read, and dictate that suitable guarantees be implemented to prevent reading the correspondence during inspections for illicit enclosures. In finding the interference disproportionate, the ECHR gave particular weight to the following findings of fact:

- there were no grounds to suggest that the applicant had ever abused, or intended to abuse, the confidentiality of his medical correspondence;
- the applicant's life-threatening condition made it understandable that he should wish to check the quality of the treatment he was receiving in prison;
- there was an 'inescapable risk of abuse' involved in the monitoring, and that in the course of monitoring the applicant's medical correspondence, the prison medical officer might encounter criticism of his own performance, which could cause difficulties for the applicant's prison life and treatment;
- the address and qualifications of the medical specialist were easily verifiable and the risk that she might be intimidated or tricked into transmitting illicit messages was insufficient to justify the interference, particularly as the same risk attended correspondence with secretarial staff of Members of Parliament, which the court held must be afforded complete confidentiality.

Relevance to the Victorian *Charter*

The *Charter of Human Rights and Responsibilities* protects a person's right not to have their correspondence unlawfully or arbitrarily interfered with (s 13(a)). Relevantly for the application of this case to Victoria, the *Convention* and the *Charter* mandate different tests for proportionality. The *Charter* is structured around a general proportionality test in s 7(2) which requires that *Charter* rights may only

be subject to such reasonable limits as can be demonstrably justified. Although s 13(a) contains the qualifying phrase 'unlawfully or arbitrarily', it is unlikely that this adds anything to the proportionality test as set out in s 7(2). Therefore the demonstrable justification test in the *Charter* is arguably a lower hurdle for the interfering body to overcome than the *Convention* requirement that the interference be 'necessary'. Nonetheless, the recognition that correspondence between a specialist medical practitioner and a prisoner is, in certain circumstances, as deserving of confidentiality as legal correspondence, has relevance for conduct by Victorian prison authorities.

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Right to a Fair Hearing, Control Orders and Counter-Terrorism

Secretary of State for the Home Department v AF & Anor [2009] UKHL 28 (10 June 2009)

Nine Lords of the House of Lords have unanimously followed the Grand Chamber of the European Court of Human Rights in Strasbourg (ECHR) in the decision of *A v United Kingdom*. That decision clarified that where a person subject to a 'control order' under the *Prevention of Terrorism* Act *2005* (PTA) challenges its validity, he or she must be given sufficient information to effectively answer the allegations against them. The reading down of the PTA to include a right to a fair trial means control orders cannot be based entirely on evidence undisclosed to the 'controlee'.

Facts

The three appellants in *AF* were subject to control orders significantly restricting their liberty. The orders were made because the Secretary of State suspected the appellants were, or had been, involved in terrorism-related activity. The issue raised in the appeals was whether the procedures for judicial supervision of the control orders satisfied the appellants' right to a fair hearing as guaranteed by art 6 of the *European Convention on Human Rights*. Each contended this right was violated because the judges relied on material received in closed hearings, the nature of which was not disclosed to the appellant.

Prior to this decision, the rules governing hearings on control orders were outlined by the House of Lords in *Secretary of State for the Home Department v MB and AF*. The Court of Appeal in *AF* considered *MB* in detail and interpreted its principles as follows:

- The right to a fair trial was to be read into the PTA rather than declaring the Act incompatible with the Convention.
- Where full allegations and evidence are not provided to the appellant [the 'controlee'] for reasons of national security, the 'controlee' must be provided with a special advocate who will represent the controlee's interests in a closed hearing;
- There is no principle that a hearing will be unfair under art 6 and the HRA in the absence of disclosure; and
- Whether or not a hearing is unfair depends on all the circumstances of the case. That includes *what difference disclosure might make*, meaning where a judge based his/her decision on closed material, this would not necessarily compel the conclusion that the controlee was denied procedural fairness.

The House of Lords revisited these issues to address the criticism that the *MB* decision was too sanguine in accepting how much protection the special advocates procedure could offer 'controlees', and that the principle of considering what difference disclosure might make was unclear. These inquiries effectively became redundant when, one week before the hearing, the ECHR delivered a judgment in *A*. The decision addressed the extent to which the admission of closed material was compatible with the fair trial requirements of arts 5(4) and 6(1) of the *Convention*. Accordingly, the House of Lords in *AF* primarily addressed whether the decision in *MB* and judicial supervision of control orders was in line with *A*.

Decision

The original submissions before the House of Lords highlighted the tension between a rigid interpretation of *Convention* rights based on 'a solid bedrock of core legal principle', against a flexible, teleological approach to procedural justice, more in line with the common law tradition.

The applicants submitted the right to a fair hearing in the *Convention* conferred a core, irreducible entitlement to be told sufficient information of the case against a 'controlee' to enable him or her to challenge that case, and that there had been no approval of the 'makes no difference' principle.

The Secretary of State submitted that the relevant principle was whether, having regard to the proceedings as a whole, there had been significant injustice to the controlee or whether the controlee had been afforded a substantial and sufficient measure of procedural justice. On their submissions, the court was entitled to consider what difference any disclosure to a controlee may have made.

Unexpectedly, the submissions were answered definitively before the House of Lords hearing, when in Strasbourg, the ECHR held where full disclosure was not possible due to concerns for national security, the *Convention* requires that the 'controlee' still has the possibility to effectively challenge the case against him or her. This in turn obliges disclosure of sufficient information to enable the 'controlee' to give adequate instructions to a special advocate. Where the open material consists purely of general assertions but the case against the controlee is based solely, or to a decisive degree, on closed materials, the requirements of a fair trial will not be satisfied, however cogent or unanswerable the allegations.

The House of Lords, when faced with these dicta, followed the ECHR, although not without some reservation.

Lord Hoffman made very clear his belief that the ECHR decision was wrong, illustrating his personal politics in statements like:

> It is sometimes said that it is better for ten guilty men to be acquitted than for one innocent man to be convicted. Sometimes it is a hundred guilty men. The figures matter. A system of justice which allowed a thousand guilty men to go free for fear of convicting one innocent man might not adequately protect the public.

Other Lords expressly endorsed the ECHR approach with Lord Hope quoting that 'denunciation on grounds that are not disclosed is the stuff of nightmares. The rule of law in a democratic society does not tolerate such behaviour'. He said 'the slow creep of complacency must be resisted. If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle'.

Lord Scott, while agreeing that the ECHR decision had to be followed, disagreed with reading fair trial requirements into the PTA. Rather he believed:

> The underlying problem, as I see it, with the 2005 Act and the government's attitude to it, is that the government having formed the view that the provisions of the Act were necessary for the safety of the public from terrorism... has been unwilling publicly to accept that the implementation of these provisions may require the curtailment of fair hearing rights, and to face up to whatever may be the political consequences of that acceptance.

These diverse judgements demonstrate the wavering attitudes of the Lords on numerous issues underpinning the applications. Unfortunately for them, the potency of their jurisprudence was blunted once the ECHR decision emerged. As Lord Rodger said '*Argentoratum locutum, iudicium finitum* – Strasbourg has spoken, the case is closed.'

Relevance to the Victorian *Charter*

The decisions in *AF* and *A* may prove persuasive for interpreting the right to a fair trial guaranteed by s 24 of the Victorian *Charter*, however Victorian courts are not obliged to apply a prescriptive interpretation. Victorian judges may prefer to retain the flexibility concomitant with the common law tradition that the UK Lords were so loathe to concede.

Furthermore, Australian control orders (as imposed upon 'Jihad' Jack Thomas) were introduced into the *Criminal Code 1995* (Cth) by the *Anti-Terrorism Act 2005* (Cth), placing them under the purview of federal jurisdiction. Consequently State Human Rights Charters have little relevance.

The decision is available at http://www.bailii.org/uk/cases/UKHL/2009/28.html.

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HRLRC Policy Work

UN Committee on Economic, Social and Cultural Rights Review of Australia

The UN Committee on Economic, Social and Cultural Rights recently met in Geneva to review Australia's compliance with the *International Covenant on Economic, Social and Cultural Rights*. The Committee was briefed by a non-government delegation (including representatives from the Human Rights Law Resource Centre, National Association of Community Legal Centres and Kingsford Legal Centre) on 4 May and an Australian Government delegation on 5 and 6 May.

On 25 May 2009, the Committee released its Concluding Observations on Australia. The Committee's report commends Australia on recent initiatives and advances, including the national human rights consultation, efforts to combat violence against women, and the Apology to the Stolen Generations. The Committee also, however, made 26 recommendations for Australia to improve its human rights performance with respect to economic, social and cultural rights, in the following areas:

- implementation of a comprehensive national human rights legislation that includes the protection of economic, social and cultural rights;
- the enactment of comprehensive federal anti-discrimination laws;
- strengthening the mandate of the Australian Human Rights Commission to cover ESC rights;
- implementation of the recommendations of the *Little Children Are Sacred* report with respect to the Northern Territory Intervention;
- the realisation of economic, social and cultural rights for particular groups, including people with disability, asylum seekers and Aboriginal peoples;
- the development of a comprehensive poverty reduction strategy;
- ensuring universal and adequate social security coverage and removing the 'conditionalities' associated with the payment of social security benefits; and
- adopting special measures to improve workforce participation among disadvantaged groups.

The Committee also called on Australia to take urgent action to address the human rights implications of climate change and to increase aid to developing countries; the first time that a UN treaty body has included recommendations on these issues in a human rights report.

The Committee's Concluding Observations were released on 25 May 2009 and are available at: http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc.

For further information about the Committee's review of Australia, including comprehensive NGO reports and fact sheets, see: http://www.hrlrc.org.au/content/topics/esc-rights/icescr-ngo-report-australia-un-committee-on-economic-social-and-cultural-rights/.

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

HRLRC and PILCH Contribute to International Jurisprudence on the Right to Equality and Non-Discrimination

In May 2009, the UN Committee on Economic Social and Cultural Rights adopted *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, an authoritative interpretation of art 2(2) of the *International Covenant on Economic, Social and Cultural Rights.* Article 2(2) requires States Parties to guarantee the rights in ICESCR 'without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' The General Comment elaborates the content and meaning of art 2(2), including in respect of states' obligations, the prohibited grounds of discrimination, and the measures necessary to ensure national implementation.

In 2008, the Human Rights Law Resource Centre, together with the Public Interest Law Clearing House, made a joint submission to the Committee in response to an early draft of the General Comment. In the submission, PILCH and the Centre welcomed the Committee's commitment to elaborating the nature and scope of states' obligations under art 2(2), but urged it to strengthen the General Comment in a number of key areas. In particular, the submission urged the Committee to:

- elucidate states' obligations to eliminate systemic discrimination;

- explain the positive and negative elements of the obligation to eliminate discrimination;
- emphasise the obligation to effectively remedy individual and structural discrimination;
- highlight the obligation to implement temporary special measures and clarify their meaning;
- clarify that differential treatment is permissible only if it pursues a legitimate purpose and is a proportionate response to the aim that it seeks to achieve; and
- further clarify prohibited grounds of discrimination.

It is very significant that many of these recommendations are reflected in General Comment No. 20.

In the General Comment, the Committee explained that, in order to guarantee the right to non-discrimination in the exercise and enjoyment of economic, social and cultural rights, States Parties must eliminate formal and substantive discrimination in the form of direct and indirect discrimination, in both the public and private spheres. In accordance with the recommendations made by PILCH and the Centre, the Committee further explained that States Parties must not only refrain from discrimination; they must also take positive steps to eliminate discrimination, including, in particular, systemic discrimination. In certain circumstances, states may be required to adopt temporary special measures. Reflecting the recommendations in the PILCH/Centre submission, the Committee clarified that '[s]uch measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved.'

The Committee also affirmed that not all differences in treatment will constitute discrimination requiring elimination under art 2(2). In line with the views of PILCH and the Centre, the Committee explained that differential treatment will not be characterized as discriminatory if the justification for the differentiation is 'reasonable and objective' and there is a 'clear and reasonable relationship of proportionality between the aim sought to be realised and the measures or omissions and their effects.'

In light of the submission's recommendation for further clarification around the prohibited grounds of discrimination in art 2(2), it is significant that the General Comment usefully elaborates the nature and scope of those grounds. In particular, it provides important insights into the breadth of attributes that may fall under the umbrella of the prohibited ground of 'other status,' noting that:

> [t]he nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of 'other status' is thus needed to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognised grounds in Article 2(2). These additional grounds are commonly recognised when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization.

Taking into account the importance of eliminating all forms of discrimination and ensuring substantive equality, General Comment No. 20 is especially significant in that it gives content and meaning to art 2(2) of ICESCR and provides normative guidance on the nature and scope of state obligations in this regard. As the Federal Government considers how to improve the protection and promotion of human rights in Australia, it is important that it seriously considers its obligations under ICESCR, including under art 2(2).

For a copy of General Comment No. 20, see:
http://www2.ohchr.org/english/bodies/cescr/docs/gc/E.C.12.GC.20.doc.

For a copy of the joint submission (and annexure), see:
http://www.hrlrc.org.au/content/topics/equality/equality-submission-to-un-committee-economic-social-cultural-rights-draft-general-comment-non-discrimination/.

Simone Cusack is Public Interest Lawyer at the Public Interest Law Clearing House (Vic)

HRLRC Casework

Centre Granted Leave to Appear as Amicus Curiae in Right to Life Test Case

On 17 June, the Centre was granted leave to appear as amicus curiae in the Victorian Supreme Court in the matter of *Chief Commissioner of Police v Bryant (in his capacity as Coroner)*.

The case concerns a coronial inquest into the death of a cyclist in December 2006 and, in particular, the Coroner's powers and the scope of matters into which the Coroner may inquire pursuant to s 19 of the *Coroners Act 1985* (Vic).

The Centre proposes to make submissions and assist the Court on three issues:

- the application of the right to life under s 9 of the *Charter*, particularly the procedural obligation to ensure that, in cases of death (or near death or potential death) in circumstances potentially engaging the responsibility of the state, provision is made for an independent and impartial official investigation procedure that satisfies certain minimum standards;
- the scope and operation of s 32 of the *Charter*, which requires that all statutory provisions be interpreted compatibly with human rights; and
- the retrospective operation of the *Charter*.

The Centre is being represented on a pro bono basis in this matter by Clayton Utz, together with Brian Walters SC and Sam Ure of Counsel.

Phil Lynch is Director of the Human Rights Law Resource Centre

Seminars and Events

'The Defence of Human Rights in Asia and the Malaysian Bar's Long March for Justice'

with Andrew Harding, Professor of Asia-Pacific Law – 13 July 2009

Time: 5.45 for 6.00pm – 7.30pm

Date: Monday, 13 July 2009

Venue: DLA Phillips Fox, Level 21, 140 William St, Melbourne

Cost: $20 / $10 concession

RSVP: By 6 July 2009 using Booking Form available at www.hrlrc.org.au/content/events/upcoming-events/seminar-the-defence-of-human-rights-in-asia-13-july-2009/

Andrew Harding is a Professor of Asia-Pacific Law at the University of Victoria in Canada. He is the former Head of the Law Department at the School of Oriental and African Studies, University of London and has also taught at the National University of Singapore and Harvard Law School.

Professor Harding has published widely in the areas of South-East Asian legal studies, comparative public law, law and development, comparative law theory and environmental law. His most recent publications include *Access to Environmental Justice: A Comparative Study* and *New Courts in the Asia-Pacific Region*.

Professor Harding is in Australia to teach 'Human Rights in Asia' as part of the LLM at Melbourne Law School.

'Advancing Women's Rights and Gender Equality'

with Justice Yvonne Mokgoro and Elizabeth Broderick – 27 July 2009

Time: 12.30pm – 2.15pm

Date: Monday, 27 July 2009

Venue: Mallesons Stephen Jaques, Level 50, 600 Bourke St, Melbourne

Cost: $25 / $15 concession

RSVP: By 20 July 2009 using Booking Form available at http://www.hrlrc.org.au/content/events/upcoming-events/seminar-advancing-womens-rights-and-gender-equality-27-july-2009/

About Justice Yvonne Mokgoro:

Justice Mokgoro has been a judge of the Constitutional Court of South Africa since 1994. The Court is one of the world's leading sources of human rights and equality jurisprudence.

Justice Mokgoro is also Chair of the South African Law Reform Commission. From 1995 to 2005 she was President of Africa Legal Aid, a non-governmental organisation which provides legal aid and human rights education throughout Africa.

Justice Mokgoro is a Professor of Law, a member of the International Association of Women Judges and Interim President of the South African Chapter of the International Federation of Women Lawyers.

About Elizabeth Broderick:

Elizabeth Broderick was appointed Australia's Sex Discrimination Commissioner and Commissioner responsible for Age Discrimination in 2007. Prior to her appointment, Ms Broderick was a partner with leading commercial law firm, Blake Dawson, and developed the firm's business case for flexibility in the workplace. Her efforts contributed to creating a workplace where more than 20 percent of the firm's employees engage in flexible work arrangements.

In 2002, Ms Broderick was named Australian Corporate Business Woman of the Year and Telstra NSW Business Woman of the Year. In 2009, she led an Australian delegation to the UN Commission on the Status of Women.

2009 Human Rights Gala Dinner – 31 July 2009, Melbourne

The event will acknowledge and celebrate the work and dedication of the many community organisations, not-for-profit groups, lawyers and others around the country in their efforts to engage and educate the community about the National Human Rights Consultation and, in so doing, to improve the promotion and protection of human rights for all Australians.

Speakers at the event include:

- **Justice Yvonne Mokgoro**, Judge of the South African Constitutional Court and leading human rights jurist
- **The Hon Catherine Branson QC**, President of the Australian Human Rights Commission

Australian journalist and author, **David Marr**, will MC the evening.

Subsidised tickets are available for not-for-profit and community groups.

Date: Friday, 31 July 2009

Time: 7.00 to 11.30pm

Venue: Atlantic, Shed 14 Central Pier, Docklands, Melbourne

Tickets: $150 per person ($75 for community and non-profit organisations)

Table bookings available

3-course meal, drinks and entertainment included

For further information and to book, go to: http://www.hrlrc.org.au/content/events/upcoming-events/human-rights-gala-dinner-31-july-2009/.

The 2009 Human Rights Gala Dinner is brought to you jointly by the Human Rights Law Resource Centre and the Australian Lawyers Alliance. All profits from this fundraising event will be donated to the Human Rights Law Resource Centre.

Liberty Victoria Annual Voltaire Award Dinner – 18 July 2009, Melbourne

Date: Saturday, 18 July 2009

Time: 7.00pm

Venue: The Windsor Hotel, 111 Spring Street Melbourne

Cost: $55 (concession) $65 (Liberty Victoria members) $75 (non-members)

RSVP: By Monday 13 July at www.libertyvictoria.org.au

The MC for the night is Julia Zemiro, television and radio presenter and host of SBS's RocKwiz.
The 2009 Voltaire Award winner is GetUp! The National Director of GetUp!, Simon Sheikh, will be the guest speaker.

Labour and Human Rights

An Address by Geoffrey Robertson QC – 31 July 2009, Sydney

Date: Friday, 31 July 2009

Time: 5.45 – 7.00pm

Venue: Trades Hall, 4-10 Goulburn St, Sydney

Cost: $40, $20 (concession)

RSVP: admin@evatt.usyd.edu.au or 02 8090 1170 or online at http://evatt.labor.net.au/events/8_20090612.html

On 31 July, in the auditorium of Sydney's historic Trades Hall, the Evatt Foundation is proud to present a lecture by Geoffrey Robertson QC, Labour and Human Rights. The seminar will be introduced by Julian Burnside AO, QC.

Human Rights Resources

Human Rights Fact-Finding Guidelines

The International Bar Association's Human Rights Institute has recently published international guidelines on human rights fact-finding by NGOs.

According to IBAHRI Deputy Director, Dr Phillip Tahmindjis, 'NGO fact-finding is now an important method by which human rights violations are investigated and made known. Such reports are frequently used by courts and tribunals as documentary evidence of the facts alleged in them, yet there is no agreed international standard by which such reports may be judged for accuracy and impartiality.'

The Guidelines, developed after wide consultation and extensive analysis over five years, cover matters relating to selecting a delegation for a fact-finding mission, being clear in the terms of reference, the use of interpreters and others during a mission, pre-visit preparation, working methods during the mission, report writing, publication and follow-up.

The Guidelines can be downloaded at: www.factfindingguidelines.org.

Book Review: *From Convention to Classroom: The Long Road to Human Rights Education*

Paula Gerber, *From Convention to Classroom – The Long Road to Human Rights Education: Measuring States' Compliance with International Law Obligations Mandating Human Rights Education* (2009)

Using a socio-legal approach, law academic Paula Gerber conducts an engaging qualitative assessment of the implementation of international human rights norms in both Australia and the United States. Narrowing her study, Gerber assesses to what extent art 29(1) of the *Convention on the Rights of the Child* ('CROC') is put into practice. Article 29(1) of the CRC requires States to provide children with human rights education ('HRE') that will foster a respect for human rights and develop the child to their full potential. Gerber employs a comparative method, contrasting the level of HRE in government secondary schools in Melbourne, Australia with government secondary schools in Boston, United States. These two developed States were chosen because they are both federations and because Australia has ratified the CRC, whereas the US has not, thus providing the basis for comparison. HRE is a crucial component of implementing and protecting human rights and Gerber's work is motivated by the concern that there is currently insufficient human rights education in schools. Using the lens of HRE, Gerber ultimately seeks to answer the questions: why do States enter treaties; what effect does treaty ratification have on State behaviour; and what factors most influence compliance with international treaties?

Utilising a combination of mail-out surveys and interviews, Gerber has compiled a rich body of data from which she draws some informative observations. Her interviews with teachers, government employees and non-governmental organisations reveal starkly different understandings of what constitutes HRE. The comprehensive research exposes the fact that few teachers are aware of art 29(1) of the CRC and that most teachers have a limited and very general understanding of what HRE is and how it can be implemented in the classroom. An analysis of the curriculum in both jurisdictions reveals that there are

extremely limited opportunities for HRE in schools' already overloaded curriculum. Further, there is a lack of government direction about the importance of HRE or how HRE may be incorporated and an absence of national policy on this issue. Whist this may be expected in the US, where the CRC has not been ratified and is in fact vocally opposed, it is surprising that this is also the case in Australia. Australia was active in drafting of the CRC and was keen to demonstrate to the international human rights community its enthusiasm in supporting this human rights initiative. Gerber concludes that Australia seeks to be seen as a committed member of the international human rights community but that, in reality, governments lack the political will to implement the necessary strategies, such as an effective National Committee for Human Rights Education (with adequate funding) at the domestic level.

It emerges that HRE takes place due to the efforts of individual teachers, who are generally motivated by some personal experience to incorporate human rights into their teaching and that the resources they utilise are mainly produced by NGOs. Gerber thus finds that grass roots efforts are having the greatest effect on the classroom, demonstrating the existence of a bottom-up approach to HRE in both Australia and the US. From this evidence, Gerber concludes that factors other than treaty ratification are essential to the implementation of HRE as the work of individual teachers appears almost entirely unrelated to the CRC. This research supports the findings of other studies that there is little connection between treaty ratification and State compliance with international human rights law.

Gerber skilfully analyses her data using various rational and normative theoretical models to understand what impediments exist to effective top-down implementation of HRE. This analysis uncovers various obstacles such as federalism, lack of political will, lack of teacher training, inadequate resources and an already crowded curriculum. However, Gerber argues for an integrated theory which canvasses all the factors that influence State behaviour and finds that each of the existing theories on their own are too limited in their scope. One draw back of this research is its narrow scope, as it is limited to the experiences in two developed cities, and Gerber herself recognises that it is dangerous to make broad assumptions on the basis of her research. However, she manages to place her findings appropriately amongst the results of other qualitative and quantitative studies so that her research valuably adds to the limited research in this area. By restricting the study Gerber is able to conduct in-depth qualitative research which provides valuable insight for further studies and for organisations who seek to improve both ratification levels and compliance with international human rights treaties.

It is notable that, since production of this text, both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have been critical of lack of a formal, national human rights education framework in their Concluding Observations on Australia. Both Committees recommended that Australia implement a program for HRE at all levels of education. The Committees further recognised that teachers, among other professionals who engage in human rights protection, require extensive training in order to implement the education reforms. Similar comments have been made at round tables throughout the National Human Rights Consultation, with participants frequently stating that human rights education needs to be made a priority at all stages of education in Australia. In response to these recent recommendations, Gerber's book provides a timely and valuable insight as to why previous HRE initiatives appear to have failed and about the true lack of understanding about what HRE is in schools at present. Gerber makes several pertinent recommendations, such as improved funding for the National Committee for Human Rights Education, more effective dissemination of HRE resources and a clear inclusion of human rights in the current curriculum structure, which would allow Australia to meet its current obligations under the CRC and implement the recent treaty body recommendations on Australia. This book is a valuable resource for anyone interested in HRE and is particularly useful for those coming from an educational, political or legal background, as it exposes the difficulties faced in implementing structured top-down human rights education in schools in Australia and the US and provides recommendations as to how these obstacles may be overcome.

Jess Williamson is on placement with the Human Rights Law Resource Centre from La Trobe University

Foreign Correspondent

Human Rights and Responsibilities in the United Kingdom: Some Reflections for Australia

The United Kingdom experience offers some valuable lessons in relation to the incorporation and implementation of a domestic human rights instrument. Although any recommendations made by the National Human Rights Consultation Committee must be grounded in the views and values of the Australian community, it would remiss of the Committee to not look to the experience of the UK in the adoption of the *Human Rights Act 1998* (UK) ('HRA').

With this in mind, a group of postgraduate law students and Law Faculty members from the University of Oxford prepared a submission to the Committee, under the auspices of Oxford Pro Bono Publico. The submission provides thoroughly researched brief on the UK experience and, more specifically, the lessons that Australia might derive from that experience.

Many of those who participated in the project are Australian citizens, with additional expertise of postgraduate students and Faculty members researching in the field of human rights and public law in comparable jurisdictions, including the UK, New Zealand and Canada.

A copy of the submission is available at http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/key-submissions-to-the-national-human-rights-consultation-june-2009/.

The final submission made 16 recommendations. It is only possible to deal briefly with three of the recommendations here. It should be noted at the outset that the submission and its recommendations focus on the form that a domestic human rights instrument should take, if one were to be adopted. We have not engaged in the arguments for and against the incorporation of a domestic human rights instrument; a debate which, no doubt, has been thoughtfully canvassed in some detail in the 35,000 submissions received by the Consultation Committee.

Before addressing the three specific recommendations, it is important to outline a substantial caveat to the submission. In circumstances where the terms of reference of the Committee were limited to the consideration of a legislative instrument, there seemed little benefit to considering a constitutionally entrenched model of protection, subject to extant forms of constitutional review. It is disappointing that the Committee was not given a broader mandate. There are reasons to suggest that a constitutional instrument may be the preferable option in the Australian context. In contrast to the UK when it first introduced the HRA, the Australian democratic system is already familiar with judicial review of legislation. It is unsurprising that comparative experience tells us that a constitutional model of human rights protection has been preferred for countries that had a pre-existing constitution.

What rights should be protected in an Australian Charter of Human Rights?

Particular attention should be paid to the current debate in the UK regarding the replacement or supplementation of the HRA with a 'Bill of Rights'. This in part has been motivated by the concern that the direct implementation of the European Convention on Human Rights failed to adequately reflect British interests, concern and values. The extensive consultation process currently underway in Australia will undoubtedly go a long way towards forestalling similar objections, ensuring both ownership and sensitivity to the Australian social, political and legal landscape.

In relation to social, economic and culturally rights, the Joint Committee on Human Rights ('JCHR') has recently issued a report indicating that there is widespread support in the UK for the inclusion of economic, social and cultural rights in a domestic human rights instrument. The report identifies that the crux of the debate concerns the form that such rights should take. Options put forward in report include fully justiciable and legally enforceable rights at one end of the spectrum, and unenforceable directive principles of state policy at the other. The JCHR proposed, as a middleground, an approach analogous to that taken in the South African Constitution: a duty of progressive realization by reasonable legislative and other measures, within available resources.

In the recent Green Paper (released 29 April 2009), *Rights and Responsibilities: Developing Our Constitutional Framework*, the UK Government reiterates its position that economic, social and cultural rights should be matters for the political process, rather than the courts. At the same time the Green Paper expressed a clear interest in articulating the guarantees of the welfare system, particularly in relation to healthcare and the well-being of children, in a legislative instrument.

Declarations of incompatibility

Over the past few months there have been a number of questions raised as to the constitutionality of a legislative dialogue model in the Australian federal context. At the heart of the debate is a concern about the constitutional validity of a 'declaration of incompatibility' mechanism, similar to that contained in section 4(1) of the HRA. Although acknowledging the constitutional difficulties (dealt with in some detail in Chapter 5 of the submission), recommendations suggesting a watered-down 'declaration of incompatibility' mechanisms are of some concern.

The UK experience demonstrates that judicial declarations of incompatibility have significant political weight. To date there have been 26 declarations of incompatibility, 7 of which have been overturned on appeal. The parliament has subsequently acted to amend the relevant legislation in respect of 17 of the remaining 19 declarations, and is currently considering its position in relation to the two most recent declarations of incompatibility.

The role of the Australian Human Rights Commission

Human rights reform is about more than the protection of legal rights by courts: it about the promotion of a human rights culture. The UK experience indicates the importance of an independent statutory authority to promote the values underpinning any domestic human rights instrument. In the UK, the Equality and Human Right Commission ('EHRC') was established on 1 October 2007, almost a decade after the enactment of the HRA.

Australia is fortunate to have an established human rights commission. It will be necessary to expand the mandate of the Australian Human Rights Commission, to reflect the rights contained in a domestic human rights instrument, and to provide expanded law enforcement powers in respect of those rights.

The opportunity to work with like-minded students and Faculty members over the past few months has been an engaging and rewarding process. It is hoped that the submission contributes in some way to the current debate in relation to the protection of human rights in Australia.

Jason Pobjoy is currently reading for the Bachelor of Civil Law at the University of Oxford. He will commence a PhD in international refugee law at the University of Cambridge in October 2009

If I Were Attorney-General…

From Convention to Classroom: Advancing Human Rights Education in Australia

'If you are thinking a year ahead – plant seeds.

If you are thinking 10 years ahead – plant a tree.

If you are thinking 100 years ahead – educate the people.'

– Kuan-Tzu (4th - 3rd Century BC) China

As Federal Attorney-General, I want to leave a legacy that will last 100 years, so my focus will be on educating the people, specifically about human rights. I am all too aware that Australia presents itself to the international community as a strong supporter of human rights education (HRE). We have ratified numerous treaties containing provisions mandating HRE, including the *Convention on the Rights of the Child*, art 29(1) of which states:

> States Parties agree that the education of the child shall be directed to: …
>
> (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

Not only has Australia committed itself to implementing this provision but we have also been a key player in other international HRE initiatives. For example, we signed up to the UN Decade for HRE (1995-2004) and, in 2004, actually introduced in the UN General Assembly, the draft resolution proposing the World Programme for HRE (2005 – ongoing), which was duly proclaimed. Thus to all the world, we look like a State that takes its HRE responsibilities very seriously. However, I know that children in Australian schools do not generally learn about human rights. There are many reasons for this, including:

- human rights are not part of the formal curriculum in any state or territory;

- teachers are not trained in how to teach human rights as part of their teacher training;
- there is a lack of understanding about where/how to teach human rights (should there be a separate subject devoted to human rights, or should it be incorporated into exiting subjects like English, History or Civics?); and
- the 'crowded curriculum' phenomenon whereby teachers struggle to teach everything that is already in the curriculum within the available time, and therefore resist efforts to add even more material.

I know we have a national Human Rights Education Committee, but it does not appear to have been very active of late. One of my first tasks as Attorney-General would therefore be to re-invigorate this body, and assign to them the task of developing a National Human Rights Education Plan that is comprehensive, effective and sustainable. I would stress that I want the Plan of Action to be a practical guide as to the steps that need to be taken in order to ensure HRE is part of the educational experience of every child attending school throughout Australia.

The next step I would take as Attorney-General would be to request a meeting with the recently established Australian Curriculum, Assessment and Reporting Authority. I know that they are working on a uniform national curriculum and I want to make sure that HRE is an integral part of the end product, so that our domestic practises reflect the international persona we seek to portray in this field.

I have looked at the way human rights education is addressed in our two domestic Human Rights Acts (Victoria and the ACT) and note that in Victoria, for example, the responsibility 'to provide education about human rights and this Charter' falls on the Victorian Equal Opportunity and Human Rights Commission (s 41 of the Charter). To imbed HRE in the school curricula is too large a task for the Commission, and clearly needs to be part of the portfolio of the Department of Education. If we are to have a national bill of rights, I will make sure that this mistake is not repeated, and that education about human rights, at least within schools, is the responsibility of the Department of Education. I will lobby my mate, the Treasurer, to ensure that there is money allocated in the budget for this undertaking.

In addition, I would encourage the Australian Human Rights Commission to continue to publish excellent resources for teachers and students about human rights, but to work more closely with relevant Education Departments to ensure greater use of these materials in schools. This should be possible once HRE becomes part of the formal school curricula.

Finally, I would research the way human rights are incorporated into the school curricula in other countries. I gather that South Africa, Canada and Ireland have all enjoyed some success in this regard. No point in re-inventing the wheel, let's see what we can learn from their experiences. Come to think of it, maybe I should check my travel budget and see whether I can manage an overseas study tour so that I can get some first-hand knowledge about HRE in practice…

Once all these initiatives come to fruition, we should see a generation of young Australians who understand, respect and promote human rights, and start to build a culture of human rights. Hopefully, it won't take 100 years for this dream to be realised!

Dr Paula Gerber is a Senior Lecturer at Monash University Law School, a Deputy Director of the Castan Centre for Human Rights Law, a Sessional Member of the Victorian Civil and Administrative Tribunal, and author of the book From Convention to Classroom: The Long Road to Human Rights Education *(2008) VDM Publishers, Germany.*