human rights law resource centre

Bulletin
Number 40 – August 2009

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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

Why the Current UN Treaty Body Reform Process Cannot Fully Deliver

The discussion around the reform of UN human rights mechanisms in recent years has focused overwhelmingly on the creation of the UN Human Rights Council. In this shadow, the UN human rights treaty bodies also enhanced their efforts to review disparate working methods following a 2006 proposal by the UN High Commissioner for Human Rights for a unified single standing treaty body. Then High Commissioner, Louise Arbour, identified many challenges, including that 'limited coordination and collaboration among treaty bodies, and different approaches, in particular with respect to the role of NGOs, NHRIs and the wider United Nations system, increase duplication and impede interaction with stakeholders, who find the system obscure.' While the single treaty body idea did not garner support, the critical arguments it presented necessitated that the treaty bodies consider more seriously how to coordinate and streamline their work.

Progress since then has been slow. A central cause is that the Inter Committee Meeting ('ICM') of treaty bodies – the primary mechanism mandated to address treaty body reform – itself requires reform, thus falling foul of a fatal caricature of UN bureaucracy. Among its shortcomings has been its inability to adequately consider and incorporate NGO and National Human Rights Institutions ('NHRIs') contributions into its work, despite its appreciation for their contributions each time the ICM meets.

The maze of differing treaty body working methods are well-known to those who have engaged with more than one of these bodies, including knowing when a State party will be examined; determining the best time to submit information, whether elements may be kept confidential and who to communicate with; arranging meetings around the examination of the State; and having clear expectations regarding outcomes and follow-up. It is even less clear for NHRIs, as a number of Committees call for their active participation, while others are silent. Many NGOs and NHRIs know from experience which methods work best, although treaty bodies themselves are often reluctant to concede that others function better, and are thus resistant to change.

Chairpersons of treaty bodies have convened to share information since 1984, where discussion focused on external challenges faced by States, such as their failure to report. However, with new conventions, Committees and States Parties, challenges within the treaty body system itself increasingly became the focus of meetings.

ICMs began in 2002 alongside the meetings of Chairpersons to look specifically at methods of work and 'substantive issues that affected all treaty bodies'. These meetings increased to twice per year in 2008 in order to 'make recommendations for the improvement and harmonization of working methods of human rights treaty bodies'.

The ICM meets in Geneva in June/July and December each year and tends to address the same issues according to an agenda drafted by the OHCHR secretariat. This included, at the most recent meeting in June 2009 for example, follow-up to concluding observations, the identity and role of country rapporteurs, and cross-referencing of each other's work.

However, the first critical problem with the current ICM arrangement when it comes to addressing NGO participation, and all other matters related to harmonisation, is the rotating composition of the ICM itself. At each meeting, membership changes as treaty bodies elect new Chairpersons and send different additional representatives. This stifles continuity in the discussions, resulting in a situation where the same discussions around the Universal Periodic Review mechanism of the Human Rights Council, for example, have taken place at the last three meetings without any clear development or outcome.

A second related problem arises from the apparent lack of authority vested in representatives to fully speak for and make decisions on behalf of their respective Committees. Treaty bodies are not in a position to consider the agenda of upcoming ICM meetings and so do not consider collective positions in advance. Individuals then come in with their own views, which are not necessarily consistent with the general view of their Committee or their predecessor on the ICM. Representatives then report back to their Committees on issues addressed at the ICM, with rarely adequate levels of detail, and individual treaty bodies more often than not fail to approve these outcomes.

Working within this environment, a group of international NGOs (comprising Amnesty International, the Association for the Prevention of Torture, the International Service for Human Rights, International Women's Rights Action Watch, the NGO Group for the CRC, Save the Children, and the World Organization against Torture) with long-standing experience working with the treaty bodies formulated a joint submission in early 2008 intended to enhance the system by outlining best practices and recommendations related to NGO participation (see NGO Joint Submission to the 7th ICM, 2008, at http://www.ishr.ch/lca/statements_general/treaty%20bodies/joint_ngo_icm_7.pdf). The submission was well-received by the ICM, yet the summary report and recommendations of the June and December 2008 ICM meetings made no reference to the submission. Advancements have been made in relation to certain areas contained within the submission, such as agreement on the need for more effective follow-up procedures, yet generally NGOs have had to reiterate recommendations in consecutive meetings with no institutional memory of the ICM. The same can be said with NHRIs' attempts to secure recommendations in 2007 and again in 2009, without any noticeable shift. This has undermined NGOs' and NHRIs' confidence in investing in the process, despite an offer by the secretariat in December 2008 to provide space for interventions by NGOs and NHRIs under all agenda items.

So what is needed? First, Committees must be provided with a draft agenda by the secretariat well in advance of ICM meetings and must allocate time to considering what its representatives should contribute to the ICM meeting. The agenda should include elements that the ICM could reach consensus on, such as webcasting of the treaty bodies, for example. The ICM itself then needs to be invested with decision-making powers. This was recommended by the International Service for Human Rights in December 2008, and was also taken up by the ICM itself and the new UN High Commissioner for Human Rights, Navi Pillay, in her engagement with treaty bodies in 2009. To date, however, only the Committee on the Rights of the Child has agreed to this proposal, in January 2009, while the Committee against Torture rejected such a development at its session in April 2009, although its reasons are not clear as this was considered in private session (an example in itself of less than ideal working methods). This decision does not bode well for the future relevance of the ICM.

The ICM should then give official consideration to recommendations presented by NGOs, NHRIs and other stakeholders, including in its final reports. NGOs need also to consider how to make more strategic use of the space provided. The ICM would benefit from the input of national NGOs, who can relay first-hand experience of the challenges of engaging with the system, while NGOs based in Geneva can remind Committees of ICM recommendations during their regular meetings on working methods. Recent suggestions from NGOs at the June 2009 meeting included that the ICM make decisions in December on issues discussed in June. NGOs should also consider submitting their views to the ICM's

working group/task force on follow-up to concluding observations, to be established in late 2009, and to push for other interim working groups to address outstanding recommendations. But ultimately, as described, the ICM must first illustrate a commitment to making use of what has already been provided.

In relative terms, it should be noted that the much more difficult challenge of protecting the 'independence and expertise' of treaty bodies exists outside and transcends the ICM process. With a recent increase in treaty body membership of working Ambassadors and politicians (including incidentally the Chair of the ICM, who is also the Assistant Minister of Foreign Affairs of Egypt), this requires a strengthening of States Parties understanding of independence and expertise, not only when it comes to nominating candidates but also in applying these criteria when casting their vote for the election of new treaty body members.

Nonetheless, the current framework within which treaty body members can contribute should also be put to proper use. The current ICM structure, however, tends to have the opposite effect of reinforcing the former High Commissioner's perception that 'the treaty body system … does not function as an integrated and indivisible framework for human rights protection'. And so, with little credit to the UN human rights system, the mechanism for reform must itself first be reformed.

Gareth Sweeney is Deputy Manager of the International Human Rights Defenders Programme at the International Service for Human Rights in Geneva

News

Legislative Measures Improve Disability Rights

On 25 June 2009, Parliament passed the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008.

The Bill seeks to improve the efficiency and effectiveness of anti-discrimination system and clarifies the obligation of employers, service providers and other parties to remove discriminatory barriers for people with disabilities.

The Attorney-General has also signed a declaration under the *Human Rights and Equal Opportunity Act 1986* to enable the Australian Human Rights Commission to conciliate complaints based on breaches of the *Convention on the Rights of Persons with Disabilities*. This declaration gives the Commission power to consider disability rights under the Convention and enables it to report to Government on how the Convention is being implemented.

Have Your Say about Homelessness and Human Rights

On 18 June 2009, the House of Representatives Standing Committee on Family, Community, Housing and Youth announced an inquiry into homelessness legislation.

The inquiry follows on from the Federal Government's 2008 White Paper on Homelessness, The Road Home: A National Approach to Reducing Homelessness, in which it committed to 'enact new legislation to ensure that people who are homeless receive quality services and adequate support.' For further information on the White Paper, see www.pilch.org.au/white_paper/.

The Inquiry Terms of Reference specifically direct attention to 'the scope of any legislation…in the areas of social inclusion and rights': see www.aph.gov.au/house/committee/fchy/homelessness/index.htm.

The Human Rights Law Resource Centre, with the pro bono assistance of Mallesons Stephen Jaques, is preparing a submission to the inquiry which will focus on the right to adequate housing, including as to issues of: non discrimination, core minimum standards; progressive realisation; benchmarking and monitoring; and justiciability and enforceability.

Submissions to the Inquiry are called for by 14 August 2009.

Senate Inquiry into Same-Sex Marriage

The Senate Committee on Legal and Constitutional Affairs has begun receiving public submissions for its inquiry into the Marriage Equality Amendment Bill 2009, which was introduced into the Parliament by Australian Greens senator Sarah Hanson-Young in the final week of June.

The bill seeks to remove all discrimination from the *Marriage Act 1961* (Cth) on the basis of sexuality and gender identity and to permit marriage regardless of sex, sexuality and gender identity.

The Senate has not examined the issue of same-sex marriage since 2004, when it received some 16,000 public submissions – mostly standardised letters sent by members of conservative religious organisations.

Before the Committee could conclude its 2004 inquiry, the Australian Parliament became the first legislature in the world to pass a law specifically rejecting the legal recognition of same-sex marriage. The Australian Labor Party, which was in Opposition at the time, voted in favour of the amendment to the *Marriage Act*. The party will have an opportunity to review its policy on this important human rights issue at its triennial national conference in Sydney later this month. The gathering will coincide roughly with the fifth anniversary of the same-sex marriage ban.

The right to marry is protected by the *ICCPR*. However, the UN Human Rights Committee has interpreted this right narrowly to exclude same-sex marriage. Many human rights organisations, including the HRLRC, disagree with this interpretation, believing that the right to marry applies without distinction as to gender or sexual orientation. Seven countries and six US states now allow same-sex marriage. The HRLRC supports full marriage equality and has endorsed Equal Love, a national coalition of more than 50 organisations working on this issue.

For further information about the inquiry, see http://www.aph.gov.au/senate/committee/legcon_ctte/marriage_equality/index.htm. A closing date has not yet been set. The Committee is due to report in November.

Tim Wright is a Board Member of Australian Marriage Equality

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The Centre has recently established a Facebook page. To keep abreast of the latest HRLRC developments, follow us on Facebook or even become a 'fan' by clicking on the Facebook icon at www.hrlrc.org.au.

You can also keep up with the most recent developments by subscribing to our RSS Feed.

National Charter of Rights Developments

National Human Rights Consultation Committee Convenes Public Hearings

The National Human Rights Consultation Committee convened Public Hearings at Parliament House in Canberra from 1 to 3 July. According to the Committee, the Public Hearings were intended to provide a forum for key commentators on human rights issues, from both Australia and overseas, to present information to the Committee.

The Director of the Human Rights Law Resource Centre, Phil Lynch, was invited to participate on a panel entitled 'Developing a Culture of Human Rights'. On behalf of the Centre, Mr Lynch made five fundamental observations, set out below.

First, it is misconceived to debate the merits of a Human Rights Act as a dichotomy between re-distributing power to judges or parliaments. Human rights instruments involve re-distributing power to the people.

Second, a Human Rights Act can have a powerful normative and educational impact. In Victoria, the Centre has used the Charter to protect dignity, address disadvantage, challenge unfairness, promote flexibility and responsiveness, and enhance policy-making and service delivery – sometimes through litigation but much more often through dialogue, advocacy and negotiation.

Third, in order for a Human Rights Act to have (or at least maximize) the positive impacts referred to above, it must be comprehensive, judicially enforceable and afford effective remedies. By comprehensive, it is meant that the Act should enshrine the full range of civil, political, economic, social and cultural rights. Such rights are inter-dependent and mutually reinforcing. By judicially enforceable, it is meant that all rights in an Act should be justiciable and that effective judicial remedies must be available as an ultimate sanction and vindication. While codes of conduct and soft power options may work well for the well-intentioned, sometimes something more is needed to achieve cultural change.

Fourth, in order for a Human Rights Act to have the positive impacts alluded to above, it must be accompanied by targeted, well-resourced, ongoing education and training. For legislators, policy-makers, the judiciary and the public sector, inadequate education and training runs the risk of rendering any human rights instrument – no matter how eloquent and comprehensive – little more than a tick-the-box exercise. Further, for human rights to be relevant, living, breathing, dynamic and effective, the community, particularly the marginalized and disadvantaged, must be able to understand and exercise their rights, whether independently or, more often, through community sector advocates. This requires ongoing education and training for the community, and adequate resourcing for community sector advocates.

Fifth, there are a range of other initiatives that could assist in developing a culture of human rights. In the Centre's first submission to the Consultation, entitled *Engage, Educate, Empower*, we set out eight key areas in which reform would assist in this process. Briefly, these areas relate to:

- expanding the role, functions and resources of the Australian Human Rights Commission;
- developing, mainstreaming and integrating human rights education at all levels of the curricula;
- expanding access to justice, including through additional funding for the legal aid and community legal sectors and through government procurement practices;
- building human rights capacity in Australian civil society, including through additional resources, taxation reform, and dialogue with government;
- enhancing Australian engagement with the international human rights system and mainstreaming and integrating human rights in Australian foreign policy, including with respect to aid, development, trade, investment and security;
- establishing a Joint Parliamentary Committee on Human Rights to lead parliamentary engagement with and understanding of human rights issues at both the domestic and international levels;
- holding a national, public inquiry into the merits of a single, comprehensive Equality Act; and
- developing and deploying a range of soft and hard power options for promoting the human rights responsibilities of business.

It is crucial to re-iterate, however, that these initiatives would be most effective as complements to human rights legislation and that the effective development of a culture of human rights requires a robust enabling framework; namely a comprehensive, national, judicially enforceable Human Rights Act.

Extension for National Human Rights Consultation

The Attorney-General has granted a one month extension to the reporting date of the National Human Rights Consultation. The Committee will now report to Government by 30 September 2009.

According to the Attorney-General, the Committee requested a short extension to ensure that it has sufficient time to consider all of the views expressed by the community during the consultation. The Committee has undertaken a broad and extensive consultation process, receiving around 40,000 written submissions and conducting 66 community roundtables in 52 locations across Australia.

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.

Residential Tenancies Amendment (Housing Standards) Bill 2009

The Residential Tenancies Amendment (Housing Standards) Bill 2009 aims to protect Victorian tenants from living conditions which are considered substandard and do not meet public health expectations.

Amendments to the *Residential Tenancies Act 1997* ('RTA') seek to achieve these aims by empowering the Minister to:

- set minimum housing standards for rental properties and rooming houses through regulation; and

- resolve disputes between tenants and landlord which may arise if these minimum standards are not complied with.

The Statement of Compatibility in relation to the Bill identifies three *Charter* rights engaged by these measures: the right to privacy and reputation (s 13), protection of families and children (s 17) and property rights (s 20).

Division 8 of the RTA as it currently stands sets out requirements with which landlords must comply in order to lawfully enter premises, namely: the grounds of entry; the manner in which entry can be made; and the notice period which must be given. These requirements protect tenants' right to privacy, and are not abrogated by the provisions of the Bill.

Section 11 of the Bill actively protects the rights of families and children by giving the Minister the power to formulate standards of physical safety, health and comfort. This provides particular protection to vulnerable families and children.

The Statement of Compatibility asserts that the Bill will not diminish property rights. The property rights of landowners are not weakened by the obligation in s 20 to repair, modify and upgrade their properties to meet minimum standards. The requirement for landlords to meet the cost of improvements themselves is consistent with the *Charter*, and does not constitute extraction of property as it is an incidental expense associated with the landlord entering into a commercial relationship with his or her tenant. The Statement of Compatibility notes that this requirement is equivalent to the payment levied to obtain a roadworthy certificate in order to register a vehicle.

The Statement of Compatibility also refers to the human right to housing as included in art 11 of the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'). While the *Charter* does not contain a specific section which replicates this right, Australia is a signatory to the ICESCR. General Comments of the UN Committee on Economic, Social and Cultural Rights state that the right to housing in art 11 of the ICESCR should not be interpreted narrowly, but rather as a right to live somewhere in security, peace and dignity. The right therefore entails that housing must be habitable and provide adequate space and protection from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease. The Bill engages and applies this right through the creation of minimum housing standards.

The Statement of Compatibility concludes that the Bill's social equity objectives and rights enhancing provisions comply with the requirements of the *Charter*. The Bill will improve housing for all tenants without diminishing the property rights of landowners.

Amelia Edwards and Emma Barton, Human Rights Law Group, Mallesons Stephen Jaques

Victorian Charter Case Notes

Right to Privacy and Unlawfulness of Eviction into Homelessness

Homeground Services v Mohamed (Residential Tenancies) [2009] VCAT 1131 (6 July 2009)

The Victorian Civil and Administrative Tribunal ('VCAT') has held that a non-profit welfare agency acted unlawfully pursuant to s 38(1) of the Victorian *Charter* in seeking to evict a young tenant from transitional housing in accordance with a 'youth tenancy policy' in circumstances in which it was likely that the tenant would thereby become homeless.

Facts

The landlord, Homeground Services, is a non-profit welfare agency that has contracted with the Director of Housing to provide transitional housing to indigent tenants.

The tenant, Abdi Mohamed, is 21 years old and commenced his tenancy with Homeground on 23 November 2007. He is supported in his tenancy by Southern Direction Youth Services ('SDYS'), which has a protocol with Homeground pursuant to which SDYS nominates and supports prospective tenants and Homeground provides transitional housing for the tenants so nominated.

Homeground has a policy with respect to 'youth tenancy' (tenants under 24 years of age), which relevantly provides that:

- The tenant must have an 'exit strategy' (that is, a long term housing plan) in place within 14 months of the commencement of the tenancy.

- If the tenant is approved for public housing by the Director of Housing within 14 months, the tenant may continue in transitional housing until the public housing becomes available.
- If the tenant's 'housing exit' is into private housing, the tenant may stay in the transitional housing for a maximum of 18 months from the commencement of the tenancy. A 120 day notice to vacate pursuant to s 263 of the *Residential Tenancies Act 1997* (Vic) ('RTA') is given to the tenant at the 14 month mark, effectively giving the tenant another four months' occupation of the rented premises. Thereafter, an application for possession is made to VCAT.

In the present case, SDYS did not apply on the tenant's behalf for public housing and the tenant is unable, on his Newstart allowance, to afford private housing.

In accordance with its policy, Homeground gave the tenant a 120 day notice to vacate, pursuant to s 263 of the Act, on 5 February 2009 for vacation by 10 June 2009 and subsequently applied to VCAT for a possession order on 17 June 2009.

The evidence in the case established that:

- The tenant is conscientious in his payments of rent, and maintained the premises appropriately.
- The tenant had complied with all reasonable policies and requests from Homeground and SDYS.
- The likely effect of obtaining a possession order would be to make the tenant homeless (through, on the evidence, no wrong-doing or fault on his part), and to give a home to a person who is currently homeless.

There was no evidence that, prior to issuing a notice to vacate, Homeground considered the reasonableness of that decision, or the reasonableness of the implementation of its 'youth tenancy' policy in the circumstances of this case.

Decision

VCAT held that the Director of Housing is a public authority pursuant to s 4(1)(b) and/or s 4(1)(c) of the Victorian *Charter* and, further, that Homeground is also a public authority, being 'an entity whose functions are or include functions of public nature, when it is exercising those functions on behalf of the State or a public authority [the Director of Housing] (whether under contract or otherwise)'.

As a public authority, it is unlawful, pursuant to s 38(1) of the *Charter*, for Homeground 'to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.'

VCAT held that the termination of a tenancy prima facie engages s 13(a) of the *Charter*, which provides that 'a person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with'. The Member noted that, in this section, the term 'arbitrarily' is to be understood as being distinct from 'unlawfully', and refers to something being 'dependent upon will or pleasure', 'based upon mere opinion or preference as opposed to the real nature of things' or 'discretionary, not fixed'. The Member further held that, on the evidence, 'the implementation of the landlord's "youth tenancy" policy in the circumstances of this case was arbitrary, for the purposes of s 13(a) of the *Charter*'.

While not explicitly considering s 7(2) of the *Charter*, which permits reasonable limitations on human rights, the Member did consider the argument that the policy is not arbitrary in that it 'reflects a need to achieve broader aims, that is, to maintain the landlord's ability to provide transitional housing for indigent people who require it'. Rejecting this argument, the Member found that there was no evidence that transitional housing arrangements would be undermined in the absence of a strict policy such as that applied by Homeground, noting that 'a tenant who otherwise abides by the landlord's housing policies, and who maintains their tenancy in accordance with the provisions of the *Residential Tenancies Act* may, if they have been approved within the relevant time by the Director of Housing for public housing, continue in transitional housing until the public housing becomes available, regardless of how long that takes (and that in such cases, it may take years for the public housing to become available)'.

Having regard to the above, VCAT held that:

- As a public authority, Homeground must comply with s 38(1) of the *Charter*.
- By giving a notice to vacate pursuant to s 263 of the RTA, in the circumstances of this case, Homeground acted in a way that was incompatible with the right to privacy in s 13(a) of the *Charter*

and, furthermore, or in the alternative, failed to give proper consideration to a relevant human right, both contrary to s 38(1) of the *Charter* and therefore unlawful.

- Accordingly, in the terms of s 330(1) of the RTA, Homeground was not 'entitled to give the notice' given under s 263.

By consequence, the application for an order for possession was refused.

The decision is available at http://www.austlii.edu.au/au/cases/vic/VCAT/2009/1131.html.

Phil Lynch is Director of the Human Rights Law Resource Centre

Supreme Court holds that the 'Interests' of Mortgagors include their Right to Protection from Arbitrary Interference with the Home

Nolan v MBF Investments Pty Ltd [2009] VSC 244 (18 June 2009)

The Supreme Court of Victoria recently confirmed that fundamental human rights, both in international law and the Victorian *Charter*, are relevant interests that must be considered when a mortgagee sells a property to satisfy a debt. This is especially relevant where a debt is secured over a family home.

Facts

A mortgagor, Nolan, defaulted on a loan from MBF secured by a mortgage. The mortgage was over three adjoining parcels of land. The Nolan family home of 10 years was on lot 1. Lots 2 and 3 held gardens and a tennis court.

Under the *Transfer of Land Act 1958* ('TLA'), the mortgagee had the right to sell the mortgaged land 'in good faith and having regard to the interests of the mortgagor, grantor or other persons'.

Nolan argued that sales of lots 2 and 3 would have been enough to satisfy the debt, and he urged MBF not to sell lot 1 (with the family home). However, in 2001, MBF sold all three parcels of land, including the family home. The prices achieved at auction for lots 2 and 3 were enough to cover the debt.

Nolan argued that by unnecessarily selling the family home, MBF had not acted in good faith and with regard to Nolan's interests.

The key question was whether, in making the decision to sell all lots, MBF should have taken into account Nolan's desire to retain the family home.

Decision

Justice Vickery of the Supreme Court of Victoria found that Nolan's desire to retain the family home was a relevant interest under the TLA to which the bank should have had regard.

Justice Vickery interpreted the word 'interest' in the TLA expansively, meaning that according to the 'principle of legality' it included fundamental human rights, including the right to protection from arbitrary interference with a person's home. That right is reflected in art 17 of the ICCPR and s 13 of the Victorian *Charter*. His Honour said of the right:

> The right to protection of a person's home from arbitrary interference is reflected in all of the major international human rights instruments to which I have referred and the Victorian *Charter*. It is unequivocally a fundamental human right. …
>
> In the case at hand, applying the principle of legality necessarily involves construing the general word 'interests' as it appears in s 77(1) TLA in a manner which does not curtail the fundamental human right of protection of a person's home from arbitrary interference.
>
> To approach the matter otherwise, would result in an unintended curtailment of the right. … if the mortgagor was to have no relevant 'interest' in his home within the meaning of s 77(1) TLA, the way would be opened for the mortgagor to act in an arbitrary manner in making its choice. Such a construction of the section would render the fundamental human right ineffective in this circumstance.

MBF had failed to take into account Nolan's interest in making its decision to sell the family home. MBF should have taken reasonable care to protect Nolan's interest, but failed to do so.

> MBF recklessly dealt with the property in a way which sacrificed the interests of the mortgagor. The decision of MBF [to sell] … was not made in good faith, having regard to the relevant 'interest' of the mortgagor pursuant to s 77(1) TLA. The conduct was also manifestly unreasonable. … It amounted to an arbitrary interference of the most serious kind with Mr Nolan's right to continue in occupation of his home.

Accordingly, Vickery J held that MBF had acted in breach of the TLA. The question of damages was deferred to a later hearing.

Relevance to the Victorian *Charter*

This case is significant in that Vickery J was prepared to interpret the word 'interest' broadly to encompass human rights despite the fact that the TLA did not expressly refer to human rights.

The sale of land occurred in 2001, which is before the enactment of the Victorian *Charter*. However, Vickery J did not need to rely on s 32 of the Victorian *Charter* in order to import human rights principles into the TLA. Rather, the principle of legality required that they be taken into account. For all sales of land that occur after the commencement of the Victorian *Charter*, s 32 (which provides that all Victorian legislation be interpreted in accord with human rights) would reinforce Vickery J's decision. Furthermore, the fact that s 32 was not essential to the decision in this case may mean that the decision can also be used as persuasive authority in non-*Charter* jurisdictions.

This case serves as a reminder that human rights principles may be relevant even in relation to commercial agreements between parties, such as loan contracts, even in the absence of one of those parties being a public authority.

The judgment is available at http://www.austlii.edu.au/au/cases/vic/VSC/2009/244.html.

Helen Conrad is a lawyer with mdp McDonald Partners

Comparative Law Case Notes

Evictions Must be Just, Equitable and Reasonable

Residents of Joe Slovo Community v Thubelisha Homes & Ors [2009] ZACC 16 (10 June 2009)

The South African Constitutional Court has upheld a High Court decision to grant an application to evict approximately 20,000 residents of the informal settlement known as the Joe Slovo settlement. The eviction was sought by Thubelisha Homes (a government company), the Minister for Housing and the Minster of Local Government and Housing (together, the 'Respondents') for the development of an affordable housing project in the Western Cape (the 'Project').

The Court held that the Respondents had complied with laws and acted reasonably and in accordance with the Constitution. However, the Court granted the eviction order subject to certain conditions, to ensure that the eviction would be conducted in a just and equitable manner.

Facts

The Joe Slovo settlement

The Joe Slovo settlement began in the early 1990's and is situated at the start of the N2 Highway, Western Cape. The land which the settlement is built on is owned by the City of Cape Town.

In the initial years of the settlement during apartheid, security operatives would forcibly evict the Joe Slovo residents and destroy their dwellings. However by 2002, following a fire at the settlement, the City had provided tap water, toilets, refuse removal, drainage and electricity.

In 2005 another fire struck the Joe Slovo settlement and destroyed the homes of 996 families. The victims of the fire were informed they could not rebuild their homes but that they would be catered for through the Project. The Project was formally launched a month later. By this time, the land had been occupied by the Residents for over 15 years.

The Project

The Project is a pilot project of the South African government, which is aimed at upgrading all informal settlements along the N2 Highway, of which Joe Slovo was the starting point. The Project required that the Residents be relocated to Delft, 15 kilometres away, where temporary accommodation had been set up.

Project implementation issues and community disenchantment

In 2006 the Joe Slovo settlement suffered another fire and as a result most victims were transported to temporary accommodation in Delfit. A large number of the Residents voluntarily relocated to Delfit after encouragement to do so by the Respondents.

By mid 2006, however, cooperation between the Joe Slovo community and the authorities had broken down for a number of reasons, in particular:

- the government had increased the rent for new housing at the Project by four times (or more) that which was initially indicated;
- the government had reneged its promise that most of the Residents would be able to return to Joe Slovo; and
- the Residents felt that the authorities had not adequately communicated with them about the Project.

In early September 2007, the Respondents initiated eviction proceedings.

Decision

The Court delivered 5 separate judgements each of which considered two main issues:

- whether the Residents were 'unlawful occupiers' under the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998* ('PIE Act'); and
- whether the Respondents had acted reasonably in accordance with s 26 of the Constitution in seeking the eviction.

Were the Residents 'unlawful occupiers'?

As the Respondents sought an eviction order pursuant to the PIE Act, it was first necessary to establish whether the Residents were unlawful occupiers and subject to eviction under that Act.

The PIE Act defines an unlawful occupier as a person who occupies land without the express or tacit consent, or some other legal right to do so. If there was consent, there can be no eviction until the right to occupy is terminated.

The Residents argued that the City had tacitly consented to their occupation, pointing to indicators such as the fact they had been on the land for over 15 years and that the Council provided facilities such as water and electricity.

The Court held that at the time eviction proceedings were launched, the Residents did not have consent to occupy the settlement and were therefore unlawful occupiers. The Court differed in opinion about whether this had always been the case.

Justice and equity

The Court then considered, as required by the PIE Act, whether it was just and equitable to grant an eviction order. The PIE Act specifically requires the Court to consider the availability of suitable alternative accommodation as part of its analysis.

Availability of accommodation

The Court underscored the vital importance of ensuring suitable alternative accommodation where the State seeks to evict people from their homes. In the present case, the Court considered that the temporary accommodation at Delfit would be physically better, less dangerous and more hygienic than the current informal dwellings at the Joe Slovo settlement.

The Court also noted that the prospect of securing adequate housing after the temporary relocation was an important consideration. In this regard, the Court considered that the Respondents' undertaking to allocate 70% of the new housing to the Residents was sufficient to render the relocation just and equitable.

Concerns were raised about the hardship associated with the relocation, such as community dislocation, interrupted schooling and limited transportation to employment. However, the Court noted that the Constitution does not guarantee a person a right to government funded housing at a locality of their choice. In any event, the Court expressed the view that the Respondents had ameliorated hardship by undertaking to provide transport to relocated Residents.

Other relevant factors

The Court followed its decision in *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, which requires the Court to consider all relevant circumstances including the extent and nature of negotiations, the reasonableness of offers of alternative accommodation and time scales relative to the disruption which would be caused.

Requirement of engagement

The Residents argued that the Respondents had broken numerous promises and that the level of community consultation and engagement was inadequate. The Court held that while these factors are highly relevant, the promises were not broken deliberately but as a result of changing circumstances. Furthermore, while being critical, to varying degrees, of the community consultation process undertaken by the Respondents the Court held there had been a reasonable level of community engagement.

Reasonableness and justice of implementation choice

It had been argued that the Residents should not be relocated as in situ development of the Joe Slovo settlement was feasible. The Court held however that relocation was not an unreasonable implementation choice by the Government. Justice Sachs emphasised that the relevant enquiry is not whether there is a more desirable or favourable option.

Constitutional right to adequate housing

Section 26(2) of the Constitution imposes an obligation on the State to take reasonable measures, within its available resources, to achieve the progressive realisation of the right to adequate housing. The Court examined whether the Project and the actions of the Respondents in implementing the Project were reasonable and in accordance with the right to adequate housing.

The Court as a whole held that the Project had overall been implemented reasonably, despite any failings in regards to community consultation.

The Court recognised that reasonableness must take into account the interests of all people who are affected by the conduct of the Respondents. In this case the resistance to relocation was stalling the Project and affecting the interests of the thousands of Residents who had already voluntarily relocated.

In discussing the reasonableness of the Respondent's engagement with the community, O'Regan J held that the requirement to engage meaningfully should be understood together with the obligation to act fairly imposed by s 33 of the Constitution. Her Honour held, however, that it would be unduly burdensome to require that a fair hearing be given to the Residents each time a decision needed to be made. Instead fairness required that the Residents were aware of the Project generally and given a reasonable opportunity to comment on the fairness and reasonableness of the relocation process. Similarly, Yacoob J acknowledged that the principle of reasonableness requires realism and practicality.

The eviction order

In granting the eviction order, to ensure the eviction was just and equitable, the Court also ordered:

- that no person may be moved unless alternative accommodation is provided;
- that the alternative temporary accommodation meets minimum standards, including requirements as to size, materials and availability of essentials such as roads, electricity, water and toilet facilities;
- that there be meaningful engagement on the relocation timetable and any other matters arsing from it, such as transportation needs; and
- that 70% of the housing which is to be constructed at Joe Slovo be allocated to qualifying current and former Residents.

Relevance to the Victorian *Charter*

Whilst there is no explicit right to adequate housing in the Victorian *Charter*, this decision may inform the interpretation and application of s 13, which protects individuals against unlawful or arbitrary interferences with their home.

In particular, the factors relevant to the Court's determination in this case of whether an eviction is reasonable and just in the circumstances (namely the availability of alternative accommodation and the level of consultation and engagement) may also be relevant factors to be considered by a Victorian Court when determining whether an interference with the right to home is reasonable under s 7(2) of the Victorian *Charter*.

The decision is available at http://www.saflii.org/za/cases/ZACC/2009/16.html.

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Costs in Public Interest and Constitutional Litigation

Trustees for the time being of the Biowatch Trust v Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14 (3 June 2009)

The Constitutional Court of South Africa has confirmed that the general rule for an award of costs in constitutional litigation between a private party and the state is that if the private party is successful, it should have its costs paid by the state, and if unsuccessful, each party should pay its own costs.

The litigation must raise a genuine constitutional issue and any perceived 'misconduct' on the part of the applicant would need to be of such a compelling kind to justify a departure from the general rule. The Court held that the over-arching principle is not to discourage the pursuit of constitutional claims.

Facts

The Biowatch Trust, an environmental watchdog, brought an application to challenge the validity of a government agency's refusal to provide information regarding the genetic modification of organic material. Biowatch argued that the Registrar for Genetic Resources' failure to grant access to the information constituted an infringement of its rights to information in relation to constitutionally-protected environmental interests.

Biowatch was substantially successful in its claim and the High Court held that the Registrar had failed in its constitutional and statutory duties to provide the requested information. Despite this finding, the High Court was disapproving of the manner in which the requests for information were formulated and the relief claimed in the notice of motion. To mark its displeasure, no costs order was made against the governmental body in favour of Biowatch.

Another costs decision, the subject of this same appeal, involved Monsanto SA (Pty) Ltd, a company involved in biotechnology research. Monsanto intervened in the litigation to prevent Biowatch from having access to confidential information it had supplied the Registrar. Even though Biowatch obtained the information, the High Court ordered that Biowatch pay Monsanto's costs (as well as its own) because of its supposed 'inept requests for information'.

As a result of the controversy with the costs decisions and the anticipated 'chilling effect' they would have on public interest litigation, three public interest NGOs were granted the status of amici to assist the Court. The amici argued that the High Court misdirected itself in failing to give sufficient regard to the fact that Biowatch was a public interest NGO litigating not in its own behalf, but in the public interest.

Decision

General rule

The Court reaffirmed the general rule established in *Affordable Medicines* [2005] ZACC 3 that where a private party is seeking to assert a constitutional right and is successful, the government should pay the costs of that private party. If the private party is unsuccessful, each party should bear its own costs. The Court held that the rationale for this rule is three-fold:

1. it diminishes the 'chilling effect' that adverse costs orders have on parties with meritorious claims seeking to assert constitutional rights;
2. it recognises the inherent public interest in constitutional litigation, since the outcome will affect the rights of all those in similar situations; and
3. it acknowledges the state's primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution.

The Court confirmed that this general rule is not unqualified. For example, an applicant with a frivolous or vexatious claim should not expect that the worthiness of its cause will immunise it against an adverse costs award.

Application of general rule

The Court held that in determining whether to apply the general rule for costs in constitutional litigation, the following issues should be considered:

- whether the litigation raises genuine and substantive constitutional issues – will a costs order hinder or promote the advancement of constitutional justice?

- the character of the litigation and not the nature of the parties or the causes they advance, such as their private or public interests (*Affordable Medicines*);
- the extent of public controversy in the outcome of the litigation. The greater the public controversy, the greater need for transparency and commitment to the principles of the Constitution;
- the presence of public interest groups and acknowledgement that they play a vital role in the development of the Court's jurisprudence but they will not be granted a privileged status simply because they are acting in the public interest or happen to be indigent.

The Court held that the general rule does not ordinarily extend to constitutional litigation between private parties, but may be applicable if the parties raise important constitutional issues. Constitutional issues are more likely to arise in litigation where the state is required to perform a regulatory role, in the public interest, between competing private parties.

Outcome

The Court held that Biowatch raised important constitutional issues in terms of the rights to information and environmental justice and achieved substantial success in its meritorious claim. The 'misconduct' of Biowatch in the manner it requested the information would need to have been compelling to justify a departure from the general rule, and in this case, the Court held it was not. The manner in which the High Court chose to demonstrate its disapproval was held to be 'demonstrably inappropriate… and unduly chilling to constitutional litigation'.

As such, the appeal was upheld and the governmental authority was ordered to pay the costs incurred by Biowatch in the High Court and in this Court. In addition, the order of the High Court requiring the applicant to pay Monsanto's costs was set aside and no costs order was made in this respect.

Relevance to the Victorian *Charter*

This case demonstrates the significance of the issue of costs to access to justice, the rule of law and the vindication of the public interest.

In Victoria and throughout Australia, unlike in South Africa, there is no general public interest exception to the rule that costs follow the event. PILCH has observed that many meritorious public interest matters are not ultimately pursued due to the risk of an adverse costs order. In this way, costs rules are a disincentive to public interest litigation, particularly for marginalised and disadvantaged people.

Courts in other jurisdictions have been prepared to make orders protecting public interest litigants against adverse costs orders. The orders are described as 'protective costs orders' (PCOs) and may include orders that: a party will not be exposed to an order for costs if it loses at trial; the amount of costs that a party will be required to pay if it loses at trial will be capped at a certain amount; or there will be no order for costs whatever the outcome of the trial.

This case may form useful obiter for courts in determining costs in cases involving the protection of fundamental and quasi-constitutional rights and freedoms, such as those enshrined in the Victorian *Charter*. In addition, Australian courts may interpret this decision broadly to challenges under other Acts which involve regulation by government authorities, such as the *Freedom of Information Act 1982* (Cth).

The decision is available at http://www.saflii.org/za/cases/ZACC/2009/14.html.

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Unreasonable Delay in Criminal Proceedings: Supreme Court of Canada Holds 30 Month Delay Unconstitutional

R v Godin, 2009 SCC 26 (CanLII) (4 June 2009)

The Supreme Court of Canada upheld an appeal for a stay of proceedings where there was a delay of 30 months between the accused being charged and brought to trial. The Court held that the accused's right to be tried within a reasonable time under the *Canadian Charter of Rights and Freedoms* had been violated.

Facts

In May 2005 the accused was charged with sexual assault, unlawful confinement and threatening to kill his girlfriend. The Crown proceeded summarily, but four days before the trial date new evidence arose, and with the defendant's consent, the Crown elected to proceed on indictment.

The earliest date available for the preliminary hearing was 16 months later, in September 2006. Defence counsel proposed several earlier dates when he would be available, without any response from the prosecution. Subsequently, the preliminary hearing was adjourned twice, and the trial was finally set down to be heard in November 2007, 30 months after the charges were first brought against the defendant.

The accused brought an application for a stay of proceedings in June 2007, claiming that his right to be tried within a reasonable time guaranteed by s 11(b) of the *Charter* was violated. The defendant's application to stay the proceedings was successful at first instance, but reversed on appeal to the Ontario Court of Appeal. The defendant appealed to the Supreme Court of Canada.

Decision

The Supreme Court of Canada unanimously allowed the defendant's appeal and held that the accused's right to be tried within a reasonable time had been violated.

In assessing whether the delay was unreasonable, Cromwell J, with whom the other members of the Court agreed, looked to the length of the delay, the reasons for delay, and the prejudice to the accused, taking into account the interests that s 11(b) seeks to protect.

Length of delay

It was held that the delay in this case substantially exceeded the guidelines set by previous Supreme Court cases. The Court noted that, while this did not of itself make the delay unreasonable, the reasons for the delay and the prejudice caused to the defendant made the delay unreasonable in this case.

Reasons for delay

The Court found that the delay was mostly attributable to the Crown, who had neither sufficiently explained nor adequately justified its length. The defendant had tried to expedite the matter, but the Crown had ignored his efforts.

Although defence counsel had on one occasion rejected an earlier date proposed for the preliminary hearing, the Court remarked that 'while scheduling requires reasonable availability and cooperation, it does not require defence counsel to hold themselves in a state of perpetual availability'. It was not open to the Crown to place too much responsibility on the defence counsel for the delay.

The Court also took into account the fact that the case was relatively straight forward and would have required little court time, which added to the unreasonableness of the delay.

The Court emphasised that the Crown held the burden of explaining any unusual delays caused by forensic investigators, and noted that the defendant was entitled to timely disclosure of the case against him.

Prejudice

Whether the accused had suffered any prejudice as a result of the delay was a key consideration.

In the context of s 11(b) of the *Charter*, there are three relevant interests of the accused that are intended to be protected:

- liberty (regarding pre-trial custody and bail);
- security of the person (in the sense of being free from the cloud of suspicion); and
- the right to make full answers and defence (as delay can prejudice the defendant's ability to lead evidence, cross-examine witnesses and lead its defence).

The Court stated that the 'the question of prejudice cannot be considered separately from the length of the delay', and that prejudice may be inferred from the inordinate length of delay in this case. The Court also noted that it was more likely to draw an inference of prejudice as the delay increased.

The Court found that the defendant had suffered prejudice in this case because:

- the defendant was subject to strict bail conditions (even though the bail conditions had been relaxed as the delay lengthened);

- the defendant had experienced prolonged exposure to criminal proceedings resulting from the delay; and
- the case was likely to turn on credibility and the extra passage of time was likely to diminish the defendant's ability to effectively cross-examine relevant witnesses, which was critical to the defendant's case.

Relevance to the Victorian *Charter*

Section 25 of the *Victorian Charter of Human Rights* protects the rights of defendants during criminal proceedings, including the right to be tried without unreasonable delay. This case provides some valuable insight into the scope of the right to be tried without unreasonable delay, and guidance on how 'unreasonable delay' should be assessed.

The decision is available at http://www.canlii.org/en/ca/scc/doc/2009/2009scc26/2009scc26.html.

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Supreme Court of Canada Balances the Right to Freedom of Religion and the Best Interests of Children

AC v Manitoba (Director of Child and Family Services), 2009 SCC 30 (26 June 2009)

On 26 June 2009, the Canadian Supreme Court handed down a decision which discussed in detail the right of adolescents to make their own medical decisions. The Court held that the wishes of the child must be considered when determining what action was in the child's best interests.

Facts

AC was 14 years old. She was admitted to hospital with intestinal bleeding, and needed a blood transfusion. AC was a Jehovah's Witness and was prohibited from receiving blood or blood products. She, and her parents, refused to consent to the transfusion. AC's doctor applied for a court order permitting the transfusion on the grounds that it was medically necessary to prevent death or serious injury to AC.

Under s 25(8) of the *Child and Family Services Act* the Court has power to order medical treatment that is in the 'best interests' of the child, despite the child and/or parents refusing to consent to the treatment. Where a child is 16 or older, s 25(9) provides that the child's views should be determinative, and the Court shall not authorise the treatment without the child's consent unless there is evidence that the child lacks the maturity to appreciate the consequences of their decision.

AC was deemed competent to make decisions about her medical treatment, but because she was under 16, her wishes were not determinative. The court granted the treatment order as requested by the doctors, and the transfusion was given to AC. In making the treatment order, Kaufman J proceeded on the basis of deemed capacity, and did not investigate AC's actual capacity to make medical decisions. This was done because, in Kaufman J's view, there was no requirement under s 25 for the Court to give consideration to the wishes of a child under 16.

AC appealed the decision to order treatment. Her appeal was denied so she further appealed to the Canadian Supreme Court on the grounds that ss 25(8) and 25(9) of the Act:

- were unconstitutional because they create an irrebuttable presumption of incapacity for minors aged under 16 years and thus infringe the *Canadian Charter of Rights and Freedoms*;
- infringed her liberty and security interests (s 7 of the *Charter*);
- discriminated against her based on age (s 15 of the *Charter*); and
- violated her right to religious freedom (s 2(a) of the *Charter*).

In a 6:1 decision, the Canadian Supreme Court rejected AC's appeal and upheld the validity of s 25 of the Act on all grounds.

Decision

Justice Abella, in the majority, noted the difficulty of adolescent consent cases and said that, 'maturity is necessarily an imprecise standard'. Her Honour argued that the consideration of the particular child's

ability to make informed decisions was essential in order to ensure the constitutionality of s 25 of the Act, and said:

> It is a sliding scale of scrutiny, with the adolescent's views becoming increasingly determinative on his or her ability to exercise mature, independent judgment. The more serious the nature of the decision, the more severe its potential impact on the life or health of the child, the greater the degree of scrutiny that will be required.

Her Honour noted that this approach was consistent with the common law's 'mature minor' doctrine which has been developed in both Canadian and international jurisprudence. Under the doctrine, 'an adolescent's treatment wishes should be granted a degree of deference that is reflective of his or her evolving maturity.'

Whilst s 25(8) does not expressly provide for the wishes of a child under 16 to be considered, Abella J said the section must be viewed in the context of the Act. Her Honour referred to s 2 of the Act, which provides that a child of 12 years or more is entitled to be advised of the proceedings and can make their views known. It also provides that children under 12 can have their views considered where the judge is satisfied that they understand the nature of the proceedings. Section 2(1) provides that, in determining 'best interests', consideration should be given to the mental and emotional state of the child, the need for the treatment, the views and preferences of the child, and the child's religious and cultural heritage.

Justice Abella concluded that the 'best interests' test requires consideration of the child's views, and argued that it is, 'by definition, in a child's best interests to respect and promote his or her autonomy to the extent that his or her maturity dictates.'

With respect to s 7 of the *Charter*, her Honour noted that an inability to determine ones own medical treatment constitutes a deprivation of liberty and security of the person. However, Abella J considered that this is constitutional where the deprivation is in accordance with the principles of fundamental justice, including that the provisions must not be arbitrarily applied. Her Honour stated, 'it would be arbitrary to assume that no one under the age of 16 has capacity to make medical treatment decisions. It is not, however, arbitrary to give them the opportunity to prove that they have sufficient maturity to do so.'

With respect to s 15 of the *Charter*, Abella J noted that there are two questions in determining discrimination on the basis of age: (1) Does the law create a distinction based on an enumerated ground?; and (2) Does the distinction cause disadvantage by perpetuating prejudice or stereotyping? Her Honour stated that:

> By permitting adolescents under 16 to lead evidence of sufficient maturity to determine their medical choices, their ability to make treatment decisions is ultimately calibrated in accordance with maturity, not age, and no disadvantaging prejudice or stereotype based on age can be said to be engaged.

With respect to the s 2(a) right to religious freedom, Abella J noted that religious heritage forms part of the consideration given when determining the 'best interests' of the child. Accordingly, her Honour did not consider that s 25(8) of the Act violates the right to religious freedom.

Justice Binnie delivered a dissenting judgment and would have allowed AC's appeal. In essence, his Honour argued that s 25(8) of the Act did not specifically provide a child under 16 with the right to have their opinions heard and taken into consideration by the Court. Justice Binnie considered the approach put forth by Abella J, and said:

> [A] young person with capacity is entitled to make the treatment decision, not just to have 'input' into a judge's consideration of what the judge believes to be the young person's best interests. Under Abella J's approach, the court may (or may not) decide to give effect to the young person's view, but it is still the court that makes the final decision as to what is best for the young person. This mature young person, however, insists on the right to make her own determination about what treatment to receive or not to receive, based on a mature grasp of her perilous situation.

His Honour argued that the limitations on AC's rights were not reasonable as reasonableness relates to the purpose of the limitation. His Honour argued, 'if the legislative net is cast so widely as to impose a legal disability on a class of people in respect of an assumed developmental deficiency that demonstrably does not exist in their case, it falls afoul of the 'no valid purpose' principle …'

Relevance to the Victorian *Charter*

This decision may be relevant to the interpretation of ss 8, 14 and 21 of the *Victorian Charter of Human Rights and Responsibilities*.

Section 8 of the Victorian *Charter* is similar in effect to the Canadian s 15 provision. Accordingly, the two stage inquiry proposed by Abella J may prove useful in determining the scope of the s 8 prohibition on age discrimination.

Section 14 of the Victorian *Charter* provides for freedom of religion and is, in essence, equivalent to s 2(a) of the Canadian Charter. However, s 14(2) of the Victorian *Charter* provides that a person must not be restrained in a way that limits their freedom to have a religious observance or practice. This additional section may limit the impact of the s 2(a) analysis given by the Canadian Supreme Court.

Section 21 of the Victorian *Charter* protects the right to liberty and security of the person. Unlike s 7 of the Canadian Charter, the Victorian provision does not contain the limitation that the liberty and security can be deprived, 'in accordance with the principles of fundamental justice'. However, s 7 of the Victorian *Charter* imposes limitations of similar effect, and provides that human rights may be subject to 'reasonable limits'. In determining reasonableness, the Victorian *Charter* prescribes that consideration should be given to the relationship between the limitation and it's purpose (s 7(2)(b)). Accordingly, the discussion in *AC v Manitoba* may prove highly relevant.

The decision in *AC v Manitoba* may also impact on s 17 of the Victorian *Charter*, which provides for the protection of families and children. There is no corresponding right in the Canadian Charter, but the 'best interests' analysis given by the Canadian Supreme Court may prove useful if an *AC v Manitoba* type case should arise in Victoria.

The decision is available at http://www.canlii.org/en/ca/scc/doc/2009/2009scc30/2009scc30.html.

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UK Court of Appeal Considers Definitions of 'Public Authority' and 'Private Act'

London & Quadrant Housing Trust v Weaver, R (On the application of) [2009] EWCA Civ 587 (18 June 2009)

A recent decision of the Court of Appeal has revisited the vexed issue of the definition of 'public authority'. The decision warrants attention for a number of reasons. First, the decision acts as clear authority that a social landlord *is* a pubic authority, and that the act of terminating the tenancy of a tenant is not a private act and is therefore susceptible to judicial review under the *Human Rights Act 1998* (UK) ('HRA'). Second, the decision highlights the need for clear legislative guidance on what constitutes a 'public authority'. This is discussed further below.

Facts

The decision arose out of a judicial review proceeding brought by Susan Weaver against the London & Quadrant Housing Trust (the 'Trust'). The Trust is a registered social landlord ('RSL'). In order to understand the background and implications of the decision, it is necessary to have a basic understanding of the role of RSLs in the provision of social housing. In England and Wales, approximately one half of all social housing is provided by RSLs. RSLs are regulated in various ways by the Housing Corporation; an executive non-departmental public body, which is responsible for ensuring that an RSL is properly managed. The Housing Corporation provides detailed guidance on a number of matters (including, for example, evictions). RSLs typically receive grants from the Housing Corporation in respect of expenditure incurred in connection with their housing functions.

The Trust sought to evict Mrs Weaver, after she was more than eight weeks in arrears. Mrs Weaver challenged the notice of possession on the basis that the Trust had acted in breach of a legitimate expectation arising out of Guidance issued by the Housing Corporation in respect of evictions. She also argued that her eviction amounted to a violation of her rights under art 8 of the *European Convention of Human Rights* (which enshrines the right to respect for private and family life), however her argument was advanced in such a way that this claim also depended on establishing a legitimate expectation.

The Divisional Court held that there had been no legitimate expectation created, and the claim therefore failed on both grounds. Notwithstanding that it was unnecessary for it to do so, the Court went on to

state that the Trust was a public authority under s 6(3)(b) of the HRA, and that the act of terminating the tenancy was not a private act under s 6(5) of the HRA. The Trust, although successful in defending the particular application, appealed on this point.

A note on the decision of the Divisional Court is available at http://www.hrlrc.org.au/year/2008/r-weaver-v-london-and-quadrant-housing-trust-2008-ewhc-1377-admin-24-june-2008/.

Decision

Lord Justice Ellias (Lord Collins concurring; Rix LJ dissenting) held that the Trust was a hybrid public authority, and considered that the act of eviction did not constitute a private act. The act of eviction by the Trust was therefore amenable to judicial review.

In reaching the decision, Ellias LJ referred to the decisions in *YL v Birmingham City Council* [2008] 1 AC 95 and *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546. His Lordship was critical of the Divisional Court's focus on the question of whether or not the Trust was a public authority (and he considered that this had been conceded), and felt that the focus of consideration should have been on whether or not the act of terminating the tenancy is a private act. However, his Lordship considered (at [66]) that '[w]hen considering how to characterise the nature of the act, it is in my view important to focus on the context in which the act occurs; the act cannot be considered in isolation simply asking whether it involves the exercise of a private law power or not'.

The Court took into account the fact that the Trust was significantly reliant on public finance, operates in 'close harmony' with local government, and could properly be regarded as a 'government function'. The Court also took into account the fact that the Trust was ostensibly acting in the public interest and had charitable objectives and was subject to regulations designed to render its activities more transparent.

The Court considered that the act of termination was 'part and parcel' of determining who should be allowed to take advantage of this public benefit. It rejected the submission of the Trust that because it involves a contractual power, it is to be characterised solely as a private act. On this point, Ellias LJ stated:

> This is not an act which is purely incidental or supplementary to the principal function, such as contracting out the cleaning of the windows of the Trust's properties. That could readily be seen as a private function of a kind carried on by both public and private bodies.

His Honour further noted,

> In my opinion, if an act were necessarily a private act because it involved the exercise of rights conferred by private law, that would significantly undermine the protection which Parliament intended to afford to potential victims of hybrid authorities. Public bodies necessarily fulfill their functions by entering into contractual arrangements. It would severely limit the significance of identifying certain bodies as hybrid authorities if the fact that the act under consideration was a contractual act meant that it was a private act falling within section 6(5).

The appeal was accordingly dismissed.

Relevance to the Victorian *Charter* and Lessons for Australia

This decision highlights the difficulties that have arisen in the United Kingdom as a result of the absence of a clear definition of a 'public authority' in the HRA. Largely in response to these difficulties, the Victorian *Charter* adopted a more prescriptive definition of a 'public authority'. Section 4 of the *Charter* contains a more comprehensive definition of 'public authority' which, in broad terms, is broken into two categories: core public authorities, and functional public authorities.

The Explanatory Memorandum to the Victorian *Charter* states that the inclusion of functional public authorities: '…reflects the reality that modern government utilise diverse organisational arrangements to manage and deliver government services. The Victorian *Charter* applies to 'downstream' entities, when they are performing functions of a public nature of another public authority'. In the Second Reading Speech to the Bill, the Minister stated that '… the obligation to act compatibly with human rights should apply broadly to government and to bodies exercising functions of a public nature'. In contrast to the HRA, s 4(2) of the *Charter* sets out a list of factors that may be taking into account in ascertaining whether or not a *function is of a public nature*.

The decision in *Weaver* provides a clear illustration of the advantage of the Victorian approach to the understanding of what constitutes a public authority. The provision of a non-exhaustive list of factors

that a court can take into account is clearly preferable to ambiguous reference to entities performing 'functions of a public nature', as reflected in s 6 of the HRA. Recent amendments to the ACT *Human Rights Act 2004* further clarify the definition of 'public authority' by specifying certain functions that 'are taken to be of a public nature', such as health, education, housing, gas, electricity and water supply.

This guidance remedies a number (although not all) of the interpretative ambiguities inherent in the HRA. In the event that Australia adopts a legislative human rights instrument, the ACT and Victorian approaches to the definition of a 'public authority' should be preferred.

The decision is available at http://www.bailii.org/ew/cases/EWCA/Civ/2009/587.html.

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Freedom of Expression and the Right to Privacy: Reporting the Name of a Person Acquitted of Rape

Attorney-General's Reference No 3 of 1999: Application by the British Broadcasting Corporation to set aside or vary a Reporting Restriction Order [2009] UKHL 34 (17 June 2009)

The House of Lords has held that, in the interests of the right to freedom of expression, it was a reasonable intrusion on the right to privacy to publish the name of a defendant acquitted of rape.

Facts

D was charged with 'a most shocking offence', the rape of a 66 year old woman. At D's trial, the trial judge excluded highly persuasive DNA evidence that was crucial to the Crown's case. D was subsequently acquitted. The Attorney-General referred the trial judge's ruling on evidence to the Court of Appeal. Ultimately, on appeal to the House of Lords, the Lords held that the excluded evidence could have been properly admitted by the trial judge in the exercise of the trial judge's discretion.

Before the reference was heard by the House of Lords, the Lords made an anonymity order preventing any reporting that would disclose D's identity. No reasons were given for the making of the Order.

BBC intended to broadcast a documentary revealing the identity of D, and sought to have the Order overturned. The issue before the Lords was whether, in discharging the Order, the Lords would breach D's right to privacy under the *European Convention on Human Rights*. Ultimately, the Lords found in favour of BBC and discharged the Order, allowing the BCC to reveal D's identity.

Decision

The Convention rights

At the centre of this decision is a fundamental tension between two rights protected by the Convention – the right to privacy and the right to freedom of expression. Was publication of D's name enough to engage his right to privacy and, if so, was the BBC's right to freedom of expression sufficient to overcome D's right to privacy in the circumstances?

Article 8(1) of the Convention provides that 'Everyone has the right to respect for his private and family life, his home and his correspondence'.

The Lords accepted that, under the influence of human rights instruments such as art 8, personal information, including one's name, is worthy of protection, and that publication of D's name would – in the circumstances of this case – engage his art 8 right to privacy.

The question flowing from this finding was whether art 8(2) nevertheless entitled the BBC to exercise its right to freedom of expression in publishing D's name. Article 8(2) provides:

> There shall be no interference by a public authority with the exercise of this right **except** such as is in accordance with the law and is necessary in a democratic society in the interests of […] **the protection of the rights and freedoms of others**.

Balancing the right to privacy and freedom of expression

Protection of privacy must be balanced against the freedom of expression guaranteed by art 10, which is subject to the protection of the 'reputation and rights of others'. Lord Hope held that the tests to be applied in such a situation are well settled. They are:

- whether publication of the material pursues a legitimate aim; and
- whether the benefits that will be achieved by its publication are proportionate to the harm that may be done by the interference with the right to privacy.

Neither article has *prima facie* precedence over the other. The decisive factor in balancing the competing rights is weighing up the extent to which the published material contributes to a 'debate of general interest'.

The Lords concluded that BBC was entitled to publish D's name. Although the interference with D's art 8 right was significant, it was justified by reference to the 'undoubted public interest' in the publication of D's name. Three key findings underpinned this conclusion.

First, reporting of criminal trials promotes confidence in the administration of justice and the rule of law. According to Lord Brown, central to reporting criminal trials is the identity of the defendant, without which – from the media's point of view – the BBC's documentary about the trial would be 'very much disembodied and have a substantially lesser impact upon its audience'. Hence there is significant public benefit derived from BBC identifying D.

Second, 'judges are not newspaper editors'. In response to a submission that BBC could make virtually the same contribution to the general debate without disclosing D's identity, the Lords expressed reluctance to encroach upon the media's judgement in presenting journalistic material. Article 10 'protects not only the substance of the ideas and the information expressed but also the form in which they are conveyed…judges are not newspaper editors.' Lord Hope held that determining where the balance is to be struck between the competing rights must be approached on this basis. Despite explicitly agreeing with each other, Lord Hope's reasoning on this point appears inconsistent with the statement by Lord Brown that press reporting lacks impact if it fails to disclose the identity of the defendant, an opinion that does impart a judgment on how journalistic material is presented.

Third, upholding the Order would place D in a better position regarding anonymity than if he had merely been acquitted. Lord Brown placed great significance upon the fact that, had the Attorney-General not referred D's case to the Court of Appeal, the Order would not have been made and the media would be free to report the full details of D's trial and his identity.

Relevance to the Victorian *Charter*

Sections 13 ('Privacy and Reputation') and 15 ('Freedom of expression') provide broadly similar protections under the *Charter*. In Australia, suppression orders in criminal trials are not uncommon, and this case highlights the tensions inherent in these competing rights in situations where the media seeks to disclose the identity of alleged criminals or defendants acquitted of criminal charges.

The decision is available at http://www.bailii.org/uk/cases/UKHL/2009/34.html.

Andrew Rodger, Human Rights Law Group, Mallesons Stephen Jaques

Freedom of Expression and Restrictions on Political Advertising

Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component, 2009 SCC 31 (10 July 2009)

The Canadian Supreme considered advertisements on public buses and held that a policy prohibiting political advertisements amounted to a breach of the right to freedom of expression under s 2(b) of the *Canadian Charter of Rights and Freedoms*.

Facts

The Canadian Federation of Students and the British Columbia Teacher's Federation had each tried to place political advertisements on the side of buses.

The Greater Vancouver Transportation Authority and British Columbia Transport had advertising space available, but each had a policy of refusing to place political advertisements.

The unions brought an action on the basis that the policies violated their right to freedom of expression under s 2(b) of the *Canadian Charter of Rights and Freedoms*. The trial judge dismissed the action but, on appeal from the unions, the Court of Appeal reversed the trial judgment. The Transit Authorities appealed to the Supreme Court of Canada.

Decision

Justice Deschamps delivered the reasons for judgment on behalf of the majority. Her Honour noted that the first issue for consideration was whether the Transit Authorities were subject to the *Charter*, and said:

> …there are two ways to determine whether the Charter applies to an entity's activities: by enquiring into the nature of the entity or by enquiring into the nature of its activities. … If an entity is not itself a government entity, but nevertheless performs governmental activities, only those activities which can be said to be governmental in nature will be subject to the Charter.

Given that both Transit Authorities ran public buses, the court had no difficulty in finding them to be 'governmental' for the purposes the *Charter*.

With respect to the s 2(b) right to freedom of expression, her Honour considered previous cases and noted the Court's broad and purposive approach to the interpretation of rights. She said:

> An activity by which one conveys or attempts to convey meaning will prima facie be protected by s 2(b)… Furthermore, the Court has recognised that s 2(b) protects an individual's right to express him or herself in certain public places … Therefore, not only is expressive activity prima facie protected, but so is the right to such activity in certain public locations.

In determining if the Transit Authorities' policies infringed s 2(b), Deschamps J considered the application of the *City of Montreal* case (2005 SCC 62), which said that the questions to be asked were: First, do the Unions' advertisements have expressive content that brings them within the *prima facie* protection of s 2(b)? Second, if so, does the method or location of this expression remove that protection? Third, if the expression is protected by s 2(b), do the Transit Authorities' policies deny that protection?

Her Honour suggested that the first and third questions were uncontroversial, but noted that the second question raised issues as to whether buses could be said to be a location that removed the protection of freedom of speech in relation to political advertising. Her Honour said:

> Like a city street, a city bus is a public place where individuals can openly interact with each other and their surroundings. Thus, rather than undermining the purpose of s 2(b), expression on the sides of buses could enhance them by furthering *democratic discourse…*

Accordingly, the majority held that the policies infringed the Unions' right to freedom of expression. They then examined whether the limitation was reasonable under s 1 of the *Charter*. Specifically, whether the policies were 'prescribed by law' and 'demonstrably justified in a free and democratic society'.

Justice Deschamps noted that the 'prescribed by law' requirement safeguards the public from arbitrary limits on *Charter* rights being imposed by the state. Her Honour noted that the Court takes a broad approach to what constitutes 'law', and said policies could be considered 'law' where they establish a general norm that has been enacted by a government entity pursuant to a rule making authority. She described a rule-making policy as existing where the power to make rules of general application has been designated by Parliament to a government entity. On the facts, the majority found that the Transit Authorities' policies were 'law'.

Accordingly, they considered whether the limitation imposed under the policies was 'justified in a free and democratic society'. Justice Deschamps considered that the ban on political advertising was not rationally connected to the aim of providing a 'safe, welcoming public transport system'. She said:

> It is not the political nature of an advertisement that creates a dangerous or hostile environment. Rather, it is only if the advertisement is offensive in that, for example, its content is discriminatory or advocates violence or terrorism – regardless of whether it is commercial or political in nature – that the object of providing a safe and welcoming transit system will be undermined.

The majority held that a blanket exclusion of political advertising was not a minimal impairment of freedom of expression in these circumstances. They dismissed the appeal and granted a declaration that the policies were of no force or effect to the extent of their inconsistency.

Justice Fish reached the same decision as the majority, although he got there via a different means of analysis. His Honour differed on the nature of the s 2(b) right, and said:

> Freedom of expression enjoys broad but not unbounded constitutional protection in Canada … the *Charter* cannot have been intended to protect all expression, so broadly defined, at all time in every 'space' or 'place' under government control.

His Honour argued that the inquiry into whether the expressive activity is protected depends on the circumstances of the case. His Honour argued that this approach limits the need to go through the *Montreal City* test, and said:

> where the alleged incompatibility is manifest, the matter should be disposed of at the s 2(b) stage of the analysis [without needing to consider the reasonableness of the limitation]. Governments should not bear the burden of strictly prescribing by law and justifying limits on those kinds of expression that are so obviously incompatible with the purpose or function of the space provided…

Relevance to the Victorian *Charter*

The right to freedom of expression in the Canadian *Charter* is expressed without limitation but is, of course, subject to the s 1 'reasonable limits prescribed by law' test. The *Victorian Charter of Human Rights and Responsibilities* operates differently. Section 15(3) of the *Victorian Charter* provides an internal limit to the right to freedom of expression and, specifically, says that the right may be subject to lawful restrictions reasonably necessary to protect reputation, public order and public morality. However, in essence and in application, these provisions achieve a similar objective and, accordingly, the Canadian Supreme Court analysis may prove relevant.

The decision is available at http://www.canlii.org/en/ca/scc/doc/2009/2009scc31/2009scc31.html.

Victoria Edwards is on secondment to the Human Rights Law Resource Centre from Freehills

Freedom of Expression and the Restrictions on Advertising regarding Cruel Treatment of Animals

Verein Gegen Tierfabriken Schweiz (VgT) v Switzerland (No 2) [2009] ECHR 32772/02 (30 June 2009)

In *VgT v Switzerland (No 2)* the Grand Chamber of the European Court of Human Rights held that not only should the State refrain from interfering with an individual's rights under the *European Convention on Human Rights*, but in some circumstances there is a positive obligation on the State to ensure that an individual is afforded guarantees under the Convention. In this case, the State was required to ensure the full and proper execution of a judgment of the European Court to remedy a breach of the Convention and the failure to adequately do so constituted a fresh breach of the Convention.

Facts

Verein Gegen Tierfabriken Schweiz ('VgT') is an animal protection association, which produced a television commercial critical of battery pig farming. Permission to broadcast the commercial was refused on the basis of a prohibition on political advertising. The Federal Court of Switzerland upheld the refusal.

VgT lodged an application appealing the decision of the Federal Court to the European Court of Human Rights. The European Court held that the refusal to broadcast the commercial was in breach of the protection of the freedom of expression under art 10 of the Convention. It was held that VgT had simply intended to participate in an ongoing general debate on the protection of animals and was unlawfully prevented from doing so.

On the basis of the European Court's judgment, VgT applied to the Federal Court to re-open the domestic proceedings. On 29 April 2002 the Federal Court dismissed VgT's application, finding, *inter alia*, that there was no remaining purpose in broadcasting the commercial as more than 8 years had elapsed since VgT first sought permission to air the commercial.

The Committee of Ministers of the Council of Europe, which is responsible for supervising the execution of the European Court's judgments, was not informed that the Federal Court had dismissed VgT's application. In July 2003 the Committee noted the possibility of applying to the Federal Court to re-open the proceedings.

In the meantime, on 25 July 2002 VgT lodged an application with the European Court challenging the Federal Court's decision to refuse to re-open the proceedings and allow the continued prohibition on broadcasting the commercial.

In a Chamber judgment, the European Court held that there had been a further violation of article10 in preventing the commercial from being aired. The matter was referred to the Grand Chamber, where

VgT argued that the continued prohibition on broadcasting the commercial, after the Court had found a breach of its freedom of expression, constituted a fresh violation of article 10.

The Swiss government argued that the application was inadmissible because VgT had not exhausted the domestic remedies available to it and also because the execution of the Court's judgment was within the exclusive jurisdiction of the Committee.

Decision

Admissibility of the application

The European Court held that the domestic remedies available to VgT had been exhausted following the decision of the Federal Court on 29 April 2002. Further, the European Court found that although its findings as to a violation of the Convention were essentially declaratory and the Committee was to supervise execution of the judgment, measurers taken by a State to remedy a violation could raise a new issue and form the subject matter of a new application. In this case, the Federal Court's judgment of 29 April 2002 refusing VgT's application was a new decision of which the Committee had not been informed and which would escape all scrutiny under the Convention if the Court were unable to examine it.

Accordingly, VgT was permitted to make an application to the European Court alleging a fresh breach of art 10.

Merits of the application

The European Court opined that the freedom of expression is a precondition of a functioning democracy and it is applicable not only to 'information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.' Significantly, it was held that that the protection of the right of freedom of expression may impose positive duties on the part of the State. In determining whether a positive obligation existed, the European Court considered the balance between the general interests of the community and the interests of the individual.

As to whether the protection of the freedom of expression under art 10 had been breached, it was held the Swiss authorities were under an obligation to execute the 2001 judgment of the European Court in good faith, abiding by its conclusions and spirit. In the absence of any new grounds that could justify continuing the prohibition, the Swiss authorities were under an obligation to authorise the broadcasting of the commercial without taking the place of VgT in judging whether the debate in question was still a matter of public interest. Accordingly, it was held by 11 votes to 6 that there had been a fresh violation of art 10 of the Convention.

Relevance to the Victorian *Charter*

Section 15 of the Victorian *Charter of Human Rights and Responsibilities* provides a corresponding safeguard to that under art 10 of the Convention in protecting an individual's freedom of expression. Accordingly, the decision may have direct relevance to restrictions placed on any political advertising in Victoria.

Further, in light of the decision of the European Court, the Victorian government should ensure that it has sufficient mechanisms in place to ensure compliance with the *Charter*. In particular, in finding that the State will in some circumstances have positive obligations to protect an individual's rights, the decision should assist and stimulate the Victorian government in giving further content and meaning to the right of freedom of expression and other guarantees provided by the *Charter*. This may include the implementation of education programmes, policies and campaigns to ensure that human rights are appropriately protected.

Guy Donovan is a lawyer with the Public Interest Law Clearing House (Vic) and Holding Redlich

HRLRC Policy Work

Centre Proposes Innovative Model for Enhanced Parliamentary Scrutiny of Human Rights

On 1 July 2009, the Centre made a submission to the Standing Committee on Procedure Inquiry into the effectiveness of House Committees, entitled *Human Rights and Parliamentary Scrutiny*.

The submission focuses on the second and fourth of the Committee's Terms of Reference namely, 'the type of work being undertaken by committees' and 'the powers and operations of committees'. The HRLRC considers that parliamentary committees should play a more significant role in the promotion and protection of human rights in Australia.

In addition to considering Australia's international human rights obligations in this regard, the submission also considers the operation and effectiveness of parliamentary human rights scrutiny mechanisms in other jurisdictions, including the United Kingdom, Canada, New Zealand, South Africa, The Netherlands, Belgium and Germany.

The submission concludes that Parliament should establish a Joint Parliamentary Committee on Human Rights to lead parliamentary engagement with and understanding of human rights issues, including by:

- scrutinising all Bills and subordinate legislation for compatibility with protected rights;
- conducting thematic inquiries into human rights issues;
- monitoring and reporting on the implementation of the Concluding Observations and Views of UN treaty bodies and the recommendations of the Special Procedures of the UN Human Rights Council; and
- monitoring and assisting in government responses to Declarations of Incompatibility (under any Australian Human Rights Act) and other court and tribunal decisions and judgments.

The submission is available at http://www.hrlrc.org.au/content/topics/international-human-rights-mechanisms/parliamentary-scrutiny-of-human-rights-submission-to-standing-committee-on-procedure-july-2009/.

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

ESC Rights: Australia Should Show International Human Rights Leadership and Ratify OP-ICESCR

In September 2009 the Optional Protocol to the ICSECR opens for signature. The Optional Protocol to the ICESCR establishes three important mechanisms for bringing violations of economic, social and cultural rights before the UN Committee on Economic, Social and Cultural Rights, namely an individual communication mechanism, an inter-state complaint mechanism and an inquiry procedure.

On 1 July 2009, the Centre made a submission strongly urging the Australian Government to be part of the first group of States to ratify the Optional Protocol to the ICESCR and bring it into force.

The submission sets out:

- the background to the content and operation of the Optional Protocol;
- why ratification of the Optional Protocol is in the national interest; and
- responses to arguments against ratification.

The submission is available at http://www.hrlrc.org.au/content/topics/esc-rights/op-icescr-australia-can-provide-international-leadership-and-ratify-op-icescr-july-2009/.

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

Eliminating Discrimination and Promoting Substantive Equality: Submission to Scrutiny of Acts and Regulations Committee

On 10 July 2009, the Centre and the Public Interest Law Clearing House made a joint submission to the Victorian Scrutiny of Acts and Regulations Committee Inquiry into Exceptions and Exemptions under the *Equal Opportunity Act 1995* (Vic) ('EO Act'), entitled *Eliminating Discrimination and Ensuring Substantive Equality*.

Below is a brief summary of the submission.

Permanent Exceptions

PILCH and the HRLRC submit that the permanent exceptions to the EO Act have had a notable role to play in facilitating and condoning discrimination in Victoria. In essence, permanent exceptions permit certain forms of differential treatment that would otherwise be characterised in law as discriminatory.

In many cases, permanent exceptions have institutionalised, or are at risk of reinforcing, systemic discrimination against the most marginalised and disadvantaged members of the Victorian community. Many exceptions to the EO Act appear to protect traditional social structures and hierarchies that discriminate against marginalised and disadvantaged groups. Rather than allowing a nuanced balancing of rights in cases where particular rights conflict, many permanent exceptions appear to be arbitrary, inflexible, broad, and unreasonable. In contrast to the objectives of the EO Act, many of the permanent exceptions also perpetuate discriminatory practices. Moreover, as the current exceptions cannot adapt to natural shifts in community values without legislative reform, they enable the stagnation of such practices.

For these reasons, PILCH and the HRLRC submit that the permanent exceptions in Parts 3 and 4 of the EO Act should be repealed. This does not mean that a person or organisation will never be able to lawfully discriminate. Repealing the permanent exceptions in the EO Act would simply mean that before discrimination is deemed permissible, that person or organisation must justify the reasons why they should be allowed to discriminate in the manner proposed.

Exemptions

Exemptions, like permanent exceptions, have also had a notable role to play in facilitating and condoning discrimination in Victoria, although to a lesser extent. Because exemptions in the EO Act permit conduct and activities that would otherwise be characterised in law as discriminatory, they should be granted only on a case-by-case basis and only after an individual application for exemption has been subject to a limitations analysis.

PILCH and the HRLRC submit that the exemptions regime in s 83 of the EO Act should be amended in line with s 7(2) of the Victorian *Charter* to explicitly require VCAT to take into account the relevant factors set out in s 7(2), when deciding whether or not to exercise its discretion to grant an individual exemption. This model ascribes value to all human rights and does not automatically privilege one human right or fundamental freedom over another. It also helps to ensure that the rights to non-discrimination and equality are only limited in circumstances where it is necessary, reasonable and proportionate to do so.

PILCH and the HRLRC further submit that the EO Act should incorporate a requirement that successful exemption applicants consider, on an ongoing basis, the need for their respective exemptions, taking into account the considerations outlined in s 7(2)-based limitations provisions.

Guidelines

Whilst PILCH and the HRLRC submit that the permanent exceptions in the EO Act should be repealed and replaced with an amended s 83, we submit that, in the interests of certainty and security, there may well be circumstances where it is useful to have Guidelines on permissible limitations to the rights to non-discrimination and equality. Such Guidelines would foster understanding about when it is or is not appropriate to discriminate and when it is necessary to apply for an individual exemption under a reformed s 83 of the EO Act. They would also help to prevent unnecessary litigation before Victorian courts and tribunals.

PILCH and the HRLRC submit that the EO Act is not an appropriate instrument in which to provide guidance on permissible limitations. The primary focus of the EO Act should be the elimination of all forms of discrimination and the realisation of substantive equality, and not the circumstances in which it is permissible to discriminate. Legislative guidelines could only be reformed by an Act of Parliament, a requirement that is cumbersome and inflexible. Moreover, inclusion in the EO Act of guidelines on permissible limitations would result in *de jure* discrimination.

Instead, PILCH and the HRLRC submit that Guidelines should be developed apart from the EO Act and be subject to ongoing, regular review and judicial oversight. PILCH and the HRLRC submit that only those current exceptions that pass a s 7(2) limitations analysis should be included in the Guidelines. For instance, as the permanent exceptions for religious bodies and institutions (s 77), private clubs (s 78) and gender identity (s 27B) do not satisfy s 7(2) of the Victorian Charter, they should not be included in the Guidelines, and persons or organisations wishing to discriminate in these areas should be required to apply to VCAT under an amended s 83 to demonstrate why it is justifiable for them to discriminate. Conversely, as the permanent exception in s 17 of the EO Act for bona fide occupational

requirements does pass a s 7(2) analysis, that exception should be included in the Guidelines and individual employers would not be required to apply to VCAT, under an amended s 83, for individual exemptions to the EO Act.

Temporary Special Measures

The Equal Opportunity Review, conducted by Julian Gardner for the Department of Justice in 2007-2008, recommended that '[t]he existing provision in the *Charter* that provides that special measures, taken for the purpose of assisting or advancing people disadvantaged because of discrimination do not constitute discrimination, should be incorporated in the Act' .

PILCH and the HRLRC support this recommendation and consider that the EO Act should be amended to reflect the legal distinction between permissible discrimination and special measures. Special measures do not constitute discrimination; rather they are part of a necessary strategy to achieve substantive equality for some groups in the community.

In accordance with this recommendation, those permanent exceptions that are designed to address existing disadvantage (and are therefore properly characterised as 'special measures') should not be included in any legislative or quasi-legislative exceptions scheme. Rather, they should be contained in a separate part of the EO Act that deals specifically with special measures.

The submission is available at http://www.hrlrc.org.au/content/topics/equality/equality-submission-to-sarc-inquiry-into-exceptions-and-exemptions-under-the-equal-opportunity-act-1995-july-2009/.

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

Privacy Rights: Submission to VLRC Inquiry into Surveillance in Public Places

On 26 June 2009, the Human Rights Law Resource Centre made a short submission to the Victorian Law Reform Commission's inquiry into Surveillance in Public Places entitled *Surveillance in Public Places: A Human Rights Perspective*. Its primary recommendation is that the Victorian Law Reform Commission's draft principles to guide public place surveillance be amended to expressly reflect human rights standards and obligations.

Below is a brief summary of the submission on *Surveillance in Public Places: A Human Rights Perspective*.

The Human Rights Framework

The submission sets out the applicable human rights framework, namely the obligations applying under the Victorian *Charter of Human Rights and Responsibilities Act 2006*. It also considers the impact of the *Charter* on policy decisions, and draws comparisons with other jurisdictions with a human rights act.

Right to Privacy

The submission sets out the sources of the right to privacy, namely art 17 of the *International Covenant on Civil and Political Rights* and s 13 of the *Charter*. It then considers the limitations on the right to privacy, and draws on jurisprudence illustrative the scope of the right to privacy.

Options for Reform

Given the technical nature of surveillance mechanisms and our lack of expertise in relation to these technical matters, the HRLRC did not consider it appropriate to comment on the substance of the laws. Instead, the HRLRC endorsed Liberty Victoria's submission to the Inquiry which we believe accords with the relevant human rights principles.

Whilst *Surveillance in Public Places: A Human Rights Perspective* is a short submission, we consider that it makes a valuable contribution to the Inquiry and will, hopefully, enable reform in the area of Public Place Surveillance to be conducted within the requirements of the human rights framework.

The submission is available at http://www.hrlrc.org.au/content/topics/victorian-charter-of-human-rights/privacy-rights-submission-to-vlrc-inquiry-into-surveillance-in-public-places-june-2009/.

Victoria Edwards is on secondment to the Human Rights Law Resource Centre from Freehills

HRLRC Casework

Centre Granted Leave to Appear as Amicus Curiae in Victorian Court of Appeal

On 22 July, the Centre was granted leave to appear and was heard as amicus curiae in the Victorian Court of Appeal in the matter of *Momcilovic v R*. The matter concerns the application of the *Charter* and the interpretation of s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), a 'reverse onus' provision.

The Centre's submissions focused on the proper approach to the interpretative task that the Court is required to perform under s 32 of the *Charter*, including particularly that:

1. The proper approach to statutory construction under the Charter is to *start with* s 32; that is, to see s 32 as a cardinal principle of statutory construction (rather than seeing s 32 as a 'last resort' or 'extraordinary' provision which only comes into play in the event that a statutory provision is incompatible with human rights as a matter of 'ordinary' construction).
2. Where a provision is said to limit a human right, it is wrong to consider, first, whether such limits can be justified under s 7(2), before considering whether it is possible to interpret the provision compatibly with human rights under s 32. Rather, where it is alleged that a statutory provision limits human rights, it is necessary to consider whether it is possible to interpret the provision in a way that is compatible with human rights in accordance with s 32 of the *Charter*. Consideration of s 7 only arises in the event that it is not possible to interpret the provision compatibly with human rights under s 32.

The Centre was represented on a pro bono basis in this matter by Allens Arthur Robinson, together with Mark Moshinsky SC and Chris Young of Counsel. The decision of the Court has been reserved.

Phil Lynch is Director of the Human Rights Law Resource Centre

Centre Issues Representative Proceeding in the Federal Court regarding Northern Territory Intervention

On 24 July, the Centre issued proceedings in the Federal Court of Australia on behalf of Barbara Shaw, an Indigenous woman from the Mount Nancy Town Camp near Alice Springs, regarding the proposed compulsory acquisition of lands by the Federal Government under the *Northern Territory National Emergency Response Act 2007* (Cth). Ms Shaw, together with other Indigenous community members, is concerned that this process is occurring without adequate notice or consultation.

The Federal Court application seeks that the proceeding be fast-tracked and that the Court order that the Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon Jenny Macklin, give proper notice and afford affected Indigenous community members the opportunity to be properly consulted and heard prior to any decision on acquisition.

The Centre is being assisted in this matter by Allens Arthur Robinson, together with Ron Merkel QC and Diana Harding and Richard Niall of Counsel.

Seminars and Events

A Conversation on Human Rights with Justice Arthur Chaskalson – 11 August 2009

Time: 4.00 – 5.15pm

Date: Tuesday, 11 August 2009

Venue: La Trobe University, Melbourne (Bundoora) campus, John Scott Meeting House

RSVP: www.latrobe.edu.au/lawman/events/conversation-human-rights

La Trobe University's School of Law will host a conversation on human rights with Justice Arthur Chaskalson, former Chief Justice of South Africa, which will explore the international experience in relation to the human rights issues being so hotly debated in Australia. Justice Chaskalson will be joined by Professor Dianne Otto of Melbourne University's School of Law and Ms Padma Raman, Chief Executive Officer of the Victorian Law Reform Commission. The conversation will be moderated by Ronald Merkel QC, formerly a judge of the Federal Court.

Human Rights Policy and Practice Forum 2009

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

The Human Rights Policy & Practice Forum aims to critically explore the human rights policy and practice in Australia in an open and interactive format, allowing for a robust discussion between all participants. This event is addressing challenging content and is a must attend event for all policy makers and practitioners who are seeking a broad understanding of the most pressing issues today.

Featured speakers include: The Rt Hon Malcolm Fraser, Geoffrey Robertson QC, Mick Palmer (National Human Rights Consultation Committee), Rosslyn Noonan (Chief Commissioner, New Zealand Human Rights Commission).

Topics Explored Include:

- Protecting our Rights and Fulfilling our Responsibilities - A Common Sense Approach
- Ensuring our most Vulnerable Citizens are Fairly Represented and Protected
- Commitment to Human Rights and its Practice in the Public Services
- Indigenous Rights and Compensation

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

Human Rights Resources

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

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

Foreign Correspondent

Human Rights Developments at the UN and in International Law

11th Session of the UN Human Rights Council

The 11th Session of the Human Rights Council was held from 2 to 18 June 2009 in Geneva. A number of important developments occurred at this session, including, notably, the creation of a working group to develop an *Optional Protocol to the Convention on the Rights of the Child* (to introduce a complaints procedure for the CRC), and the first ever resolution on preventable maternal mortality and morbidity and human rights (which, amongst other things, requested the Office of the High Commissioner for Human Rights to draft a comprehensive report on maternal mortality). The Council also requested the OHCHR to convene an expert workshop on violence against women and girls, which will be held in 2010, and another event on trafficking in persons, especially women and children, in order to identify good practices in implementation of the Recommended Principles and Guidelines on Human Rights and Human Trafficking.

Some of the conclusions were not as positive. For example, the Council decided to discontinue consideration of the situation in the Democratic Republic of the Congo (which had been under discussion in the Council's complaint procedure), and to end the mandate of the Special Rapporteur on the situation on human rights in the Sudan. On Sudan, it was decided that instead an Independent Expert would be appointed for a one-year period to monitor the human rights situation. The Sudanese government argued strenuously against the appointment of this expert, and the result of the tense

negotiations on this issue was that the resolution specifies the new mandate holder must cooperate with the government. The discontinuation of the complaint against the DRC, and this downgrading of the status of the expert on Sudan, are examples of how the focus on country specific human rights concerns has been systematically downgraded by the member states since the creation of the Human Rights Council in 2007. On the more positive side, maintaining at least some form of independent monitoring over the situation in the Sudan is one of the first positive signs that the Council is nonetheless still committed to analyzing the human rights situation in particularly problematic countries.

Further concerns arising from this (and previous) Council sessions, which have been raised particularly by NGOs, are the continued threats to the independence and integrity of the entire system of Special Procedures, and the way in which the dialogues with these experts at the Human Rights Council are not always conducted in a manner that is appropriately respectful. The International Service for Human Rights details these concerns in their statement to the Council (available at www.ishr.ch), and along with other NGOs they raised these concerns with the High Commissioner for Human Rights, Navi Pillay, in an open meeting on 17 June. The High Commissioner was supportive of the need for governments to re-focus efforts on strengthening the system of Special Procedures, rather than undermining it.

Human Rights Council's Advisory Committee

The Human Rights Council's Advisory Committee will meet for the third time from 3 to 7 August 2009. Two of the main issues it is due to discuss are the drafting of a Convention on Human Rights Education, and work on the right to food and non-discrimination.

Regulating Private Military Security Companies

From 20 July to 3 August, the UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self determination will visit the USA to investigate the use of private military and security contractors. This visit follows the working group's missions over the last year to the UK and Afghanistan. It is particularly important as, in a parallel process, the US Government and others are engaged in discussions with industry leaders regarding options for monitoring and regulating private military and security companies (PMSCs). In particular, the Swiss Government convened a meeting in June to begin drafting a code of conduct regarding PMSC's compliance with international human rights and humanitarian law, a process which is being driven largely by the PMSCs themselves.

Responsibility to Protect

This week in New York, the General Assembly is discussing the issue of the 'responsibility to protect', the first time this issue is being discussed in this forum since its adoption at the 2005 World Summit. The GA is addressing how to progress this issue from a concept paper to a norm of international law. The 'responsibility to protect', championed by Australian Gareth Evans (who is widely seen as the architect of this concept), relates to the responsibility of governments to prevent major human rights violations by protecting people facing imminent or ongoing violence that might lead to genocide, war crimes, crimes against humanity or ethnic cleansing. The discussions this week will include the presentation by the Secretary-General of his report 'Implementing the Responsibility to Protect', and, hopefully, outcomes targeted towards establishing rapid response mechanisms for exceptional situations such as those previously in Rwanda and the former Yugoslavia, and currently in Darfur and the DRC.

G-8 and G-20 Meetings Discuss Global Food Crisis

Recently the Food and Agricultural Organisation of the UN issued the latest statistics on the global food crisis. They estimate that this year 1,020 million people are living in hunger, representing an 11% increase in global hunger. In light of this, and the severity of the situation over recent years, the Group of Eight focused their July meeting on agriculture. A key outcome of this meeting was a decision to increase agricultural aid and investment. While this was welcomed by the human rights community, the UN Special Rapporteur on the right to food, Olivia de Schutter, explained that more still needs to be done. He encouraged the G-8 to address structural measures, and also called on the G-20 to continue this focus by tackling food price volatility, social protection, sustainability of production and the protection of agricultural worker rights. The Special Rapporteur also called on the G-20 to adopt a global action

plan on food security, based firmly on human rights.

International Symposium on Realizing the Right to Health with Mary Robinson and the Deputy High Commissioner for Human Rights

Finally, if you will excuse the shameless self-promotion, some Bulletin readers may be interested to watch the video of an international symposium on the right to health, chaired by Mary Robinson, which was held in Geneva on 22 June to launch her latest book, *Realizing the Right to Health* (co-edited by Andrew Clapham, Scott Jerbi, and myself: see www.swisshumanrightsbook.com). The international symposium brought together experts from around the world to address the issue of 'Whose role is it anyway?", involvin' the WHO, public-private partnerships like the Global Alliance on Vaccines and Immunizations, civil society (such as Médecins Sans Frontières and Physicians for Human Rights), the UN, and academics, in discussions about how to realize the right to health at the national and international levels. The Deputy High Commissioner for Human Rights presented the keynote address, outlining some of the many ways the UN views health care issues as fundamental human rights concerns. You can view the video by following the links at www.adh-geneva.ch.

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If I Were Attorney-General…

The Environment, Child Protection and Indigenous Disadvantage: An Agenda for the Attorney-General of 2015

The boomers will remember the reforms of the 1970s and 80s, spurred by two decades of generational, gender and race conflict, which coloured a then grey Australian justice system. Most of the reforms, such as no fault divorce, race discrimination and later sex discrimination, are still in place today. More recently, a dominant concern is the rapport between government and the governed.

As you will recall, in 2010, Australia enacted human rights standards by which to measure our actions. Yet despite billions having been spent over the last decade, deep-seated problems still need our urgent attention. Some regions are experiencing the worst weather conditions and events on record, habitat loss and urban sprawl have grown unabated, the gap between rich and poor has widened, and Aboriginal disadvantage and imprisonment have not been stemmed.

Now, in 2015, our government is determined to again look through a different prism, to confront these difficult and controversial problems. As you know, my role as Commonwealth Attorney-General is unique, as the states and territory parliaments were abolished in 2012.

As Attorney-General, I will work with my cabinet colleagues in this new government elected to govern in the 'fifth way' to fully focus on three interlocking policy areas – the environment, child protection and Aboriginal disadvantage – devoting all effort and available funding to achieve real, practical and lasting change to secure our future survival.

We cannot survive – morally or practically – without a healthy and clean environment, which includes diverse and extensive habitats for all species. The government will introduce environmental legislation that draws a real balance between the importance of a healthy environment and biological diversity and the interests of humans. So often, when politicians talk about that balance, they are comparing valuable ecosystems with 200 jobs, neglecting our health and the health of the environment over development at any cost and dicing with our very future for the sake of a privileged present. Of course, employment is necessary for social equity and community well-being, but the rollercoaster of increasing population, energy use, development and consumption, has no destination and is running on empty. I am uncomfortable with the idea that everything, including air and water has to be valued in monetary terms. Nonetheless, all ideas will be on the table. We will seek a new paradigm for our age that moves us from self-interest to sustainability, just as the industrial revolution took us out of servitude and subsistence.

Our culture is diminished if we don't respect our past. Our past is not just about ANZACS and Bradman, but also about Aboriginal Australians. Ignoring Aboriginal history and law that protected the

environment rather than selfishly exploited it underpins our failure to live more lightly and sensitively in this land.

Children, the most vulnerable members in our society, need our complete protection and care. The government will oversee a vast increase in early intervention programs and far greater family support. The government will particularly focus on reducing violence in all its forms. As Attorney, I will significantly increase funding for violence prevention programs. Violence has a devastating social impact and cost.

None of this is new. What will be different is how we approach it:

- We will take the same sort of approach to these issues taken in 2008 to address the global financial crisis: a vast investment of funding and a concentration of effort. All ministers will participate in planning and taking ongoing responsibility, not just the relevant ministers.
- We will greatly increase funding for community services. Until now, governments have worked in short-term fiscal cycles where funds must be expended or lost and money is wasted while non-government services are starved. We haven't saved in the good times for social programs so that they can be sustained when times aren't so good. We have a Future Fund and infrastructure funds; we will institute a community investment fund and we will take a long-term focus that gives the community sector confidence in pursuing projects and outcomes.
- Most of our social programs in the past have been universal in application – one size fits all. Little effort has been put into devising innovative and sensitive ways to implement new ideas because they are usually done 'on the cheap' and imposed down from the top. Our government will be unified in our goals but have available a multiplicity of responses.
- Our government will support programs devised and implemented at a local level. We will support partnerships and collaborations where the contribution of all partners is valued and decisions and responsibility are taken at the lowest appropriate level, particularly by the people who are primarily affected, necessitating a radical overhaul of bureaucratic methods.
- The government will introduce some structural changes starting at the top so that we can more effectively promote and monitor our reforms, such as that we will: appoint to cabinet an expert in each field to ensure that cabinet discussion is grounded and better informed and debate is more robust; appoint a minister at deputy prime minister level to have overall responsibility for each of the areas of the environment, child protection and Indigenous disadvantage; require all policy decisions to be in the public interest and for the public good; and increase transparency in political donations and in lobbying so we are not diverted from our objectives by a compromised democratic process.

We are not compelled to make the same mistakes if we properly reflect on the past and listen now to the very people who are experiencing the troubles that we are trying to solve. We will be determined to act with care and not be tripped up in political haste.

Now, if I were Prime Minister ….

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