Human Rights Law Centre

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RIGHTS AGENDA

HRLC Monthly Bulletin

OPINION: MOVING BEYOND BEST PRACTICE RHETORIC

Amidst mounting international pressure over Australia's human rights record, the HRLC's **Phil Lynch** and **Ben Schokman** examine the recent commitments made by the Government at the UN.

NEWS: HIGH COURT CHALLENGE TO MALAYSIA SOLUTION

The Refugee and Immigration Legal Centre lodges proceedings in the High Court.

CASE NOTES:

VCAT considers when disciplinary action constitutes a punishment.

IF I WERE ATTORNEY-GENERAL…

The Director of the National Congress of Australia's First Peoples, **Tammy Solonec**, outlines why prevention is the best cure in the field of criminal law.

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OPINION

It’s time for Australia to move beyond ‘best practice’ engagement to best practice implementation on human rights

A growing chorus of international voices is telling Australia that it must do better on human rights.

As pressure mounts on the Federal Government over the ‘Malaysia solution’, Australia's human rights record faced further scrutiny from the international community when it appeared before the UN Human Rights Council in Geneva last month. On 8 June, Australia delivered its formal response to 145 recommendations made as part of the Universal Periodic Review process. The process, to which every country in the world is subject on a rolling basis, provides the international community with the opportunity to ask questions and make recommendations about the human rights record of the country under review.

When Australia first fronted the Human Rights Council to commence the review in January, it was called on to answer some tough human rights questions. Six months later, and with ample time for further consultation and consideration, the time has come for Australia to give answers.

Back in January, three key issues topped the international community's concern: Australia's treatment of refugees and asylum seekers, the disadvantage and discrimination experienced by Aboriginal and Torres Strait Islander peoples, and the lack of a Human Rights Act or Charter. Other significant issues, such as violence against women, police use of Tasers and the rights of people with disability also received critical attention during Australia's review.

In advance of its formal statement to the international community through the Human Rights Council, the Government released an outline of its response which, it says, "showcases" Australia's "strong human rights record".

When the time came to respond, the Government, to its credit, accepted, at least in part, more than 90 per cent of the recommendations made during the review. As we should. We are a stable, democratic and highly-developed state with a government that espouses a commitment to human rights leadership. We ought to be held to the very highest human rights standards.

However, while a 90 per cent acceptance rate sounds impressive, the precise nature of the commitments made by the Government warrants closer examination.

Close to half of the recommendations were "fully accepted" by the Government. Most of these relate, however, to existing policies and processes, such as the recognition of Aboriginal people in the Australian Constitution and implementing a national policy to reduce violence against women. There are a small number of welcome new commitments, including a promise to "enhance" anti-discrimination laws (which were previously to be merely "consolidated") and to consider increasing our aid budget to the internationally agreed target of 0.7 per cent "as economic and fiscal conditions permit".

The Government accepted almost a third of recommendations on the basis that they "are already reflected in existing laws or policies". This is true in some cases, but in others the claim is dubious at best. Contrary to the Government's response, for example, there is no Australian jurisdiction in which police-related deaths are independently investigated. Similarly, the Government's statement that UN recommendations concerning Aboriginal and Torres Strait Islander peoples are "already reflected in existing laws or policies" somehow overlooks repeated recommendations to abolish the Northern Territory Intervention, compensate the Stolen Generations and reform native title laws.

Finally on the positive side of the ledger, about one-fifth of recommendations were accepted "in part", generally on the basis that the Government will further "consider" the recommendation.

This leaves 6 per cent of the recommendations that were rejected by the Australian Government. Regrettably, these recommendations are precisely those which require real legal and institutional reform. They are also those which relate to the most persistent and significant human rights criticisms from UN human rights bodies, the Australian Human Rights Commission and non-government organisations. The Government rejected recommendations to enact a Human Rights Act and to end the mandatory and indefinite detention of asylum seekers, including children. They also rejected recommendations designed to meaningfully address Aboriginal disenfranchisement and disempowerment, such as negotiating a treaty, compensating the Stolen Generations and strengthening land rights.

Announcing Australia's response, Foreign Minister Kevin Rudd said "the Universal Periodic Review is a good opportunity to demonstrate that when it comes to human rights, equality and opportunity, we can always achieve more". Regrettably, while demonstrating that we *can* achieve more, the response to date has been a missed opportunity to *actually* achieve more.

Fortunately, the Universal Periodic Review process did not end on 8 June. While much of the work to date has been done in Canberra and Geneva, this is a process intended to promote and protect human rights "on the ground" and the 90 per cent of recommendations that have been accepted do provide a valuable framework for further action. It is positive that the Government has committed to including each of the accepted recommendations in a National Human Rights Action Plan, although if this plan is to work, it must contain concrete measures and identify clear responsibilities, timeframes and targets. It is also positive that Australia has committed to provide the UN Human Rights Council with an interim report on implementation, a report which will probably coincide with a vote on Australia's UN Security Council candidacy.

There are some disappointments - major disappointments - in the Government's UPR response, but also some welcome commitments. The time has now come for Australia to move from the rhetoric of best practice in engaging with human rights mechanisms to the reality of best practice in implementing our human rights obligations.

***Ben Schokman** is the HRLC's Director of International Human Rights Advocacy and **Phil Lynch** is Executive Director.*

This piece was first published online by the ABC's *The Drum Unleashed*

NEWS IN BRIEF

Australia delivers formal response to international scrutiny of human rights record at UN Human Rights Council

In response to a periodic review by the UN Human Rights Council, the Australian Government has rejected the UN recommendations to change its detention and treatment of asylum seekers including children. It has also rejected the UN recommendation for a comprehensive national Human Rights Act. Amnesty International has accused the federal government of being deliberately misleading in its response to the UN Universal Periodic Review. The HRLC gave credit to the government for accepting, at least in part, more than 90 percent of the recommendations, but said it is unacceptable that key issues that topped the international community's list of concerns have been brushed aside.

Gillard Government braves stormy waters with its 'Malaysia solution'

In addition to the critical UNHCR response to the Malaysia Solution, the Government's plan has come under fierce attack from both ends of the political spectrum following revelations the draft agreement contained no references to human rights. The Greens and the Coalition combined to pass a motion opposing the Malaysian refugee swap deal. The Greens oppose sending any asylum seekers offshore, while the Coalition is proposing to send them to Nauru instead of Malaysia. In response, the Gillard government gave assurances the Malaysia Solution will include human rights protection guarantees. A leaked document claimed the Immigration Minister will determine which children are sent to Malaysia. The government subsequently reported the 800 asylum-seekers to be sent to Malaysia under Canberra's refugee swap will be granted immunity from harsh immigration laws and human rights abuses.

…And faces a High Court challenge

The deal to swap refugees with Malaysia is also under legal challenge in the High Court on the grounds that it will separate a Kurdish man who has been recognised as a refugee in Australia from his newly arrived wife and four-year-old son currently being held on Christmas Island. Human Rights Watch says the United Nations High Commission for Refugees (UNHCR) should withdraw from the Australia and Malaysia refugee pact saying its role violates the UN's protection mandate.

Commitment to remove children from detention postponed

With 741 children in immigration detention, the Gillard Government has informed the United Nations it is unlikely to meet the commitment it made to move the majority of children out of detention by the end of June.

Mandatory sentencing for young offenders

The Baillieu Government plans to introduce mandatory minimum jail terms for youths aged 16 and 17 convicted of violent offences, despite concern from the legal profession it will breach human rights obligations. This follows the Government's proposal to use a tabloid survey to inform minimum sentences which polling experts agree will not accurately reflect public opinion because of the survey's self-selecting approach.

Children held in adult maximum security prison

A 16 year old boy has been ordered by the Perth Magistrates' Court to stand trial on charges of people smuggling, together with two strangers who were not captured on the same boat. Human rights lawyers say he is the fourth Indonesian boy under 18 who is being held as an adult in a maximum security prison, contravening Federal Government policy to return home children apprehended on asylum-seeker boats. According to an Age editorial, up to 60 Indonesians who claim to be under 18 are being held as adults in jails and immigration detention.

Indigenous Australians in the Constitution

The campaign to recognise indigenous Australians in the Constitution has cleared its first major hurdle, with an overwhelming majority of members of the National Congress, the new peak body for Aborigines and Torres Strait Islanders, backing the change.

Mental illness triggered by homelessness

A report released by RMIT shows mental illness is often triggered by homelessness. This coincides with new proposals for the *Better Access to Mental Health Care* initiative which, according to Barbara Dickson, will be detrimental for homeless people, people on pensions or benefits, and people who have poor health who are unable to pay for extra sessions.

INTERNATIONAL HUMAN RIGHTS DEVELOPMENTS

UN adopts Guiding Principles on Business and Human Rights but NGOs call for more robust regulation

The global community has agreed on a new set of standards for business and human rights, following the consensus endorsement of the Guiding Principles for Business and Human Rights at the 17th session of the UN Human Rights Council in Geneva.

The Guiding Principles are intended to provide concrete guidance to states, business and investors as to implementation of the UN's 'Protect, Respect and Remedy' Framework (which comprises a state duty to protect people for corporate human rights violations, a corporate responsibility to respect human rights in their activities and operations, and a shared business and state responsibility to provide victims of corporate abuses with access to effective remedies).

In addition to endorsing the Guiding Principles, the Council also resolved to establish a five member expert working group to promote the dissemination and implementation of the Guiding Principles, and a multi-stakeholder forum on business and human rights to promote ongoing dialogue and cooperation on the issue.

According to Professor John Ruggie, the UN Special Representative for Business and Human Rights, "the Council's endorsement establishes the Guiding Principles as the authoritative global reference point for business and human rights. They will also provide civil society, investors and others the tools to measure real progress in the daily lives of people."

However, the consensus resolution was criticised by a coalition of leading international NGOs, including Human Rights Watch, Amnesty International, the International Federation of Human Rights, ESCR-Net and the International Commission of Jurists. In a joint statement, they described the resolution as suffering from three main shortcomings:

- "It focuses almost exclusively on the dissemination and implementation of the proposed Guiding Principles, which are incomplete in important respects and do not fully embody the core human rights principles contained in the UN Protect, Respect, Remedy Framework."
- It fails to establish a mechanism to "examine allegations of business-related abuse and evaluate gaps in legal protections."
- "It does not clearly recognize the Council's unique role to provide global leadership in human rights by working toward strengthening of standards and creating effective implementation and accountability mechanisms."

It is likely that the expert working group will be appointed at the next session of the UN Human Rights Council in September.

UN Human Rights Council adopts landmark Optional Protocol to remedy violations of Children's Rights

In a landmark development, the UN Human Rights Council has, by consensus, adopted an Optional Protocol to the Convention on the Rights of the Child to provide better access to remedies for violations of children's rights.

The Optional Protocol establishes a communications procedure which empowers the UN Committee on the Rights of the Child to receive complaints from individuals or groups of individuals alleging a violation of rights under the Convention and its other optional protocols relating to the sale of children, child prostitution, child pornography and the involvement of children in armed conflict.

"We applaud this decision", said Anita Goh, Advocacy Officer of the NGO Group for the CRC coordinating the international campaign for the new mechanism. Ms Goh said that, "Despite some regrettable omissions in the final text, such as the deletion of the collective communications procedure, this is a unique opportunity to translate into international law States' commitments to protect and respect children's rights."

The new Optional Protocol will now be transmitted to the UN General Assembly for adoption in December 2011, following which it will be opened for states to sign and ratify.

Australia sponsors historic UN Human Rights Council Resolution on National Human Rights Institutions

In a landmark development, Australia was responsible for presenting a draft resolution to the UN Human Rights Council in Geneva regarding the importance of national human rights institutions in promoting and protecting human rights at the domestic level. The resolution, which was adopted by consensus and without a vote, also welcomes and recognises the increasingly important role played by national human rights institutions at the international level, including through their engagement with UN treaty bodies and the Universal Periodic Review process.

The resolution calls on all states to establish national institutions, in accordance with the Paris Principles, and to ensure that such institutions are independent and adequately resourced and mandated to fulfil their role in promoting and protecting human rights.

The resolution also calls on the UN, through the Secretary General and the Office of the High Commissioner for Human Rights, to continue to assist the work of national human rights institutions, and on states to contribute voluntary funds to support their establishment and operation.

UN human rights experts release guidance on extraterritorial regulation of transnational corporations

The United Nations Committee on Economic, Social and Cultural Rights recently issued a statement on the obligations of states in relation to corporations and the rights set out in the International Covenant on Economic, Social and Cultural Rights. Significantly, the statement emphasises that states which are home to transnational corporations are responsible for taking steps to prevent those corporations from contravening Convention rights abroad. Consistent with its statement, the Committee's recent Concluding Observations on Germany contained a number of recommendations regarding states' extraterritorial obligations in relation to transnational corporations and economic, social and cultural rights.

As the Committee's statement observes, the corporate sector often contributes to the realisation of economic, social and cultural rights, but frequently also detracts from the enjoyment of such rights. Corporations promote Convention rights by contributing to economic development, employment generation and productive investment. At the same time, however, corporate activities can result in a number of harms including environmental damage, unsafe working conditions, corruption and discrimination — all of which have a detrimental effect on the realisation of Convention rights.

According to the Committee's statement, states have the primary responsibility to respect, protect and fulfil the Covenant rights of all persons under their jurisdiction in the context of corporate activities. According to the statement:

- respecting rights involves ensuring that domestic laws regarding corporate activities conform with Convention rights, and ensuring that companies demonstrate due diligence in relation to their impact on Convention rights;
- protecting rights involves safeguarding rights holders against infringement of their Convention rights by ensuring access to effective remedies for victims of corporate abuses of economic, social and cultural rights; and
- fulfilling rights involves cooperating with the corporate sector to ensure its support for the realisation of economic, social and cultural rights both at home and abroad.

Importantly, recognising that corporations often operate beyond national boundaries, the Committee's statement notes that states' obligations to protect and fulfil Convention rights are extraterritorial. The Committee's statement requires states to take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, and to encourage such companies to assist host states to build their capacity to address corporate responsibility for the observance of economic, social and cultural rights.

Interestingly, while the Committee refers in its statement to the 'Protect, Respect, Remedy' Framework for Business and Human Rights, the views on extraterritorial obligations expressed in the Committee's statement go beyond what is required in either the Framework or the related Guiding Principles issued by Professor Ruggie in March this year. Both the Framework and Guiding Principles have been interpreted to mean that states are not prevented from, but are not required to, regulate or otherwise control the extraterritorial conduct of transnational corporations based in their country. By contrast, the Committee's statement appears to require that states take positive action to ensure such corporations respect Convention rights abroad.

The Committee's statement gives two examples of states' extraterritorial obligations in relation to transnational corporations — General Comment No 15 on the Right to Water, which requires states to “prevent their own citizens and companies from violating the right to water of individuals and communities in other countries”, and General Comment No 19 on the Right to Social Security, which requires states to “extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries”.

Issued at the same time as the statement, the Committee's Concluding Observations on Germany reflect many of the observations made in the statement. In particular, in paragraph 10 of the Concluding Observations, the Committee 'expresses concern that [Germany's] policy-making process in, as well as support to, investments by German companies abroad does not give due consideration to human rights', and calls on Germany to ensure that its policies on foreign investments by German companies respect Convention rights. Outside of the corporate sphere, the Committee also expresses concern about the effect of Germany's agriculture, trade and development co-operation policies on economic, social and cultural rights in other countries.

According to the Committee's statement, the Committee is determined to devote special attention to the obligations of states in relation to corporations and Convention rights, and to monitoring the role and impact of the corporate sector on the realisation of economic, social and cultural rights.

The Committee's statement represents an important step towards recognising the substantial interaction between the corporate sector and the realisation of Convention rights. Particularly in developing countries, large transnational corporations are often in a position to exert significant influence over the extent to which employees and local communities are afforded economic, social and cultural rights. While the extent to which states will be willing or able to protect Convention rights extraterritorially remains to be seen, the Committee's statement is an encouraging development.

Mark Hosking *is a lawyer with Allens Arthur Robinson*

Positive progress, but Human Rights Council must show more principle and perseverance

The 17th session of the UN Human Rights Council concluded on 17 June 2011. At the conclusion, Michael Ineichen of the International Service on Human Rights made an oral statement on behalf of a group of NGOs, including the Human Rights Law Centre.

Mr President,

This is a joint statement on behalf of the Cairo Institute for Human Rights Studies, the International Commission of Jurists, the Human Rights Law Centre, Civicus, Humanas, International Federation for Human Rights, ARC International and the International Service for Human Rights.

We are pleased to be able to commend the Council for continuing to build on the improved performance observed at the March session, when amongst other successes, we witnessed the will to create new special procedure mandates where needed. This past session has – in part – built on this success. The principled approach and perseverance of many delegations has enabled the Council to take several positive decisions.

First of all, we applaud the landmark resolution on human rights and sexual orientation and gender identity passed. It represents a long overdue move by the Human Rights Council to step up to the mark, and begin to display the leadership in protecting all persons from human rights violations that the world expects from this body. In that regard, we salute the leadership of South Africans – both the government delegation and human rights defenders – which has galvanised the support of States from all regions. We regret that some States have attempted to portray the protection of all human beings from discrimination and violence as a divisive issue, but we recognize the readiness in this room to move beyond these difficulties and take more nuanced positions. We hope for and look forward to the constructive engagement of all in the panel discussion in March next year.

While we are happy about this progress, we regret that the Council has backtracked on previously agreed language in the violence against women resolution, and we trust that the Special Rapporteur will continue to address violence against women with a focus on all vulnerable groups.

We also welcome the renewal of several important special procedures mandates. While we welcome the working group on business and human rights, we are disappointed that the mandate focuses almost exclusively on the Guiding Principles. We trust that it and the Council itself will continue to work on the implementation of the Framework, particularly concerning accountability and remedies.

The renewal of other mandates, including those on the independence of judges and lawyers and extrajudicial, summary or arbitrary executions is welcome, but we also see those resolutions as lost opportunities to include language reflecting the Council's principled resolve to end reprisals against those who cooperate with UN human rights mechanisms, as enshrined in the review-outcome-document. We urge all States to ensure that specific cases are investigated, and that the broader phenomenon of reprisals is made the subject of sustained attention when the Secretary-General's report is presented in September.

We welcome the response of this Council to the unfolding situations in Cote d'Ivoire, Libya, and Syria over the last several months, including the dedicated debates during this past session. The resolutions on Kyrgyzstan and Belarus, and the decision on Yemen are positive examples of incremental and innovative approaches. This is a move in the right direction, but must be followed up with sustained attention and response to the situation on the ground, and accompanied by the willingness to step up pressure in case of lacking cooperation.

The selectivity and double-standards that have prevented the Council from addressing other urgent situations adequately, such as Sri Lanka and Bahrain, must be addressed more seriously by member States to avoid undermining the Council's credibility. The panel-discussion on peaceful protest is a further positive attempt to do so, but will not be sufficient by itself. More cross-regional efforts, coupled with the kind of leadership and principled human rights based approaches shown by individual delegations during this session, are key for success.

Finally, Mr President, we wish to support previous speakers in expressing concern about the appointment process of special procedures mandate holders. The past session has shown the importance of observing scrupulously the criteria set out in Resolution 5/1, and of the independent role of the President. We hope that your successors will build on your efforts in maintaining that role.

Last but not least, Mr President, we thank you for steering the Council through a challenging, but overall successful cycle, and look forward to working with you in your reincarnation as Ambassador of Thailand.

Europe adopts equality principles

On 6 June 2011, a report entitled 'The Declaration of Principles on Equality and the Activities of the Council of Europe' was approved by the Committee on Legal Affairs and Human Rights, which is a subcommittee of the Parliamentary Assembly of the Council of Europe.

The report contains:

- Analysis of the current implementation of the principles of equality and non discrimination in the member states of the Council of Europe;
- Discussion of the central role of equality and non discrimination in the protection of human rights provided under international law; and
- Concern at the low level of ratification of Protocol 12 to the European Convention of Human Rights, which extends the scope of the prohibition of discrimination to any right set forth by law.

The report also presents the Declaration of Principles on Equality.

The Declaration is the result of contributions made by international human rights and equality experts in a project coordinated by the Equal Rights Trust. The Declaration recognises that there is a disparity between international human rights law and the approaches adopted by nations to protect human rights and prevent discrimination. To address this disparity, the Declaration of

Principles on Equality articulates the latest legal standards relating to the protection of human rights and the pursuit of equality.

The Declaration also acknowledges that many countries lack the legal means to promote equality. It is therefore envisaged that the Declaration of Principles on Equality will guide legislators, the Judiciary and other interested parties in member states seeking to promote the protection of human rights and equality law reform.

The Declaration consists of 27 principles arranged under the following five headings: Equality, Non discrimination, Scope and Rights-holders, Obligations, Enforcement and Prohibitions.

The Committee on Legal Affairs and Human Rights has recommended that the Declaration of Principles on Equality be endorsed by the Committee of Ministers. If this occurs, the Declaration will influence the development of new and existing national equality legislation among member states. Endorsement by the Committee of Ministers will also validate the Declaration of Principles on Equality as a document that reflects the jurisprudence of human rights and equality laws. This will, in turn, increase the credibility of the Declaration as a guide for promoters of human rights and equality law reform throughout the world.

The Committee of Ministers is the decision making body of the Council of Europe. It comprises the ministers of foreign affairs of each member state or their diplomatic representative.

The Council of Europe consists of the nations that make up the European continent. There are 47 member states. The Council works towards European integration with a focus on legal standards, human rights, democratic development and the rule of law. The Parliamentary Assembly of the Council of Europe is one of the Council's most important institutions. It creates international treaties and Europe wide legislation. This assembly comprises parliamentarians from each of the member states. The representation of parliamentarians in the council is distributed according to the population of each member state.

Heath Paynter *is on secondment with the Human Rights Law Centre from Russell Kennedy.*

NATIONAL HUMAN RIGHTS DEVELOPMENTS

Australia issues formal response to Universal Periodic Review

On 8 June 2011, the Australian Government issued its formal response to recommendations made by the UN's Human Rights Council through the Universal Periodic Review and accepted, at least in part, 90 percent of the recommendations. The formal response was accompanied by a Statement by the Australian Ambassador to the UN and a media release. The HRLC has prepared a list of Australia's Response to All UPR Recommendations and a Summary of the Key UPR Recommendations that were rejected or only partially accepted by Australia.

NGO Statements on Australia's Response to the UPR

On 8 June 2011, the HRLC, NACLC and KLC delivered a statement to the Human Rights Council on Australia's response to the UPR. In that statement, the NGO Coalition:

- welcomed that Australia has accepted the majority of UPR recommendations, including by committing to enhance anti-discrimination laws and to consider increasing overseas development assistance to 0.7% of GNI
- welcomed the commitment to provide the Council with an interim report and to incorporate UPR recommendations into the National Human Rights Action Plan

- expressed regret that Australia's response in some areas does not accurately reflect law, policy or practice
- expressed regret that Australia's response does not meet the need for legal and institutional reform to redress persistent and significant issues documented by UN human rights bodies, the Australian Human Rights Commission and NGOs

The statement called on Australia to:

1. incorporate international human rights into domestic law through a comprehensive Human Rights Act;
2. strengthen laws to address systemic discrimination and promote substantive equality;
3. fully implement the Declaration on the Rights of Indigenous Peoples and all of the recommendations of the Special Rapporteur on the Rights of Indigenous Peoples, and
4. legislate to ensure that asylum seekers are detained only where strictly necessary and as a last resort, that no children are held in immigration detention, and that all asylum seekers have equal access to and protection under law.

The HRLC issued a media release and published an op-ed on Australia's response to the UPR.

The Australian Human Rights Commission's statement on the UPR of Australia is here.

Oral statements on the UPR of Australia from other NGOs, including Human Rights Watch, Amnesty International, Save the Children and the National Aboriginal and Torres Strait Islander Legal Services, are available here (Login: hrc extranet; Password: 1session).

NGO Statement on Follow Up and Implementation

On 9 June 2011, the HRLC and NACLC delivered a further statement at the UN Human Rights Council in relation to follow up and implementation of UPR recommendations.

In that statement, the HRLC and NACLC stated that:

1. The implementation of UPR recommendations requires principled, high-level leadership from government and an adequate investment of time and resources. We recommend to Australia the development of a ministerial-level UPR working group in this regard.
2. Effective implementation also requires ongoing constructive dialogue and coordination between governments and civil society. Mechanisms may include regular meetings and also the appointment of NGO representatives to governmental and inter-departmental working groups responsible for implementation. It is also useful for states to establish and make publicly known dedicated UPR focus points within government.
3. States must commit to the clear and effective dissemination of UPR recommendations. We commend the Australian Government for tabling the Report of the UPR Working Group in Parliament and urge them to consider developing a website dedicated to the UPR, with a particular emphasis on providing information about follow up and implementation.
4. It is crucial that states provide clear details as to their response to UPR recommendations, including reasons as to acceptance or rejection. We commend Australia's response to the UPR yesterday in this regard. We also warmly welcome that Australia has committed to provide the UN Human Rights Council with an interim report on implementation.
5. It is imperative that states develop concrete action plans for implementation of UPR recommendations. We commend Australia on the development of a National Human Rights Action Plan and urge the government to include all of the accepted UPR recommendations in that plan, together with specific details of how the recommendation will be implemented, by whom and by when. If National Human Rights Action Plans are to serve their intended

purpose, they must contain concrete measures and identify clear responsibilities, timeframes and targets.

Further information about the UPR can be found here on the HRLC website.

NGO engagement on National Human Rights Action Plan

This year the Government is in the process of developing Australia's National Human Rights Action Plan as part of Australia's Human Rights Framework. Following an initial consultation earlier this year, the Government is due to release the draft Baseline Study shortly, which will set out the state of enjoyment of human rights in Australia as well as where we can do better. Following that, a draft National Action Plan will be released and the government will consult with the community on both documents.

This week the Attorney-General, The Hon Robert McClelland MP, made a speech in which he clearly stated that the recommendations that the government accepted in the Human Rights Council's Universal Periodic Review of Australia will be included in the National Action Plan. This provides NGOs with clear guidance on areas of law and policy that can be improved through the National Action Plan.

The HRLC is working on promoting NGO engagement with the upcoming government consultations. We are holding workshops for NGOs in Sydney (June), Melbourne (July), Brisbane (July), Darwin (August) and Perth (August). The workshops aim to assist NGOs to participate in the government's consultation by increasing awareness of the National Action Plan process, considering the draft Baseline Study (once it is released) and developing possible action points for inclusion in the final plan.

All the latest National Action Plan news and background information is available here.

STATE-BASED HUMAN RIGHTS DEVELOPMENTS

Community and legal groups call for Victoria's Human Rights Charter to be strengthened

A coalition of legal and community organisations has urged the Baillieu Government to ensure Victoria does not become the first jurisdiction in the developed, democratic world to weaken or repeal a human rights act.

At a joint media conference hosted by the Human Rights Law Centre on 9 June, representatives from the Federation of Community Legal Centres, Liberty Victoria and the Homeless Persons' Legal Clinic, outlined their visions of how the Victorian Charter of Human Rights and Responsibilities should be expanded and strengthened.

Lucy Adams from the Homeless Persons' Legal Clinic said the Charter was particularly important for many of the most vulnerable members of Victoria's community. The HPLC's charter-related work has prevented 42 people being evicted from social housing into homelessness.

"These people and their family members, including 21 children, have avoided homelessness and the personal, social and economic consequences that come with it. The State has also avoided adding 42 people to an already overstretched emergency accommodation system. This exemplifies the way in which the Charter has been used to bring about just, fair and efficient outcomes since its commencement," Ms Adams said.

Liberty Victoria's Jamie Gardiner said the Charter is working well by increasing human rights considerations throughout the public service and by improving service delivery to the public.

"Developing a human rights culture is a long term project. The value of the Charter is to introduce consistency and a framework for government. Over time, the Charter will improve efficiency and reduce the cost of delivery of public services," Mr Gardiner said.

Acknowledging that the Charter has limitations arising from the conservative 'quiet achiever' nature of the model, the panellists all agree that the Government's current review is an ideal opportunity to expand and strengthen the Charter.

The Executive Officer of the Federation, Hugh de Kretser, said even when a law clearly breaches human rights, all the courts can do is refer the matter back to parliament which is free to ignore any incompatibilities with human rights laws.

"In spite of limitations, the Charter has improved outcomes as it focuses the attention of government agencies on delivering human rights compliant services and focuses the Government on the human impact of its actions. It has quietly and surely been delivering better results for vulnerable Victorians," Mr de Kretser said.

The HRLC's Ben Schokman said proper protection of human rights requires access to a legal remedy where rights have been infringed.

"A lot of myths have developed about the Charter which are simply not true. The Charter provides ordinary Victorians with increased human rights protections and no government should be taking steps that will strip Victorians of these protections," Mr Schokman said.

The deadline for submissions to the review of the Charter has recently been extended to 1 July 2011. Further information is available at http://www.hrlc.org.au/content/four-year-review-of-the-victorian-charter/.

Victorian Government weakens protections against discrimination

In the early hours of 15 June 2011, in a post-midnight extended sitting of the Legislative Council, the Equal Opportunity Amendment Bill 2011 was passed. Below is a summary and analysis of key provisions of the Bill.

The main purposes of the Bill include:

- altering the governance arrangements of the Equal Opportunity and Human Rights Commission, removing the Commission's power to conduct public inquiries and altering the Commission's powers relating to the conduct of investigations;
- creating various exemptions permitting discrimination in the contexts of the payment of youth wages, the provision of accommodation to persons with children, the granting of membership to political clubs and in the organisation of single-sex sporting activities;
- extending the ability of religious bodies and schools to discriminate on a number of grounds in the context of employment without requiring that the basis of discrimination be an inherent requirement of the position; and
- amending the Electoral Act 2002 to permit the Victorian Electoral Commission to discriminate on the grounds of political belief and activity in employment.

Charter rights

The amendments in the Bill primarily engage the right to recognition and equality before the law under s 8 of the Charter. This right has three limbs:

- the right to recognition as person before the law;

- the right to enjoy one's human rights without discrimination; and
- the right to equal protection under the law without discrimination and to equal and effective protection against discrimination.

Any provision permitting discrimination will engage, and likely limit, the rights protected by s 8 of the Charter. In addition, various aspects of the Bill engage Charter rights independently of s 8, such as the limitation of the right to freedom of expression caused by permitting schools to set standards of dress, appearance and behaviour.

Standards of dress, appearance or behaviour for school students

The Bill states that the standards of dress, appearance or behaviour set by a school for its students must be taken to be reasonable so long as the views of the community were considered by the school in setting those standards. The Statement of Compatibility acknowledged that this exemption allows schools to limit their students' right to freedom of expression and notes the same test of reasonableness exists under UK law. The SARC report, in response to the Statement of Compatibility, noted that this exemption is very broad because it is only limited by procedure and referred the amending clause to Parliament for consideration as to whether it is the least imposing restriction on the engaged right.

Payment of youth wages, refusing accommodation to persons with children and membership of political clubs

The Bill allows accommodation to be refused to persons with children on the basis that the accommodation is unsuitable by reason of its design or location. This provision engages the right to equality. The Statement of Compatibility asserted that this limitation is reasonable and connected to its purpose because it does not allow refusals to be made for any other reason such as the "amenity of other guests."

The Bill permits the payment of youth wages to persons under 21. The Statement of Compatibility asserted that this limitation on the right to equality is reasonable and justified on the basis that it serves the important purpose of promoting entry to the work force by compensating for the inexperience of young applicants. Arguably, however, wage discrimination based on experience, rather than the arbitrary age of 21, would be a less restrictive and more rationally connected means of achieving this purpose.

The Bill also permits political clubs to discriminate in the admission of membership on the basis of political belief or activity. The Statement of Compatibility notes this exemption advances the right to freedom of association and is reasonable and justified because it applies restrictively to clubs whose primary purpose is political.

Without discussing any of these exemptions in detail, the SARC report referred them to Parliament for consideration as to whether they are the least imposing restrictions on the engaged rights.

Discrimination in employment by religious bodies and schools

The Bill allows religious bodies and schools to discriminate against persons in employment on the basis of "religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity" so long as the discrimination conforms with the doctrines or beliefs of the religion or "is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion." Permitted discrimination will no longer be restricted solely to where the necessary attribute giving rise to the discrimination is an "inherent requirement" of the position (a requirement contained in the *Equal Opportunity Act 2010* in the form passed by parliament, but which had not yet come into effect).

The Statement of Compatibility describes the amendments as being necessary in order to strike the necessary balance between the right to freedom of religion and freedom of association, and the right to equality. However, without the inherent requirement test, the proposed amendment does not maintain a close or rational connection between the limitations it imposes on the right to equality and the stated aim of enabling religious bodies and schools the freedom to recruitment suitable employees.

Victorian Electoral Commission exemption and single-sex sporting activities

The Bill introduces two instances whereby sex discrimination in competitive sporting activities will be permitted. These are when single-sex participation is required for progression to elite levels of competition and where single-sex participation is intended to facilitate participation in the activity. The Statement of Compatibility asserts that these limitations on the right to equality as serve an important purpose in facilitating competitive and wider participation in sports where necessary.

As with the competitive sporting activity exemptions, the Bill introduces a statutory exemption to discriminatory recruitment practices on the basis of political belief or activity for the Victorian Electoral Commission. The Statement of Compatibility described the exemption as clearly appropriate and vital to maintaining public confidence in the integrity of elections.

Previously exemptions for sporting organisations and for the VEC of similar effect were judicially granted and included a condition that the on-going need for discriminatory practices be evidenced and reported on. By introducing statutory exemptions, it will no longer be necessary to justify these practices on an ongoing or case-by-case basis. This imposes a greater limitation on the right to equality. The SARC report made note of this and referred these amendments to Parliament for consideration as to whether they are reasonable and justified in light of their aims.

Restructuring of the Commission

The bill replaces Part 9 of the 2010 Act and restructures the Commission. The Bill removes the Commissioner's power to conduct public inquiries. This is potentially a limitation upon the right to a fair and public hearing. The Statement of Compatibility and the SARC report do not discuss this amendment. It is noted however that the bill introduces greater judicial supervision by VCAT over Commission investigations. Under the Bill the Commission will have to seek orders from VCAT to compel the provision of documents and information from VCAT, which will be limited in its ability to grant such orders. Exemptions to the secrecy provision in the 2010 Act will allow disclosure of information by the Commission and its staff without facing criminal sanction when compelled to by a court order or at the consent of the parties to which the information relates.

While the operations of the Commission and its investigative powers have been altered, from a human rights perspective, it is the extension of the discrimination exemptions that is the most significant and key point of reform in the Bill.

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Justice Legislation Amendment (Infringement Offences) Bill 2011

The *Justice Legislation Amendment (Infringement Offences) Bill 2011* provides for a permanent infringement scheme to deal with a number of public order and liquor-related offences. It also seeks to extend the trial period during which infringement notices can be issued for shop theft and wilful damage offences.

The Bill was introduced following a three-year trial expansion of enforcement by infringement notice in Victoria. According to Attorney-General Robert Clark, the trial confirmed the suitability of

this type of enforcement mechanism for a number of offences, including offensive behaviour and indecent language offences.

The Statement of Compatibility tabled with the Bill identifies two rights under the *Charter of Human Rights and Responsibilities Act 2006* that are potentially engaged by the Bill, being the right to a fair hearing (s 24) and the right to be presumed innocent until proved guilty (s 25).

The Statement acknowledges that the use of on-the-spot infringement notices might be seen to deny an accused the ability to have the charge decided by a competent, independent and impartial court or tribunal after a fair and public hearing. However, the Government contends that the Bill does not limit the rights protected by s 24 because the *Infringements Act 2006* (Vic) preserves an accused's right to elect to have the matter heard and determined by a magistrate in open court and provides opportunities to have matters reviewed administratively.

The Statement further contends that, unless a person elects to have the matter heard in open court, the issue of an infringement notice will not constitute a charge. Moreover, provided the infringement fine is paid, no conviction is recorded and payment is not to be taken as an admission of guilt. As such, the Bill does not limit the right of a person charged with a criminal offence to be presumed innocent until proved guilty.

The Scrutiny of Acts and Regulations Committee made no express comment in relation to the Bill's compatibility or otherwise with human rights.

According to the Victorian Equal Opportunity & Human Rights Commission, the Statement did not provide a thorough analysis of the impact of the infringement penalty regime on relevant human rights. In its submission to SARC, the Commission identified two additional rights that are said to be engaged by the Bill, being the right to equality (s 8) and the right not to be tried or punished more than once (s 26).

The Commission raised concerns about the potential impact of the infringement scheme on vulnerable persons and people with special circumstances, including children and young people, people experiencing homelessness, people with a disability and those who experience serious financial hardship. The Commission argued that the Bill has the potential to disadvantage vulnerable individuals for the following reasons:

- they are more susceptible to being issued with infringement notices for offences necessarily occurring on the streets or in public places;
- they are less likely to be able to pay a fine under an infringement notice;
- they are less likely to have the resources to challenge an infringement notice; and
- the fact that the offences are of 'strict liability' could permit discriminatory treatment by an issuing officer.

The Commission further argued that there is the potential for 'double punishment' under the Bill in circumstances where a person is placed in temporary custody for being disorderly or intoxicated and then subsequently issued with an infringement notice. It observed that the relative ease of issuing infringement notices could mean that discretion is not exercised by issuing officers and other diversion and remedial options could be ignored. The Commission's submission concluded by quoting the Second Reading Speech for the *Infringements Act*, which states: "[p]eople with special circumstances are disproportionately, and often irrevocably, caught up in the system. In a just society, the response to people with special circumstances should not be to issue them with an infringement notice" (Mr Gavin Jennings, Legislative Council, 28 March 2006, Hansard, p 947).

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AUSTRALIAN HUMAN RIGHTS CASE NOTES

When will disciplinary action constitute a 'punishment'?

Psychology Board of Australia v Ildiri (Occupational and Business Regulation) [2011] VCAT 1036 (14 June 2011)

Summary

The Victorian Civil and Administrative Tribunal (VCAT) has held that deregistering a practitioner for unprofessional conduct under the *Health Professions Registration Act 2005* (Vic) is not punishment and therefore does not infringe the right to freedom from double punishment under s 26 of the Victorian Charter.

Facts

Ms Ildiri was a registered psychologist. Between 2003 and 2007 Ms Ildiri lodged false invoices with the Victims of Crime Assistance Tribunal for counseling sessions that did not take place. Ms Ildiri was found guilty by the Magistrates' Court of a number of fraud charges. In May 2009 Ms Ildiri was sentenced to 9 months' jail and ordered to pay $51,675.90 in compensation.

The Psychology Board of Australia applied to VCAT for a finding of unprofessional conduct and to have Ms Ildiri's registration cancelled on this basis.

Decision

The Tribunal found that Ms Ildiri had engaged in unprofessional conduct and that this conduct warranted cancellation of her registration as a psychologist.

Counsel for Ms Ildiri argued that s 26 of the Charter, which provides that a "person must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with law", prevented the Tribunal from imposing a penalty for unprofessional conduct because to do so would amount to double punishment in light of Ms Ildiri's prior fraud convictions. Counsel further argued that s 38 of the Charter, which requires public authorities to consider Charter rights in making decisions, required the Tribunal to choose the least punitive of the range of penalty options available to it to act compatibly with s 26.

The Tribunal rejected these arguments as "misconceived". It cited authority that the primary purpose of disciplinary proceedings is not to punish a practitioner but rather to protect the public and the reputation of the practitioner's profession. On this basis the Tribunal found that a penalty issued under the *Health Professions Regulation Act 2005* (Vic) was not punitive and that as such "the Charter's protection against being 'punished' twice for the same offence is not engaged".

Relevance to the Victorian Charter

The finding that s 26 of the Charter will be relevant only when the purpose of a penalty is punitive is consistent with the Tribunal's decision in *Swain v Department of Infrastructure (General)* [2008] VCAT 848, in which it was held that a government authority's refusal to issue a commercial driver's licence to a person because of their history of insurance fraud was not punitive, and therefore did not constitute double punishment.

This case does not clarify whether the prohibition on double punishment in s 26 is limited to criminal punishment, as is the case in the analogous provisions to s 26 in the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights*, or

whether s 26 will also apply to non-criminal penalties applied for a punitive purpose. Moreover, this case does not clarify whether punishment needs to be the sole or dominant purpose of a penalty in order to raise the protection of s 26.

The decision is at http://www.austlii.edu.au/au/cases/vic/VCAT/2011/1036.html.

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INTERNATIONAL HUMAN RIGHTS CASE NOTES

Indefinite detention of non-convicted persons' DNA violates right to privacy

GC v The Commissioner of the Police of the Metropolis [2011] UKSC 21 (18 May 2011)

Summary

On 18 May 2011 the Supreme Court of the United Kingdom handed down a judgment which considered whether a provision in the *Police and Criminal Evidence Act 1984* (PACE) which provided that DNA samples "may be retained after they have fulfilled the purposes for which they were taken but shall not be used by any person except for purposes related to the prevention or detection of crime" could be interpreted compatibly with art 8 of the *European Convention of Human Rights* and if not, whether police acts of retaining DNA data permanently, were unlawful.

Facts

Section 64 of PACE, as originally enacted, provided for the collection of fingerprints and other DNA samples and that such samples must be destroyed as soon as practicable after the conclusion of the proceedings if the person suspected of an offence is cleared of the offence. Given concerns that destroying DNA data could inhibit the investigation and prosecution of other offences, s 64(1)(a) of PACE was enacted to provide that data may be retained after it has fulfilled the purposes for which is was obtained but shall not be used for any purpose except for purposes related to the prevention or detection of crime.

However, PACE does not specify any time limit for the retention of the data or any procedure to secure its destruction if it was not to be retained indefinitely. These matters are addressed in guidelines issued by the Association of Chief Police Officers. The guidelines give Chief Officers the discretion to authorise the release of any specific data entry on the police national database and are responsible for the authorisation of the destruction of data. The guidelines suggest that this discretion should only be exercised in exceptional cases such as where the original arrest was found to be unlawful.

Subsequent to the guidelines, the European Court of Human Rights (ECHR) held that the "blanket and indiscriminate nature of the power of retention" provided for by the guidelines failed to 'strike a fair balance between the competing public and private interests' and that the retention at issue before the ECHR was a disproportionate interference with the applicant's rights to respect for private life and could not be regarded as necessary in a democratic society.

Whilst the guidelines were under review at the time of these proceedings, they had not been revised. These proceedings arise from two applications for judicial review of the retention of DNA data on the grounds that in light of the ECHR's decision, such retention was unlawful, being incompatible with the *Human Rights Act 1998* (UK).

The Issues

The respondent in the proceeding argued that under s 64(1)(a) of PACE, the police had a power which, save in exceptional circumstances, *must* be exercised so as to retain all data indefinitely. As such, section 64(1)(a) cannot be read or given effect to so as to permit the power to be exercised proportionately in a way described by the ECHR and the guidelines reflected this position. It was not put, however, that s 6(2)(a) of the *Human Rights Act* was at play because it was accepted that there was a discretion, but limits as to how the discretion should be exercised.

In support of this position, it was argued that to require the police to comply with the *Human Rights Act,* or the European Convention of Human Rights, would defeat the statutory purpose of establishing a scheme for the protection of the public interest free from the limits and protections required by these instruments. It would, in effect, re-write the statutory provision in a manner inconsistent with the fundamental feature of the legislative scheme which is that instead of being destroyed, data taken from all suspects shall be retained indefinitely. As such, Parliament must have intended that the discretion conferred by s 64(1)(a) of PACE should be exercised to promote the statutory policy that data from all suspects in connection with the investigation should be retained indefinitely.

Secondly, it was argued that to read the guidelines compatibly with the *Human Rights Act* would require the Court to undertake a statutory amendment which is something that should be left to Parliament.

Decision

The majority of the Court resolved the issue by construing s 64(1)(a) of PACE, including its statutory purpose, and determining whether the provision can be interpreted compatibly with the *Human Rights Act* and therefore the Convention. The Court found that the provision could be read compatibly as the discretion provided by s 64(1)(a) of PACE must be exercised to enable the data to be used for the statutory purpose but in a way which is proportionate and rationally connected to the achievement of those purposes. It particular, the Court considered that s 3 of the *Human Rights Act* imposes a duty on the public authority, insofar as it is possible to do so, to give effect to the power conferred on it in a way which is compatible with Convention rights. Whilst Parliament had not prescribed the essential elements of the scheme by which the statutory purposes were to be promoted, the Court found that the use of the word "may" was not an obvious way of expressing an intention that all samples should be retained indefinitely, in a disproportionate manner inconsistent with the Convention.

As to the appropriate order, the Court considered it appropriate to grant a declaration that the present guidelines are unlawful since they are incompatible with the *Human Rights Act*. The Court noted that if Parliament does not produce revised guidelines within a reasonable time then the appellants will be able to seek judicial review of the continuing retention of their data under the unlawful guidelines and that their claims will be likely to succeed.

The decision is at http://www.bailii.org/uk/cases/UKSC/2011/21.html.

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Balancing the right to privacy and freedom of expression: What is the public interest in private affairs?

CTB v News Group Newspapers Limited [2011] EWHC 1232 (QB) (16 May 2011)

Summary

In this case, Eady J of the England and Wales High Court granted an injunction restraining disclosure of the identity of a footballer who had had an extramarital affair. In doing so, the judge first had to consider two competing rights in the European Convention of Human Rights: the right to respect for private and family life (art 8) and the right to freedom of expression (art 10). The judge undertook a balancing exercise to determine the relative importance of the two rights in the circumstances. Given the very personal nature of the information and the lack of any real public interest in disclosure, Eady J held that the right to privacy prevailed.

Facts

On 14 April 2011, an article appeared in *The Sun* newspaper containing an account of a sexual relationship between former UK Big Brother contestant Imogen Thomas and a high-profile footballer. While Thomas was identified in the article, the footballer remained unnamed.

During the afternoon of 14 April 2011, the footballer — referred to throughout the case as CTB — sought an interim injunction to prevent disclosure of his identity and further reporting of the story.

The material facts before the Court can be summarised as follows:

- CTB was a married man with a family.
- CTB stated that he had met with Thomas three times in 2010 (this was in stark contrast to *The Sun*'s article, which suggested that the two had been in a relationship that had lasted six months).
- CTB stated that he had met with Thomas a couple of times in 2011 before *The Sun* article was published. From the evidence, it appeared that Thomas had informed photographers and journalists about those meetings in advance. CTB claimed that at the meetings, Thomas asked him for money to stop her from selling her story to the media. Thomas denied this and also denied any involvement with *The Sun* article.

Decision

Eady J started by saying that in cases involving competing Convention rights, the Court's function is "well known" and "well established" by judicial authority. These cases require the Court to carry out a "balancing exercise". In particular, where the right to respect for private and family life (art 8) and the right to freedom of expression (art 10) are in conflict, the balancing exercise translates to a two-step process. First, the Court looks to the subject-matter of a proposed publication and asks whether it gives rise to a "reasonable expectation of privacy" on the part of the claimant resisting publication. Second, the Court asks whether the claimant's art 8 right to privacy ought to be "overridden by any countervailing considerations". Those considerations include the art 10 freedom of expression right of all stakeholders (eg, journalists), as well as the public interest and "the right of citizens generally to receive information".

On the first limb, Eady J found in favour of CTB. The judge held that information about "conduct of an intimate and sexual nature" was well within the ambit of CTB's reasonable expectation of privacy. This was especially so in the circumstances of this case, where there was no indication that either CTB or Thomas intended to conduct their relationship openly and in public.

Eady J also found in favour of CTB on the second limb. The judge held that there was little "legitimate public interest in the revelation" of the information of the relationship between CTB and Thomas. In the opinion of the Court, this information was quite clearly not of a kind that would "contribute to 'a debate of general interest'" or that would "achieve some legitimate social purpose" such as preventing or detecting criminal acts. Also, there was no risk of the "public being seriously misled" if the information was not revealed to them.

Lastly, Eady J considered the applicability of the so-called "public domain proviso". The proviso applies when information which would otherwise be protected by the right to privacy is previously released in the public domain. Such information loses its confidentiality and cannot be protected by the Court. Eady J went on to draw an important distinction between, on the one hand, secrets of the state, and, on the other, secrets from a person's private life. With respect to the latter, the judge explained that "[i]t is more difficult to establish that confidentiality or a reasonable expectation of privacy has gone for all purposes … by reason of it having come to the attention of only certain categories of readers". Eady J was not satisfied that publication of *some* of the details of the relationship in a *single* newspaper had extinguished all of the confidentiality in that information or that the publication had removed CTB's reasonable expectation of privacy. As a result, Eady J granted the injunction.

There have been some interesting developments to this case that are worth mentioning. In the days following the judgment, CTB was named by a substantial number of users of the social media site Twitter. Also, a Member of Parliament in the UK relied on parliamentary privilege to name CTB in the House of Commons. Despite this, the Court refused to set aside its injunction. The Court, in two further judgments, stated that the law of privacy is concerned with *intrusion* just as much as it is with secrets. In the circumstances of the case, although the injunction proved ineffective at protecting the secrecy of CTB's identity, it remained effective at preventing further intrusion — such as harassment and taunting by the media — into CTB's private life.

Relevance to the Victorian Charter

The case provides a useful balancing framework that can be applied to situations where a conflict arises between two rights in the Victorian Charter, in particular, a conflict between the right to privacy and reputation (s 13) and the right to freedom of expression (s 15).

The emphasis of Eady J was that there is no hierarchy of rights under the Convention whereby one right automatically takes precedence over another. The judge explained that what is required when an apparent conflict between two rights emerges is an "intense focus" on the prevailing circumstances, with a view to correctly balancing the relative importance of one right over another. There is no reason why a similar approach should not be extended to cases of conflict of rights under the Charter.

The decision is at http://www.bailii.org/ew/cases/EWHC/QB/2011/1232.html.

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Supreme Court of the United States upholds 'structural injunction' requiring California to reduce its prison population

Brown, Governor of California et al v Plata et al, 563 US _____ (2011) (23 May 2011)

Summary

On 23 May 2011 the Supreme Court of the United States upheld a lower court's decision finding that the conditions in California's overcrowded prisons violated prisoners' Eighth Amendment

right not be subjected to cruel and unusual punishment. As a result of the overcrowding, adequate medical care could not be provided to prisoners. The Court reaffirmed US authority that denial of basic sustenance, including adequate medical care, violates the Eighth Amendment. What is perhaps more notable is the remedy it upheld, a cap on the prison population. The Court could have ordered the State to provide adequate medical care in its prisons, and accepted the State's plans for achieving that result. The Court instead found that only if the prison population decreased would it be possible for adequate medical care to be provided.

Facts

The facts as found in the lower court decisions are grim. A prisoner in California "needlessly dies every six to seven days due to constitutional deficiencies in the medical delivery system". Prisoners requiring urgent referrals to specialist treatment often waited months for that treatment, if they ever received it.

The decision on appeal related to two class actions arising from these conditions. In *Coleman v Brown,* filed in 1990, the District Court found that prisoners with serious mental illness do not receive minimal, adequate care. A Special Master appointed to oversee remedial efforts reported 12 years later that the mental health care provided continued to deteriorate due to further overcrowding. In *Plata v Brown*, filed in 2001, the State accepted that deficiencies in prison medical care violated prisoners' Eighth Amendment rights and stipulated a remedial injunction. But when the State had not complied with the injunction by 2005, the court appointed a Receiver to oversee remedial efforts. Three years later, the Receiver described continuing deficiencies caused by overcrowding.

Following these ongoing failings, a three judge lower court ordered that the prison population be reduced to 137.5% of capacity.

Decision

The ability of a court in the United States to order that prison numbers be reduced is stringently curtailed by the Prison Litigation Reform Act (1995), which contains a range of requirements that will not be directly relevant in Australia. For present purposes, the most relevant findings are that overcrowding was the primary cause of the violations of Eighth Amendment rights, and as a result these violations could not be remedied any other way.

The Supreme Court accepted the lower court's findings of fact that the State's efforts to provide adequate health care would not succeed until overcrowding was reduced. Efforts to deliver new programs were thwarted by the inability to hire and retain adequate staff and the absence of physical space to provide medical care. These issues simply could not be addressed so long as prisons remained overcrowded. Plans for construction of new facilities had no real prospect of being carried out given budgetary constraints. A cap on the population, achieved through reductions in the absolute number of prisoners, was therefore the only possible means of avoiding ongoing constitutional violations.

The Court was firmly divided, 5:4, in this finding. The dissenting judgments focused, most relevantly, on the concern that the judiciary not involve itself in policy decisions that are the proper province of the executive. If the Court orders such relief on the basis that "prison medical facilities are inadequate, the essential distinction between judge and executive would have disappeared: it would have become the function of the courts to assure medical care."

Relevance to the Victorian *Charter*

Brown is of most direct relevance to s 22 of the Charter, the right to humane treatment while in detention. Given the egregious facts of *Brown*, however, it does not represent an extension of the standard already likely to be required by s 22. In *Castles v Secretary to the Department of Justice*

[2010] VSC 310 the Victorian Supreme Court commented that s 22 will require that "Like other citizens, prisoners have a right to…a high standard of health. That is to say, the health of a prisoner is as important as the health of any other person." A high standard of health will require the provision of medical care well beyond what was found to be available in California's prisons.

The Supreme Court's affirmation of the order to reduce the prison population, a form of structural injunction is the more notable of its findings. Such orders, which require large scale changes in an organisation's practices and procedures, are unknown in Australian courts. However when confronted with ongoing, systemic conditions that, on the facts as found, make continued human rights breaches all but inevitable, their appeal is difficult to deny. The Charter requires that public authorities act compatibly with human rights, and give proper consideration to human rights in any decision making process. This may give some basis for arguing that broader injunctions may be necessary to provide the relief envisaged by s 39 if a public authority displays the level of dysfunction found in *Brown*. It is likely, however, that any such broadening will be limited, for reasons similar to those expressed by the minority in *Brown*.

The decision is at http://www.supremecourt.gov/opinions/10pdf/09-1233.pdf.

Further reading about prisoner rights can be found here on the HRLC website.

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The right to family life and liberty of persons affected by disability

London Borough of Hillingdon v Neary & Anor [2011] EWHC 1377 (COP) (09 June 2011)

Summary

In this case, a 21 year old man with autism and severe learning disabilities who was institutionalised, rather than being permitted to return to his home under the care of his father, has been held to have been deprived of the right to liberty and family life. The England and Wales High Court has ruled that that the public authority who kept the man in a care facility for nearly a year, did so unlawfully.

Facts

As a result of his autism, Steven Neary requires routine care and becomes highly anxious if unprepared for change of any kind. He needs constant adult supervision and care for his safety and that of others, as he may sometimes “lash out, not in malice but rather in the manner of a small child.” His father, Mark Neary, is Mr Neary’s primary care-giver and a dedicated single parent, who was supported by daytime carers funded by the Borough of Hillingdon.

For the most part, Mr Neary resided at his family home, with the exception of a short stay in a support unit in 2008. During the 2009 Christmas period (a particularly difficult time for Mr Neary because a number of changes need to be made to his routine, as a result of closures of facilities which he usually frequented), his father sought the assistance of Hillingdon, as Mr Neary was particularly unsettled. Mr Neary was taken into respite care. At the outset, this was intended to only last for a few days to allow his father to recharge himself, however, Hillingdon made the unilateral decision to extend Mr Neary’s institutionalisation indefinitely, concerned about his weight gain and behaviour. In December 2010, a year after having been kept at the facility by Hillingdon, Justice Mostyn, on the application of Mr Neary’s father, made a ruling that Mr Neary should be returned home.

The current case arose out of claims made on behalf of Mr Neary, supported by his father, that Hillingdon’s actions were unlawful.

Decision

The central issue for determination by Justice Jackson was whether Hillingdon violated Mr Neary's right to family life and deprived him of his liberty, in contravention of arts 8 and 5 of the European Convention on Human Rights (ECHR).

Hillingdon contended that it had acted in Mr Neary's best interests. Justice Jackson rejected Hillingdon's arguments that it had his father's consent to Mr Neary institutionalisation during the period of January to April and found the deprivation of liberty (DOL) authorisations that had been granted by Hillingdon, under the *Mental Capacity Act 2005*, to legitimise its own actions were invalid. Ultimately, the Court found that Hillingdon had unlawfully kept Mr Neary away from his home and had deprived him of his liberty and the right to family life.

Two principles are relevant. It is settled law that actions may be taken by public authorities and families together, after a careful consideration of the best interests of an incapacitated person, and that such actions, which are regularly undertaken, involve no breach of an incapacitated person's rights. Where there is a DOL, statutory safeguards exist to provide protection. In cases of disagreement, where a local authority seeks to compel, coerce or restrain, with the exception of an emergency, such actions must be endorsed by a specific statutory code, or the public body must obtain the sanction of the court.

In the present case, far from being a safeguard, Justice Jackson found that "the way in which the DOL process was used masked the real deprivation of liberty, which was the refusal to allow Steven to go home." The fact that Hillingdon formed a view that it was acting in Mr Neary's best interests was "neither here nor there." As Justice Jackson articulated, where a supervisory body "grants authorisations on the basis of perfunctory scrutiny of superficial best interests assessments, it cannot expect the authorisations to be legally valid."

Moreover, the Court also found that by failing to:

- refer the matter to the Court of Protection;
- appoint Steven with an Independent Mental Capacity Advocate; and
- conduct an effective assessment of the DOL best interests evaluations (Part 8 of the *Mental Capacity Act 2005*),

Hillingdon had breached Article 5(4) of the ECHR, depriving Mr Neary of his right to a speedy determination of the lawfulness of his detention, the onus being on public authorities to refer DOL cases to the relevant Court, and it being insufficient to rely on an incapacitated person, or their family members to enforce such rights.

Justice Jackson also made a number of cautionary statements about:

- the need to expediently bring matters before the Court of Protection, where welfare issues cannot be resolved by discussion between the parties; and
- the need for accountability in relation to decision making.

Right to family life and the deprivation of liberty

Justice Jackson considered the right to family life formed the "nub" of the proceedings. This was not to say that the deprivation of Mr Neary's liberty was an insignificant issue, but rather that the question of where he should be residing ought not be conflated with whether he was unlawfully detained.

The requirement to respect a person's right to family life in the arena of adult care is well settled and enunciated in a number of UK and European statements of principle. Citing a number of authorities, Justice Jackson commenced his analysis with the established principle that mentally

incapacitated adults are better off living with family, rather than being institutionalised and family life should not be lightly be interfered with. If a public body seeks to remove such a person from their family, this must only be done in circumstances where the state care will be of a better standard to that which the person has been receiving at home.

In the present case the following factors were key to the Court's finding that Mr Neary's right to family life had been violated:

- Hillingdon did not consider the disadvantages to Mr Neary of living away from his family;
- there was no genuine attempt made by Hillingdon to undertake a balanced best interests evaluation;
- the approach taken by Hillingdon was aimed at preventing appropriate scrutiny of the situation - the father's opposition to Mr Neary's institutionalisation was overborne by turning a deaf ear to his objections and suggesting that financial support of Mr Neary at home could potentially be withdrawn if he did not acquiesce;
- the DOL authorisation utilised to restrict Mr Neary's freedom and activities were not defensible on the evidence available to Hillingdon. Steven was, as a result of these authorisations, deprived of participating in activities that were significant to him and holidays with his father

Justice Jackson also ruled that Mr Neary had been deprived of his liberty. He canvassed a number of reasons to support this ruling. Key to his decision were the following factors:

- Mr Neary's objection to being at the support unit;
- Mr Neary's father's objections to Hillingdon's actions; and
- the "total effective control of Steven's every waking moment, in an environment that was not his home."

Justice Jackson was troubled by the extremely disquieting proposition that Mr Neary may have "faced a life in public care, that he did not want and does not need," as it was Hillingdon's ultimate plan to transfer him to a long term facility outside of London, potentially causing irreversible harm to his close relationship with his father and family ties. With this background in mind, the Court commended the actions of Mr Neary's father who did not give up, "in the face of such official determination" regarding the best interest's of his son and his care.

Relevance to the Victorian Charter

Justice Jackson's ruling in *Hillingdon v Neary* provides a comprehensive discussion of the right of individuals affected by disability to liberty and private life, and the obligations of public authorities who seek to impose restrictions on such individuals in pursuit of their best interests.

The treatment of the issues in this case is balanced and cognisant of the complex social and psychological interplay between family and public welfare authorities in this arena and the intricacies associated with care-giving. The case is welcomed as a highly valuable piece of comparative jurisprudence, which provides guidance to both public authorities working in this sector and practitioners seeking to represent individuals whose rights are at risk of being contravened.

In the Victorian context, ss 13 and 21 of the Charter are most relevant to the issues canvassed in *Hillingdon v Neary*. Section 13 of the Charter provides that a person has the right not to have their family arbitrarily interfered with, and section 21 enshrines an individual's right to liberty, whereby a person must not be arbitrarily detained except on grounds and in accordance with procedures established by law.

The decision is at http://www.bailii.org/ew/cases/EWHC/COP/2011/1377.html.

Alysia Abeyratne *is a Solicitor with the Human Rights Law Group at Mallesons Stephen Jaques.*

European Court holds that failure to provide access to reproductive healthcare may violate prohibition against torture and ill-treatment

R.R. v Poland [2011] ECHR 828 (26 May 2011)

Summary

In this case the European Court of Human Rights (ECHR) delivered judgment in favour of an applicant, Ms R.R., who brought a case against Poland for a violation of arts 3 and 8 of the European Convention of Human Rights. Article 3 of the Convention protects the right to freedom from inhuman and degrading treatment. Article 8 of the Convention, *inter alia*, protects an individual's right to respect for privacy and family life. This case is a significant step forward in the protection of reproductive rights, with third-party comments submitted by the United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, the International Federation of Gynaecology and Obstetrics, and the International Reproductive and Sexual Health Law Programme, University of Toronto, Canada.

Facts

In December 2001, the applicant, a Polish national, R.R., was informed by a local doctor, Dr S.B., that she was approximately 7 weeks pregnant. During an ultrasound conducted in her 18th week of pregnancy, R.R. was informed by the same doctor that it could not be ruled out that the foetus was affected with some malformation. The applicant informed him that if tests concluded that this was the case, then she wished to have an abortion.

R.R. underwent two more ultrasounds, one by referral at a public hospital, and another at a private clinic, both confirmed the likelihood that the foetus was suffering from a malformation, and both recommended amniocentesis genetic testing occur to confirm the suspicion.

With these recommendations, R.R. attended Professor K. Sz., a clinical genetics specialist who also recommended genetic testing, however, Professor K. Sz. advised that R.R. obtain a formal referral from the original local doctor, Dr S.B., so that the testing could be carried out in a public hospital. Subsequently, Dr S.B. refused to provide this referral on the basis that, in his opinion, the foetus' condition did not satisfy the provisions for abortion under the *1993 Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act.*

Section 4(a) of the Act provides that an abortion can only be carried out by a physician where the pregnancy endangers the mother's life or health, where prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable life threatening ailment or where there are strong grounds for believing that the pregnancy is a result of a criminal act.

Although R.R. had requested a referral for further genetic testing from Dr S.B (which he refused), when she and her husband demanded a termination of the pregnancy in early March, Dr S.B. refused on the basis that the results of the ultrasound scan could not form the sole basis for diagnosis of a "severe malformation" satisfying the Act.

R.R. continued to attempt to obtain a more conclusive diagnosis, including admission to her regional hospital. When R.R. was finally given a certificate confirming that the foetus had a chromosomal aberration and congenital defects, satisfying the requirements of the Polish abortion laws, R.R. was informed by the hospital that it was too late in the pregnancy for an

abortion under Polish law. R.R. gave birth in July 2002 to a baby girl affected with Turner Syndrome.

After exhausting domestic remedies (and receiving partial compensation at the Polish Supreme Court), R.R. appealed to the ECHR for breaches of her rights protected under the Convention.

Decision

The Court found that Poland had breached R.R.'s right to freedom from inhuman or degrading treatment or punishment (art 3) and her right to respect for private and family life (art 8). Whilst the applicant also argued that her right to seek an effective remedy for an infringement of a Convention right (art 13) was breached, the Court unanimously found that there was no need to make a separate ruling on this point as it was effectively covered by examination of the breach of art 8.

The Court's approach to art 3 and art 8 are discussed in turn below.

Article 3 - Right to freedom from inhuman or degrading treatment

The Court made it clear that a minimum level of ill-treatment must be reached to be covered by art 3, however this threshold is relative to the circumstances and the individual. The majority (see below for the partially dissenting opinion on this point) found that the applicant was in a situation of great vulnerability, and was exposed to multiple instances of withholding of medical information regarding the foetus, "had to endure weeks of painful uncertainty" and "acute anguish" concerning the health of the foetus, her own and her family's future. In concluding this point, the court found that "the applicant's suffering, both before the results of the tests became known and after that date, could be said to have been aggravated by the fact that the diagnostic services which she requested early on were at all time available and that she was entitled as a matter of domestic law to avail herself of them". The Court found that the applicant's suffering surpassed the minimum threshold of severity required, and concluded that there was a breach of art 3.

Article 8 - Right to private life, family

The right to private life was confirmed by the majority of the Court to be a broad concept that includes the right to personal autonomy, including to have or not to have a child (see below for the partially dissenting opinion on this point). Importantly, the Court affirmed that "the decision of a pregnant woman to continue her pregnancy or not belongs to the sphere of private life and autonomy. Consequently, also legislation regulating the interruption of pregnancy touches upon the sphere of private life".

Accepting that art 8 was applicable to the circumstances of the case, the Court explored whether there had been an arbitrary interference by public authorities, which includes positive obligations to respect private life.

The Court acknowledged that Poland possessed a margin of appreciation with respect to determining the point at which life begins, and the subsequent balancing of rights (discussed in further detail in the partial dissenting opinion below). However, "once the State […] adopts statutory regulations allowing abortion in some situations, it must not structure its legal framework in a way which would limit real possibilities to obtain it. In particular, the State is under a positive obligation to create a procedural framework enabling a pregnant woman to exercise her right of access to lawful abortion".

After applying the various facts to this requirement, and acknowledging third party submissions on this point, the Court concluded that the State failed to comply with their positive obligations to ensure that the applicant's right to respect for her private life was protected, thus breaching art 8.

Partially dissenting opinions

There were two partially dissenting opinions in this case. The first opinion, that of Bratza J, found that art 8 alone was violated, and whilst the applicant was treated callously and uncompassionately, this did not amount to a breach of art 3. In deference to the majority of the Court however, Bratza J agreed with the total amount of compensation awarded.

The second partially dissenting opinion was that of De Gaetano J, who found that whilst there had been a breach of art 3 in the manner in which the applicant was treated, there was not a violation of art 8. De Gaetano J found that there was no such thing as a right to an abortion, and the Court had failed to adequately discuss the right to life of the unborn child, referencing the 1977 case of *Brueggemann and Scheuten v. Germany* which stated that "…pregnancy cannot be said to pertain uniquely to the sphere of private life [as protected by Article 8]. Whenever a woman is pregnant her private life becomes closely connected with the developing foetus".

Relevance to the Victorian Charter

Section 48 of the Charter provides that "[n]othing in this Charter affects any law applicable to abortion or child destruction". Although competing views have been raised as to the correct interpretation and application of this provision, it is arguable that a Victorian Court could nonetheless examine the substantive rights in ss 10 and 13 of the Charter (the right to protection from inhuman and degrading treatment and the right to privacy respectively) in a similar factual scenario to this case.

In particular, proceedings could be instituted relying on a discrete cause of action unrelated to Victoria's abortion laws, for example negligence, which is not a "law applicable to abortion or child destruction". In such a case, a Victorian Court may then be required to consider whether a woman's right to privacy and reputation in particular is engaged, despite the difference in wording between s 13 of the Charter and art 8 of the European Convention.

The case is available at: http://www.bailii.org/eu/cases/ECHR/2011/828.html

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South African Constitutional Court considers the right of appeal to or review by a higher court

Qhinga and Others v S (CCT 50/10) [2011] ZACC 18 (25 May 2011)

Summary

The Constitutional Court in South Africa recently considered an application for leave to appeal against a dismissal by the Supreme Court of Appeal of a petition filed by the applicants on the basis that relevant portions of the record of the proceeding in the High Court were not properly considered in the applicants' petition. It was held that the applicants did not have the benefit of a right of appeal or review by a higher court as envisioned in s 35(3)(o) of the *Constitution* and thus the order made by the Supreme Court of Appeal was dismissed, the petition was set aside and the matter remitted to the Supreme Court of Appeal for reconsideration.

Facts

Seven applicants were convicted in the Eastern Cape High Court (trial court) on two counts of attempted murder and for four counts of robbery with aggravating circumstances. Each was sentenced to long terms of imprisonment. The applicants were implicated in the commission of the crimes solely by statements or pointing-outs they had made to the police or to a magistrate.

The trial court held that "the State relies on statements and some pointings-out the accused made in which they implicated themselves. Trials-within-a-trial in respect of the seven accused were held. Rulings were that the statements and the pointings-out were admissible in evidence. The rulings form part of the record. The Court rules finally that the statements and the pointings-out in respect of the accused are admissible in evidence."

In April 2009, the applicants applied to the trial court for leave to appeal to a full court of the High Court against their convictions and sentences on the basis that their incriminating statements and pointings-out were incorrectly admitted as evidence. The applicants argued that they had not made their statements and pointings-out freely, voluntarily and without undue influence. At the time of making them, they had not been told of their right to legal representation and they had been threatened, tortured and assaulted by police. The trial court rejected their application for leave to appeal on the ground that the applicants had no reasonable prospects of success.

In May 2009, the applicants petitioned the President of the Supreme Court of Appeal for leave to appeal against the judgement of the trial court again on the grounds that their statements and pointings-out were wrongly admitted as evidence. The Constitutional Court has held that where no constitutional issues are raised the Supreme Court of Appeal can refuse leave to appeal without hearing oral argument or providing reasons. In July 2009 the applicants' petition was summarily dismissed.

Decision

In May 2010, the applicants applied to the Constitutional Court for leave to appeal against the order of the Supreme Court of Appeal on the grounds that their right to a fair trial, including "appeal to, or review by, a higher court", under s 35(3)(o) of the *Constitution* was infringed. The applicants argued that the petition procedure of the Supreme Court of Appeal was unfair and that their submissions were not properly considered. The applicants suggested that this was because the Supreme Court of Appeal did not have regard to relevant portions of the trial court's record regarding the admission of the applicants' statements and pointings-out, which required consideration in order for the Supreme Court of Appeal to conduct a fair reappraisal.

The Constitutional Court noted that the trial court did not discuss or describe or publish its reasons for its rulings in the trials-within-the-trial in which it admitted statements and pointings-out, it merely referred to the reasons set out in an earlier record. The Supreme Court of Appeal did not provide any reasons for its order and therefore the Constitutional Court could not comment on whether the relevant records of the trial court were considered by the Supreme Court of Appeal before it dismissed the applicants' petition.

The Constitutional Court concluded that "the applicants did not have the benefit of an adequate reappraisal of their case or an informed decision on it... [and] were not afforded a fair procedure in terms of their right 'of appeal to, or review by, a higher court', as contemplated by section 35(3)(o) of the Constitution." The order of the Supreme Court of Appeal was therefore set aside and the applicants' petition remitted to the Supreme Court of Appeal for reconsideration.

Relevance to the Victorian Charter

Section 24 of the Charter states that "A person charged with a criminal offence or party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing". This is distinct from s 35(3)(o) of the South African Constitution, as it does not specifically mention of the right to appeal or review by a higher court. The case of *Qhinga* highlights the importance of the right to appeal or review a decision from a judicial court or tribunal in order to ensure the judiciary is held accountable and the integrity of the legal system is maintained. For these reasons, s 24 of the Charter arguably

does not go far enough and should be amended to include a right to appeal to higher courts for review of decisions.

The decision is at http://www.saflii.org/za/cases/ZACC/2011/18.html.

***Bridie Murray** is a graduate and **Daniel Creasey** is a Senior Associate with DLA Piper.*

HRLC POLICY WORK

Broadening of Migration Act character test unprincipled and incoherent

On 31 May 2011 the HRLC made a submission to the Senate Legal and Constitutional Affairs Committee opposing the enactment of the *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011*.

The Bill, introduced in response to recent unrest in the Christmas Island and Villawood Immigration Detention Centres, broadens the already significant power afforded to the Minister or his delegate to refuse to grant, or to cancel, a visa on character grounds.

The HRLC opposes the Bill on the basis that:

1. it excludes asylum-seekers from international refugee protection on grounds that would be deemed impermissible under the 1951 Convention Relating to the Status of Refugees;
2. it may result in the return of a person to a territory where he or she faces persecution, contrary to obligations of non-refoulement contained in several international human rights treaties to which Australia is a party; and
3. it is unprincipled and incoherent for the Australian government to impose sanctions on detainees who 'demonstrate a fundamental disrespect for Australian laws, standards and authorities' when the fact and conditions of detention itself constitutes a contravention of international laws, standards and authorities.

The HRLC considers that the more effective and rights-compliant way of deterring criminal behaviour of persons in immigration detention would be to remove the cause of offending behaviours by repealing the provisions of the *Migration Act 1958* relating to mandatory detention.

***Rachel Ball** is the Director of Policy at the Human Rights Law Centre.*

UN and HRLC urge Australia to adopt human rights-based approach to aid and development

On 31 May 2011, the UN Independent Expert on Human Rights and Foreign Debt tabled a report on his February 2011 country mission to Australia in the UN Human Rights Council.

The mission focused on the human rights impacts and implications of Australia's aid, development, trade and investment policies. The report contains ten concrete recommendations for the Australian Government to better promote and protect human rights, including the right to development, through aid and trade.

The Human Rights Law Centre was pleased to make an oral statement to the Council in response to the report and to recommend that the Australian Government adopt a human rights-based approach to foreign policy, poverty and development.

Statement by Human Rights Law Centre and National Association of Community Legal Centres to UN Human Rights Council on 1 June 2011

The National Association of Community Legal Centres and the Human Rights Law Centre warmly welcome the report of the Independent Expert on Foreign Debt and Human Rights.

The Independent Expert undertook a mission to Australia in February. We were pleased to convene a number of NGO consultations during this visit.

Mr President, the promotion, protection and realisation of human rights should be a primary goal and instrument of Australian foreign policy. The IE's report makes a range of concrete and practical recommendations to achieve this. We deeply regret that Australia's statement yesterday in response focused on alleged inaccuracies in the report rather than substantively and seriously engaging with its recommendations.

In line with the Independent Expert's recommendations, we urge the Australian Government to develop a comprehensive strategy on human rights and foreign policy.

We particularly urge the Australian Government to explicitly adopt a human rights-based approach to aid and development and to increase ODA to the internationally agreed target of 0.7% of GNI. Australia should also increase funding to programs explicitly directed towards the promotion and protection of human rights, such as AusAID's Human Rights Grants Scheme and funding for the UN Office of the High Commissioner for Human Rights.

Mr President, human rights should be central to Australia's trade policy. We urge the Australian Government to include human rights safeguards in trade and investment agreements. Australia should also undertake Human Rights Impact Assessments as a core part of doing business abroad, including in the areas of trade, investment and military cooperation.

While in Australia, the Independent Expert considered the operation of vulture funds. His report refers to a November 2010 case in which an Australian court found in favour of a vulture fund operator, ordering the Democratic Republic of Congo to pay in excess of $30 million. This undermines debt relief initiatives and development. We call on the Australian Government to enact legislation to prevent profiteering by vulture funds in Australia.

Mr President, the National Association of Community Legal Centres and the Human Rights Law Centre also welcome the report of the Independent Expert on Human Rights and Extreme Poverty.

In particular, we commend the Independent Expert on her important work regarding the criminalisation of homelessness and poverty.

Many Australian jurisdictions continue to criminalise the effects of homelessness and poverty. In Victoria, for example, begging is a criminal offence punishable by imprisonment. Across Australia, discrimination on the grounds of homelessness and poverty remains lawful and widespread.

We strongly support the Independent Expert in her continuation of this work and call on all states to strengthen economic, social and cultural rights so as to address the causes of homelessness and poverty rather than criminalise their consequences.

Thank you Mr President.

Following the HRLC statement, the Independent Expert made a statement in response to Australia. In that statement he set out that:

1. Despite differences of opinion with the Australian Government over aspects of his report, he is committed to an ongoing and constructive dialogue about human rights, aid and development.

2. A human rights-based approach to development does not merely comprise of funding programs which may promote and protect human rights. Rather, it is an approach to development which is participatory, empowering, non-discriminatory and focuses first and foremost on the most marginalised and disadvantaged.
3. It is not only the Independent Expert who recommends that Australia adopt a comprehensive human rights-based approach to development. Such an approach is also urged by many submissions to the recent Australian aid effectiveness review, including those of the Australian Human Rights Commission and the Human Rights Law Centre.

HRLC makes NGO statement on asylum seekers and mandatory detention to UN Human Rights Council

On 30 May 2011, the UN High Commissioner for Human Rights, Navi Pillay, delivered her report on the global state of human rights to the UN Human Rights Council in Geneva. The report deals with a wide range of international human rights issues, including Australia's policy of mandatory immigration detention and the ongoing issue of Indigenous disadvantage and disempowerment.

The High Commissioner's report contained the following statement on Australia:

> *While in Australia last week, I visited immigration detention centres and met with representatives of migrant, refugee and asylum seeker communities. The urgent need for Australia to develop alternatives to the current hardline and unsustainable immigration detention policies, as well as to effectively counter new forms of racism and Islamophobia emerging in this multicultural society, is striking. I should add that while in Australia, I also had the priviledge of visiting Aboriginal communities in Northern Territory and Queensland, where I learned first hand about the discrimination and disadvantages facing indigenous peoples, as well as about policy challenges for the Government in addressing them. The unique identify of Aboriginal people deserves Constitutional recognition, and with it better protection in law and practice would follow.*

The Ambassador for Australia then took floor to make a statement on the High Commissioner's report, particularly as it relates to Australia's practice of mandatory immigration detention.

The Human Rights Law Centre subsequently made an oral statement to the UN Human Rights Council in response to the High Commissioner's report and Australia's statement as follows:

Mr President,

The National Association of Community Legal Centres and the Human Rights Law Centre welcome the report of the High Commissioner for Human Rights and strongly support the work of her office.

We were pleased to meet with the High Commissioner during her recent mission to Australia. We welcome those parts of her report dealing with Australia's policy of mandatory immigration detention and Indigenous disadvantage and disempowerment.

Overall, Australia's engagement with the UPR and the Human Rights Council, including the Government's engagement with civil society, has been very constructive. We record our concern, however, that statements made by Australia regarding immigration detention during the UPR and repeated by the Ambassador today do not reflect Australian law, policy or practice. The facts are as follows.

1. Australian law provides for mandatory detention of "unlawful non-citizens" and does not allow for judicial consideration of the need for detention in individual cases. Immigration detention

is not, as Australia asserted, a measure of last resort. Asylum seekers who arrive in Australia informally are detained as a matter of course before other options have been exhausted. The law does not impose time limits on detention and the Government may and does detain people in immigration detention indefinitely.

2. Detention is not only used as a last resort or for the shortest practicable time. As of 15 April 2011 there were 6872 people in immigration detention. More than 4200 of those people had been detained for longer than six months, and 1222 people had been detained for longer than 12 months.
3. As at 15 April 2011, there were 1048 children in immigration detention. Since the Australian Government's announcement in October 2010 that it would move unaccompanied minors and vulnerable family groups out of immigration detention facilities, the number of children in detention has increased by more than 300.

Australia does have a strong commitment to and record on the promotion and protection of human rights. Immigration detention practices, however, remain a significant blight.

We look forward to working candidly and constructively with the Australian Government and the Council to redress this situation.

Thank you Mr President.

HRLC CASEWORK

Further hearing of Momcilovic in High Court

On 7 June 2011 the full bench of the High Court of Australia sat for a further day of hearing in the case of R v Momcilovic. The HRLC is appearing in this proceeding as amicus curiae to make written and oral submissions on the correct approach to the application of the Charter of Human Rights and Responsibilities Act 2006 (Vic).

The case is an appeal from the decision of the Court of Appeal of the Supreme Court of Victoria in R v Momcilovic (2010) 265 ALR 751. The initial High Court hearing was held in February 2011. Following the initial hearing the court asked the parties to respond to five further questions in written submissions, one of which concerned the application of section 32 of the Charter - the statutory interpretation requirement. The HRLC made written submissions on that question and appeared at the further hearing on 7 June 2011. The bulk of the submission at the 7 June 2011 hearing focused on questions related to whether the state and commonwealth criminal laws regulating drug trafficking are inconsistent, and therefore whether the federal law must prevail pursuant to s 109 of the Australian Constitution.

The High Court has reserved its judgment.

Emily Howie *is the HRLC's Director of Advocacy and Strategic Litigation*

HRLC MEDIA COVERAGE

The Centre has featured in the following media coverage since the last Bulletin:

- Interview, Govt rejects UN Human Rights Council recommendations, *National Indigenous Radio Service*, 9 June 2011
- Phil Lynch and Ben Schokman, Australia's humans rights obligations, *The ABC's Drum Opinion*, 8 June 2011
- Kirsty Needham, Backdown over detention pledge, *Sydney Morning Herald* , 7 June 2011
- AAP, Govt stands firm against UN on detention, *SBS World News*, 6 June 2011
- Jeremy Thompson, UN human rights review takes aim at Australia, *Radio Australia News*, 6 June 2011
- AFP, Australia rejects UN calls on asylum seekers, *Mysinchew.com*, 6 July 2011
- Howard Sattler, Push to pay killer $500,000, *6PR882 News Talk*, 1 June, 2011
- Damien Carrick, The right of prisoners to speak out*, ABC's Law Report*, 31 May 2011
- Daniel Scoullar, Unchartered territory, *MCV*, 31 May 2011
- Peter Munro, State told human rights a matter of decency, *The Age*, 29 May 2011
- Anonymous, Lex Wotton challenging legal ban in High Court, *IndyMedia*, 26 May 2011

SEMINARS & EVENTS

Reforming Australia's Equality Laws

A conference about best-practice models and frameworks for the promotion of equality.

Tuesday 26 July 2011

Storey Hall, RMIT, 342 Swanston Street, Melbourne

As the Australian Government prepares to consolidate various federal anti-discrimination laws into a single Act, the Human Rights Law Centre is hosting a conference to encourage and inform debate on this 'consolidation project'.

The conference is an opportunity for representatives from a range of NGOs, business, Government, members of the legal profession, academics, regulators and policy makers to share ideas and help shape Australia's future equality laws.

The international keynote speaker is Dr Dimitrina Petrova. Dr Petrova is Executive Director of the Equal Rights Trust, a lead author of the Declaration of Principles on Equality and a former Member of Parliament in Bulgaria. She was awarded the American Bar Association's prestigious Human Rights Award in 1994.

Registration forms and further information at: http://www.equalitylaw.org.au/elrp/events/

Social Policy Connections Public Forums 2011

7.30pm Thursday 30 June 2011

Study Centre, Yarra Theological Union, Box Hill

Human Trafficking: What's at the cutting edge of debate in Australia and internationally

Forum featuring: Professor Jennifer Burn, Director, The Anti-Slavery Project; Christine Carolan, Programs Coordinator, Australian Catholic Religious Against Trafficking Humans; Michaela Guthridge, Justice Development Manager, Good Shepherd Australia New Zealand; and with guest moderator: Rachel Ball, Director – Policy and Campaigns, Human Rights Law Centre.

For further details click here.

Annual Castan Centre for Human Rights Law Conference

9:15am – 4:30pm, Friday 22 July 2011

Spring Street Conference Centre, 1 Spring Street, Melbourne

The program for the Castan Centre for Human Rights' annual conference includes **Mr Michael Thurston,** United States Consulate General, on 'Corporate Social Responsibility and the Right to Connect (to websites, to the internet and to each other)', **Mr Rex Wild QC,** Barrister and co-author of the *Little Children are Sacred* report into child abuse in the Northern Territory, on 'Intervention, Interference or Invasion?' and **Professor Samina Yasmeen,** Director of the Centre for Muslim States and Societies at the University of Western Australia on 'Islamophobia and Multicultural Australia'.

For further program and registration details, click here.

Change the World: Amnesty International Human Rights Conference

6 to 8 October 2011

Royal on The Park Hotel, Corner of Albert and Alice Streets, Brisbane

Celebrate 50 years of Amnesty International at their Human Rights Conference in Brisbane this October.

Salil Shetty, Amnesty International's Secretary General will be delivering an address to the conference on the state of the world's human rights. Come along and hear amazing personal stories, take part in robust discussions with top international speakers and learn about new ways to defend human rights. For more information check the conference website.

Law and Religion: Legal Regulation of Religious Groups, Organisations and Communities

15-16 July 2011

Melbourne Law School

The Centre for Comparative Constitutional Studies at Melbourne Law School and the International Center for Law and Religion Studies at Brigham Young Law School are pleased to invite you to an international conference on: Law and Religion - Legal Regulation of Religious Groups, Organisations and Communities. Keynote Speakers include: Professor John Witte Jr, Emory University (US); Professor Rik Torfs, Catholic University of Leuven (Belgium); Dr Edward J. Larson Pepperdine University (US); Ratna Osman, Sisters in Islam (Malaysia). For further information download a registration form.

RESOURCES

The Australian Human Rights Register

The Australian Human Rights Register provides a quick and easy opportunity for NGOs to document human rights developments in Australia. The Register provides an annual record of human rights stories from across Australia, documenting the current state of human rights by tracking both positive and negative human rights developments. The 2010/11 register has closed and the report is currently being prepared, but the 2011/12 register is now open for entries.

The Register allows NGO contributors to share the human rights stories that have arisen in case work and service delivery. Your contribution will help ensure the better protection and enhancement of human rights in Australia and raise awareness of human rights in the community. Please note that the Register only takes entries from NGOs and not from individuals. Tell your clients' stories by submitting them to the Register at: www.hrlrc.org.au/australianhuman-rights-register/

HUMAN RIGHTS JOBS

Public Interest Law Clearing House

The Public Interest Law Clearing House (PILCH) is a leading, independent, not-for-profit organisation that is committed to furthering the public interest, improving access to justice for those who are disadvantaged or marginalised, and protecting human rights. PILCH does this by facilitating pro bono legal services to Victorian individuals and organisations in need, and by addressing injustice through law reform, policy work and legal education.

Make your mark in an exciting new role and put PILCH clients' stories at the heart of their work. Work with passionate, dynamic colleagues in this part time Communications and Marketing role.

FOREIGN CORRESPONDENT

Human Rights Council adopts historic resolution on sexual orientation and gender identity

The 17th session of the Human Rights Council ended in Geneva in June with the adoption of a landmark resolution entitled 'Human Rights, Sexual Orientation and Gender Identity'. The historic resolution is the first at the UN level to focus specifically on the issues of sexual orientation and gender identity. The initiative was led by South Africa, with 39 cosponsors from all regions of the world. It passed with 23 votes in favour, 19 against, and 3 abstentions.

The resolution was originally tabled by South Africa at the 16th session of the Council, in March 2011, in what at that stage was a worrying initiative that presented sexual orientation and gender identity as new concepts, and would have created an intergovernmental working group with the exclusive right to discuss those concepts before they could be integrated into international law.

Under the proposal, only at that point could issues relating to sexual orientation and gender identity be raised with other bodies, including the Council, special procedures, and treaty bodies.

Just a few months later the resolution adopted is unrecognisable. The text expresses grave concern at violence and other violations faced by individuals on the basis of sexual orientation and gender identity, commissions a study to document such violations and examine how international law can be use to end them, and decides to convene a panel discussion at the 19th session to discuss the findings of the report and appropriate follow-up. It is a text that sets out a framework for dialogue, and in this sense it is relatively minimalistic. From the perspective of defenders working on issues of sexual orientation and gender identity, however, the adoption of a resolution and the promise of focused dialogue on these issues at the international level, is a prospect that just a few months ago seemed out of reach.

The adoption of the resolution comes eight years after Brazil introduced a resolution to the 59th session of the Commission on Human Rights (the Commission), in 2003, entitled 'Human Rights and Sexual Orientation'. The strength of opposition to this resolution, and the divisions exposed, were extremely damaging to the cause of sexual orientation and gender identity at the international level, and were followed by many years, both in the Commission and the Council, in which States were reluctant to push too hard on the issue for fear of inviting another such backlash. Instead, States attempted to advance the issue through a series of joint statements, perceiving this to be a less divisive format than a resolution.

At the General Assembly, in December 2010, in an explanation of its vote in favour of an amendment that would reinsert the reference to sexual orientation and gender identity in the resolution on extrajudicial executions and other unlawful killings, South Africa lamented the fact that the issue in general continues to be divisive and highly contested. Blaming the manner in which some delegations raised sexual orientation and gender identity in numerous contexts without consideration being given to the sensitivities around the issue, South Africa first called for the creation of an intergovernmental working group to define the concept of sexual orientation and gender identity.

At the 16th session of the Council, in March 2011, Colombia read out a joint statement on sexual orientation and gender identity, supported by 85 States. The high level of support for the statement was a landmark in affirmation of the principle that no one should suffer violence or discrimination on any ground, including sexual orientation and gender identity.

In response to the statement, however, South Africa acted on its call to the General Assembly the previous December, introducing a resolution entitled, 'The imperative need to respect the new established procedures and practises of the United Nations General Assembly in the operation of new norms and standards and their subsequent integrations into existing international human rights law'. The negative import of this resolution, combined with indications from the US that they would respond by tabling their own counter-resolution, were troubling shadows of the re-emergence of the same divisive and damaging debates that had taken place in the Commission eight years earlier.

Eventually, South Africa did sign onto the joint statement, and chose to defer its resolution. This gave civil society the opportunity to engage more vigorously, both in Cape Town and Geneva, on some of the key concerns they had with the resolution as it stood. The South African delegation also held three open informal consultations on the resolution at the 17th session of the Council. These consultations were extremely constructive, resulting in improved drafts at each stage.

South Africa's leadership role cannot be underestimated. It cannot have been an easy task to break from the African Group position, in a Council dominated by group politics. Nigeria, in a

strong statement during the adoption of the resolution, presented South Africa's stance as a betrayal of its own citizens, and condemned the imposition of values on countries that do not accept them as universal standards. Further opposition was voiced by Pakistan (on behalf of the OIC) and OIC members including Saudi Arabia, Bahrain, Bangladesh, Qatar, and Mauritania. Noteworthy, however, is that from the African Group, Mauritius voted in favour of the resolution, while Burkina Faso and Zambia abstained.

Much remains to be done to overcome the inevitable and strong continuing opposition even to discussion of issues related to sexual orientation and gender identity, but this resolution and in particular the fact that it was led by a State from the midst of the traditionally hostile African Group, raises the hope that the way is paved (long though it may be) towards mutual understanding, together with an affirmation from all sides that no one, on any grounds, may be denied their rights and freedoms.

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IF I WERE ATTORNEY-GENERAL…

Prevention is the best cure

Tammy Solonec

If I were the Federal Attorney-General, I would immediately take steps to ensure that the justice system in Australia move towards prevention and diversion, rather than continuing to place the majority of its funds in helping people at the last call, just before they are imprisoned, in the field of criminal law.

I would recognise that prevention is better than cure and adopt Justice Reinvestment initiatives throughout Australia through the Standing Committee of Attorney Generals. We know this approach has worked in the USA and that, before long, the economic savings, as well as the creation of safer communities would be felt by all.

I would urge State and Territory Governments to work in partnership with their Corrective Services Departments to immediately undertake step one of Justice Reinvestment (mapping), which asks: Where do the offenders come from? Where did they commit their offending? And most importantly, why did they commit those offences? Armed with this knowledge and evidence of high risk communities, I would ensure that targeted programs be implemented into those communities, in partnership with the affected communities.

I would acknowledge that an aspect of our system of government that makes Australia so great is the strong civil society participation and non-governmental organisation (NGO) sector. Although I know that increasing strength and funding to the NGO sector may cause some discomfort for the Australian Government, I also know that in the end, it would make for a better society and reflect well on Australia locally, nationally and internationally.

I would put ‘tough on crime’ state Attorneys General on notice that unless they moved also towards prevention and diversion, worked seriously to reduce incarceration and started assisting to fund the legal NGO sector, rather than leaving it up to the Commonwealth, that their Council of Australian Governments (COAG) funding would be seriously under threat.

With the savings that stem from Justice Reinvestment and investment by States and Territories in the NGO sector, I would work to ensure that Aboriginal and Torres Strait Islander Legal Services

(ATSILSs), Family Violence Prevention Legal Services (FVPLSs) and Community Legal Centres (CLCs) received increased funding to allow their staff to be paid at rates equivalent to those in the Legal Aid Commissions. The continuing underfunding of these services is in breach of our international obligations.

I would also ensure that the epidemic overrepresentation of Aboriginal and Torres Strait Islander peoples in the justice system of Australia is urgently addressed in a strategic manner. Rather than merely creating aspirational documents such as the National Indigenous Law and Justice Framework, I would ensure the framework has a budget and implementation strategy attached to it and push for justice to be incorporated into the COAG 'Close the Gap' strategy. In essence, I would move away from rhetoric and into action.

High numbers of Aboriginal and Torres Strait Islander women and children reside in our capital cities and there are copious barriers to them accessing mainstream legal services. I would ensure therefore ensure that FVPLSs are funded to represent Indigenous victims of violence in large urban areas and provide them with funding for a national secretariat with a mandate to work on community legal education and policy and law reform at state, national and international levels.

In regards to the ATSILS, I would reconsider the current restructure being enforced on them. Whilst on the face of it, the inclusion of the previously separately funded policy, law reform and community legal education programs into the ATSILS main grant seemed like a windfall for these programs and recognition of the good work being undertaken by them, by incorporating them into the main grants, they are likely to then be given lower standing within the ATSILS, who struggle day to day to deal with the onslaught of Indigenous peoples charged with criminal offences.

I would also significantly reform the Indigenous Prisoner Through Care Program including moving away from the onerous reporting obligations, annual unsecured funding and have the sense to liaise with State and Territory corrections departments to work in partnership with them, rather than setting it up to fail. I would also extend the program to allow organisations funded by it to provide advocacy for prisoners as well as through care.

Whilst we're on the topic of Indigenous incarceration, I would call for an immediate review of the recommendations of the Royal Commission into Aboriginal Deaths in Custody and ask for a 'please explain' from each State and Territory as to why recommendations had not been implemented, and then work to finally implement them. One of the main calls from the Royal Commission was for Australia to take a holistic view to justice that appreciates the inter-relation between poverty, education, housing, police relations, health and other social factors with the legal system.

In this vein, I would recognise, that within the ATSILSs, FVPLSs, CLCs and Legal Aid Commissions, the work of civil law, family law, coronial inquests, community legal education and policy and law reform are just as if not more important than criminal law for they work on the basis of prevention rather than a band aid at the end.

I would also recognise the importance of international advocacy by legal NGOs and reward rather than penalise those who keep Australia accountable. I would understand than rather than their advocacy reflecting badly on Australia, that the strong civil society participation is viewed positively.

I would work hard to address recommendations made by United Nations bodies in relation to law and justice, including the recommendations of the Special Rapporteur on the Rights of Indigenous Peoples, Universal Periodic Review, Committee on the Elimination of Racial Discrimination and so on.

I would urge Australia to immediately ratify and implement the Optional Protocol to the Convention Against Torture and set up a National Preventative Mechanisms within Australia to ensure that the human rights and dignity of people in detention are adhered to and that appropriate support be given to such people.

Finally, I would engage heavily in the current campaign underway for Constitutional recognition of Aboriginal and Torres Strait Islander peoples, and push for a general guarantee of equality to be included into the Constitution, which would give all Australians a Constitutional mechanism to challenge any laws, policies or practices which unfairly discriminate against them.

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The Human Rights Law Centre would like to thank everyone who contributed to the production of this Bulletin.

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