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The Human Rights Law Resource Centre Ltd aims to:

1. Promote and protect human rights in Australia through litigation, advocacy, research, education and training.
2. Build capacity in the legal and community sectors to use human rights in casework, advocacy and service delivery.
3. Empower people that are disadvantaged or living in poverty by operating within a human rights framework.

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Opinion

A National Charter of Rights:
Some Reflections from the United Kingdom

I have been asked to give an assessment of the British *Human Rights Act 1998* (HRA), now in its eighth year, and to suggest some lessons that Australia might draw from the British experience. Inevitably, the latter leads one to focus on the more negative aspects of our experience, so I want to start with the good stuff before dwelling at greater length on the problems that you might want to avoid.

The Act has led to improved scrutiny of deaths in custody and to changes in the release of mandatory life prisoners – decisions on release are now made by judges and not politicians. Asylum seekers have successfully challenged changes to benefits laws that would have left them destitute. Laws have been introduced to allow transgendered people to have their ‘new’ gender legally recognised and to allow gay men and lesbians to marry in all but name (the latter was not in response to a specific HRA case but I have no doubt that the decision to introduce the legislation was made in part to pre-empt HRA challenges). Our courts are now developing a law of privacy, seeking to achieve a balance between an individual’s rights and freedom of expression of the press. More broadly, matters that would not previously have been justiciable can now be brought before the courts. We have a new language to articulate rights.

The high point for me and my colleagues at Liberty was the House of Lords’ ruling in December 2004 in *A & Ors v Secretary of State for the Home Department* [2004] UKHL 56. The Government had derogated from article 5 of the *European Convention on Human Rights* (the right to liberty) in order that Parliament could pass a law to permit the indefinite detention of non-nationals suspected of international terrorism. The House of Lords struck the derogation down as overbroad and declared the legislation incompatible with the Convention. In the face of the Lords’ condemnation the Government did not seek to renew the legislation.

This is an example of the constitutional balance in the HRA working well. To preserve parliamentary sovereignty the HRA did not give the courts the power to strike down primary legislation; all the courts can do is make declarations of incompatibility. The courts have used the power sparingly and Government and Parliament have acted or are acting on all such declarations. The niceties of constitutional theory are being observed. Moreover, a scheme that does not depend on the blunt instrument of a strike-down allows incompatibilities to be remedied in a considered fashion.

Now I come to three things that have not worked so well.

First, there is the issue of which bodies are directly bound by the HRA. The HRA imposes an obligation on public authorities to act compatibly with the Convention but does not define what a public authority is save, crucially, to say that a body will be a public authority if it is performing 'functions of a public nature'. The courts have taken a very restrictive approach to this issue. It came to a head in a case concerning an elderly woman who was placed in a privately run care home by a local authority acting pursuant to its statutory duty to provide her with care (*YL v Birmingham City Council & Ors* [2007] UKHL 27). The House of Lords held, by a narrow margin, that the care home was not a public authority and owed the woman no duties under the HRA. Legislation is now being passed to overturn this ruling. While this may deal with the problem in relation to care homes, the courts' restrictive approach will doubtless cause problems elsewhere.

A second problem is that the HRA has done little to change the courts' traditional reluctance to trespass in the social policy sphere. In large part this is due to the *European Convention* itself: it is concerned with civil and political rights, not economic and social ones. Two examples of the courts' continuing reluctance come to mind. Firstly, the courts have declared our system of housing law broadly compatible with the Convention even though, in some circumstances, a court may be required to make a possession order against a tenant without any consideration of the tenant's individual circumstances or any balancing of the tenant's interests with those of the landlord. A recent decision of the European Court of Human Rights in Strasbourg suggests that this will breach article 8 (right to respect for a person's home: see *McCann v United Kingdom* [2008] ECHR 19009/04 (13 May 2008)). Secondly, the courts have held that the right to a fair trial does not extend to the procedure whereby a homeless person can seek a review of a decision on his or her application for housing. The fact that the primary review is carried out by an officer of the local authority that would have to provide the housing and that there is no right to a full merits review by a court or other independent body did not breach article 6. According to the courts, article 6 should not be allowed to extend into administrative decision-making.

The final issue is one that stems from the relationship of our domestic courts to Strasbourg. The courts are enjoined by s 2 of the HRA to take account of Strasbourg case law. When the Bill was before Parliament, the hope was expressed by Lord Lester QC that the British courts would be able to give a lead to the Strasbourg court in developing its jurisprudence; Strasbourg's interpretation of the Convention would be a floor not a ceiling. Sadly, this is not how our courts have looked at it. Rather, the House of Lords has made it clear that the European Court of Human Rights is the primary body charged with the interpretation of the *Convention* and that the English courts must not overreach it. Hopes that we might develop a distinct human rights jurisprudence drawing on English common law have been shattered.

Before concluding I want to take off my lawyer's hat (as an English solicitor I don't get to wear a wig) to consider the HRA's standing more generally. There is visceral hostility to the HRA in some sections of the media. Attempts by perceived 'undesirables' to use the HRA, however unmeritorious the claim, are reported as if they were successful. Faced with this barrage of criticism and smarting from some court decisions with which they no doubt genuinely disagree (particularly on terrorism-related issues), ministers in the very government that introduced the HRA have failed to support it and have even in some cases expressed regret at having passed it. Both main parties are now working on proposals for British bills of rights even though both must realise that any replacement for the HRA could not guarantee lesser rights than under the *Convention*.

It is difficult to know why there is such hostility towards the HRA. It may be that it is seen as a European imposition. More broadly, it may be that the problem lies in way that it was enacted. We chose to adopt and incorporate an existing human rights instrument as our bill of rights. There was no public dialogue on the content of the rights. Further, it was pushed through Parliament by a triumphant new government, albeit with muted support from the recently defeated Tories. Perhaps if there had been full consultation on the content of the HRA and it had been passed with the full engagement of all main political parties, the HRA would be on a much surer footing now.

James Welch is the Legal Director of Liberty, a leading UK NGO which aims to protect civil liberties and promote human rights.

News

Opportunity for New Leadership as UN Committee against Torture Calls on Australia to Take Urgent Action to Promote Human Rights

The Rudd Government faces the first major test of its commitment to positive re-engagement with the United Nations following a report on Australia by the UN Committee against Torture in Geneva, released on 16 May.

The Committee commended the Rudd Government for its constructive approach to the UN review and acknowledged a range of recent human rights initiatives, including the Apology to the Stolen Generations, the abolition of the 'Pacific Solution', and the Government's intention to ratify the Optional Protocol to the Convention against Torture.

The Committee, however, expressed great concern that there is no national human rights instrument. It called on the Rudd Government to adopt a Charter of Rights 'to ensure comprehensive protection of basic human rights at the federal level'.

The absence of a national human rights instrument against which laws and policy are measured led the Committee to call on Australia to take urgent action in a number of areas to promote human dignity and freedom.

Given the strong relationship between incommunicado detention and torture or ill-treatment, the Committee was very concerned that, under Australia's anti-terror laws, a person can be detained for extended periods without charge. They can also be prohibited contact with a lawyer under conditions of limited judicial oversight and great secrecy. The Committee was very critical that remand prisoners, particularly persons accused of 'terrorist'-related offences, are routinely held in highly oppressive conditions, calling for 'treatment appropriate to their status as unconvicted persons'.

Calling on the Government to take urgent action to improve conditions of detention, the Committee noted evidence of overcrowding in Australian prisons, the 'insufficient provision of mental health care' and 'extensive use of solitary confinement' against mentally ill inmates. This is consistent with recent statements from the Victorian Government's own Institute of Forensic Mental Health that 'the provision of care to mentally ill prisoners in Australia rudimentary at best'.

In November 2000, following the previous periodic review of Australia, the Committee against Torture recommended that Australia address the socio-economic disadvantage and disproportionate incarceration of Indigenous Australians. Eight years on, the Committee regretted that Indigenous Australians remain among the most highly incarcerated peoples in the world. They expressed particular alarm at the 'increasingly high incarceration rates of children and women'.

Australia's immigration law and policy remained another area of major concern for the Committee. Australia's continued policy of mandatory indefinite detention of asylum-seekers, together with the impact of such detention on the mental and physical health of asylum-seekers, especially children, breaches fundamental human rights under the *Convention against Torture*. The Committee also noted credible reports that Australia has returned asylum-seekers to countries where there is a possibility that they may be tortured, recommending that the Government pass legislation to prohibit the deportation, expulsion or extradition of a person in such circumstances.

Unlike in 2007 when Australia cancelled its appearance before the Committee against Torture, under the Rudd Government Australia engaged in a constructive and rigorous review with the UN.

International scrutiny and accountability – particularly by experts such as the Committee against Torture – is critical to the effective promotion and protection of human rights. A constructive dialogue about how Australia could more fully implement its obligations under international human rights law should be welcomed. There was once a time when Australia was a world leader and very active participant in the development and operation of international human rights standards and monitoring mechanisms. How Australia responds to the Committee's report is an opportunity for the Rudd Government not only to reaffirm Australia's position as a human rights leader on the international stage, but to continue the important local work of building an Australia in which all people can live with freedom, respect, equality and dignity.

Philip Lynch is Director of the Human Rights Law Resource Centre

Australia Moves to Ratify International Human Rights Treaties on Torture and Disability

The Attorney General, Rob McClelland MP, and the Minister for Foreign Affairs, Stephen Smith MP, have announced that the Rudd Government is taking steps to ratify the UN Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention against Torture.

The Convention on the Rights of Persons with Disabilities entered into force on 3 May 2008 and enshrines the civil, political, economic, social and cultural rights that are necessary to ensure that people with disabilities have the capacity and opportunity to fully participate in and contribute to our community. It sets out a detailed code for the implementation of human rights for persons with disabilities.

The Optional Protocol to the Convention against Torture provides for the establishment of a system of regular visits to places of detention, including prisons and immigration detention centres, to be carried out by independent international and national bodies. There is substantial evidence that independent and regular monitoring of places of detention can substantially reduce the incidence of ill treatment.

In the case of the Disabilities Convention, the Rudd Government has stated that it 'is committed to becoming a party to it as quickly as possible. A National Interest Analysis will be tabled in the Parliament in the coming months.' The Government will also soon begin consulting the States and Territories on the Optional Protocol to the Convention, which provides a mechanism by which individuals and groups may submit a complaint to the Committee on the Rights of Persons with Disabilities that a State has breached its obligations under the Convention, provided the complainant has first exhausted domestic remedies.

In the case of the Optional Protocol to the Convention against Torture, the federal Attorney-General is consulting State and Territory Attorneys on Australia acceding to the instrument; 'a necessary step towards Australia becoming a party to this important instrument,' according to Mr McClelland.

The Centre's submission on the importance of ratifying the Disabilities Convention is available at www.hrlrc.org.au under Policy Work>Domestic Submissions>Disability Rights: Australia Urged to Ratify UN Convention (Feb 2008).

Federal Government to Legislate to Address Same-Sex Discrimination

The Federal Government has announced that it will introduce legislation to remove discrimination from a wide range of Commonwealth laws during the Winter Sittings of Parliament.

The legislation will give effect to many of the recommendations contained in HREOC's landmark report, *Same-Sex: Same Entitlements*, which focused on financial and work-related entitlements, together with the findings of a government commissioned audit of Commonwealth laws, which identified other areas of discrimination. According to the Federal Attorney-General, 'The changes will provide for equality of treatment under a wide range of Commonwealth laws between same-sex and opposite-sex de facto couples. Importantly the reforms will also ensure children are not disadvantaged because of the structure of their family.'

The Centre's submission to the HREOC inquiry is available at www.hrlrc.org.au under Policy Work>Domestic Submissions>Discrimination against Same-Sex Couples (June 2006).

UN Releases Framework for Action on Corporations and Human Rights

In April this year, the United Nations Special Representative on Business and Human Rights, Professor John Ruggie, released a report that aims to provide an international framework for action on the issue of corporations and human rights. The report will be considered at the June session of the Human Rights Council.

Background

The April 2008 report is the result of a consultation and investigative process which began in June 2005 when then UN Secretary General, Kofi Annan, appointed Professor Ruggie as Special Representative on the issue of human rights and transnational corporations and other business enterprises.

Since his appointment, the UN Special Representative has undertaken extensive research and consultation on the perceived impact of corporate activity on human rights; and the existing international and domestic human rights law obligations of corporations.

The UN Special Representative has released two reports prior to the April 2008 Report, both of which have focussed on mapping international standards of responsibility and accountability for corporate acts in respect of human rights. In general terms, these reports found a lack of a systematic approach and gaps in governance at both the international and domestic levels in respect of corporate human rights impacts.

The UN Special Representative's April 2008 Report: A framework for Business and Human Rights

The April 2008 report aims to address the issues identified by the UN Special Representative's work to date, by proposing a triple-pronged international policy framework focused on:

1. the State's duty to protect against human rights abuses by third parties, including business;
2. the corporate responsibility to respect human rights; and
3. the need for more effective access to remedies for victims of corporate related human rights violations.

The State Duty to Protect from Human Rights Violations

The State duty to protect from human rights violations is described by the Special Representative as requiring both regulation and adjudication of corporate activities with regard to human rights. The report states that this duty applies to the activities of all types of businesses – national and transnational – though acknowledges that the role of home states in legislating with respect to the extraterritorial activity of their corporate citizens remains subject to debate. The UN Special Representative proposes that governments should take further steps to foster corporate cultures in which respecting rights is an integral part of doing business, and that this may include the use of 'corporate culture' in determining corporate liability, as is the case under Australian criminal law. The report also proposes that States investigate policy alignment in respect of implementation of their international human rights law obligations concerning corporations; and that home States should particularly address the human rights related issues and exposures faced by corporations operating in conflict zones overseas.

Corporate Responsibility to Respect Human Rights

On the second limb of the proposed framework, the corporate responsibility to respect human rights, the UN Special Representative cites the recognition of this principle in soft law instruments such as the OECD Guidelines for Multinational Enterprises and by numerous multinational organisations in their policies and practices. The report quotes the International Organisation of Employers' statement that companies *'are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments when national law is absent'*. The UN Special Representative concludes that the corporate duty to respect human rights *'essentially means not to infringe on the rights of others – put simply, to do no harm'*.

The report goes on to identify a process of due diligence that corporations may undertake to assist in discharging their responsibility to respect human rights. This process involves:

- adopting a human rights policy,
- undertaking human rights impact assessments in respect of proposed activities that may affect human rights,
- integrating human rights policies throughout their operations, and
- monitoring and auditing human rights impact and performance.

The Special Representative notes that the corporate responsibility to respect human rights includes avoiding complicity by companies in human rights abuses where the actual harm is committed by another party, including government and non-state actors.

The types of corporate activities that have to date typically been the subject of such allegations have involved corporate arrangements with public and private security forces, resettlement of persons for project activities and financing of projects with identified environmental or social risk.

Due diligence is proposed as a means of minimising such exposure.

Access to Grievance Mechanisms

The report discusses the increasing expectations on States to take concrete steps to adjudicate corporate-related human rights violations. Commentary is provided on the gaps in existing grievance

mechanisms and improvements are proposed in respect of judicial mechanisms, non-judicial grievance mechanisms, company level grievance mechanisms, state based non-judicial mechanisms, multi stakeholder or industry initiatives and financier grievance mechanisms.

The UN report can be found at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> .

Conclusion

The evolving human rights obligations of corporations demonstrate the increasing relevance of international law and standards to the activities of corporations operating in a globalised environment. As well as informing domestic law reform, international law, including human rights law, is increasingly relied upon by corporations to provide guidance on best practice in areas as diverse as labour and employment, environmental management, community and stakeholder relations, anti-corruption and engaging with foreign governments.

Rachel Nicolson is a Senior Associate in the Allens Arthur Robinson Corporate Responsibility Group. AAR has been advising the UN Special Representative since soon after his appointment in July 2005.

Victorian Charter of Rights Developments

Statement of Compatibility on the Public Health and Wellbeing Bill 2008 (Vic)

The Public Health and Wellbeing Bill 2008 (Vic) seeks to implement a new scheme to promote public health and wellbeing in Victoria. In particular, the Bill aims to:

- improve protection of the community from infectious diseases, notifiable conditions and other health hazards;
- promote safe and healthy behaviours and environments; and
- better enable health services to respond effectively to serious public health risks, disasters and other mass casualty events.

Significant human rights issues arise under many provisions of the lengthy Bill, including:

- provisions allowing for the examination and testing of persons suspected to have, or to have been exposed to, an infectious disease; and
- provisions allowing public health orders to be imposed in order to minimise a person's risk to public health; and
- various provisions allowing for the collection, use and (in certain circumstances) disclosure of private information.

The Statement of Compatibility prepared by the Minister of Health in relation to the Bill adopts a different format to that usually adopted for Statements of Compatibility, given the length of the Bill and the number of provisions which engage human rights.

The Statement commences with an overview of the operative provisions of the Bill, then provides a general discussion of each of the human rights engaged by various provisions of the Bill. The Statement then analyses each of the twelve parts of the Bill in turn, identifying particular clauses which engage human rights and outlining the impact of the provision on the particular human right (and, where relevant, the reasonableness of any limitation on the right).

This analysis focuses on two aspects of the Bill which potentially require individuals to involuntarily submit to various procedures.

Under the Bill (part 8, division 2), the Chief Health Officer (CHO) has the power to make:

- (a) an examination and testing order, requiring a person to undergo tests and/or examinations if they are suspected of having or having been exposed to an infectious disease and therefore may constitute a serious risk to public health; and
- (b) a public health order, requiring that a person comply with conditions designed to minimise the risk they pose to public health.

The Bill (part 8 division 5) also establishes a regime for dealing with a situation where someone who exposes a 'caregiver' (eg doctors, nurses) or 'custodian' (eg police officer) to blood or other bodily fluids refuses or is unable to provide their informed consent to be tested for HIV or other prescribed diseases.

These similar provisions engage a number of rights within the *Charter*, including the right not to be subjected to medical treatment without full, free and informed consent (s 10(c)), the right to freedom of movement (s 12), the right to privacy (s 13), the right to freedom of expression (s 15) and the right to liberty and security of person (s 21).

The Statement asserts that, in general, restrictions on the abovementioned rights are reasonable and demonstrably justified due to the importance of protecting the community from the spread of infectious diseases and maintaining public good health.

In particular, the Statement asserts that limitations on rights arising from the examination / testing and public health order regime are justified because:

- (a) limitations on the right not to be subjected to medical treatment without consent are less restrictive than other limitations which could have been implemented, because an individual cannot be physically forced to undergo a test or accept medical treatment (such individuals can, however, be detained if they continue to refuse treatment). The Statement appears to consider this analysis addresses the issue of whether there are any less restrictive means available to achieve the purpose of the limitation (s 7(2)(d) of the *Charter*);
- (b) the Bill provides that restrictions can only be imposed on a person's freedom of movement by way of a public health order if there are no less restrictive ways of minimising the risk to public health, and the imposition of a public health order can be challenged in VCAT;
- (c) limits on the right to privacy imposed by requiring medical practitioners to provide information about their patients in certain circumstances are justified because they enable the Chief Health Officer to make informed decisions about whether to impose a public health order; and
- (d) although refusal to comply with the provisions can lead to arrest or detention, the Bill specifically defines the circumstances and procedures by which this can happen, requires that the person detained or arrested be informed of the reason/s for their detention, includes certain procedural safeguards said to protect against detention becoming arbitrary, and allows appeal rights to VCAT.

In relation to the provisions by which someone can be compelled to give a blood or urine test against their will if they have potentially exposed a caregiver or custodian to a risk of contracting HIV or other infectious diseases, the Statement asserts that limitations on rights are justified because:

- (a) limitations on the right not to be subjected to medical treatment without consent only apply in circumstances where it is necessary in the interest of rapid diagnosis, clinical management and treatment, and it is anticipated that the power will only have to be used rarely (because, according to the Statement, people will usually give their consent to blood and urine tests);
- (b) limitations on the right to privacy arising from disclosure of information regarding the person suspected of transmitting a disease are not arbitrary, because the circumstances in which disclosure may occur are strictly defined, and there are safeguards protecting against unauthorised disclosure of such information (eg fines can be imposed, and information is not admissible in Court or tribunal proceedings); and
- (c) restrictions on the right to freedom of expression which prohibit disclosure of test results in a manner which would identify the person being tested are necessary to protect the privacy of the person tested, and therefore fall within the exception to the right contained in s 15(3)(b) of the *Charter*.

Rachel Guthrie, Articled Clerk and Jonathan Kelp, Solicitor, Human Rights Law Group, Mallesons Stephen Jaques

Other Charter of Rights Developments

Allocation Made in Federal Budget for National Consultation on Human Rights

The Federal Budget included an allocation of \$2.8 million over two years from 2007/08 'to facilitate national public consultations about the recognition and protection of human rights and the recognition of civil responsibilities'. According to the Budget papers, 'the consultation process will also facilitate discussion of possible frameworks to address these issues', thus 'delivering on the Government's election commitment'. Details of the public consultations have not yet been announced.

Amendments to Health and Social Care Bill to Extend Coverage of UK Human Rights Act to all Care Homes

Amendments moved to the UK Health and Social Care Bill, currently before parliament, will extend the coverage of the UK *Human Rights Act 1998* to all private and voluntary sector care homes.

The amendment is intended to reverse the decision of the UK House of Lords in *YL v Birmingham City Council & Ors* [2007] UKHL 27 (reported in Edition 15 of this Bulletin), which held that the provision of care and accommodation by a privately owned care home to an 84 year old woman with Alzheimer's Disease did not amount to a 'function of a public nature' within the meaning of s 6(3)(b) of the *Human Rights Act*. This was despite YL's accommodation in the care home being largely funded by Birmingham City Council pursuant to a determination under the *National Assistance Act 1948* that she was eligible for such assistance.

Pursuant to the amendment, any person or entity providing accommodation and care to an individual under arrangements made under legislation including the *National Assistance Act 1948*, 'is to be taken for the purposes of s 6(3)(b) of the *Human Rights Act 1998* (HRA) to be exercising a function of a public nature in doing so'.

Commending the amendment, the UK Minister for Health, Ivan Lewis, said: 'Everyone who has an elderly parent or grandparent will want to know we are doing everything to protect vulnerable older people from ill-treatment.'

The amendment is consistent with the minority decision of the House of Lords in *YL*, which considered that, among other things:

- The phrase 'function of a public nature' should be interpreted widely to give effective domestic protection to human rights. A narrow approach to 'functions of a public nature' is likely to mean that many people, particularly vulnerable people, are deprived of their right to an effective remedy for any violation of their human rights and that the HRA will continue to fall short of its aims of 'bringing rights home' to the UK.
- It is relevant to consider the extent of the risk, if any, that improper performance of the function might violate an individual's human rights. Persons in care are – by reason of age, illness, disability and other circumstances – a particularly vulnerable section of the community. There is a significant public interest in the promotion and protection of the human rights of such people.

It is to be hoped that Victorian courts and tribunals heed the amendment and follow the approach of the minority in *YL* in interpreting s 4(1)(c) of the Victorian *Charter* (which provides that a 'public authority' includes 'an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise)').

Commenting on the majority decision giving rise to the need for amendment, the British Institute of Human Rights stated, 'By exempting private care homes from the *Human Rights Act* when they house people under contract to a local authority, the House of Lords undermined the fabric of human rights protection in the UK.' The UK Joint Committee on Human Rights expressed a similar view, stating that

In an environment where many services previously delivered by public authorities are being privatised or contracted out to private suppliers, the law is out of step with reality. The implications of the narrow interpretation...are particularly acute for a range of particularly vulnerable people in society, including elderly people in private care homes, people in housing association accommodation, and children outside the maintained education sector, or in receipt of children's services provided by private or voluntary sector bodies.

It is critical the Victorian Courts heed this warning and ensure that the Victorian Charter is interpreted and applied so as to give real and effective protection to human rights.

Phillip Lynch is Director of the Human Rights Law Resource Centre

Victorian Charter Case Notes

Balancing the Right to Freedom of Expression against the Right to a Fair Hearing

General Television Corporation Pty Ltd v DPP & Anor [2008] VSCA 49 (26 March 2008)

In a recent decision, the Victorian Court of Appeal (Warren CJ, Vincent and Kellam JJA) considered the jurisdiction of a trial judge to make suppression orders to restrain an apprehended contempt of court. In

doing so, it discussed issues that will be relevant in balancing the *Charter* right to freedom of expression (protected by s 15) against the right to a fair hearing (protected by s 24).

Facts

The trial of 'A' for the murder of 'B' commenced in the Supreme Court of Victoria earlier this year. The murder was allegedly committed in connection with the so-called 'Gangland Wars'. General Television Corporation proposed to commence broadcasting the television series *Underbelly* on Channel 9 from 13 February 2008, and the broadcast of some episodes would have overlapped with A's trial. The series depicts events associated with the Gangland Wars, including the death of B, and was said to contain both factual and fictional elements.

At the prosecution's request, King J viewed 12 of the 13 episodes of the series, and found that it would be 'very difficult' for members of the public (and in particular potential jurors in A's trial) to differentiate between its factual and fictional elements. It was of particular concern that the series corroborated the evidence of an accomplice who would give evidence at A's trial.

King J formed the view that the broadcast of the series would strongly prejudice A's forthcoming trial. Her Honour did not consider it practical to delay the trial until the prejudicial effect of the broadcast had dissipated. Her Honour therefore made orders prohibiting the publication of the series, and the publication of related internet materials, until the completion of A's trial. GTV appealed to the Victorian Court of Appeal.

Decision

On appeal, GTV's primary argument was that in making the orders, the Supreme Court had exceeded its jurisdiction. The Court of Appeal rejected this argument, holding that King J had an inherent jurisdiction to make such orders as were necessary to ensure the fairness of A's trial. This power extends beyond making orders prohibiting the publication of reports of court proceedings (commonly known as suppression orders), and includes making broader orders restraining the publication of extrinsic materials that may prejudice A's trial. The basis of this jurisdiction is the Supreme Court's power to restrain apprehended contempts of court. The Court of Appeal saw no reason to disturb her Honour's finding that the mixing of fact and fiction in the series, including in relation to the events surrounding B's death, posed a serious risk to the fairness of A's trial.

GTV also argued that King J erred in failing to have regard to ss 7 and 15 of the *Charter*. Section 7 is often referred to as the 'general limitation' clause. It provides that the rights protected by the *Charter* may only be subject to such limits as can be demonstrably justified in a free and democratic society. Section 15 of the *Charter* protects the right to freedom of expression.

This ground was ultimately abandoned during argument before the Court of Appeal. Nonetheless, the Court noted by way of *obiter dicta* that even if it were open to GTV to rely upon the *Charter* right to freedom of expression (which the Court considered unlikely), the Court would have adopted the view taken in *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563. In that case, the New Zealand Court of Appeal held that where it is not possible to simultaneously give full effect to the rights to freedom of expression and a fair trial, 'it is appropriate in our free and democratic society to temporarily curtail freedom of media expression so as to guarantee a fair trial.'

However, GTV's appeal was allowed in part, with the Court of Appeal holding that King J's orders were too wide. It recast the orders to prohibit GTV (as opposed to the world at large) from publishing the series and related internet materials. It nonetheless cautioned others that any person with knowledge of the orders who saw fit to publish the series or internet materials would run a grave risk of committing a contempt of court.

Relevance for the Victorian *Charter*

Ultimately, this case was not decided on *Charter* grounds. However, the decision does provide some guidance as to how Victorian courts may in future balance the competing *Charter* rights to freedom of expression and a fair hearing.

Where these rights conflict, it appears likely that the right to freedom of expression will be limited to the extent necessary to preserve a person's right to a fair hearing. This will particularly be so where the

expression in question is in the nature of entertainment, rather than the reporting of news or the discussion of public affairs.

It is notable that the scope and application of the right to freedom of expression in a commercial context has recently been considered by the UK Court of Appeal (see *Boehringer Ingelheim Limited v Vetplus Limited* [2007] EWCA Civ 583 (20 June 2007)) and the Supreme Court of Canada (see *Canada v JTI-Macdonald Corp* 2007 SCC 30 (28 June 2007)). While neither court recognised a 'corporate right' to freedom of expression, both cases held that the right may be engaged by expression about commercial matters and, moreover, that the public have a prima facie right to 'hear' the expression (as opposed to a corporation having a right to 'express' the information). It is clear from both cases, however, that freedom of expression about commercial matters will be afforded a lower threshold of protection than expression about socio-political matters.

The full text decision is available at <http://www.austlii.edu.au/au/cases/vic/VSCA/2008/49.html>.

Daniel Perkins is a lawyer in the Workplace Relations practice group at Corrs Chambers Westgarth

Comparative Law Case Notes

Conditions of Detention of Remand Prisoners

Zealand v Minister for Justice and Constitutional Development and Another [2008] ZACC 3 (11 March 2008)

This decision of the South African Constitutional Court concerns whether the imprisonment of a remand prisoner in maximum security custody deprived him of liberty arbitrarily or without just cause.

Facts

On 24 January 1997, Jonathan Zealand was charged in a regional South African court with murder, rape and assault ('the original charges'). The case was postponed several times, with Zealand remanded in custody. On 15 May 1997, Zealand escaped.

Zealand was subsequently captured and charged with offences relating to his escape, including murder and firearms offences allegedly committed while Zealand was on the run. Zealand was convicted in relation to these offences on 28 September 1998, and sentenced to 18 years' imprisonment.

Pursuant to this conviction, Zealand was moved into maximum security custody. On 23 August 1999, his conviction and sentence were set aside on appeal. The court Registrar, however, negligently failed to communicate this to the prison, and Zealand remained in maximum security, where only convicted prisoners were meant to be housed.

Meanwhile, the original charges were repeatedly postponed. Various court orders were made, mostly remanding Zealand in custody, with one in 2001 ordering his release on warning. The original charges were finally withdrawn on 1 July 2004. Zealand was not released from the maximum security prison until 9 December 2004.

Zealand sued the Minister for damages resulting from his allegedly unlawful detention in maximum security custody. The Minister conceded that Zealand's detention was unlawful from when the original charges were dropped until his eventual release.

Decision

In determining whether Zealand's imprisonment was lawful, the Constitutional Court needed to determine whether his rights under s 12(1)(a) of the *South African Constitution* had been infringed. That is, whether Zealand had been 'deprived of freedom arbitrarily or without just cause'.

Deprivation of Freedom

The Court found that Zealand had been 'deprived of freedom'. Only convicted prisoners were kept in maximum security, and Zealand would have been moved elsewhere had the prison known his sentence was overturned. Maximum security prisoners had more limited freedom than those on remand – for instance, remand prisoners did not wear prison dress, and were not restricted in the phone calls they made or visitors they received.

More fundamentally though, the Court explained, Zealand was denied the right to have his status as an

unsentenced prisoner reflected in his conditions, including, crucially, the right to be presumed innocent. The Court held this right to be an aspect of respect for fundamental human dignity, and is specifically required by art 10(2) of the *International Covenant on Civil and Political Rights*.

Arbitrary or without just cause?

The Court reiterated that s 12(1)(a) of the *Constitution* encompassed both procedural and substantive protections: that is, a person may only be deprived of freedom in a fair manner and for acceptable reasons.

In this case, the state failed to provide the substantive protection. By doing more than was necessary to secure his attendance at trial, the state deprived Zealand of freedom 'without just cause', and by treating him differently to other remand prisoners, it effectively inflicted upon him an additional punishment. The detention was also arbitrary, as it was 'in no way connected to an objectively-determinable purpose'.

The Minister argued, and the lower court accepted, that Zealand's imprisonment was not arbitrary or without just cause because of a series of orders, made after his sentence was set aside, remanding him in custody. The Court rejected this argument. The court held that the existence of the orders did not justify what was otherwise arbitrary. Further, the orders themselves were arbitrary because they brought about an unlawful state of affairs in a way not rationally related to the purpose for which the court was so empowered.

Relevance to the Victorian Charter

This case has relevance for the interpretation of s 21 of the Victorian *Charter*, which concerns the right to liberty and security of persons. It suggests that s 21 may be invoked when a prisoner is afforded lesser rights than those to which he or she is entitled, and may provide a useful guide to interpretation of s 21 in such a context.

It is interesting to contrast this with the Supreme Court of Victoria's decision in *R v Benbrika* [2008] VSC 80. The accused there had been held in highly-restricted custody, which Bongiorno J considered jeopardised their right to a fair trial at common law. Although s 49(2) of the *Charter* operated to exclude the proceedings in that particular case, *Zealand* suggests that the Charter may have an important role to play in similar cases in future.

This decision is available at <http://www.saflii.org/za/cases/ZACC/2008/3.html>.

Sharyn Broomhead, Human Rights Law Group, Mallesons Stephen Jaques

Fair Hearing may Require an Oral Hearing

Abrahamian v Austria [2008] ECHR 35354/04 (10 April 2008)

The European Court of Human Rights has held that the right to a fair hearing requires an oral hearing which may only be dispensed of in exceptional circumstances.

Facts

The applicant, a medical practitioner, appealed to the Administrative Court against a decision of the Vienna Medical Association, a public law body established under the *Medical Practitioner's Act* with compulsory membership, to levy compulsory contributions.

The applicant and the Association both made written submissions and, on 5 December 2003, the applicant also requested an oral hearing. On 27 February 2004, the Administrative Court dismissed the applicant's complaint without holding a public hearing.

The applicant subsequently complained to the European Court of Human Rights regarding the lack of an oral hearing. She relied on art 6(1) of the *European Convention on Human Rights*, which provides that, 'In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by [a] ... tribunal'.

The Government argued that the Administrative Court was dealing with 'exclusively legal issues' and that it 'could therefore refrain from holding a hearing, even though the applicant had requested one'.

The applicant submitted that she had explicitly requested a hearing and was thus entitled to be heard. She further contended that the lack of an oral hearing meant that 'the facts were not properly assessed'.

Decision

The Court reiterated its jurisprudence that, in principle, a fair hearing requires a public and oral hearing (see, eg, *Malhous v Czech Republic* [2001] ECHR 33071/96 [GC]; *Oganova v Georgia* [2007] ECHR 25717/03 (13 November 2007)).

It further held that, in certain cases ‘in which exclusively legal or highly technical questions are at stake’ (see, eg, *Schelling v Austria* [2005] ECHR 55193/00), the requirements of a fair trial may be fulfilled even in the absence of an oral hearing, but that this was not such a case.

In the present case, the applicant expressly requested an oral hearing with the Administrative Court, which was refused without reasons. According to the European Court of Human Rights,

There did not appear to have been any exceptional circumstances that might have justified dispensing with a hearing. The Administrative Court was the first and only judicial body before which the applicant's case was brought; it was able to examine the merits of her complaints; the review addressed not only issues of law but also important factual questions. This being so, the Court considers that her right to a ‘public hearing’ included an entitlement to an ‘oral hearing’.

Accordingly, the Court held that there had been a violation of art 6(1) of the *Convention*.

Relevance to the Victorian *Charter*

This decision may be relevant to the interpretation and application of s 24 of the Victorian *Charter*, which enshrines the right to a fair and public hearing in both criminal and civil matters.

The decision confirms that, prima facie, the right to a fair hearing subsumes the right to an oral hearing. Any limitations on the right to an oral hearing pursuant to s 7 of the *Charter* are only likely to be permissible in exceptional circumstances, such as that the matter concerns only questions of law or is before an appellate court in circumstances where the first instance court did provide a full oral hearing. The decision also suggests that reasons should be provided in any case in which an oral hearing is requested but denied.

The decision confirms that limitations on the right to a fair hearing in the interests of efficiency, case management, timeliness and the like must not impair the ‘essence’ of the right itself. As the ACT Supreme Court held in *R v McBride* [2007] ACTSC 8 (13 February 2007), ‘issues of practicality and convenience must give way to the overwhelming interest, now recognised by the *Human Rights Act 2004*, that every accused must be afforded a fair trial’.

Philip Lynch is Director of the Human Rights Law Resource Centre

UK House of Lords Considers Scope and Application of the Right to Life

Gentle, R (on the application of) & Anor v The Prime Minister & Anor [2008] UKHL 20 (9 April 2008)

In a judgment handed down on 9 April 2008, the UK House of Lords held that the right to life protections under art 2 of the *European Convention on Human Rights* did not impose a duty on the UK Government to hold an independent inquiry into the legality and decision-making process behind the 2003 invasion of Iraq.

They did, however, confirm that the right to life imposes both substantive and procedural obligations on states, including obligations to establish a system of laws, precautions, procedures and enforcement mechanisms to protect life, and to do what can reasonably be expected to avoid a real and immediate risk to life.

Facts

The appellants were the mothers of two soldiers killed on duty in Iraq. Although inquests had been held into the circumstances of the soldiers’ deaths, the appellants sought a public inquiry into the legality of the UK Government’s decision to invade Iraq. The applicants argued that the State’s duty to protect life under art 2 of the *Convention* and ss 1 and 2 of the *Human Rights Act 1998* (UK) gave the appellants an enforceable right to have such an inquiry.

The appellants were unsuccessful at first instance and before the Court of Appeal because of a finding that the case was not justiciable (specifically, because questions of law and government policy in taking a country to war could not be separated, and courts were not a suitable forum to resolve the issue). The appeal to the House of Lords was unanimously dismissed.

Decision

Lawfulness of the Invasion

Article 2 of the *Convention* provides that 'everyone's right to life shall be protected by law'. The House of Lords confirmed that this imposes both substantive and procedural obligations on States. The substantive obligations include:

- not to take life without justification;
- to establish a system of laws, precautions, procedures and enforcement mechanisms to protect life; and
- to do what can reasonably be expected to avoid a real and immediate risk to life.

Article 2 also imposes a procedural obligation to conduct public investigations in cases where the substantive obligation may have been breached. Lord Bingham observed that the procedural obligation is 'parasitic upon the existence of the substantive right'. For this reason, the appellants had to establish a breach of the substantive right by the UK Government under art 2 before the duty to hold an independent inquiry could arise.

Their Lordships held that the UK Government was not under a substantive obligation to take reasonable steps to ascertain the lawfulness of the invasion under international law. Lord Bingham (with whom the majority of the Lords agreed) observed that the lawfulness of military action was not directly related to the risk to soldiers' lives. For example, an unlawful attack may have an element of surprise that would actually minimise the risk to an aggressor.

Further, the drafters of the *Convention* could not have imagined that it would be a suitable mechanism for resolving questions about a state's resort to war. The *United Nations Charter* was the more appropriate framework (rather than a treaty focused on the protection of individual human rights within the domestic legal system of member states).

Importantly, as noted by Baroness Hale, the lawfulness of the invasion under international law was squarely an issue between sovereign states, not as between individuals or between a state and an individual. This issue was linked to the justiciability of the appellant's claim. The traditional restraint shown by the courts in entertaining issues of 'high policy' was seen as particularly pertinent to the existence of the appellants' rights.

Although the appellants did not make submissions on this issue, several of the Lords emphasised that art 2 did not obligate a State not to participate in a war without UN authorisation.

Lord Hoffman observed that duties under art 2 do not incorporate by reference a State's duties under the *United Nations Charter* (or any other international duties that govern relations between states at the international law level). Lord Rodger observed that 'there is nothing to suggest that the countries which agreed art 2 intended to go further and use it to impose on member states a fresh obligation to abide by art 2(4) of the *United Nations Charter*'.

Extraterritoriality

There was also a subsidiary point related to the *Convention's* extra-territorial application. Under art 1, the *Convention* applies to everyone within a member State's jurisdiction. Lord Bingham interpreted this as extending only as far as the borders of the State, subject to limited exceptions. In his Lordship's view, the appellants' sons were not within the UK's jurisdiction when deployed in Iraq.

Relevance to the Victorian Charter

The Victorian *Charter* contains a similar 'right to life' provision in section 9. Section 32(2) of the *Charter* states that '[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human rights may be considered' when interpreting a *Charter* provision.

This House of Lords decision confirms that the right to life imposes both substantive and procedural obligations on States, including obligations to establish a system of laws, precautions, procedures and enforcement mechanisms to protect life, and to do what can reasonably be expected to avoid a real and immediate risk to life. It also highlights the need to imply a procedural obligation to conduct a public inquiry whenever the substantive obligation concerning the right to life may have been violated, and provides guidance to courts in instances when fulfilment of an obligation would require judgment on matters of government policy.

The decision is available at <http://www.bailii.org/uk/cases/UKHL/2008/20.html>.

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Procedural Safeguards, Evictions and the Right to Privacy and the Home

McCann v United Kingdom [2008] ECHR 19009/04 (13 May 2008)

The European Court of Human Rights has found that the United Kingdom violated art 8 of the *European Convention on Human Rights* by failing to provide adequate procedural safeguards to protect the right to respect of a person's home in the context of public housing.

Facts

The applicant, Mr McCann, and his wife were joint tenants of a house owned by the local housing authority in Birmingham. Following accusations of domestic violence against the applicant by Mrs McCann, he was temporarily removed by ouster order. Mrs McCann and their two children successfully applied to be re-housed. The house remained unoccupied until November 2001, when the applicant returned. The local authority continued to assume that the house was uninhabited.

In January 2002 the local authority discovered that the applicant was living there. The local authority asked Mrs McCann, as joint tenant, to formally end her tenancy of the old house by signing a notice to quit. Mrs McCann signed the notice. The legal effect of this was to end the joint tenancy, extinguishing the applicant's right to live in the house or exchange it for another council property.

Mrs McCann claimed that she was not advised and had no understanding of the consequences of signing the notice to quit. She attempted to withdraw the notice a week after signing it, but was unsuccessful.

Proceedings for possession were brought by the local authority against the applicant. The applicant was successful in claiming relief under the *Convention* at first instance in the County Court. This decision was overturned in the Court of Appeal and all further appeals by the applicant were unsuccessful. The applicant argued before the European Court of Human Rights that the manner in which the notice to quit was obtained, and the applicant's consequent eviction from his home, breached his right to respect for the home under art 8 of the *Convention*.

Decision

The parties agreed that the notice to quit, and the accompanying proceedings for possession, engaged the applicant's right to respect for his home under art 8. However, they disagreed on whether the interference with the applicant's rights was 'proportionate to the aim pursued and thus "necessary in a democratic society"'.

The Court acknowledged that the interference was in accordance with the law and was pursued with the aims of protecting the rights and freedoms of others. It held that the public authority, in attempting to evict the applicant, was ensuring that the statutory scheme for the provision of public housing was properly applied. This in turn protects and benefits the rights of others in society who may be eligible for assistance under the scheme.

The scheme included provisions intended to protect secure tenants of public landlords. However, the public authority bypassed these provisions by requesting Mrs McCann to sign the notice to quit, effectively denying the applicant the opportunity for appropriate independent review as to whether the loss of his home was proportionate to the aim pursued.

Consequently, the 'procedural safeguards' protecting the applicant's rights under art 8 were considered to be insufficient. The local authority had requested Mrs McCann sign the notice to quit without 'any consideration to the applicant's right to respect for his home'. There was no independent tribunal to examine the proportionality of the decision to evict the applicant, and judicial review was inadequate because the proportionality of the possession order was not open for the domestic courts to consider. The applicant's rights under art 8 were therefore held to have been violated.

Relevance to the Victorian Charter

On its face, *McCann* may appear to set a precedent for a human rights charter interfering with the legitimate aims and lawful decision making of a public housing authority. However, the Court was

careful to note that art 8 was only breached in a procedural sense, and that given the claims of domestic violence against the applicant, his status as a single man, and the scarcity of public housing, it was by no means clear that the applicant would have been successful were his case to be subjected to independent review.

Section 13 of the *Charter* provides that a person has the right not to have his or her home unlawfully or arbitrarily interfered with, while s 38 prohibits a public authority from acting in a way that is incompatible with a human right, or failing to give proper consideration to a human right in its decision making processes. The combined effect of these sections is broadly similar to art 8 of the *Convention*.

In a Victorian context, *McCann* suggests that where rights to the home under the *Charter* are interfered with by a public housing authority, a robust decision-making process, and access to an independent tribunal to review the proportionality of the relevant decision, are necessary 'procedural safeguards' to which individuals are entitled.

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Children and the Right to Privacy

Murray v Big Pictures (UK) Ltd [2008] EWCA Civ 446 (07 May 2008)

The England and Wales Court of Appeal has considered that scope of a child's right to privacy in a case in which photographs of the child of a celebrity were taken and published without consent.

Facts

Dr Neil and Mrs Joanne Murray were walking in Edinburgh with their 19-month-old son David when a photographer for Big Pictures (UK) Ltd (BPL) took a covert picture of the family. Mrs Murray is the author of the Harry Potter books and is known more commonly by her pen-name JK Rowling. The photograph was subsequently published in several newspapers and magazines.

Dr and Mrs Murray issued proceedings on David's behalf as his litigation friends. David asserted an infringement of his right to privacy for the taking and subsequent publication of the photograph contrary to art 8 of the Convention. Publishers of the photograph, Express Newspapers Plc were named as the first defendant. The photographer's employer, BPL, was named as the second defendant. The action against Express Newspapers Plc settled, leaving BPL as the sole defendant. BPL applied for an order striking out the claim or an order for summary judgment on the ground that David's claim was not arguable.

Decision at First Instance

Justice Patten of the court of first instance decided in favour of BPL and struck out the claim. Relying on *Campbell v MGN* [2004] UKHL 22, he considered 'what a reasonable person of ordinary sensibilities would feel if placed in the same position as the claimant and faced with the same publicity.' In applying this test to David's case, Justice Patten concluded that David had no obvious sensitivity to an invasion of privacy because (1) the photograph was taken with a long-range lens from across the street and (2) there was no direct physical intrusion into David's personal space. Further, Patten J observed that the law does not allow celebrities to carve out a press-free zone for their children in respect of everything they choose to do. As an illustration of this point, he noted that 'if a simple walk down the street qualifies for protection, it is difficult to see what does not.' He concluded that there remains an area of routine activity which, when conducted in a public place, carries with it no guarantee of privacy.

Justice Patten also followed the *obiter* in *McKennitt v Ash* [2008] QB 73 that English courts 'pay respectful attention' to the decision of the European Court of Human Rights in *Von Hannover v Germany* (2005) 40 EHRR 1. In *Von Hannover*, Princess Caroline of Monaco made a successful claim for breach of privacy against the German press for a series of photographs taken without her consent. These photographs were of her regular day-to-day activities, including her picking her children up from school, playing sport and shopping at a market. They were, in this respect, similar to the photograph of David. Also significant was the fact that Princess Caroline's claim did not involve harassment or significant press intrusion. It is clear that *Von Hannover* interprets private life more broadly than *Campbell*, allowing for a legitimate expectation of privacy in relation to family and personal activities which are not, in themselves, embarrassing or intimate. However, the House of Lords made it clear in *Kay v Lambeth*

LBC [2006] UKHL10 that in the event of a conflict between *Campbell* and *Von Hannover*, the decision of the House of Lords in *Campbell* should prevail.

Decision of the Court of Appeal

The Court of Appeal decided that David's claim was arguable and reinstated the action. The Court considered that Dr and Mrs Murray's wish, on behalf of David, to protect their child's freedom to live a normal life without the constant fear of media intrusion was reasonable and should be protected by law. The court conceded that the photograph of David showed no more than could be seen by any passer-by on the street. However, once published, it would be disseminated to potentially a large number of people, leading to the possibility of further future intrusion into his private life. The court also noted that at the time the case was decided by Justice Patten, there was no authority on a child being targeted by the press in the way that David had been. It also considered the fact that the United Kingdom is a party to the *United Nations Convention on the Rights of the Child*. Finally, the Court of Appeal was influenced by the obligation of editors under the Press Complaints Commission Editors' Code of Practice to avoid using the fame or notoriety of a parent or guardian as the sole justification for publishing details of a child's private life: 'The test to be applied by newspapers in writing about the children of public figures who are not famous in their own right is whether a newspaper would write such a story if it was about an ordinary person.' The Court held that it is at least arguable that a child of 'ordinary' parents could reasonably expect that the press would not target him and publish photographs of him; on the alleged facts, the photograph would not have been taken or published if David had not been the son of JK Rowling. For these reasons, the Court of Appeal held that David did have an arguable claim for breach of his right to privacy under art 8.

Relevance for the Victorian Charter

The most relevant *Charter* rights to *Murray* are ss 13 and 17. Section 13 protects a person's privacy, family and home from unlawful and arbitrarily interference. Section 17(1) provides that as families are the fundamental unit of society, they are entitled to protection by society and the State. Finally, section 17(2) provides that every child has the right, without discrimination, to such protection as is in his or her best interests. The decision in *Murray* confirms that any intrusions on the right to privacy must be demonstrably justifiable and that this threshold will be particularly stringent in the case of children.

The decision is available at <http://www.bailii.org/ew/cases/EWCA/Civ/2008/446.html>.

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ACT Supreme Court Considers Right to Family Life under ACT Human Rights Act

In the Matter of an Adoption of D [2008] ACTSC 44 (15 May 2008)

A decision of the ACT Supreme Court has considered the scope of the right to family life and protection in the context of adoption proceedings.

Facts

This matter concerned an application under s 35 of the *Adoption Act 1993* (ACT) to dispense with the consent of the birth father to the adoption of his young child by the new partner of the child's birth mother. The birth father was a citizen of Papua New Guinea who was residing in Australia when the child was born. He had occasional contact with the birth mother and child in the early months following the birth (he was said to be often intoxicated and sometimes violent during these visits, although not towards the mother or child), but had not maintained any contact since that time and had never provided any financial or other support for the child. Some attempts had been made to locate the birth father without success, and it was not clear whether he had returned to Papua New Guinea.

Decision

Justice Refshauge granted the application to dispense with the consent of the birth father to the adoption.

Justice Refshauge acknowledged the serious nature of the adoption process and the severing of ties between a parent and child. He noted that the gravity of the process was reinforced in the ACT by s 11

of the *Human Rights Act 2004* (ACT) which provides that 'The family is the natural and basic group unit of society and is entitled to be protected by society,' which his Honour considered 'amounts to a right to family life.' Justice Refshauge went on to note the international jurisprudence on this issue (at paras 7 to 8):

As was said by the European Court of Human Rights in considering art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (slightly differently worded but to the same effect) in *Scozzari and Gunta v Italy* (13 July 2000, Applications Nos 39221/98 and 41963/98) at [148]:

... it is an interference of a very serious order to split up a family. Such a step must be supported by sufficiently sound and weighty considerations in the interests of the child.

The seriousness is underlined by the consequences of an adoption order which has the effect of severing the existing legal parent/child relationship and substituting a new legal parent/child relationship: *Re Adoption of SS* (2002) 167 FLR 238 at [7].

Such an approach does not, of course, mean that adoption is inconsistent with the rights of children to have respected the right to protection including the protection of the family. Indeed, as the UN Human Rights Committee stated in its General Comment No 17 made in its Thirty-fifth session (1989) on art 24 of the *International Covenant on Civil and Political Rights* (which is the source of s 11(2) of the *Human Rights Act 2004*: see schedule 1 of that Act):

... in cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the State should intervene to restrict parental authority and the child may be separated from his (sic) family when circumstances so require.

In this context, art 21 of the *Convention on the Rights of the Child 1989* recognises that adoption is a means for appropriate protection of children in proper circumstances. It also sets standards against which adoption practice is appropriately assessed: *B v G* [2002] 3 NZLR 233 at [43].

His Honour went on to consider the Australian authorities on the issue of dispensing with the consent of a birth parent, and the criteria under s 35 of the *Adoption Act*, without further reference to the *Human Rights Act*.

Comment

This decision is an interesting one as the first decision of Justice Refshauge (former DPP of the ACT and a recent appointment to the Supreme Court) to touch upon the *Human Rights Act*. His Honour's detailed references to international human rights jurisprudence show a refreshing depth of research which has not often been found in the passing references to the *Human Rights Act* which characterise many of the ACT cases.

Nevertheless, while acknowledging the international authorities relating to the interaction between the right to family and adoption in general, his Honour did not go on to consider whether these might affect the interpretation of s 35 of the *Adoption Act*, or the extent to which the Australian jurisprudence on dispensing with consent was consistent with this right. While there seems a strong case that the adoption would be in the best interests of this child, and consistent with his right to protection under s 11 of the *Human Rights Act*, it seems arguable that the right to a fair trial in s 21 of the *Human Rights Act* might also have some relevance to the ex-parte nature of these proceedings, where evidence about the birth father's conduct was being presented in a context where it had not been established that 'reasonable inquiry' had been made to establish his whereabouts, and he had not been given the opportunity to respond to the allegations or to argue that he had a 'reasonable excuse' for the failing to discharge his parental obligations.

The decision is available at <http://www.courts.act.gov.au/supreme/judgments/adoption%20of%20d.htm>.
Gabrielle McKinnon is Director of the ACT Human Rights Act Research Project
(<http://acthra.anu.edu.au/index.html>)

HRLRC Policy Work

The Right to Equality and Non-Discrimination under Victorian Law

The Victorian Government is in the final stages of its broad review of the *Equal Opportunity Act 1995* (EO Act). The review aims to 'better promote the right to equality and improve protection from discrimination'.

In January 2008, the Centre made a major submission to the EO Act Review, focusing on issues including systemic discrimination and the compatibility of the Act with international human rights standards and the *Charter*.

The EOA Review then produced an Options Paper, which details findings from consultation and sets out options for reform. The areas include the future scope of the EO Act, the Victorian Equal Opportunity and Human Rights Commission's (VEOHRC) governance and its powers to eliminate discrimination and dispute resolution. On 12 May 2008, the Centre submitted a response to the Options Paper which recommended that:

- the links between the EO Act and the *Charter* be expressly recognised in the EO Act;
- the EO Act include a broad positive duty not to discriminate which is not limited to the attributes and areas currently protected by the EO Act; and
- a complainant elect to pursue a complaint either at VCAT or at VEOHRC, rather than being required to first conciliate at VEOHRC.

The Centre's submissions, together with further information about the Reviews, are available at www.hrlrc.org.au at Policy Work>HRLRC Submissions>Submissions to Equal Opportunity Act Reviews.

Further information is also available at <http://www.justice.vic.gov.au/equalopportunityreview>.

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

Centre Makes Major Contribution to UN Committee against Torture's Concluding Observations on Australia

The Centre has made a major contribution to ensuring Australian law and practice complies with the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, with 90 per cent of the Centre's recommendations being incorporated in the UN Committee against Torture's 'Concluding Observations on Australia' issued on 16 May 2008.

The Centre made three submissions to the Committee (April 2008, October 2007 and July 2007) and gave oral briefings and evidence in Geneva in November 2007. The Centre's submissions considered and made recommendations regarding the following areas of Australian law, policy and practice which may raise issues of incompatibility with the *CAT*:

- the inadequate protection of human rights, including the prohibition against torture and other cruel, inhuman or degrading treatment or punishment, under Australian domestic law;
- immigration and asylum-seeker law, policy and practice;
- Australia's law and policy in relation to refoulement, extradition and expulsion;
- the impact of the criminal justice system on Indigenous Australians;
- Australia's treatment of prisoners and conditions of detention, including in particular the lack of access to adequate health care;
- Australia's counter-terrorism law and practice, including in relation to incommunicado detention, and the use of preventative detention and control orders;
- the use of evidence obtained under torture or pursuant to other cruel, inhuman or degrading treatment or punishment;
- Australia's failure to investigate and remedy allegations of torture; and
- Australia's failure to adequately protect its citizens from the death penalty and other forms of ill-treatment.

The Committee's recommendations included that Australia should:

- fully incorporate the Convention into domestic law and move quickly towards the 'adoption of a Bill of Rights to ensure a comprehensive constitutional protection of basic human rights at the federal level';
- ensure that the increased powers of ASIO and the regime of preventative detention and control orders are consistent with human rights, including the right to a fair trial;

- ensure that accused remand prisoners are 'subject to separate treatment appropriate to their status as unconvicted persons';
- abolish mandatory immigration detention and ensure that all asylum-seekers are provided with adequate physical and mental health care;
- explicitly incorporate the principle of non-refoulement into domestic legislation;
- improve the arrangements for custody of persons deprived of liberty, including by reducing prison overcrowding, providing adequate mental health care services, and implementing recommendations of the *Royal Commission into Aboriginal Deaths in Custody*; and
- comprehensively legislate to exclude the admission of evidence obtained as a result of torture.

In a media release dated 16 May 2008, the Attorney-General and the Minister for Foreign Affairs 'welcomed the concluding observations of the Committee' and undertook to 'commence consideration of the Committee's recommendations, in consultation with States and Territories'.

The Centre's submissions are available at www.hrlrc.org.au under Policy Work>International Submissions>UN Committee against Torture Review of Australia (May 2008).

The Committee's Concluding Observations are available at <http://www2.ohchr.org/english/bodies/cat/docs/co/CAT-C-AUS-CO1.pdf>.

HRLRC Casework

Using the *Charter* to Prevent Eviction into Homelessness

A tenant in community housing has successfully invoked the *Charter* to challenge the validity of an eviction notice. The notice required the tenant – a pregnant single mother to two young children – to vacate her home within 120 days. The notice did not provide any reasons for the eviction.

In oral submissions before VCAT, the PILCH Homeless Persons' Legal Clinic submitted that the landlord is a functional public authority (s 4(2)) and that its actions amounted to an eviction into homelessness. The landlord is a registered housing association under the *Housing Act 1983* (Vic) and provides community housing to low-income Victorians on behalf of a local council and assisted by substantial public funding. The HPLC submitted that the landlord's actions were incompatible with her and her children's rights to privacy, family, the home and life. Following the filing of written submissions, the landlord withdrew the notice, meaning that the family was able to remain in their home.

Section 263 of the *Residential Tenancies Act 1997* (Vic) (RTA) provides that a landlord can serve a 120-day notice to vacate without providing reasons. The RTA provides a narrow ability to oppose the notice. However, following the entry into force of the *Charter*, landlords are now obliged to interpret their rights under the RTA in a way which is compatible with the *Charter* (s 32(1)). In this case, the landlord had not provided any reasons for the eviction nor provided the tenant with an opportunity to address its concerns. Relying on *Ghaidan v Godin-Mendoza*, the HPLC submitted that VCAT read in to s 263 the italicised words: 'A landlord may give a tenant a notice to vacate rented premises without specifying a reason for the giving of the notice, *if reasonable to do so in the circumstances and if to do so is compatible with the Charter.*'

Further, as a functional public authority, the HPLC submitted that in deciding whether to issue the notice, the landlord is obliged to consider the tenant's and her children's rights and the consequences of and alternatives to eviction (ss 38 and 7(2)). Pursuant to s 32(2), the HPLC relied on international decisions of the European Court of Human Rights in *Connors v UK*, *McCann v UK* and *Stanková v Slovakia* and judgment of the High Court of South Africa in *City of Johannesburg*. In these cases, evictions into homelessness, under statutory powers, were found to be impermissible limitations on the rights to privacy and family as they could not be justified in a free and democratic society.

Assisted by Richard Wilson of Counsel, the HPLC filed substantial submissions and sought an urgent injunction preventing the eviction. Following filing, the landlord withdrew the notice and a more open dialogue between the parties was achieved. VCAT granted consent orders that the landlord withdraw the notice and that the parties attend a compulsory conference to discuss their relationship and future conduct.

This case is a great example of how the *Charter* can be used to ensure that legislation and powers are interpreted and applied compatibly with rights so as to address disadvantage, ensure accountability and promote human dignity. This case also demonstrates how the *Charter* can be used to strengthen other arguments, seek to call parties to account and address a broader range of concerns than may have been previously available.

Phoebe Knowles, a seconde solicitor from Minter Ellison to the Homeless Persons' Legal Clinic and Human Rights Law Resource Centre, was instructing solicitor in this case

Seminars and Events

Accountability for War Crimes: Issues of Command Responsibility in International Tribunals

Date: 6.00 to 8.00pm, Wednesday, 28 May 2008

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

The seminar, jointly presented by the Australian Red Cross and Mallesons Stephen Jaques, will consist of two presentations focusing on the issue of command responsibility. Firstly, 'The Defender', Melbourne barrister Peter Morrissey, will discuss his experience as lead counsel for the defence in the Halilovic proceedings at the ICTY in 2005. Secondly, 'The Prosecutor', Elli Lewis, will discuss her experience as a solicitor in the Office of the Prosecutor at the ICTY in 2006/7, during which time she was assigned to the Boskoski and Tarculovski trials.

Entry is free, however, bookings are essential. Please RSVP to Agata Wierzbowski at Australian Red Cross on (03) 8327 7737 or awierzbowski@redcross.org.au.

Workshop on the Convention on the Rights of Persons with Disabilities

with Dr Martin Leckey, Philip French and Associate Professor Lee Ann Bassar

Date: 10.00am to 12.00pm, 6 June 2008

Venue: Room 920, Level 9, University of Melbourne Law School, 185 Pelham St, Carlton

The Convention on the Rights of Persons with Disabilities came into force on 3 May 2008. This workshop will examine the development of the Convention and explore the legal and other ramifications of its entry into force.

The workshop is a free event and has limited places. If you would like to attend please RSVP to human.rights@unimelb.edu.au.

Protecting Human Rights: Train-the-Trainer

Date: Friday, 13 June 2008

Venue: CBD, Sydney

Cost: \$80 (includes materials, morning and afternoon tea and a certificate of attendance)

Registration is essential. For more information, contact Lizzie Simpson at esimpson@piac.asn.au or (02) 8898 6522.

Many of the rights we take for granted have no protection under Australian law. Human rights are a way of promoting social justice for disadvantaged people. This training will be useful for anyone who is interested in understanding and speaking out about human rights.

This one-day workshop will equip you with knowledge and skills to conduct human rights training in your network, group, organisation or sector. Workshop content will include principles underpinning human rights, sources and types of human rights, and impact of gaps in human rights protection. It will examine different models of human rights protection, including a Bill of Rights. It will also debate the merits of a Bill of Rights and discuss what would make a difference in NSW.

Justice Behind the Walls: Human Rights and Prisons

with Michael Jackson QC, Professor of Law at the University of British Columbia and Legal Research Director at Lawyers Rights Watch Canada and Jim Kennan SC, former Deputy Premier of Victoria

Date: 6.00 to 7.30pm, Wednesday, 18 June 2008

Venue: Allens Arthur Robinson, Level 34, 530 Collins Street, Melbourne

Cost: \$25 / \$15 for full-time students and pensioners

Registration is essential. Use Booking Form available at www.hrlrc.org.au.

The Right to Adequate Housing in the Global South

with Professor Balakrishnan Rajagopal, Associate Professor of Law and Development at the Massachusetts Institute of Technology and Director, MIT Program on Human Rights & Justice

Date: 6.00 to 7.30pm, Monday, 23 June 2008

Venue: Blake Dawson, Level 39, 101 Collins Street, Melbourne

Cost: \$20 / \$10 for full-time students and pensioners

Registration is essential. Use Booking Form available at www.hrlrc.org.au.

Human Rights Law and Policy Conference

Shaping the National Stage for a New Era of Rights

Date: 16 and 17 June 2008

Venue: Marriott Hotel, cnr Exhibition and Lonsdale Streets, Melbourne

Cost: \$1560 (discounts available for NGOs and Indigenous organisations). 15% discount available to subscribers to this Bulletin (Go to Registration page at www.thomson.com.au/humanrights; Select your pass and proceed to checkout; Enter promotional code **B019** at the bottom of customer detail page).

Speakers include:

- Geoffrey Robertson QC
- Graeme Innes AM, Human Rights Commissioner and Commissioner Responsible for Disability Discrimination, Human Rights and Equal Opportunity Commission
- Anne Deveson AO, Patron SANE Australia & Author *Tell me I'm here*
- Michael Jackson QC, Director, Lawyers Rights Watch Canada and Professor of Law, University of British Columbia, Vancouver BC
- Fiona Smith, Chairperson, Victorian Equal Opportunity & Human Right Commission
- Simon Rice OAM, Director of Law Reform & Social Justice, ANU College of Law; Judicial Member, NSW Administrative Decisions Tribunal
- Susan Ryan AO, Former Senator, Hawke Government Cabinet

For further information, see www.thomson.com.au/humanrights.

National Indigenous Legal Conference and Ball

12 and 13 September 2008, RACV Club Melbourne

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

The inaugural Indigenous Legal Ball will be held on 13 September in the main ballroom, with a sumptuous three course dinner provided. Entertainment for the evening will showcase some of

Australia's best Indigenous talent, including jazz performer Liz Cavanagh and well known singer, songwriter, author and director Richard Frankland.

For details call (03) 9607 9474 or see www.liv.asn.au/events/calendar/20080912_National.html.

2008 Protecting Human Rights Conference

Date: 3 October 2008

Venue: Melbourne Law School, 185 Pelham Street, Carlton

Cost: \$150 / \$75 concession

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

Key confirmed speakers include:

- The Hon Rob McClelland MP, Attorney-General for Australia
- The Right Hon Chief Justice Dame Sian Elias, New Zealand
- Lord Justice Sir Stephen Sedley, Judge of the Court of Appeal of England and Wales (via dvd)
- The Hon Justice Marcia Neave, Victorian Court of Appeal
- Professor Johannes Chan SC, Dean of the Faculty of Law, University of Hong Kong
- Debbie Mortimer SC, the Victorian Bar
- Sally Sheppard, Partner, Clayton Utz
- Joanna Davidson, Special Counsel Human Rights, Victorian Government Solicitor's Office
- Associate Professor Carolyn Evans, Deputy Director CCCS, Associate Dean (Research), the Melbourne Law School
- Associate Professor Jeremy Gans, the Melbourne Law School, Human Rights Adviser to the Victorian Parliament's Scrutiny of Acts and Regulations Committee
- Professor Hilary Charlesworth, RegNet and Director of the Centre for International Governance and Justice (CIGJ), ANU
- Edward Santow, Senior Lecturer, Faculty of Law and Project Director, Australian Human Rights Centre, Gilbert + Tobin Centre of Public Law, University of New South Wales

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

Human Rights Resources

What's New on the HRLRC Website?

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

- Philip Lynch, 'Start the Charge from Home', *Australian Financial Review* (Sydney), 16 May 2008
- Amy McQuire, 'Human Rights Groups Urge Federal Government to Endorse UN Declaration as "Matter of Priority"', *National Indigenous Times* (Australia), 15 May 2008
- Philip Lynch, 'Listen to Home Truths', *Herald Sun* (Melbourne), 5 May 2008

Human Rights Jobs

Marketing and Administration Officer with *Alternative Law Journal*

The *Alternative Law Journal* is a non-profit law journal which focuses on social justice, human rights, access to justice, progressive law reform and legal education. The *Journal* seeks a Marketing and

Administration Officer to work flexible hours on a casual basis. Proficiency in MS Word, MS Access, MYOB Business Basics is desirable. Knowledge and interest in marketing and website maintenance useful. The position is currently located at Monash University Clayton Campus and is long-term.

Applications to deb.candy@law.monash.edu.au or phone 03 9905 3362.

Foreign Correspondent

Australia's Practice Yet to Fulfil its Promise at the UN

As Kevin Rudd travelled the world re-establishing Australia's credentials as a player in the international community, his government's representatives at the United Nations continued to present what some labelled an 'obstructionist' stance to the international consensus on some important human rights issues. This is problematic, not only for the issues in question, but for the longer term goal of engaging more constructively with the UN human rights system.

In the last months, significant strides have been taken in expressing a renewed level of engagement with the United Nations. On 5 March 2008, Australia told other UN members, gathered together for the Human Rights Council, that '[t]he new Australian Government was elected on a platform highlighting its commitment to human rights, and ... we will work constructively and actively with the Human Rights Council to ensure this body is able to respond effectively to human rights situations that demand its attention.'

It must be a difficult thing to implement such a change in policy, and far away from Canberra we are noticing that the bold words and progressive promises we see being expounded by Rudd and others are taking some time to filter through the ranks. Real change may take a long time to manifest, but for Australia's human rights record and international credibility to improve, it is vital that the big picture policy changes are reflected at every level and in every UN meeting where Australia's position is manifested.

The difficulty in doing this was evident this month in Geneva at one of the most important UN meetings for 2008. In negotiations at a working group of the Human Rights Council to negotiate an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Australia was one of a handful of countries trying to water down the protections for victims of human rights abuses. Australia has been doing this for the past five years that UN members have been meeting on this topic, but what makes the behaviour at the last and final working group different is that the Government hasn't always been out there touting how committed it is to re-establishing its positive human rights record.

At the beginning of April, the UN met for the final time to negotiate a text that will establish a way for victims of economic, social and cultural rights to raise their concerns at the UN level and have the matter adjudicated by an independent body of experts. Such a mechanism already exists for many human rights and their violations, such as the right to life, torture, freedom of expression and religion, and all other civil and political rights. Australia is a party to this mechanism. A specialised optional protocol exists to enable persons with disabilities whose socio-economic rights are being violated to communicate a complaint to the UN. Likewise, women suffering from discrimination in the field of socio-economic rights have a protocol which allows them to access the UN complaints procedures. The new Australian Government has said it is considering becoming a party to each of these mechanisms. So, if the Australian Government has accepted (or are progressing towards accepting) the need to protect these rights for women and persons with disabilities, why does it not accept the need to protect the economic, social and cultural rights of Australians?

Australia has always been vocally reluctant to support an optional protocol on economic, social and cultural rights. In the past the Government has said that it wants to pick and chose which rights should be considered and which could be excluded from consideration. Yet this new mechanism adds nothing new to the obligations Australia already has under international law to treat all the rights equally. It would do nothing more than provide a means through which to better protect and promote the economic, social and cultural rights of Australians and millions of others all around the world. Thus Australia's opposition to an optional protocol is incomprehensible. It seems so out of step with the position of the new Government on so many other issues, both domestically and at the UN, and on the very issues which it was elected to address. After all, the kinds of rights we mean when we are talking about socio-economic rights are (amongst others) workers rights, the right to form and join trade unions,

the right to education including free primary education, and the right to access the healthcare system without discrimination. They're really just about the right to a fair go for all.

While, to its credit, the Rudd Government subtly backed off some of its previous hardline positions at the April meeting, and adopted a slightly more constructive attitude to negotiations than it previously had, the nuances of their position on many aspects were not in line with what one would expect of a country that was simultaneously embarking on a policy of positive engagement for the promotion of universal human rights, as a basis for, amongst other things, a bid for a seat on the Security Council. Under the guise of working with 'like-minded countries' to 'negotiate compromise positions', Australia's diplomatic representatives in Geneva worked with the USA, Canada, New Zealand, and other long time opponents of the Optional Protocol, to water down some key provisions of the text. Many delegates at the Working Group were full of fears that this would be another 'Declaration situation' – a reference to the kowtowing that had been done to ensure a workable text for the Declaration on the Rights of Indigenous Peoples, only to have this group of four vote against it at the last moment anyway. Just because (some of) these countries are, on many other issues, seen to be fighting the good fight for human rights, does not mean that the new Australian Government can hide behind the excuse of being in good company on this issue. Indeed, these other countries have been long criticized for their positions of reluctance and outdated legal interpretation when it comes to economic, social and cultural rights.

During the Working Group on the OP-ICESCR, Australia's approach to human rights at the UN appeared quite clearly to be two-faced. One striking example was the issue of an inquiry procedure for ESC rights violations. The draft Optional Protocol allows the UN Committee on Economic, Social and Cultural Rights to launch an inquiry if it receives information indicating grave or systematic violations of economic, social and cultural rights. Australia objected to the inclusion of this procedure, unless provision was made for them to opt out of agreeing to be bound if they don't want to be. Less than one month previously Australia had said that the UN 'has a critical role to play as a forum for early warning and prevention of gross and systematic human rights violations. There is no excuse for inaction ... The lives of countless people depend on it'. Many were struggling to understand why Australia, a relatively well resourced country with arguably little to fear in the way of 'grave or systematic violations' of human rights, would be so keen to avoid this. What kind of excuse could Australia possibly offer to argue against the establishment of a system which will do exactly what they claim the UN should be doing? If the lives of people really depend on it, let's not start being two-faced before the ink has dried on the speech writer's text.

Inspiring words about enhancing international human rights promotion and protection are a welcome change, but changes in the fine print of this country's positions on human rights are equally necessary in order to re-establish credibility in terms of engagement in the UN human rights system.

Claire Mahon is an international human rights lawyer, legal advisor to the UN Special Rapporteur on the Right to Food and researcher at the Graduate Institute of International and Development Studies in Geneva.

If I Were Attorney-General...

Promoting and Protecting Indigenous Human Rights

If I were the federal Attorney-General, I would immediately increase funding to Aboriginal Legal Services. A 2004 Senate report and a 2003 report of the Office of Evaluation and Audit both found that the then annual nationwide shortfall for funding of Aboriginal legal aid was \$25 million. And that was over four years ago; there have been no increases in real terms since. Over the period that Howard was in power, funding to Aboriginal Legal Services was cut by 40 per cent in real terms, making the system almost unworkable.

Also high on my list of priorities would be a review of the Northern Territory intervention legislation. In particular, I would move swiftly to stop the suspension of the *Racial Discrimination Act* and the blanket quarantining of welfare provisions. I would hand to my cabinet colleagues all of the growing evidence that is emerging that the quarantining of welfare is not working, and certainly not improving school attendance. I would also hand them a list of programs that have been shown to improve school attendance, including breakfast and lunch programs and Aboriginal teachers' aides. These programs would be budgetary priorities. I would move to immediately reinstate the permit system and undertake a

review of the *Northern Territory Land Rights Act*, the outcomes of which would inform me as to the best ways to reinstate protections to traditional owners and return control of mining royalties to Aboriginal people, not the Minister.

It would be time to undertake a proper review of the *Native Title Act* and the National Native Title Tribunal. I would commission a proper evaluation of the workability of the Act and seek recommendations to improve its ability to provide outcomes and to shift the balance back after the 1998 amendments.

I would dust off copies of the *Bringing them Home Report* and the *Royal Commission into Aboriginal Deaths in Custody*, get advice on the best way to implement the key recommendations of both reports and develop a strategy for implementation. I would convene a special meeting of the all State Attorney-Generals and their Department heads to find ways to better co-ordinate efforts to implement the strategy with timelines and benchmarks.

The *UN Declaration on the Rights of Indigenous People* would be signed and I would seek advice from the Human Rights and Equal Opportunity Commission on the best ways to entrench the rights recognised by the declaration into Australian law.

In addition, I would lobby my parliamentary colleagues to take money from home ownership schemes and other failed policies and direct that towards Indigenous infrastructure, health, housing and education. I would also remind them that the largest Aboriginal populations are in New South Wales and Queensland and so focusing primarily on the Northern Territory means a majority of Aboriginal and Torres Strait Islanders are being ignored. I would stress that they need to fix the \$460 million underspending on basic Indigenous health needs.

I would fully support the inquiry into the Haneef case. I would take the opportunity to review the anti-terrorism legislation to ensure that it strikes a better balance between fundamental rights like due process before the law with the aims of improving national security. I would also commission reviews of the powers of the Australian Federal Police and the Australian Security Intelligence Organisation.

I would also be an active advocate for reinstating the separation of powers between the judiciary, executive and the legislature. As Attorney General, I would not use my position to denigrate judges in the media.

I would appoint Hilary Charlesworth and George Williams as co-chairs of a national committee to inquire into whether there should be a national Charter of Rights, what form it should take and what it should include. I would implement their recommendations.

I would move to establish a Constitutional Convention Committee that would hold a convention every ten years to discuss constitutional change, starting in 2009. I would ask that the first convention consider the following matters: a Preamble to the Constitution that recognises Aboriginal and Torres Strait Islander people, the inclusion of a non-discrimination or equality clause in the Constitution, and fixed terms for politicians.

The issue of whether the Northern Territory and Australian Capital Territory should become states would be revisited and I would seek to develop processes through which this could be explored in both jurisdictions.

I would legislate to make same-sex marriage legal.

Finally, I would be mindful that I would have the opportunity to make two appointments to the High Court. I would undertake extensive consultations to identify the most capable candidates but I would certainly have Chief Justice Jim Spigelman of the NSW Supreme Court and Professor Cheryl Saunders of Melbourne Law School on my list of potential candidates.

Larissa Behrendt is Professor of Law and Director of Research at the Jumbunna Indigenous House of Learning, University of Technology, Sydney. She is a member of the NSW Bar and Chair of National Indigenous Television Ltd.