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The Human Rights Law Resource Centre Ltd aims to:

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

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

Opinion

Australian Foreign Policy and Human Rights: How much will the Rudd Government Change?

The Government has started well. It appears to be taking a more compassionate view of people in detention. It has abolished Temporary Protection Visas. It is holding an enquiry into the 'Citizenship Test' and will hopefully create a test that makes more sense, does less damage, and is not so heavily biased.

But the Government has not said anything of which I am aware about our interrogation laws, about the greatly increased powers, including powers to detain those known to be innocent, given to state and federal police and ASIO in the so-called 'War on Terror'.

I want to devote myself to a particular question which goes to the heart of a government's belief in the rule of law and due process. What does this government believe about its commitment to see that *any* Australian arrested in *any* part of the world is granted justice under the rule of law and due process?

So far the Government has been silent on this issue; an issue revived in recent times by the admission by Paul O'Sullivan, head of ASIO, that Australia, at a very high level, objected on many occasions to the US rendition of Mamdouh Habib and to his torture in Egypt.

The previous government, of course, maintained that it knew none of this. The Foreign Minister, at some point, said he had made enquiry of the Egyptian authorities but that there was no record of Habib going in or out of Egypt. Did the previous government really believe that there would be an official record of America's rendition trail?

The statements of Paul O'Sullivan make it quite impossible to believe that senior ministers did not know that Habib had been taken to Egypt. We now know that ASIO, the police and three senior departments were involved in discussions concerning the matter. So, the previous government was willing for an Australian to be tortured; an Australian against whom there was never sufficient evidence to make any charge, and then sent to Guantanamo Bay. In the end the Americans just wanted to be rid of him and so sent him back to Australia.

Is this justice? It is the kind of action we would expect in a dictatorship, not the kind of action we would expect from rule of law-based countries like the United States and Australia.

We should not have been surprised by these developments because, for some time, we have known what happened to David Hicks, held for 5 years in Guantanamo Bay. As I am advised, the CIA paid large sums for every person handed over by the Northern Alliance as a 'supporter' of the Taliban.

Hick was, of course, held for many years in Guantanamo Bay, called the 'worst of the worst' and the most terrible of all people; the US Ambassador here said David Hicks would readily shoot an American or Australian if he had a gun in his hands. Yet there was no evidence he had ever fired at anyone.

When finally charges were brought against David Hicks, most were rubbed out by Justice Susan Crawford, then Head of the Military Tribunals, for lack of evidence. One charge was left standing against him; that of providing material support for terrorism. This charge involved a retrospective law; a law which even John Howard said he would not pass in Australia because he would not convict someone in Australia on the basis of a retrospective criminal law. He was, however, quite happy for the US to do so.

In the US such a law could not have applied to any American because, under their Bill of Rights, a retrospective criminal offence cannot be created. But, until it is tested in the Supreme Court of the US, the Bush Administration has taken to itself the power to pass retrospective criminal laws in relation to non-citizens.

If there is to be justice, if the rule of law is to prevail, it must apply to everyone. An Australian government should not sit by and allow an Australian to be charged with an offence, fabricated to achieve a guilty verdict, and denied access to a properly constituted court and to the rule of law, simply to please a stronger ally.

Did the previous government believe that the sacrifice of David Hicks would strengthen our relationship with the United States?

As a result of communications between lawyers, but also communications involving governments, a plea bargain was struck in Washington. Hicks' defence counsel was told to go to Washington to negotiate. The prosecution in Guantanamo Bay knew nothing of it. And so the plea bargain was struck: nine months, and nine months' silence.

But after 5 years in the most oppressive detention, wouldn't the most innocent person have accepted that plea under threat of a further 20 years in Guantanamo Bay?

Two weeks after the plea bargain was struck, the mock trial took place. You knew what the result was going to be: a guilty verdict. But the Tribunal or the Commissioners did not know, the Prosecuting Officer did not know and the ten senior colonels, flown in from all round America to determine the length of sentence, did not know that everything they were doing was irrelevant. It was all a farce but farces are meant to make us laugh. This one was evil. It was playing with an Australian's life.

After Hicks had been found guilty and after the colonels had determined a seven year sentence, the maximum for the particular offence, they were all told their role was irrelevant because the actual sentence was all determined two weeks previously, under political direction in Washington.

That is not the rule of law. That is not justice. So we should not be surprised at Paul O'Sullivan's statement that Australia was aware, at the highest levels, that Habib had been rendered to Egypt. It only reminds us of some of the things done in the time of the previous government.

We know about Habib, we know about Hicks, we know about certain cases under immigration detention. How many are there that we do not know about? How many injustices were in fact perpetrated by the previous government?

You may well say, well, all right, these are past acts and the government has suffered its electoral defeat. So let it lie. Today, however, the more important question is: what is the attitude of the new government to an ally who can behave in such a way? Will the Rudd Government stand up for basic justice for every Australian, even if it involves a stoush with the United States?

I have enormous respect for the United States. The good things that have happened since the Second World War, through most of my active life, have been supported or led by the United States. This is true even of the International Criminal Court, whose statutes would never have been drafted without the support of American lawyers and of earlier American administrations.

The America that can do so much good and which is coming to despise and deride the current President in his dying months, does not expect an ally to be subservient and compliant. The best of America respects open and often vigorous debate. That America will listen to alternative points of view and would listen to an ally like Australia if we spoke clearly and forcefully. Such attitudes would enhance respect for Australia.

Let us have an answer as to what the Rudd Government believes to be its duty of care to Australians imprisoned, abused or tortured, beyond the reach of the rule of law and a properly constituted court.

The Rt Hon Malcolm Fraser, AC, CH is a former Prime Minister of Australia

News

Australia to Ratify Optional Protocol to Convention on the Elimination of all forms of Discrimination Against Women

Consistent with its commitment to promoting and protecting human rights, both internationally and locally, the Rudd Government has announced that it proposes to accede to the *Optional Protocol to the Convention on the Elimination of all forms of Discrimination Against Women*.

By becoming a party to the Optional Protocol, Australia would recognise and accept the jurisdiction of the UN Committee on the Elimination of Discrimination Against Women, a panel of independent international human rights experts, to consider complaints from individuals that Australia has violated its obligations under the Convention, provided that the complainant has first exhausted domestic remedies.

Over the coming months, the Attorney-General's Department, supported by the Office for the Status of Women, will prepare a National Interest Analysis on the Optional Protocol in consultation with Commonwealth agencies, State and Territory Governments, and the broader Australian community. The NIA and Optional Protocol will then be referred to the Joint Standing Committee on Treaties for inquiry and report, after which a final decision on accession will be made.

For further information, and to make a submission by 30 June 2008, see

http://www.ofw.facs.gov.au/international/consult_letter.htm.

AAR Contributes to Major UN Report on Business and Human Rights

One of Australia's leading law firms, Allens Arthur Robinson, has played an important role in a major United Nations report on the role of corporations in human rights, adopted by the UN Human Rights Council in June 2008.

The Report by the UN Special Representative on Business and Human Rights, Professor John Ruggie, aims to provide an international framework for action on the role of corporations regarding human rights.

The Report proposes a triple-pronged international policy framework focused on:

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

The adoption of the Report by the UN Human Rights Council represents the first time that an official position on corporate human rights responsibilities has been agreed at the international level.

AAR's Corporate Responsibility Group contributed to the Report by preparing a comprehensive brief on the human rights law obligations of corporations in seven jurisdictions in the Asia-Pacific, including Australia, China, India and Indonesia. The firm also provided research on the extent to which corporate culture is used as a basis for corporate criminal liability in Australia, Europe and Asia and the extent to which a corporate duty to respect human rights exists under Australian domestic law.

According to Rachel Nicolson, Senior Associate with AAR's Corporate Responsibility Group, the endorsement of the UN report is very timely. 'Clients, particularly multinationals in the extractives industry and finance sector, are increasingly turning to international law – on issues like labour, the environment, community and government relations – for guidance on best practice standards across their global operations,' Ms Nicolson said. 'These international law standards are in turn becoming a part of domestic law obligations faced by corporations.'

According to Ms Nicolson, 'Professor Ruggie's report is an important development for corporations – it is a concrete step towards providing greater certainty for corporations of their obligations in relation to human rights. These developments will also help corporations respond to the emerging expectations of

their stakeholders on this issue – seen for instance in the increase in shareholder resolutions concerning rights related issues.’

The UN Report is available at

<http://daccessdds.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement>.

AAR’s summary of the Report is available at <http://www.aar.com.au/pubs/ldr/focrmay08.htm>.

Centre Welcomes New Human Rights Lawyer

The Human Rights Law Resource Centre is delighted to welcome Rachel Ball to the team as a Human Rights Lawyer. Rachel’s position is generously jointly funded for 3 years by the Helen Macpherson Smith Trust and the R E Ross Trust.

Rachel has a Master of Human Rights Law from Columbia University in New York and previously worked as a lawyer at Mallesons Stephen Jaques. She also has experience working and volunteering with the Asylum Seeker Resource Centre, the Castan Centre for Human Rights, Human Rights First in New York and the World Bank in Washington.

The Centre farewells Anna Copeland after 4 months leave from her position as Director of SCALES Community Legal Centre in Western Australia. We thank Anna for her significant contribution to the Centre over a short time and look forward to continuing a strong association with SCALES.

Victorian Charter of Rights Developments

Civil and Political Rights Explained: A Tool for Advocates

The Victorian Equal Opportunity and Human Rights Commission has developed a new resource which explains the civil and political human rights contained in the Victorian *Charter*.

In respect of each right there is a discussion of the ‘Key Issues’, a summary of key international and comparative cases relevant to the interpretation and application of the right, and examples as to how the right can be used as an advocacy tool to promote dignity and address disadvantage.

The publication is available in PDF format at

<http://www.humanrightscommission.vic.gov.au/pdf/CPRsexplainedLR.pdf> and in RTF at

<http://www.humanrightscommission.vic.gov.au/pdf/summaryofrights.doc>.

Statements of Compatibility under the Victorian Charter

Section 28 of the *Charter of Human Rights and Responsibilities* requires a Statement of Compatibility to be issued for every Bill that is introduced into a House of Parliament.

Justice Legislation Amendment Bill 2008

The *Justice Legislation Amendment Bill 2008* (‘the Bill’) seeks to expand the post-sentence regulation of certain categories of high-risk offenders. In particular, the Bill amends the *Serious Sex Offenders Monitoring Act 2005* (‘SSOMA’) to:

- allow for the additional assessment of offenders;
- extend the offences in relation to which an extended supervision order may be made to include offences against adults;
- provide for the making of interim extended supervision orders; and
- clarify the powers of the Court of Appeal in respect of extended supervision orders.

The Bill is part of a broader legislative regime being enacted by the Government that draws upon the recommendations of the Sentencing Advisory Council in its report, *High-Risk Offenders - Post Sentence Supervision and Detention* (May 2007).

Human rights are engaged by a number of provisions in the Bill. This article focuses on the most significant issues raised by the Statement of Compatibility tabled with the Bill, namely:

- the breadth of the discretion given to the Adult Parole Board in limiting offenders’ rights;

- the potential of the extended supervision scheme to limit the rights of finally convicted offenders against double jeopardy and retrospective increases in penalties; and
- what constitutes sufficient explanation for any reasonable limits on rights applied by the Government under the *Charter*.

In addition to these issues, the Bill potentially engages the rights to privacy (s 13(a)), liberty (s 21(1)), a fair hearing (s 24(1)) and a presumption of innocence (s 25(1)) under the Victorian *Charter*. However, the Statement contends that the manner in which the above *Charter* rights are engaged does not warrant special mention or adverse comment with respect to possible incompatibility with human rights.

Expansion of Board's Powers

The SSOMA gives the Board the ability to control the behaviour of serious child sex offenders after their release from prison, by the use of 'extended supervision orders' ('ESOs'). This Bill expands the powers of the Board in dealing with offenders who have committed 'relevant offences'. Among other things, the Bill gives the Board power to order compulsory treatment of an offender, to limit where an offender is permitted to reside, and to direct an offender not to associate with specified individuals or engage in community activities.

This widening of the Board's powers engages several rights under the *Charter*, including: the right not to be subjected to medical treatment without full, free and informed consent (s 10(c)), to freedom of movement (s 12) and to freedom of association (s 16). The Statement concludes that the Bill limits all three of these rights.

However, the Statement concludes that the limitations are reasonable and permissible in accordance with s 7(2) of the *Charter*. It focuses on the purpose of the limitation, being to rehabilitate the offender and protect the community (s 7(2)(b)), emphasises that each of the rights is 'not absolute' (s 7(2)(a)) and that 'less restrictive means' would not be effective in restraining 'high risk' offenders (s 7(2)(e)).

Increasing Pool of Eligible Offenders – Double Jeopardy Concerns

The Bill also amends the SSOMA to include in the definition of 'relevant offences' certain sexual offences against adults, including those involving sexual servitude or deceptive recruiting for commercial services. The Bill gives the Board the power to impose an ESO on these offenders. However, this power also extends to offenders having committed a relevant offence prior to the commencement of the expanded power.

Because this amendment would allow the imposition of ESOs on offenders when these were not able to be made at the time of the offence, this amendment has the potential to engage the right not to be retrospectively punished (s 27(2)) and the right not to be punished more than once for an offence (s 26).

The Statement concludes that these rights are not limited. Key to this conclusion is its determination of the 'threshold question' whether imposition of an ESO amounts to the imposition of a 'penalty' for a criminal offence. The Statement argues that the purpose of the act is to rehabilitate, not punish, and concludes that, rather than an ESO increasing the penalty imposed *for* an offence, a conviction is merely the antecedent fact determining whether an ESO should be made.

The Scrutiny of Acts and Regulations Committee ('SARC') has queried whether this conclusion in the Statement was correct. It referred to a 2006 decision of the New Zealand Court of Appeal, which found that a similar supervision regime to that in the SSOMA did amount to a 'punishment'. Thus, in contrast with the approach in the Statement, it concluded that the Bill may limit the rights of offenders in this way.

Adequacy of Statement

Because of its conclusion that the retrospective application of the Board's power to issue ESOs may limit offenders' rights, SARC turned to whether the limits on the right not to have a retrospective penalty imposed and the right not to be punished more than once were reasonable. Because the Statement concluded that the rights were not limited, it did not go into whether any limitation would be reasonable.

SARC was critical of the Statement's omission on this point. It noted that where a provision 'even arguably' imposes a penalty such as to engage ss 26 and 27 of the *Charter*, the issue of reasonableness should be addressed in case Parliament's conclusion on whether something is a penalty might differ.

SARC further criticised the Statement's treatment of the case law on whether a penalty was being imposed here. In particular, the Statement referred only to case law generally, and did not refer

specifically to the New Zealand decision mentioned above. The Committee said that Statements should 'draw Parliament's attention to any recent decision of a senior court in a significant comparative jurisdiction' where the case is on point and such a general point is made.

Charlotte Beeny and Sharyn Broomhead, Human Rights Law Group, Mallesons Stephen Jaques

Other Charter of Rights Developments

Centre calls for Donations to Assist Campaign for National Charter of Rights

The Human Rights Law Resource Centre has committed to providing leadership and contributing to the development and entrenchment of a national Charter of Rights as a key priority for 2008/09.

Activities that are underway in this regard include the development of a range of Fact Sheets, a Charter of Rights train-the-trainer program, significant international and comparative research and analysis, and the preparation of resources and strategies to ensure that the national consultation on a Charter of Rights engages and is accessible to marginalised and disadvantaged communities and groups.

The Centre is calling for urgent donations to assist and sustain this important work.

In January 2008, an Independent Evaluation of the Centre by Jackson Consulting and the Melbourne Law School found that:

- the Centre has made a **significant and positive contribution to the promotion of human rights** through its case work, litigation, policy work and educational activities; and
- the **planning, strategy and governance of the Centre is 'exemplary'**.

The Evaluation also found, however, that **further funding is required if the Centre is to expand its activities or operations without diluting its effectiveness.**

The Centre relies heavily on donations from individuals, business and foundations for its continued operation and growth.

The Centre has been endorsed by the Australian Taxation Office as a Deductible Gift Recipient. Donations of \$2 or more are fully tax deductible.

Your donation to the Centre will promote and protect human rights and assist the campaign to develop a national Charter of Rights.

Further information, including a Donation Form, is available at

http://www.hrlrc.org.au/html/s02_article/default.asp?nav_cat_id=155&nav_top_id=64.

Victorian Charter Case Notes

Human Rights Compatible Interpretation and the Right to a Fair Hearing

Guss v Aldy Corporation Pty Ltd & Anor (Civil Claims) [2008] VCAT 912 (1 May 2008)

In this recent decision of the Victorian Civil and Administrative Tribunal, s 32(1) of the *Charter* was used to reject the previous interpretation of certain sections of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

Facts

The dispute between the applicant and respondent related to the marketing of an apartment in the Melbourne Docklands area. In 2005, the applicant claimed compensation from the respondent for loss allegedly caused by the respondent's misleading and deceptive conduct. In the course of the proceedings, an order was made directing a compulsory conference between the parties. The applicant failed to attend the second day of the conference. In the applicant's absence, Levine SM dismissed the application with costs, pursuant to s 87 of the Act.

The applicant sought to have her application reopened pursuant to s 120 of the Act. Section 120 permits a person in respect of whom an order is made to apply to the Tribunal for a review of the order if the person did not appear and was not represented at the hearing at which the order was made.

The respondent argued that the compulsory conference was not a 'hearing' within the meaning of the Act, and therefore that the application did not satisfy the first requirement of s 120. Inter alia, the respondent submitted that:

- the Act distinguishes a 'compulsory conference' from a 'hearing' in certain headings and sections; and
- commentary on the Act suggests that an order made under s 87 is not an order made at a 'hearing', and therefore s 120 does not apply.

Decision

Vassie SM granted the application for review and rehearing under s 120, taking the view that a 'hearing' for the purposes of s 120 includes a compulsory conference when an order is made under s 87.

Vassie SM referred to s 83(2) of the Act, which states that the functions of a compulsory conference are:

- (a) to identify and clarify the nature of the issues in dispute in the proceeding;
- (b) to promote a settlement of the proceeding;
- (c) to identify the questions of fact and law to be decided by the Tribunal; and
- (d) to allow directions to be given concerning the conduct of the proceeding.

Vassie SM articulated three reasons why a compulsory conference should be considered a 'hearing' for the purposes of s 120. First, the making of orders under s 87 at a compulsory conference involves the exercise of judicial functions (namely, in deciding what orders are appropriate under s 87, the presiding Member will usually be required to receive evidence). Second, s 120 is a 'remedial' provision, and should thus be given a liberal construction.

The third reason was grounded in s 32(1) of the *Charter*. Section 32(1) states that, 'so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.

Vassie SM observed that the *Charter* enshrines the right to a fair hearing (as set out in s 24), and cited a passage from the House of Lords decision in *Grimshaw v Dunbar* [1953] 1 QB 408, which 'encapsulated what is meant by a "fair hearing" of a proceeding as a whole':

Be that as it may, a party to an action is prima facie entitled to have it heard in his presence; he is entitled to dispute his opponent's case and cross-examine his opponent's witnesses, and he is entitled to call his own witnesses and give his own evidence before the court. Prima facie, that is his right, and if by some mischance or accident a party is shut out from that right and an order is made in his absence, then common justice demands, so far as it can be given effect to without injustice to other parties, that that litigant who is accidentally absent should be allowed to come to the court and present his case - no doubt on suitable terms as to costs.

On this basis, a narrow interpretation of s 120, under which compulsory conferences are not considered 'hearings', would leave the party in question with no recourse other than an appeal. This outcome is not 'comparable with the right enshrined by the *Charter* to a fair hearing of the proceeding'. Vassie SM also observed that two earlier VCAT decisions (involving the narrow interpretation of s 120) must be distinguished on the basis of the *Charter*.

This decision appears to be the first instance of a court or tribunal using s 32(1) of the *Charter* to overturn the previous interpretation of a statute. The decision may invite other courts and tribunals to actively use s 32(1) in the same way.

It is interesting to note, however, that Vassie SM did not consider whether a narrow interpretation would be a 'reasonable' limit on the s 24 *Charter* right.

This decision is available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2008/912.html>.

Jayani Nadaraj, Human Rights Law Group, Mallesons Stephen Jaques

Right not to be Tried or Punished More than Once

Swain v Department of Infrastructure (General) [2008] VCAT 848 (9 May 2008)

The Victorian Civil and Administrative Tribunal has held that a government authority's refusal to issue a commercial driver's licence on the basis of the applicant's history of insurance fraud did not engage the

applicant's right to freedom from double punishment under s 26 of the Victorian *Charter*. However, on the facts, the applicant was nevertheless found to be entitled to such a licence.

Facts

The applicant, Peter Swain, sought accreditation to drive a commercial passenger vehicle or a vehicle being used to provide a private bus service. The Director of Public Transport ('DPT') found that it would not be appropriate to issue such accreditation in light of the 'public care objective' in s 169(3) of the *Transport Act 1983* (Vic), and consequently refused it. The 'public care objective' is defined in s 164(1)(b) and includes, among other things, that services provided by accredited drivers should 'be carried out in a manner that is not fraudulent or dishonest'.

The DPT considered that to accredit Mr Swain would be inconsistent with the public care objective due to his 2007 conviction for attempting to commit insurance fraud. The applicant had also been found guilty of six offences in the early 1980s, though these were not considered to be particularly relevant to the DPT's decision. The DPT was concerned that, although the applicant had led a 'blameless life' between these early offences and his conviction in 2007, he could not satisfy the 'public care objective' and 'in particular, was not able to carry out the service in a manner that was not fraudulent or dishonest'.

The applicant sought review of the decision, in part arguing that the DPT had failed to comply with s 26 of the Victorian *Charter*. Section 26 states that '[a] person must not be tried or punished more than once for a single offence in respect of which he or she has already been finally convicted or acquitted by law'. The applicant argued that s 26 was applicable by virtue of ss 32 (interpretation), 4 and 38 (decision making by public authorities) of the Victorian *Charter*. He asserted that, by denying him accreditation, the DPT was effectively punishing him again for a crime for which he had already received a final conviction (ie his insurance fraud).

Decision

At the outset, Megay SM stated that she believed that counsel for the applicant had 'misconstrued' the effect of ss 4 and 38. She did not, however, go on to explain how she thought they had been misconstrued, and nevertheless proceeded to discuss the substance of the s 26 claim.

Megay SM held that s 26 was inapplicable in the circumstances. She considered that it would be 'entirely incorrect' to view the dismissal of Swain's application for accreditation as double punishment, because the decision was not punitive in character. Rather, it was aimed at 'the maintenance of standards and the public care objective as set out in the Act'. Citing Murphy J's reasoning in *Inglese v Estate Agents Board* (Unreported, Supreme Court of Victoria, 15 August 1989), Megay SM held that it was 'clear law' that such decisions were to be made for protective purposes, rather than punitive ones.

Ultimately, however, Megay SM found that it was not appropriate to refuse accreditation to the applicant. Although she acknowledged the existence of the general risk of driver fraud, Megay SM concluded that all of the factors surrounding the applicant's 2007 conviction suggested that it was 'an unfortunate aberration, and one that will not be repeated'.

Discussion

Similar provisions prohibiting double punishment are contained in art 14(7) of the *International Covenant on Civil and Political Rights* and art 4 of Protocol No 7 to the *European Convention on Human Rights*. Both of these provisions are limited to criminal punishment. Unlike s 26 of the Victorian *Charter*, art 4 of Protocol No 7 expressly refers to 'criminal proceedings'. Similarly, in *Strik v The Netherlands* (Communication 1001/2001, 1 November 2002) the UN Human Rights Committee held that mere 'disciplinary measures', in the absence of a criminal charge, were outside of the scope of art 14 of the ICCPR. This suggests that, even if the DPT's actions were characterised as disciplinary rather than protective, s 26 may still have been inapplicable as this was not a criminal case.

This case does little to clarify the way in which s 26 of the Victorian *Charter* will apply in cases of double punishment. It is difficult to know what to make of Megay SM's comment that counsel for the applicant 'misconstrued' the effect of ss 4 and 38 of the *Charter*. Further, it is not clear why the DPT would not be considered a public authority under s 4.

This case does suggest that whether an action constitutes 'punishment' in relation to s 26 may depend on the legislative purpose set down for the decision-maker, rather than the substantive effect of the

decision, which would be a regrettable position. It remains unclear, however, whether actions that are disciplinary but not necessarily criminal in character fall within the ambit of the provision.

The decision is available at: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2008/848.html>

Rachel Guthrie and Chris Thomas, Human Rights Law Group, Mallesons Stephen Jaques

VCAT Considers Interpretative Provision in Involuntary Treatment Case

MH6 v Mental Health Review Board (General) [2008] VCAT 846 (7 May 2008)

In a decision regarding the review of an involuntary treatment order under the *Mental Health Act 1986* (Vic), VCAT considered the application of the obligation under s 32(1) of the *Charter* to interpret laws consistently with human rights.

Facts

In 1982 Mr J, the applicant, fell from a horse and suffered a serious brain injury.

Following a period of imprisonment for indecent assault, Mr J was admitted to Mary Guthrie House ('a specialised, secure rehabilitation facility for adults aged 18 to 65 with co-morbid diagnosis of an acquired brain injury and psychiatric illness').

At Mary Guthrie House, Mr J was subject to involuntary treatment for mental illness. He applied to the Mental Health Review Board to be discharged.

The Board held that his continued treatment as an involuntary patient was necessary, pursuant to the *Mental Health Act*.

Mr J applied to VCAT for review of the Board's decision.

Decision

The Deputy President of VCAT affirmed the Board's decision.

At the outset, the Deputy President noted relevant objects of the Act as well as relevant principles of treatment and care (drawn from s 6A). She stated that these were taken into account in reaching her decision.

The bulk of the Deputy President's judgment was devoted to applying the criteria for involuntary treatment laid out in s 8(1) of the Act. She held that all of the criteria were satisfied, namely:

- (a) Mr J appears to be mentally ill
The Deputy President accepted expert medical diagnoses of impulse control disorder, psychotic disorder and mood disorder.
- (b) Mr J's mental illness requires immediate treatment and that treatment can be obtained by Mr J being subject to an involuntary treatment order
The Deputy President made particular reference to 'the behavioural management programme which structures his whole day and is an integral part of his treatment and depends on the availability of skilled staff 24 hours a day', as well as evidence from Mr J which suggested that there was a high risk that he would stop taking necessary medication if his involuntary status were discharged.
- (c) Because of Mr J's mental illness, involuntary treatment is necessary for his health or safety (whether to prevent a deterioration in his physical or mental condition or otherwise) or for the protection of members of the public
In concluding that involuntary treatment was necessary, the Deputy President relied on expert medical evidence which indicated that Mr J poses significant risks to himself and to others, and that he has poor insight. She cited specific past examples of impulsive and sexually inappropriate behaviour.
- (d) Mr J has refused or is unable to consent to the necessary treatment for his mental illness
The Deputy President found that Mr J lacked necessary insight and understanding. She concluded that, if released, there was a high risk that he would cease to take his medication.

- (e) Mr J cannot receive adequate treatment for his mental illness in a manner less restrictive of his freedom of decision and action

The Deputy President held that there was 'no clear and consistent plan in place as an alternative.' As such, she was not satisfied that there was any less restrictive means of adequately treating Mr J's mental illness. In reaching this conclusion, she took into account the limited financial resources available to Mr J.

Having concluded that the criteria under s 8(1) of the Act were satisfied, the Deputy President was required to review Mr J's treatment plan.

The diagnosis contained in the treatment plan was not supported by the expert medical evidence presented at the hearing, and the plan lacked detail regarding the 'ongoing search for accommodation'. Nevertheless, the Deputy President found that the plan was capable of implementation and that it satisfied the relevant requirements under the Act.

Application of the Victorian *Charter*

The Deputy President found that Mr J's *Charter* rights

...are plainly engaged in several respects by the decision of the Board. At the least, the decision of the Board involves the imposition of limitations on his right not to be subjected to medical treatment without his consent (s 10(c)), on his right to freedom of movement (s 12) and on his right to liberty (s 21(1)).

After extracting s 7(2) of the *Charter* (which provides for permissible limitations on human rights), she found that the involuntary detention and treatment of Mr J was necessary and proportionate. She then concluded that '[t]he human rights issues raised on behalf of Mr J are wholly resolved on that basis and no question of the proper construction of the relevant provisions of the *Mental Health Act* arises.'

With respect, the Deputy President's conclusion appears inconsistent with the *Charter*.

Section 32(1) of the *Charter* provides that *all* statutory provisions must be interpreted in a manner that is consistent with human rights, so far as it is possible to do so consistently with their purpose.

There is nothing in the *Charter* to suggest that s 32(1) is only enlivened where a *Charter* right has been breached, or where the proportionality test under s 7(2) of the *Charter* is not satisfied.

Thus, the *Charter* required the Deputy President to interpret the provisions of the *Mental Health Act*, including the criteria set out in s 8(1), in a way that was compatible with human rights, so far as it was possible to do so consistently with the purposes of those provisions.

The decision is available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2008/846.html>.

Jessica Moir is a lawyer with Allens Arthur Robinson

Comparative Law Case Notes

Prisoners' Visitation Rights and the Right to Family and Private Life

Ferla v Poland [2008] ECHR 55470/00 (20 May 2008)

The European Court of Human Rights has held that a Polish prisoner's right to respect for his family life was violated by onerous visitation restrictions, which substantially prevented him from seeing his wife and son. The applicant was awaiting a final determination on a serious assault charge. Although his wife had previously made a statement to police about the alleged crime, the risk of prejudicing her willingness to testify at trial was considered insufficient reason for interfering with the right to family life.

Facts

The applicant, a Polish national, and his wife attended a dinner at their neighbours' house on 24 December 1998. Following an altercation between the applicant and his neighbour, the applicant assaulted the neighbour. The applicant was subsequently arrested on 25 December 1998 on charges of aggravated assault and placed in Gdansk District Detention Centre. The applicant's wife gave a statement to police on this date in which she asserted that she knew nothing about the assault.

From the date of the applicant's initial detention until the final rendering of a sentence on 10 December 1999, both the applicant and his wife made repeated visitation requests. These were routinely denied, save for one occasion on 18 March 1999, when the prosecutor allowed the applicant's wife to visit him in

prison. The applicant also made repeated requests to see his son, but the prosecutor prohibited visitation where the child was accompanied by the applicant's wife, thereby requiring her to find a custodian to take the child to the prison.

The prosecutor argued that, in view of the wife's statement to police, these restrictions were reasonably necessary to preserve the potential for her to make a statement against the applicant at trial. Contact between the applicant and his wife could limit this potential by allowing the applicant to exert influence over his wife.

Decision

Article 8 of the *European Convention on Human Rights* enshrines the right to respect for one's 'private and family life, his home and his correspondence', subject to certain restrictions that are 'in accordance with law [and] necessary in a democratic society'.

Additionally, Recommendation Rec(2006)2 of the Committee of Ministers to member states of the European Prison Rules, adopted on 11 January 2006, imposes a requirement that prisoners be afforded certain minimum 'contact with the outside world', which includes visits that 'allow prisoners to maintain and develop family relationships in as normal a manner as possible'.

The Polish Government conceded that there had been some interference with the applicant's rights under art 8, but claimed that they had 'maintained a fair balance of proportionality' in their application of visitation restrictions. They pointed to his one visit from his wife, that the applicant was able to correspond with his wife, and that, following a decision of the Court on 23 June 1999, the applicant was able to receive visits from his son provided he was not accompanied by the applicant's wife.

The Government also argued that the limitations on contact were justified on the grounds that the applicant's wife had been a witness in proceedings against him and, insofar as she might once again be a witness against him, the limitation was made in the pursuance of 'the prevention of disorder and crime' within the contemplation of art 8.

The applicant claimed that the authorities had acted unlawfully in that the restrictions were disproportionate to the stated objective. Their reasons for refusing his wife's visits were arbitrary and unwarranted in light of her refusal to testify against him as a witness during the investigatory stage of the proceedings. He argued that the visitation restrictions had resulted in 'dissolution of family bonds and finally deprivation of parental rights in respect of his son'.

The Court held that limitations on the number of family visits, supervision of those visits and, 'if so justified by the nature of the offence, subjection of the detainee to a special prison regime for visits', amount to an 'interference' with art 8 rights, but not necessarily a breach of that provision. That is, such restrictions would not breach art 8 as long as they: were 'in accordance with the law'; pursued one of the legitimate aims listed in art 8(2) (which include 'the prevention of disorder or crime'); and were 'necessary in a democratic society'.

The Court reiterated that 'necessity' requires that the interference be proportionate to the aim pursued.

The Court took the view that the prosecution should have made greater efforts to ensure the preservation of the applicant's art 8 rights. The prosecution could, for example, have permitted supervised visitation between the applicant and his wife. The Court therefore concluded that the respondent went beyond what was necessary in a democratic society 'to prevent disorder and crime' and found in favour of the applicant.

Relevance to the Victorian Charter

Section 13(a) of the Victorian *Charter* affords every person 'the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with'. Section 17 recognises that 'families are the fundamental unit of society and are entitled to be protected by society and the State ... [and] every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child'. Further, s 7 provides that a human right may be subjected only to 'such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors'.

Ferla v Poland suggests that a prisoner should be extended every opportunity to maintain family relationships whilst imprisoned — even if a member of that family is capable of testifying against him or

her. The nature of the alleged crime, the potential testimony, the needs of a democratic society as well as other factors will be taken into consideration in deciding whether, and to what extent, visitation should be granted. In every instance, the policy and practice adopted should constitute the minimal impairment of human rights reasonably possible.

Andrew Coffey, Human Rights Law Group, Mallesons Stephen Jaques

Right to a Fair Trial in Civil Proceedings and Obligation to Interpret Legislation Compatibly with Human Rights

Capital Property Projects (ACT) Pty Ltd v ACTPLA [2008] ACTCA 9 (21 May 2008)

The ACT Court of Appeal has held that the obligation under s 30 of the *Human Rights Act 2004* (ACT) to interpret laws compatibly with human rights may be engaged even where the words of a statute are clear and there is no ambiguity. In particular, the Court held that a requirement that leave to appeal certain decisions only be granted where 'substantial injustice' would otherwise occur was potentially incompatible with the positive right to a fair trial under s 21 of the *HRA*. The Court considered that it may be necessary to 'modify' the reference to 'substantial injustice' as 'something less than a substantial injustice may well result in an unfair trial'.

Facts

This matter involved an application for leave to appeal against an interlocutory decision by Gray J in a case concerning a long running planning dispute. In 2006, the ACT Planning and Land Authority had approved a development application by a Direct Factory Outlet company to develop a factory outlet retail complex in Fyshwick. This development was opposed by the applicants who are each associated with the Brand Depot complex near the Canberra airport. The applicants sought judicial review of the planning decision under the *ADJR Act 1989*. One issue which arose in those proceedings was whether the applicants could adduce evidence which had not been before ACTPLA when it made the decision, in order to show that the development was inconsistent with the Territory Plan (established under ACT legislation) and the Capital Plan (established under federal legislation). Each statute prohibits a Territory authority from approving any development which is inconsistent with the respective plan, and the applicants claimed that ACTPLA had exceeded its jurisdiction in approving the development. Justice Gray had ruled that this evidence was inadmissible.

Section 37E(4) of the *Supreme Court Act 1933* (ACT) provides that 'an appeal may be brought against an interlocutory order of the court constituted by a single judge only with leave of the Court of Appeal.'

Decision

Justice Refshauge granted leave to appeal to the Court of Appeal against the interlocutory decision.

His Honour considered the rationale for the requirement for leave to appeal against interlocutory decisions, and the common law principles which have been developed to determine whether leave should be granted. Among other criteria, this case law suggests that an applicant for leave may need to satisfy the court that 'substantial injustice' would result if leave were refused.

His Honour considered that the right to a fair trial in s 21 of the *Human Rights Act* might impact upon these principles, as something less than substantial injustice may still render a trial 'unfair.' His Honour noted that the right to a fair trial in the *Human Rights Act* is broader than the right in the *European Convention*, and clearly applies to public law rights and obligations. His detailed discussion of the interpretation issue is worth quoting in full (at paras 37-41):

Further, consideration needs to be given of the role that s 21 of the *Human Rights Act 2004* (ACT) plays in this. This Act, of course, operates principally on statutory material. Appeals are, however, creatures of statute and their limit and extent are to be found in statute...

In construing the provision for leave to appeal, then, an interpretation that is consistent with human rights as far as possible is to be preferred. This was required by s 30(1) of the *Human Rights Act 2004* (ACT) as at the date of hearing of this application, though I note that since then it has been amended, on 17 March 2008, to strengthen the requirement for consistency with human rights. I do not need to consider whether the amendment applies to this application. On either provision, the construction of the legislation for leave to appeal to make it consistent with the right to a fair trial would, it seems to me, require that the reference

to 'substantial injustice' be modified. Something less than a substantial injustice may well result in an unfair trial.

Of course, matters such as delay in or fragmentation of a trial may also affect its fairness and these factors too must be taken into account. It is also clear that the trial has to be fair, not perfect. No trial is likely to pass a test for perfection. It must, however, be positively fair; that is to say, if there was a position where a trial was neither fair nor unfair (conceptually possible, but difficult to see how it could practically exist) that would not suffice, as the trial must be fair.

As no specific argument was addressed to this issue, I do not feel able to formulate a test, including what limits may be appropriate; for example, a minor injustice (if such is possible) may not render a trial unfair and some decisions the subject of challenge may not have any relevant effect on the fairness of the actual trial at all.

His Honour went on to briefly consider the arguments raised by the applicants and respondents regarding the construction of the Territory and federal planning legislation, and whether the prohibition on a Territory authority approving a development inconsistent with the Territory Plan or Capital Plan was a test of objective inconsistency going to the jurisdiction of ACTPLA, or a subjective issue to be determined by ACTPLA without review. Justice Refshauge noted that this construction of the Territory law might again be affected by the *Human Rights Act*:

This raises what has become a somewhat problematic question with respect to statutory construction in the Territory. It appears that it is no longer enough to presume that one can start by assuming that the legal meaning of a legislative provision 'will correspond with the grammatical meaning of the provision' (*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384). A court has now to comply with legislative directives, such as in s 139 of the *Legislation Act 2001 (ACT)* and s 30 of the *Human Rights Act 2004 (ACT)*, which directives may require a construction that might not have arisen from the resolution of ambiguity: *R v Lambert* [2002] 2 AC 545.

His Honour did not need to make a final determination of the construction issue, but considered that the applicants had an arguable case for their interpretation of the legislation, and that this raised sufficient doubt to warrant reconsideration of the decision of Justice Gray by the Court of Appeal.

Comment

This decision is notable for the detailed references to the legislative interpretation issues raised by s 30 of the *Human Rights Act*, which have not often been explicitly considered by the Supreme Court. Justice Refshauge's acknowledgement that s 30 may require human rights to be brought into play in the interpretation of Territory legislation even where there is no obvious ambiguity to be resolved is particularly useful (although it is interesting that he referred to the decision of the House of Lords in *R v Lambert*, rather than the Lord's more recent doctrine on interpretation in *Ghaidan v Godin-Mendoza*). The application of s 30 to the interpretation of the leave provision is also useful in clarifying that the *Human Rights Act* may require the modification of common law doctrine which has been developed around a statutory provision. Finally, his Honour's comments on the requirements of a fair trial in this context are notable in confirming a positive requirement for fairness, rather than simply the avoidance of unfairness.

The decision is available at http://www.courts.act.gov.au/supreme/judgmentsca/capital_property.htm.

Gabrielle McKinnon is Director of the ACT Human Rights Act Research Project (<http://acthra.anu.edu.au/index.html>)

Safe-Injecting Rooms and the Rights to Life and Security of Person

PHS Community Services Society v Attorney-General (Canada) 2008 BCSC 661 (27 May 2008)

The Supreme Court of British Columbia recently declared that laws which made safe self-injecting rooms illegal were unconstitutional and incompatible with the rights to life, liberty and security of the person in the *Canadian Charter of Human Rights and Freedoms*.

Facts

The *Controlled Drugs and Substances Act 1996* criminalises possession and trafficking of controlled substances. The applicant, PHS Community Services Society, runs a safe injecting facility and had previously sought and been granted an exemption to the legislation such that its drug users and staff would not be liable for possession or trafficking. On this occasion, PHS challenged the constitutionality

of the sections arguing that they deprive addicted persons of health care and so violate the fundamental right to life, liberty and security of the person. The Canadian Attorney-General replied that while the rights were engaged, the plaintiffs had not been deprived of the rights in a manner contrary to principles of fundamental justice as criminal prohibitions on possession and trafficking are a reasonable restraint on these rights as they are not arbitrary, broad or disproportionate.

In a very progressive decision, Pitfield J struck down the constitutionality of the provisions which made possession of illegal drugs an offence, *if they are applied to an addict seeking a safe environment to inject*.

The Court held that the sections are inconsistent with the Canadian *Charter* and 'engaged the right to life because it prevents healthier and safer injection where the risk of mortality resulting from overdose can be managed'. The sections also engaged the right to security of the person as they forced addicts to feed their addiction in 'an unsafe environment when a safe environment that may lead to rehabilitation is the alternative.'

The Court recognised the broader health implications and said that federal drug laws that prohibit the management of addiction and its associated risks 'are inconsistent with the state's interest in fostering individual and community health, and preventing death and disease.' The Court issued a suspended declaration of constitutional invalidity which provides the Canadian Parliament with until June 2009 to amend the legislation.

Relevance for the Victorian *Charter*

The case is important authority for the interpretation and protection of the rights to life and liberty and security of person under ss 9 and 21 of the Victorian *Charter*.

The case is also an encouraging recognition that safe injecting is a health issue and of such importance that it may override the public interest in criminalising drug use. In this way, the case will be of assistance in challenging problematic arbitrary policies relating to drug use, in particular the finding that legislation 'which applies to possession for every purpose without discrimination or differentiation in its effect, is arbitrary. ... Instead of being rationally connected to a reasonable apprehension of harm, the blanket prohibition contributes to the very harm it seeks to prevent.'

The decision is available at http://www.cfdp.ca/sif_bpsc.pdf.

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

Children's Right to the Presumption of Innocence and to be Tried as Minors

R v DB [2008] SCC 25 (16 May 2008)

The Supreme Court of Canada recently considered the validity of a rebuttable presumption that minors committing serious offences should be sentenced as adults. A majority of the Court concluded that the presumption offended against the right not to be deprived of liberty otherwise than in accordance with principles of fundamental justice under s 7 of the *Canadian Charter of Rights and Freedoms*.

Facts

DB, a minor, was at the mall with some friends when he got into a fight with R, an 18 year old. During the fight, DB 'sucker punched' R, who lost consciousness. DB fled the scene. An ambulance was called to the mall, and R was taken to hospital, where he died. DB was arrested the following morning.

DB was charged with manslaughter and pleaded guilty. As a minor, he was sentenced under the *Youth Criminal Justice Act* ('YCJA'). The YCJA establishes a separate sentencing regime for minors. The YCJA also establishes a category of 'presumptive offences'. Where a young person is convicted of a presumptive offence, they are to be sentenced as an adult, unless they can justify the imposition of a youth sentence. Similarly, the onus is on the young person to demonstrate that they 'remain entitled to the ongoing protection of a publication ban' in such cases.

Manslaughter is a presumptive offence. Accordingly, the Crown sought to have DB sentenced as an adult, denying his application for a youth sentence. DB challenged the constitutionality of the presumptive offence sentencing regime.

Decision

The Supreme Court, by a majority of 5 to 4, found that the regime was inconsistent with the *Canadian Charter*. It considered the question was not whether young people could receive adult sentences for serious crimes, but whether serious offences should be *presumed* to attract such sentences.

The right engaged by this question is contained in s 7 of the *Canadian Charter*:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The Crown conceded that the imposition of an adult sentence, and thus a longer term of imprisonment, amounted to a deprivation of liberty. Thus the question for the Court was whether the way in which the presumptive offence regime applied was 'in accordance with the principles of fundamental justice'.

Majority

Abella J, for the majority, explained that the relevant principle of fundamental justice is that young persons should be entitled to a 'presumption of diminished moral blameworthiness'. The sentencing regime in the *YCJA* places the onus on the young person to justify their continued entitlement to that presumption, and as a consequence DB was effectively deprived of its benefit. Accordingly, the sentencing regime was held to infringe upon a principle of fundamental justice.

Abella J also found that the default lifting of a publication ban infringed DB's rights under s 7 of the *Canadian Charter*. Because the *YCJA* expressly deems a publication ban to be part of a young offender's sentence, depriving a young offender of the benefit of a publication ban was considered to render the sentence more severe. The onus, according to Abella J, of proving that a more severe sentence should be imposed, lies fundamentally on the Crown.

Section 1 of the *Canadian Charter* provides that rights may be 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. Abella J found that the limits could not be justified in this case. Placing the onus on the young offender to prove that a youth sentence should be imposed did not serve the objective of public protection, and thus failed both the rational connection and minimal impairment branches of the s 1 test.

The impugned provisions of the *YCJA* were thus held to be unconstitutional, and the youth sentence imposed by the trial judge was upheld.

Minority

Rothstein J delivered the dissenting judgment for the minority. The key point of dissent lay not in the relevant principle of fundamental justice, but in the way the principle applies to youth sentencing legislation. That is, Rothstein J did not view the presumption of reduced moral blameworthiness as requiring a presumption of lower sentences and a publication ban. The *YCJA* merely provided 'for a higher range of sentences for young persons convicted of the most serious violent offences'.

Nevertheless, Rothstein J held that the youth sentence imposed by the trial judge was reasonable and did not require further 'interference'.

Relevance to the Victorian *Charter*

The Victorian *Charter* includes provisions relating to the right to life (s 9), liberty and security of the person (s 21) in similar terms to the *Canadian Charter*. This decision may be relevant to the interpretation of such rights pursuant to s 32(2) of the Victorian *Charter*. The discussion of s 1 of the *Canadian Charter* may also be instructive to the interpretation of s 7 of the Victorian *Charter*, which provides for the circumstances in which human rights may be permissibly limited.

Another avenue through which such questions may arise in Victoria is via s 25 (rights in criminal proceedings). In particular, s 25(3) provides that 'a child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation'.

It is important to note that, unlike the *Canadian Charter*, the Victorian *Charter* does not empower the courts to render legislation invalid (s 32(3)(a)). In circumstances such as those arising in the present case, Victorian courts are limited to issuing a Declaration of Inconsistent Interpretation (s 36).

The decision is available at: <http://scc.lexum.umontreal.ca/en/2008/2008scc25/2008scc25.pdf>.

Sharyn Broomhead, Human Rights Law Group, Malleons Stephen Jaques

Fact and Conditions of Detention Must be Appropriate to Detainee's State of Health

Scoppola v Italy [2008] ECHR 50550/06 (10 June 2008)

The European Court of Human Rights held that there had been a violation of art 3 (prohibition of inhuman or degrading treatment) of the *European Convention on Human Rights* because the applicant's conditions of detention were not appropriate to his state of health.

In the Court's view, in circumstances such as these, the State should have either transferred the applicant to a better-equipped prison in order to avoid any risk of inhuman treatment or deferred execution of a sentence that had become tantamount to treatment contrary to art 3 of the *Convention*.

Facts

The applicant, Franco Scoppola, was sentenced to life imprisonment by the Rome Assize Court in January 2002.

In December 2003, the applicant, who was in Regina Coeli Prison in Rome and was confined to a wheelchair, unsuccessfully requested to be transferred to another prison in Rome, the architectural design of which would have provided more time outside and more humane conditions of detention.

According to a medical report of 9 January 2006, the applicant's state of health was 'totally incompatible with detention in prison and required the adoption of alternative measures, such as transfer to a hospital outside the prison capable of providing the applicant with suitable and necessary medical care, or to a home for the treatment and rehabilitation of long-term patients requiring 24-hour care'.

After breaking his thigh bone in April 2006, the applicant was admitted to Sandro Pertini Hospital. A medical report of 6 June 2006 certified that the applicant could leave hospital on condition that he was transferred to a treatment centre capable of providing him with the necessary care (in particular, round-the-clock care, a special anti-bedsore mattress and physiotherapy).

On 16 June 2006, the Rome Court granted the applicant detention at home for one year on the grounds that his state of health required care that could not be provided in prison and had reached the stage where it had become an 'unnecessary violation of the prohibition of inhuman treatment in respect of the prisoner'. That decision was set aside on 8 September 2006 on the ground that detention at home was impossible because the applicant did not have a home adapted to his needs.

On 29 December 2006 the Prison Service of the Ministry of Justice ordered the applicant to be transferred to Parma Prison, which had appropriate facilities for inmates with disabilities. The applicant was not transferred until 23 September 2007.

Relying on art 3 (prohibition of inhuman or degrading treatment), the applicant alleged that keeping him in prison constituted inhuman treatment.

Decision

The European Court observed that the applicant, who has been unable to walk since 1987 and fractured his thigh bone in April 2006, was confined to a wheelchair. He had no personal autonomy whatsoever and was obliged to spend every day in bed. He was now 67 years old, suffered from heart disease and a failing metabolism, diabetes, deteriorating muscles, hypertrophy in the prostate gland and depression. The expert instructed by the applicant concluded that his state of health was incompatible with detention in prison, given that he required round-the-clock care. That opinion was confirmed by the medical report of 6 June 2006 recommending that the applicant be moved to a suitably equipped treatment centre.

In the light of those expert opinions, the European Court affirmed the conclusion of the Rome Court that the care required for the applicant was unavailable in prison, that continuing to detain him in prison amounted to inhuman treatment, and that he should be subject to home detention.

The European Court noted that the decision to allow the applicant to serve his sentence outside the prison had been set aside on 8 September 2006 on the ground that the applicant did not have a home with facilities adapted to his condition. Consequently, the applicant was kept in the Regina Coeli prison.

The European Court did not overlook the efforts made by the Italian authorities, which had eventually placed the applicant in a prison that was equipped with a clinical centre and was architecturally better suited to the applicant's condition (Parma Prison). Furthermore, in both prisons the applicant had undergone numerous medical tests designed to treat his failing metabolism and had physiotherapy

sessions. However, the absence of an intention on the part of the national authorities to humiliate or debase the person concerned did not definitively rule out a finding of a violation of art 3.

In the applicant's case, the requirement that the applicant not be detained in a prison had remained a dead letter for reasons that could not be attributed to the applicant. In the Court's view, in circumstances such as these, the State should have either immediately transferred the applicant to a better-equipped prison in order to avoid any risk of inhuman treatment or deferred execution of a sentence that had become tantamount to treatment contrary to art 3 of the *Convention*.

Relevance for the Victorian Charter

A number of influential courts and bodies – including the European Court of Human Rights, the UK Court of Appeal and the UN Human Rights Committee – have consistently held that public authorities have a particular duty and responsibility for the health and well-being of those in its custody.

In recent cases, the European Court has stated that the quality of healthcare to those imprisoned by the state is not to be relative. While an individual in society may have no right to healthcare as such, where they are in the state's custody the state must ensure that they receive the medical care required (see, eg, *Holomiov v Moldova* ([2007] ECHR 30649/05); *Istratii and others v Moldova* ([2007] ECHR 8721/05)). Both the European Court and UK courts have stated that scarce resources or logistical difficulty will not be legitimate excuses for inadequate medical treatment to prisoners (see, eg, *Mamedova v Russia* [2007] ECHR 7064/05; *Frolov v Russia* [2007] ECHR 205/02; *R (Noorkoiv) v Secretary of State for the Home Department* [2002] EWCA Civ 770). Where authorities decide to place and maintain a seriously ill person in detention, they must demonstrate special care to provide conditions of detention to accommodate the disability (see, eg, *Testa v Croatia* [2007] ECHR 20877/04).

Given recent observations by the Victorian Ombudsman that 'there are significant deficiencies in the health care provided to prisoners' it is imperative that the relevant public authorities review and improve Victorian prison conditions and prisoner health care services if they are to meet the threshold required by s 10 (protection from torture and cruel, inhuman or degrading treatment), s 21 (right to liberty and security of person) and s 22 (humane treatment when deprived of liberty) of the Victorian *Charter*.

This case summary is partly sourced from the Registry of the European Court of Human Rights as the judgment is only available in French at this stage.

Phillip Lynch is Director of the Human Rights Law Resource Centre

HRLRC Policy Work

Government Moves Closer to Ratification of Disabilities Convention

On 4 June, the Rudd Government tabled in parliament a National Interest Analysis supporting Australia's ratification of the UN Convention on the Rights of Persons with Disabilities. The Centre previously made a submission to the NIA consultation.

Consistently with the Centre's submission, the NIA states that:

This Convention reflects and affirms the protections already existing under Australia's domestic laws and is a major step in recognising and raising awareness of the right of all people to live life to their fullest potential, including people with disability.

Australia was an active participant and leader in the development of the Convention. Ratification would reinforce Australia's commitment to the rights of people with disability both nationally and internationally. Ratification would also serve an important educative purpose; fostering a more inclusive society and further encouraging the participation of people with disability in the community.

It concludes that:

Early ratification would be highly desirable given Australia's active role in the negotiation of the Convention text, early signature and continued international support for the Convention. It is proposed that this treaty action be undertaken as soon as practicable for these reasons, as well as to increase Australia's prospects of participating in the inaugural election of the Committee on the Rights of Persons with Disabilities established under Article 34 of the Convention.

The Convention and NIA have now been referred to the Joint Standing Committee on Treaties for inquiry and report: <http://www.aph.gov.au/house/committee/jsct/4june2008/index.htm>.

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).

Centre Makes Major Contribution to Report on Fairer Justice System in Victoria

On 28 May 2008, the Victorian Law Reform Commission released a significant report on its review of the civil justice system in Victoria (see www.lawreform.vic.gov.au).

The Report makes over 170 recommendations designed to make Victoria's civil justice system 'cheaper, fairer and simpler' and to promote the 'transparent and efficient' administration of justice. The Report also recommends areas for further research, review and reform.

The Human Rights Law Resource Centre made 3 major submissions at various stages of the Civil Justice Review, considering issues such as the right to a fair hearing, access to legal advice and legal aid, interpretative services, self-represented litigants and costs and disbursements in pro bono, human rights and public interest matters. The Centre also made a submission jointly with Blake Dawson regarding third party interveners. Together, these submissions are cited over 40 times in the Commission's report, generally very approvingly and authoritatively.

The Centre's submissions are available at www.hrlrc.org.au under Policy Work>Domestic Submissions>Relevance of the Victorian Charter of Rights to Civil Justice.

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

HRLRC Casework

Freedom of Information and Freedom of Expression

The Centre is assisting a client before VCAT on the question of how the *Charter* impacts on the proper interpretation of s 50(2) of the *Freedom of Information Act 1982* (Vic). Section 50 allows a person to apply to the Tribunal for review of a decision refusing or deferring access to material sought under the *FOI Act*. His Honour Justice Bell sought the Centre's assistance regarding the way in which, or the extent to which, s 15(2) of the *Charter* (which provides the right to freedom of expression), in conjunction with s 32(1) of the *Charter* (which requires that all legislation be interpreted consistently with human rights), might impact on the interpretation of the *FOI Act*.

The Centre's submission advocates that a broad and robust interpretation of s 50 of the *FOI Act* should be adopted. Section 15 of the *Charter* subsumes a right to *access* information which requires s 50 of the *FOI Act* to be interpreted in a way which upholds this right to access and receive information.

Seminars and Events

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.

60 Years On – Human Rights Challenges: Where to Now for the Universal Declaration of Human Rights

with Professor Larissa Behrendt, Professor George Williams and Zubayra Shamseden

Date: 6.30pm, Friday, 4 July 2008

Venue: Melbourne Town Hall, 120 Collins Street, Melbourne

RSVP: (03) 9412 0700 or <http://vic.amnesty.org.au>

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

HRLRC Case Law Databases

The Human Rights Law Resource Centre maintains two major online human rights case law databases:

- a database of Victorian cases which refer to the Victorian *Charter of Human Rights and Responsibilities Act 2006*; and

- database of case notes of significant decisions of international and comparative domestic courts and tribunals that may be relevant to the Victorian *Charter of Human Rights and Responsibilities Act 2006*.

The databases are fully searchable by year, court or tribunal, human right or section of the *Charter*, topic and keyword.

Each case includes a summary and a link to the full text of the decision where available.

The databases are updated monthly and, as at May 2008, contain over 85 decisions.

The databases are available at www.hrlrc.org.au.

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:

- Ben Schokman, 'Justice for All, Bar None', *The Age* (Melbourne), 11 June 2008
- Philip Lynch, 'Protecting Economic and Social Rights under the Victorian Charter of Human Rights', Paper to the LIV Charter of Rights Conference, 30 May 2008
- John Tobin, 'Spotting a Human Rights Issue: A Guide to the Practical Skills Required', Paper to the LIV Charter of Rights Conference, 30 May 2008
- Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian Charter of Human Rights and Responsibilities: Drawing the Line Between Judicial Interpretation and Judicial Law-Making' (2007) 33 *Monash University Law Review* 9

If I Were Attorney-General...

Business and Human Rights

If I were federal Attorney-General I would ensure corporate responsibility, and in particular business and human rights, was firmly on the agenda of both the Australian government and Australian multinational enterprises.

Australia is being re-positioned as an effective global citizen through middle power diplomacy and renewed engagement to ensure regional security and economic and social prosperity. To achieve this I would exert influence over non-state actors, such as the private sector, to ensure human rights principles are upheld when engaged in global trade, sourcing and investment. This is particularly important when operating in developing and emerging economies, and conflict zones with potentially weak regulatory environments and vulnerable workers and communities.

The current corporate responsibility regulatory landscape is complex —international and national law, treaties and conventions, and a plethora of voluntary mechanisms and self regulation. Voluntary mechanisms alone, such as the OECD Guidelines for Multinational Enterprises, do not guarantee enterprises will uphold fair and decent employment practices and respect for human rights.

As AG I would collaborate with other government departments, NGOs, human rights experts and business to develop and monitor regulatory frameworks that ensure responsible business conduct.

I would establish a National Corporate Responsibility Commission that reports to parliament. Representatives would be drawn from government, business and civil society. The terms of reference would be developed in response to extensive multi-stakeholder consultation. The mandate and report by Professor John Ruggie, Special Representative of the Secretary-General for Business and Human Rights, would inform the work of both the Commission, and the government's response to business and human rights.

As AG, I would swiftly introduce mandatory corporate responsibility reporting for Australian transnational enterprises against sustainable business targets. Companies would be required to report annually under a 'comply or explain' system on the human rights, ethical, social and environmental impact of their operations. This would include their operations in developing and emerging economies. The adopted reporting framework would be based on the Global Reporting Initiative. Specifically, companies would be required to:

- disclose their top five sustainability risks;
- disclose all human rights issues;
- identify strategies to mitigate the negative impact of their operations;
- identify impacts on women, children and minority groups;
- map and disclose their supply chains, sub-contractors, subsidiaries and licensing agents;
- outline independent auditing mechanisms; and
- demonstrate meaningful stakeholder dialogue.

These reports would be made public through the ASX and ASIC. Corporate failure to meet international best practice targets would result in taxation penalties, fines and remedies for those adversely affected. This income would be redirected to the Australian aid budget to meet the Millennium Development Goals.

The Australian government is a signatory to the OECD Guidelines for Multinational Enterprises. I would ensure we meet our responsibilities to promote the Guidelines to multinational enterprises and effectively respond to cases raised under the complaint mechanism. This would be achieved by a restructure of the National Contact Point (NCP). I would actively liaise with Treasury to ensure the NCP becomes a multi-partite structure, in line with recommendations by OECD Watch and their Model National Contact Point. I would establish a Corporate Responsibility Ombudsman. One function would be to act as a mechanism of appeal for cases rejected by the NCP.

I would review the regulatory framework and contractual arrangements of public private partnerships (PPPs) to ensure human rights standards and laws are upheld. In particular, I would monitor PPPs involved in the day-to-day management and operation of prisons and detention centres to ensure, for example, the human rights of prisoners with a disability and asylum seekers are respected, and practices such as mandatory and arbitrary detention cease. I would follow up on the OECD Guidelines case against GSL (in their management of Australia's detention centres) to ensure commitments made have been implemented.

I would actively participate in, and resource, the development of business and human rights training. This would include training for CEOs, peak industry bodies and government departments. The program would include regional human rights capacity building for business, civil society and public officials.

I would work closely with the Ministers for Immigration, and Foreign Affairs and Trade to ensure the proposed seasonal migrant labour scheme with Pacific island countries is developed within a rights-based framework. This would include fair and decent working conditions and respect for human rights by the private sector throughout the supply chain.

I would ensure Australia swiftly ratified the international instruments that protect the rights of migrant workers, namely:

- UN International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families;
- ILO Migration for Employment Convention 1949 (Revised) (No 97); and
- ILO Migrant Workers (Supplementary Provisions) Convention 1975 (No 143).

I would review all trade agreements to ensure the principles of responsible business conduct and protection of human rights are included.

I would review government procurement policy and introduce procurement legislation similar to that of the UK. Initially I would focus on the procurement of uniforms for government employees, insisting they be manufactured under either NoSweat Shop accredited Australian manufacturers, or sourced through international suppliers with an ethical sourcing strategy and independent monitoring.

In recognition of those enterprises that had incorporated human rights thinking into their business operations, I would introduce an annual Australian Business and Human Rights Award.

Serena Lillywhite is Manager, Sustainable Business at the Brotherhood of St Laurence, and regularly advises the OECD on corporate responsibility. She was involved in the OECD Guidelines case against GSL for failing to uphold human rights principles in the management and operation of Australia's immigration detention centres.