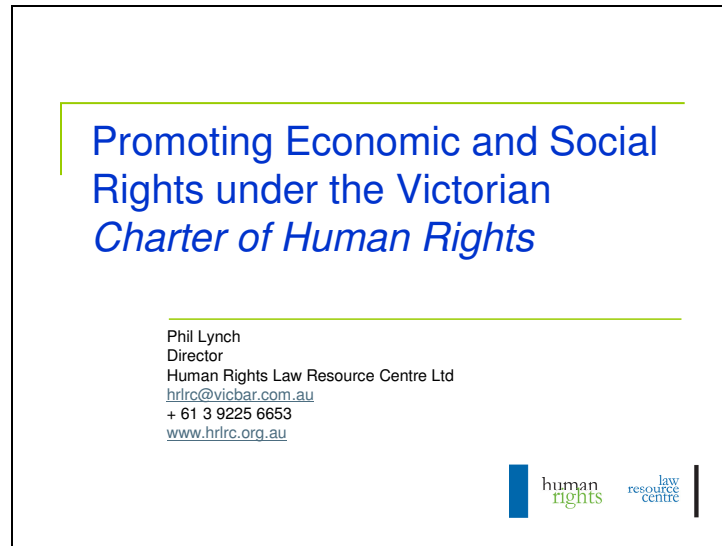



Slide 1

A rectangular box with a thin black border containing the slide's content. It features a title, contact information, and a logo.

Promoting Economic and Social
Rights under the Victorian
Charter of Human Rights

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The logo for the Human Rights Law Resource Centre, consisting of a blue vertical bar, the text 'human rights' in green, and 'law resource centre' in blue.


Thanks to the LIV for the invitation to participate in this important conference.

The topic of my presentation is 'Promoting Economic and Social Rights under the Victorian Charter of Human Rights'.

I want to address this topic by posing a question.

My question is: what difference can a Charter that enshrines CP rights make to the lives of people experiencing socio-economic disadvantage?

Overview



- 2008 - 2011
 - Setting the scene – A snapshot of select indicators of poverty and disadvantage
 - Principles of human rights interpretation
 - *Charter* rights that may subsume ESC rights
 - The importance of defining 'public authority' broadly

- 2011 and beyond
 - What value would legislating ESC rights in 2011 add?
 - Addressing concerns and misconceptions about ESC rights

I will seek to answer this question by first providing a snapshot of select indicators of disadvantage in the areas of homelessness, the mental health of prisoners, and education for kids with disabilities.

I have chosen these as case study areas for three key reasons.

First, they deal with issues that are, classically, considered to be ESC rights issues, namely the right to adequate housing, the right to health, and the right to education. For this reason they are paradigm examples of the difference that a CP rights-oriented Charter may or may not make to the promotion of ESC rights.

Second, they are significant contemporary issues in Australia and Victoria – issues on which many of you, no doubt, do work.

Finally, they are areas in which international and comparative caselaw, relevant now in Victoria pursuant to s 32(2) of the Charter, is well developed and instructive.

Having provided a snapshot of each of these three areas, I hope to then resource you to use the Charter creatively and strategically so as to address these and other issues of disadvantage and poverty. To do this, I propose to discuss:


- Some relevant principles of human rights interpretation;
- Some caselaw demonstrating the ways in which *Charter* rights may subsume or incorporate ESC rights; and
- The importance of defining 'public authority' broadly so that the protections of the Charter extend to vulnerable and marginalised groups.

Time permitting, I will then look to the 4 year review of the Charter in 2011 to consider:

- Some of the concerns and misconceptions about ESC rights; and

- The value that legislating ESC rights in 2011 would add?

Select Indicators of Disadvantage - Homelessness



- 100,000 homeless
- 46 % aged 24 or under
- 63 % of homeless families with children unable to access crisis accommodation
- Very high turn away rates for vulnerable groups: substance disorders (61 %), mental illness (54 %), intellectual disabilities (33 %)

Homelessness is perhaps one of the most extreme manifestations of disadvantage.


The 2001 ABS Census tells us that, on any given night, over 100,000 people experience homelessness across Australia, with a staggering 46,000 of these being children or young people aged 24 or under.

We also know from the Australian Institute of Health and Welfare that over 300 people per day are turned away from homelessness assistance services due to a lack of capacity and resources.

Families with children are the *least likely* demographic group to obtain assistance or support, with a turn away rate of 63 %.

Other groups with very high turn away rates include people with substance disorders (61 %), mental illness (54 %) and intellectual disabilities (33 %).

**Select Indicators of Disadvantage
– Prisoners and Mental Health**



- 25 % have 'serious mental illness'
- People with mental illness 3 to 5 times more likely to be incarcerated
- Prisoners far more likely to develop mental illness
- Mental health care in prisons manifestly inadequate: 'rudimentary at best' (Forensicare); 'frequently denied' (HREOC)
- Widespread use of solitary confinement or 'segregation' as management tool

There is a very strong causal and consequential relationship between poor mental health and imprisonment.


It is conservatively estimated that approximately 25% of Australia's total prison population of around 20,000 suffers a 'serious mental illness'.

The causal relationship is evidenced by the fact that people with mental illness are 3 to 5 times more likely to be incarcerated than people without mental illness.

The consequential relationship is evidenced by the fact that, once in prison, people are far more likely to develop mental illness.

This is due not only to the nature and impact of the deprivation of liberty itself but because, across Australia, mental health care in prisons is manifestly inadequate. It has recently been described by the Victorian Institute of Forensic Mental Health, Forensicare, as 'rudimentary at best'. 'Rarely are proper provisions made', they say. According to HREOC, mental health treatment is 'frequently denied' and the impacts of poor mental health significantly exacerbated by the widespread use of solitary confinement or 'segregation' as a management tool.

Select Indicators of Disadvantage
– Education for Kids with Disabilities



- 86 % attend mainstream schools, of whom 84 % are not provided with any education support
- Only 32 % complete secondary school

→ 58 % unemployment

→ disproportionate incidence of psychiatric illness, contact with criminal justice system


Source: *Freedom, Respect, Equality, Dignity: Action – NGO Submission to UN CESCR on Australia* (2008) at www.hrrc.org.au

Turning briefly to access to education for kids with disabilities.

The mainstreaming of education for kids with disabilities has not been accompanied by adequate resources or support.

Of the 86% of kids with disabilities, a staggering 84% are not provided with any additional educational supports, leading to a secondary school completion rate of less than 1 in 3.

This has significant long-term consequences, among them an unemployment rate of almost 60% for people with disabilities and a disproportionate incidence of psychiatric illness and contact with the criminal justice system.

Key Question

- These are social and economic problems.

- What difference can a Charter that does not incorporate social and economic rights make?

So, to return to the key issue – these are socio-economic problems, so how can a Charter that does not incorporate socio-economic rights make an impact?

Let me start to answer this by considering some key principles of human rights interpretation.

Interpreting Human Rights



- Should be interpreted broadly and beneficially
 - Right to life requires consideration of issues such as infant mortality, life expectancy, homelessness: HRC, *General Comment No 6: The Right to Life* (1982) [5]
- Interpreted and applied to be 'real and effective', not 'theoretical and illusory'
 - Right to fair hearing subsumes right of access to courts: *Kijewska v Poland* [2007] ECHR 73002/01 (substantial court and filing fees inconsistent with right)
- May impose both positive, negative and procedural obligations
 - Right to life may require steps to protect life: *Savage v South Essex Partnership NHS Foundation Trust* [2007] EWCA Civ 1375 (failure to prevent suicide of mentally ill patient)

Broad and beneficial

The *Charter* is founded on the principle that human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom.

Having regard to this, the first principle is that the rights should be interpreted broadly and beneficially. The UN Human Rights Committee has, on a number of occasions, been critical of the tendency of states to interpret and apply rights too narrowly, stating in its General Comment No 6, for example, that the right to life requires consideration of issues such as infant mortality, life expectancy and homelessness.

Real, practical and effective

The second key principle is that the rights should be interpreted and applied in a manner which renders them 'practical and effective, not theoretical and illusory'.


In Kijewska v Poland, for example, the European Court of Human Rights held that the right to a fair hearing subsumes a right of access to a court and that a requirement to pay substantial court fees to file or proceed with a claim may constitute a violation of that right.

Positive, negative and procedural obligations

The third key principle is that, consistently with the nature of human rights obligations articulated by the HRC (namely, that states have obligations to *respect*, *protect* and *fulfil* human rights) and the approach adopted by UK courts under the *Human Rights Act 1998* and the European Court of Human Rights under the *European Convention on Human Rights*, rights may impose negative, positive and procedural obligations on public authorities.

The right to life, for example, requires public authorities to not only refrain from taking life but to take steps and measures to protect human life, and also to properly investigate loss or near loss of life.

In Savage v South Essex Partnership NHS Foundation Trust, for example, the EWCA held that the right to life includes a positive obligation to actively safeguard life. They held that the negligent failure of a psychiatric hospital to take adequate steps to prevent the suicide of a patient amounted to a violation of that patient's right to life.



Interpreting Human Rights (2)

- Charter is a 'living tree' to be interpreted in context of evolving standards and values
 - Corporal punishment now amounts to cruel treatment: *Tyrer v United Kingdom* (1978) 2 EHRR 1
 - Right to vote requires 'effective representation' rather than 'one man, one vote': *Carter v Saskatchewan (Attorney General)* [1991] 2 SCR 158
- Rights should be read interdependently to complement and reinforce each other
 - Right against self-incrimination must be read in conjunction with presumption of innocence: *Dubois v R* [1985] 2 SCR 350
 - Freedom of expression in labour context should be read having regard to relevant ICESCR rights: *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038

Contemporary standards and values

The fourth key principle is that the *Charter* is a 'living document' which should be interpreted and applied in the context of contemporary and evolving values and standards.

In *Selmouni v France* (2000) 29 EHRR 403, [101], for example, the European Court of Human Rights stated that:

The Convention is a living instrument which must be interpreted in light of present day conditions...the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires firmness in assessing breaches of the fundamental values of democratic societies.

Applying this principle, the European Court held in *Tyrer v United Kingdom* that corporal punishment, while previously permissible, now amounts to cruel treatment.

Similarly applying the principle, in the case of *Carter v Saskatchewan*, the Supreme Court of Canada overturned previous jurisprudence from the US Supreme Court and its own caselaw in holding that the right to vote now requires 'effective representation' rather than 'one man, one vote'.


Interdependent and reinforcing

The fifth but by no means least important principle is that, recognising that human rights are interdependent and indivisible, the Charter rights should be read so as to complement and reinforce each other. Thus, for example:

- In *Dubios v R*, the Canadian Supreme Court held that the right against self-incrimination in s 13 of the Canadian Charter must be read in a manner that is complementary to the right to the presumption of innocence under s 11, thereby excluding certain evidence led in a trial from the re-trial.

- In *Slaight Communications v Davidson*, the Supreme Court of Canada held that the right to freedom of expression, which subsumes a right to impart and receive information, required an employer to give an employee a letter of recommendation. The Court stated that the Charter should be presumed to provide protections at least as broad as relevant rights under international human rights instruments to which Canada is party, including in this case the right to work under the ICESCR.

ESC Rights within the Charter



- Right to life (s 9)
- Protection from torture and ill treatment (s 10) / humane treatment in detention (s 22)
- Right to privacy (s 13)
- Protection of families and children (s 17)
- Right to equality (s 8)

The human rights in Part 2 of the Charter are stated in the EM to be ‘modelled on the civil and political rights contained in the ICCPR’. Social and economic rights, such as those contained in the ICESCR, were not explicitly incorporated in the Charter.

That does not mean, however, that the rights contained in the Charter can not be interpreted and applied so as to respond to socio-economic problems. One need only look to the UK – where the highest impact areas under the HRA include housing and homelessness, education, mental health and community care - to see that civil and political rights can subsume social and economic components.

There are a number of Charter rights which – if they are to be interpreted and applied so as to be ‘broad and beneficial’, ‘real and effective’, ‘reflective of contemporary values and standards’ and ‘interdependent and reinforcing’ – will necessarily incorporate social and economic considerations.

For marginalised and poor people, the fulfilment of the Charter’s promise to address disadvantage will be contingent on the success of the struggle to ensure that rights such as the rights to life, equality, privacy and families are interpreted this way.


As Bruce Porter, a Canadian social rights advocate, has written

“The first two decades of the Charter have been defined, for the poor in Canada, as a struggle to claim adjudicative space for social and economic rights as central components of rights to equality, security and dignity. For these groups, it is not a question of reading additional rights into the Charter that were excluded at the time of drafting...Where courts fail to include social and economic rights in broadly framed rights such as the right to equality and the right to life or security of the person, they are applying fundamental rights in a discriminatory manner. They are excluding from protection those groups who most need the protection of human rights, and have the most legitimate claim for judicial intervention on their behalf.”

Something that the Canadian experience constantly reminds us, and which is clear to any human rights practitioner working with those living in poverty, is that the division of human rights into two categories really makes no sense from the perspective of rights holders. Poor people in Canada find it obvious that the right to equality and security of the person includes protection from hunger and homelessness in such an affluent country. One does not have to do cartwheels to read into the right to security of the person the right to be free from hunger or homelessness. Rather, it takes some contortions of logic to read such protections out of these rights.” (Social and Economic Rights and the Canadian Charter of Rights and Freedoms)

Turning back to the Victorian Charter, I would like to now consider how a range of CP rights – among them the right to life, to protection from ill-treatment, to privacy, to protection of families and children, and to equality – may be used to promote socio-economic rights and address socio-economic disadvantage.

Right to Life (s 9)



Every person has the right to life and has the right not to be arbitrarily deprived of life

- Tripartite obligations:
 - Negative obligation 'not to take life without justification'
 - Substantive obligation to 'establish laws, precautions, procedures and enforcement which protect life to the greatest extent reasonably practicable'
 - Procedural obligation to undertake 'effective, independent, public investigation where substantive obligation may have been breached': *Gentle & Anor v The Prime Minister & Anor* [2008] UKHL 20 (9 April 2008)

The right to life, enshrined by s 9 of the Charter, has been described as the 'supreme right' from which all other rights flow.

The UN Human Rights Committee, among other influential bodies, has repeatedly held that this right must not be interpreted in a narrow or restrictive manner.

The nature of the rights and obligations provided for by the right to life was very usefully summarised by Lord Bingham of the UK House of Lords in *R (Middleton) v West Somerset Coroner* (and, more recently, *Gentle & Anor v The Prime Minister & Anor* [2008] UKHL 20 (9 April 2008) at [4]-[7]), where his Lordship said:

The European Court of Human Rights has repeatedly interpreted article 2 of the European Convention as imposing on member states substantive obligations not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life...


The European Court has also interpreted article 2 as imposing on member states a procedural obligation to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the foregoing substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, in some way implicated.

The approach adopted by both the House of Lords and the European Court is very similar to that adopted by the UN Human Rights Committee in its interpretation and application of the right to life under the ICCPR. For example, the HRC noted in *General Comment No 6* that :

The protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

Similarly, in various Concluding Observations to state reports, the HRC has identified homelessness, the rate of infant mortality, and the shorter life expectancy of women, as matters to be addressed in accordance with the right to life.

Right to Life - Applications



- Access to adequate health care for detainees
 - *Lantsova v Russian Federation*, UN Doc CCPR/C/74/D/763/1997 (2002)
- Protection from domestic violence
 - *Smith v Chief Constable of Sussex Police* [2008] EWCA Civ 39 (February 2008); *Kontrova v Slovakia* [2007] ECHR 7510/04 (May 2007)
- Heightened vigilance required for vulnerable groups such as people with mental illness and children
 - *Savage v South Essex Partnership NHS Foundation Trust* [2007] EWCA Civ 1375
- Amelioration of serious pollution
 - *EHP v Canada*, UN Doc CCPR/C/OP/1 (27 October 1982)

Turning from the content to the application of the right.

There are a range of cases from a range of jurisdictions in which the right to life has been used to address socio-economic problems and disadvantage, including in the areas of access to health care for detainees, protection from domestic violence, the protection of vulnerable groups, and the amelioration of pollution.

Access to Health Care for Detainees

The international jurisprudence makes it clear that the right to life imposes particular obligations in relation to persons in detention, and subsumes a right to adequate health care. For example, in *Lantsova v Russian Federation*, a case concerning the death of a previously healthy 25 year old man following inadequate medical treatment in prison, the HRC held that:

It is incumbent on States to ensure the right of life of detainees, and not incumbent on the latter to request protection ... The essential fact remains that the State party by arresting and detaining individuals takes responsibility to care for their life. It is up to the State party by organizing its detention facilities to know about the state of health of the detainees as far as may be reasonably expected.

Similarly, in *Fabrikant v Canada*, which concerned an alleged failure on the part of Canadian authorities to provide appropriate medical treatment to a prisoner suffering from a heart condition, the Committee stated that the State party is 'responsible for the life and well-being of its detainees' and has a positive duty to maintain an adequate standard of health for detainees.

In recent Concluding Observations on the Republic of Moldova, the HRC reiterated the State's 'obligation to ensure the health and life of all persons deprived of their liberty'. It urged Moldova to:

'take immediate steps to ensure that the conditions of detention within its facilities comply with the right to life, including the prevention of the spread of disease and the provision of appropriate medical treatment to persons who have contracted diseases, either in prison or prior to their detention.'

Domestic Violence

In the area of domestic violence, a series of cases from the UK and the European Court establish that the right to life imposes a positive obligation on responsible authorities to take reasonable steps to safeguard the lives of those in their jurisdiction as against known and immediate risks.

Thus, for example, in the March 2008 case of *Smith v Chief Constable of Sussex Police*, the EWCA held that the police had failed their positive obligation to protect Mr Smith from being attacked and seriously injured with a claw-hammer by his former partner Mr Jeffrey, in circumstances in which Mr Smith had repeatedly told the local police that Mr Jeffrey was threatening to kill him.

Similarly, in *Kontrova v Slovakia*, the European Court of Human Rights found that the right to life had been breached where the State did not take adequate steps or measures to intervene or protect the lives of children in circumstances in which the mother had reported serious domestic violence and threats by her husband.

Vulnerable Groups


International and comparative jurisprudence also establishes that where the protection of the life of a person who is vulnerable or disadvantaged is concerned – such as a child or a person with a physical, intellectual or psychiatric disability – there is a requirement for heightened vigilance and protection.

Thus, in *Savage v South Essex Partnership NHS Foundation Trust*, the EWCA held that the right to life includes a positive obligation to actively safeguard life and that the negligent failure of a psychiatric hospital to take adequate steps to prevent the suicide of a patient amounted to a violation of that patient's right to life.

Serious Pollution

Finally, as I mentioned earlier, the right to life may incorporate aspects of the right to a healthy environment. In *EHP v Canada*, for example, the HRC found that the location of disposal sites for radioactive waste near residential areas could give rise to a legitimate claim that the right to life in art 6 had been breached.

Right to Life – Future Directions



- Subsumes and includes all those conditions and capabilities which are necessary to live with human dignity, including adequate housing, health care, social assistance and education
 - *Mullin v Administrator, Union Territory of Delhi* [1981] 2 INSC 516, 528
 - *Gosselin v Quebec* (2002) 221 DLR (4th) 257 (per Arbour J and L'Heureux-Dubé dissenting)

The right to life, as with many rights, is in a state of evolution and progression. Majority jurisprudence from the Supreme Court of India, for example, has held that:

“The right to life includes right to live, with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings”: *Mullin v Administrator, Union Territory of Delhi* [1981] 2 INSC 516, 528

Recent minority jurisprudence from the Canadian Supreme Court, similarly held that:

“Freedom from state interference with bodily or psychological integrity is of little consolation to those who ... are faced with a daily struggle to meet their most basic bodily and psychological needs. To them, such a purely negative right to security of the person is essentially meaningless: theirs is a world in which the primary threats to security of the person come not from others, but from their own dire circumstances. In such cases, one can reasonably conclude that positive state action is what is required in order to breathe purpose and meaning into their right to life”: *Gosselin v Quebec* (2002) 221 DLR (4th) 257, [377] (per Arbour J dissenting)

Let us hope that the Supreme Court of Victoria, interpreting and applying s 9 of the Victorian Charter, soon appears among this company.

Protection from Torture and Ill-Treatment (s 10)

human rights law resource centre

A person must not be -

- (a) subjected to torture;*
- (b) treated or punished in a cruel, inhuman or degrading way...*

- Purpose is to protect 'physical and mental integrity and dignity'
- *Absolutely* prohibits treatment which 'to a seriously detrimental extent, denies the most basic needs of any human being':
 - *Limbuela v Secretary of State for Home Department* [2006] 1 AC 396, [7]
- Tripartite obligation:
 - Negative obligation not to engage in ill-treatment
 - Substantive obligation to ensure safeguards, facilities and conditions to ensure people are not debased
 - Procedural obligation to adequately investigate, punish and remedy breaches

Section 10 of the Charter provides that 'A person must not be subjected to torture or treated or punished in a cruel, inhuman or degrading way'.

The prohibition against torture and ill-treatment is enshrined in near identical terms in the ICCPR, the CAT, and the ECHR, among other.

In its General Comment on the norm, the HRC has stated that its purpose is to protect 'physical and mental integrity and dignity'.

Unlike many other international human rights standards, the prohibition against torture is widely acknowledged as absolute and non-derogable. According to the House of Lords in the *Limbuela case*, it absolutely prohibits treatment which 'to a seriously detrimental extent, denies the most basic needs of any human being': *Limbuela v Secretary of State for Home Department* [2006] 1 AC 396, [7].

The obligations imposed by the prohibition against torture and ill-treatment are threefold.

First, there is a 'negative' obligation on the part of the state and public authorities to not engage in ill-treatment.

Second, there is a 'substantive' obligation on the part of the state and public authorities to enact and establish the safeguards, facilities and conditions necessary to ensure that people are not debased.

Third, the prohibition against torture carries with it a 'procedural' obligation to adequately investigate, punish and remedy breaches of the negative and substantive obligations.

Protection from Torture and Ill-Treatment – Applications



- Access to adequate health care and healthy conditions for detainees
 - *Dybeku v Albania* [2007] ECHR 41153/06 (December 2007)
- Provision of drug and alcohol treatment services
 - *McGlinchey v United Kingdom* (2003) 37 EHRR 821
- Protection of vulnerable people from abuse and neglect
 - *Z v United Kingdom* (2001) 34 EHRR 97
- Prevention of and protection from destitution
 - *Limbuella v Secretary of State for Home Department* [2006] 1 AC 396

Again, turning from content to application, the prohibition of torture and ill-treatment has been used in a number of settings to ensure access to such socio-economic rights as the right to health and the right to adequate housing, as the examples on the slide illustrate.

Health care and healthy conditions for detainees

There is a substantial body of jurisprudence which establishes that public authorities have a particular duty and responsibility for the health and well-being of those in its custody or detention.

In the case of *Dybeku*, for example, the European Court held that a failure to provide adequate mental health care to detainees in circumstances which do not adequately accommodate, or which result in the deterioration of, a person's mental health, may amount to a violation of the prohibition on torture and ill-treatment.

The absolute nature of the prohibition against torture and ill-treatment has two further important implications for the provision of health care services and a healthy environment to detainees.

First, while Courts have acknowledged the financial and resource implications of ensuring adequate health care for detainees, there is a consensus that the prohibition against torture and ill-treatment is absolute and non-derogable and that, therefore, 'a lack of resources cannot in principle justify detention conditions which are so poor as to reach the threshold of severity for art 3 to apply': *Dybeku*.

As the European Court stated in *Mamedova v Russia* [2007] ECHR 7064/05, [63], 'it is incumbent on the...Government to organise its penitentiary system in such a way that ensures respect for the dignity of detainees, regardless of financial or logistical difficulties'.

The EWCA similarly held in *Noorkoiv v Secretary of State for the Home Department* [2002] EWCA Civ 770, [31] that the Government could not be excused from what were otherwise breaches of the right to liberty and

freedom from cruel treatment in the prison context 'simply by pointing to a lack of resources that are provided by other arms of government'.

Second, both UK courts and the European Court have held that the quality of healthcare to those imprisoned by the action of the state is not relative. In the *Holomiov* case, for example, the European Court held that while an individual in society may have no right to healthcare under the Convention, let alone adequate healthcare, where he or she is in the state's custody, the state must ensure that he receives the medical care he or she requires: *Holomiov v Moldova* [2006] ECHR 30649/05 (7 November 2006)

Drug and alcohol treatment services

The prohibition against torture and ill-treatment may also require the provision of drug and alcohol treatment services to detainees where necessary for their health and welfare.

In the *McGlinchey Case*, a woman who had a heroin addiction and suffered from asthma was sentenced to four months in prison. While there, she suffered severe heroin withdrawal symptoms, including vomiting and weight loss. A doctor who visited her when she arrived advised the nursing staff to monitor her symptoms. Her condition deteriorated over a weekend, but the nursing staff did not call out a doctor, nor did they transfer her to a hospital. On the Monday morning she collapsed and was immediately admitted to hospital, where she died. The European Court held that, in failing to take appropriate steps to treat the prisoner's condition and relieve her suffering, the Prison Service had not protected the woman from inhuman treatment.

Protection of vulnerable people from abuse

The prohibition against torture and ill-treatment is increasingly being applied to protect vulnerable people from abuse and to prevent and protect from destitution.

In the case of *Z v UK*, a local authority had failed to separate four children from their mother even though it was clear that they were being subjected to an unacceptable level of abuse and neglect over a four-year period. The European Court found that the authority had a positive obligation to remove the children as soon as they became aware of abuse that might amount to inhuman or degrading treatment.


Prevention of destitution

Protection from, and the prevention of, destitution, is another area in which the right to freedom from torture and ill-treatment is relevant.

The *Limbuella Case* before the House of Lords concerned a man who arrived in the UK from Angola and claimed asylum. He was provided with emergency accommodation under the Secretary of State's power to provide accommodation for people given temporary admission to the UK. Shortly afterwards, however, the Secretary of State decided that he had not claimed asylum 'as soon as reasonably practicable', and his accommodation was taken away. The man was left destitute, and his health deteriorated as he slept rough outside a police station and begged for food from passers by.

The House of Lords ruled that where the law prohibits asylum seekers from working, and charities lack the resources to help them, it is a violation of the right not to be treated in an inhuman or degrading way for the state to deny support that creates potential suffering by withholding shelter, food or other basic necessities.

Right to Privacy (s 13)



A person has the right -

(a) *not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with...*

- 'Privacy'
 - Broad term which covers all aspects of a person's physical, psychological and social identity and relationships: HRC, *General Comment 16*; *Pretty v United Kingdom* (2002) 35 EHRR 1
- 'Family'
 - Broad interpretation to include all those comprising the family as understood in society and is not confined by marriage: HRC, *General Comment 16*; EM to *Victorian Charter*
- 'Home'
 - Includes 'where a person resides or carries out their ordinary occupation': HRC, *General Comment 16*

Section 13 of the Charter provides that 'a person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with...'


There are a number of important terms to consider in connection with this right, including 'privacy', 'family', 'home', 'unlawful' and 'arbitrary'.

It is clear from the international jurisprudence that the term 'privacy' (as it appears under the Charter and the ICCPR) or 'private life' (as it appears in the ECHR and the UK HRA), is a broad term which covers all aspects of a person's physical, psychological and social identity and relationships: HRC, *General Comment 16*; *Pretty v United Kingdom* (2002) 35 EHRR 1.

It is also clear that 'family' should be given a broad interpretation to include all those comprising the family as understood in society. It is certainly not confined by marriage: HRC, *General Comment 16*; EM to *Victorian Charter*.

Finally, the term 'home' has been interpreted to include not only the place where a person resides, but also include where he or she or carries out their ordinary occupation: HRC, *General Comment 16*.

Right to Privacy (s 13) (cont)



- 'Lawful'
 - Requires that the law be 'discernable', 'adequately accessible' and 'sufficiently foreseeable':
R (on the application of Gillan) v Commissioner of Police for the Metropolis [2006] UKHL 12

- 'Arbitrary'
 - Incorporates consideration of proportionality, reasonableness, inappropriateness and injustice:
HRC, *General Comment 16; A v Australia*, HRC, No 560/1993
 - Something can be 'lawful' but nevertheless 'arbitrary' and therefore 'unlawful': *Zealand v Minister for Justice and Constitutional Development and Another* [2008] ZACC 3 (11 March 2008)


Two further critical terms are those of 'unlawful' and 'arbitrary'.

'Unlawful' means something that is not 'lawful'. In order for something to be 'lawful', according to the UK House of Lords, one must examine the 'quality' of the law, with such law being 'discernable', 'adequately accessible' and 'sufficiently foreseeable': *R (on the application of Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12.

The term 'arbitrary' is of critical importance, because it is clear that something can be 'legal' but nevertheless 'arbitrary' and therefore 'unlawful'. The recent decision of the South African Constitutional Court in *Zealand v Minister for Justice and Constitutional Development and Another* demonstrates this point aptly.

This, along with jurisprudence and General Comments from the HRC, establish that whether a measure is 'arbitrary' will incorporate consideration of issues as to proportionality, reasonableness, inappropriateness and injustice: HRC, *General Comment 16; A v Australia*, HRC, No 560/1993.

Right to Privacy - Applications



- Protection from eviction into homelessness
 - *McCann v United Kingdom* [2008] ECHR 19009/04 (May 2008)
 - *Stanková v Slovakia* [2007] ECHR 7205/02 (October 2007)
- Provision of accommodation to very vulnerable people, particularly children and people with disabilities
 - *Anufrijeva v Southwark London Borough Council; R (on the application of N) v Secretary of State for the Home Department* [2003] EWCA Civ 1406
 - *Marzari v Italy* (1999) 28 EHRR CD 175
- Access to certain medical treatments, inc IVF
 - *Dickson v United Kingdom* [2007] ECHR 44362/04 (GC, December 2007)

The right to privacy, family and the home is among the most frequently engaged rights in jurisprudence of the European Court, the UK courts, the NZ courts and the UN HRC. It applies in diverse areas of socio-economic disadvantage, including housing and homelessness, disability and access to medical treatments.

Protection from eviction into homelessness

In the very recent case of *McCann v United Kingdom*, which concerned the eviction of a man from public housing in circumstances where he had not been apprised of all of his rights to contest the possession application, the European Court stated:

The loss of one's home is a most extreme form of interference with the right to respect for privacy and the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end.

The scope of the right to privacy and the home to impact on public housing authorities, tenants and prospective tenants is not, however, limited to process alone.

It also has substantive application, as the October 2007 case of *Stankova v Slovakia* demonstrates. In that case, the applicant, Milota Stanková, had lived in a two-room flat with her father and two children since 1992. The flat was leased by the applicant's father from Poprad Municipality. Following the father's death in 1994, the applicant sought to be registered as the tenant of the flat. The Municipality refused to transfer the tenancy and argued that she could move into her son's one-room flat. The Municipality sought and obtained an eviction order and placed the applicant on a public housing waiting list.

Before the European Court, the applicant argued that her eviction constituted a violation of art 8(1) of the *European Convention* which provides that 'everyone has the right to respect for private and family life, the

home and correspondence'. Pursuant to art 8(2), limitations on this right are only permissible if they are in accordance with law and necessary in a democratic society.

The European Court held that the effect of the order 'to leave the flat without being provided with any alternative accommodation produced effects which were incompatible with her right to respect for her private and family life and for her home, regard also being had to the special protection of children and juveniles'.

The Court noted that Poprad Municipality had *de facto* acknowledged the 'gravity' of the eviction by placing the applicant on a public housing waiting list, albeit at the same time as it had initiated eviction proceedings. It also took into account that the Municipality was 'in charge of public housing' and, in that capacity, was 'under an obligation to assist the town's citizens in resolving their accommodation problems'. The European Court held, accordingly, that there had been a violation of art 8 of the *European Convention* and ordered payment of damages and just satisfaction.

Provision of accommodation

A failure to positively *provide* accommodation (as against evict from accommodation), particularly to very vulnerable people such as people with disabilities and children, may also amount to a breach of the right to respect for privacy and the home.

For example, in *Bernard v Enfield London Borough Council*, the EWHC found that the relevant public authority had acted unlawfully and incompatibly with art 8 of the *European Convention* in failing for over two years to provide suitable accommodation for a family which included a severely disabled woman.

In the *Anufrijeva Case*, the EWCA held that art 8 was capable of imposing a **positive** obligation on the state to provide accommodation where otherwise family life was to be seriously inhibited or the welfare of children threatened.


These decisions follow the landmark jurisprudence of the European Court in *Marzari v Italy*, where it was held that, although art 8 does not guarantee the right to have one's housing problem solved by the authorities, a failure or refusal to provide assistance to an individual suffering from serious disadvantage – such as a severe disease – may be incompatible with art 8 of the *European Convention* because of the impact of such a refusal on the private life of the individual.

Access to medical treatments

The socio-economic scope of the right to privacy, family and the home, including the positive obligations it can impose, is powerfully evidenced in the very recent and controversial decision of the Grand Chamber of the European Court of Human Rights in *Dickson v United Kingdom*.

That case concerned prisoners' access to artificial insemination facilities. The applicants complained that the refusal by the Secretary of State to allow the first applicant, a man imprisoned for murder with an earliest release date of 2009, access to artificial insemination facilities whilst in prison constituted a breach of their rights under art 8 of the *European Convention*. They complained that without such access, the second applicant, to whom the first applicant was married, would be unlikely to be able to bear children to him given that she would be 51 years of age by his earliest release date. The Grand Chamber held (by a 12:5 majority) that there had been a violation of art 8, which they considered to include the right to respect for the applicants' decision to become genetic parents.

Protection of Families and Children (s 17)



(1) *Families are the fundamental group unit of society and are entitled to be protected by society and the State.*

(2) *Every child has the right, without discrimination, to such protection as is in his or her best interests...*

- Modelled on art 24 of the ICCPR which requires:
 - 'development of necessary protections by social institutions'
 - 'every possible *social* and *economic* measure' to, among other things, ensure protection from violence, exploitation and adequate nutrition
 - every possible measure to foster development, including provision of adequate education: HRC, *General Comment No 17*
 - 'access to the conditions that guarantee a dignified existence': *'Street Children' Case*, Inter-American Court of Human Rights (November 1999)

The next two rights I will deal with more briefly.

Section 17 of the Charter provides that '*Families are the fundamental group unit of society and are entitled to be protected by society and the State.*' It further provides that '*Every child has the right, without discrimination, to such protection as is in his or her best interests...*'.


This section is modelled on art 24 of the ICCPR, about which there is limited jurisprudence, but which was interpreted in *General Comment No 17* to require:

- First, the 'development of necessary protections by social institutions';
- Second, 'every possible *social* and *economic* measure' to, among other things, ensure protection from violence, exploitation and adequate nutrition; and
- Third, every possible measure to foster development, including the provision of adequate education.

Interpreting an analogous provision, the Inter-American Court of Human Rights has held that the right requires 'access to the conditions that guarantee a dignified existence': *'Street Children' Case*, Inter-American Court of Human Rights (November 1999).

In the most recent judicial consideration of the rights of families, the ACT Supreme Court, interpreting s 11 of the ACT HRA which is almost identical to s 17 of the Charter affirmed that, 'in cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the State should intervene...': *In the Matter of an Adoption of D* [2008] ACTSC 44 (15 May 2008).

Right to Equality (s 8)



(2) *Every person has the right to enjoy human rights without discrimination*

(3) *Every person is equal before the law and entitled to equal protection of the law..*

- Prohibits discrimination but also includes a positive right to equality in any area falling within the 'wide ambit' or 'general scope' of relevant human rights
 - *R (on the application of Clift) v Secretary of State for the Home Department* [2006] UKHL 54 (December 2006)
- May require special measures to address inequality, including socio-economic measures
 - *Eldridge v British Columbia* [1997] 3 SCR 624

Section 8 of the Charter involves a re-orientation from the 'mere' right to non-discrimination, with which we are familiar through legislation such as the EO Act, to a positive or substantive right to equality in the enjoyment of human rights.

This is consistent with the international human rights framework, which recognises the right to equality as encompassing positive dimensions and imposing on governments obligations to address and ameliorate disadvantage, including socio-economic and systemic disadvantage. This is expressly anticipated by s 8(4) of the Charter, which provides that special measures 'for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination'.

Section 8(2) is a critical provision, providing that it is unlawful to discriminate against a person in any area that falls within the wide 'ambit' of a relevant human right even though there may not be any violation of that right: see, eg, *Wandsworth London Borough Council v Michalak* [2002] EWCA Civ 271.

The application of s 8(2) does not presuppose a breach of any of the *Charter's* substantive provisions. A measure which itself conforms with the other human rights in the *Charter* may nevertheless violate s 8(2) if it is discriminatory. Thus, in the *Clift Case* concerning treatment in detention, the House of Lords held that, notwithstanding that the detention involved did not violate any of the substantive rights of the *European Convention*, the detention did fall within the 'ambit' of the right to liberty and security such as to engage the prohibition on discrimination in the enjoyment of this right.

On this issue, the House of Lords followed the European Court of Human Rights in *Stec v United Kingdom* (2005) 41 EHRR SE 295 where the Court stated that:

The right to equality and prohibition on discrimination complements the other substantive provisions of the Convention and the Protocols. The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention...it is also sufficient for the facts of the case to fall 'within the ambit' of one or more of the Convention Articles.

*The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee. **It applies also to those additional rights, falling within the general scope of any Convention article, for which the State has voluntarily decided to provide.***

Thus, where the state has laws or measures which seek to address socio-economic problems or disadvantage and those problems may fall within the wide ambit of a protected right, substantive equality is required.

The scope of the Victorian Charter's equality provision to promote socio-economic rights and address disadvantage is well-demonstrated by the leading Canadian case of *Eldridge*.


In the *Eldridge* case, where deaf patients in British Columbia challenged the absence of sign language interpretation in the provision of healthcare, the Supreme Court of Canada considered whether the failure to allocate resources to fund a program providing interpreter services constituted discrimination against the deaf. The Court in *Eldridge* considered the cost of the program and the government's argument that upholding the appellants' claim would represent the "thin edge of the wedge", stating:

The respondents have presented no evidence that this type of accommodation, if extended to other government services, will unduly strain the fiscal resources of the state. To deny the appellants' claim on such conjectural grounds, in my view, would denude s 15(1) of its egalitarian promise and render the disabled's goal of a barrier-free society distressingly remote. Viewed in this light, it is impossible to characterize the government's decision not to fund sign language interpretation as one which "reasonably balances the competing social demands which our society must address".

Having found an incompatibility with the equality guarantee, the Court left it up to the legislature to choose from the "myriad options available to the government that may rectify the unconstitutionality of the current system." I will return to this approach to socio-economic rights adjudication shortly.

As Bruce Porter states in his article, referred to earlier, while this case was necessarily framed as an equality claim in the area of health, it is fundamentally a case regarding the right to health. An equality framework, he says, can very usefully inform and influence socio-economic policy in areas such as health and housing, by linking their protection with the promotion of fundamental dignities enshrined in the civil and political rights framework.

The Importance of Defining 'Public Authority' Broadly



A public authority includes ...

(c) *an entity whose functions are or include functions of a public nature...*

- Should be interpreted widely to give effective protection to human rights, particularly rights of vulnerable people
 - Cf *YL v Birmingham City Council & Ors* [2007] UKHL 27
 - Health and Social Care Bill 2008 (UK)
 - Human Rights Act Amendment Act 2007 (ACT)
- Interpretation should have regard to:
 - type of power being exercised; and
 - capacity to interfere with rights
 - rather than narrow administrative and institutional links with state

The question as to who or what is a 'public authority' or, more particularly, what is a 'function of a public nature' under s 4(1)(c) of the Charter, will be critical to the positive impact of the Charter on socio-economic rights, particularly as they relate to disadvantaged and vulnerable groups.

As many of you would be aware, this issue is very live in the UK under the analogous provisions of the UK HRA following the recent decision of the House of Lords in *YL v Birmingham City Council & Ors* [2007] UKHL 27.

The issue in this case was whether an aged care home run by Southern Cross Healthcare was performing functions of a public nature when providing accommodation and care to a resident, YL, pursuant to arrangements with Birmingham City Council.

YL was an 84 year old woman with Alzheimer's Disease. Her accommodation in the Southern Cross care home was largely funded by Birmingham City Council in accordance with a determination under the *National Assistance Act 1948* that she was eligible for such assistance. The issue as to whether Southern Cross was performing functions of a public nature arose after YL was served with a notice to move, allegedly in violation of her right to privacy and freedom from interference with family and the home under art 8 of the *European Convention*.

A bare majority of 3 Law Lords held that the provision of care and accommodation by Southern Cross to YL did not amount to a 'function of a public nature' within the meaning of s 6(3)(b) of the *Human Rights Act*.

In reaching this conclusion, the majority considered a range of factors, including that Southern Cross is a for-profit, private enterprise providing a service for a commercial fee. Notwithstanding that this service may be 'socially useful, they said, it is motivated by 'private and commercial' considerations and operates in a competitive market.

They further noted that while the fees for care and accommodation provided to YL were funded, in part, by Birmingham City Council pursuant to the *National Assistance Act*, the care home itself was not publicly funded.

The minority of 2 strongly dissented, holding that Southern Cross, 'in providing accommodation, health and social care for YL, was performing a function of a public nature'. They further stated that 'this was a function performed for YL pursuant to statutory arrangements, at public expense and in the public interest'.

In reaching this conclusion, the minority considered the following critical factors, among others.

- First, they considered that the phrase 'function of a public nature' should be interpreted widely to give effective domestic protection to human rights.
- Second, they considered that it is relevant to consider the extent of the risk, if any, that improper performance of a function might violate an individual's human rights. Persons in care are, they said – by reason of age, illness, disability and other circumstances – a particularly vulnerable section of the community. They considered that there is a significant public interest in the promotion and protection of the human rights of such people.

The narrow decision of the majority in YL was widely criticised. The British Institute of Human Rights, for example, stated, 'We are shocked by this decision. 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 Parliamentary 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 notable that there is now legislation before the UK parliament, the Health and Social Care Bill, which, if enacted, will extend the coverage of the UK *Human Rights Act* to all private and voluntary sector care homes, thereby filling some of the human rights gaps exposed by the narrow majority decision in YL.

It is also notable that the ACT has recently moved to clarify and arguably broaden the definition of 'public authority' under the ACT HRA.


Pursuant to amendments passed in March this year, entering into force on 1 January 2009, the following functions are, prima facie, to be taken as being 'of a public nature' under the ACT HRA:

- the operation of detention places and correctional centres;
- gas, electricity and water services;
- emergency services;
- public health services;
- public education;
- public transport; and

- public housing (ss 40 and 40A).

The amended Act also enables entities, not otherwise covered by the duty on public authorities, to 'opt in' to the duty to act compatibly with human rights (s 40D).

The Victorian Charter is, according to its preamble, intended to promote human dignity, equality and freedom. A broad interpretation of 'public authority', which focuses on the the type of power being exercised and its capacity to interfere with human rights, rather than on the narrow and 'arbitrary criterion of the body's administrative links with institutions of State', is necessary if the Charter is to give real and effective protection to human rights.



What Difference can the Charter Make in the Areas of...

- **Housing and homelessness**
 - Procedural protection from eviction into homelessness – s 13
 - Provision of accommodation, particularly to vulnerable groups such as children – ss 9, 13 and 17
 - Prevention of destitution – ss 9 and 10
- **Prisoner access to mental health care**
 - Access to adequate health care and healthy conditions – ss 9, 10 and 17
 - Lack of resources no excuse – s 10
- **Education for kids with disabilities**
 - Necessary for development of children – s 17
 - Substantive equality and positive measures necessary where state has provided a program within the broad ambit of a right – s 8 (education being within ambit of, at least, s 17)

So, returning to our original snapshot of disadvantage in areas of housing and homelessness, prisoners and mental health, and education for kids with disabilities, what difference can the Charter make?

In my view, there is scope for considerable impact, although this of course will, in part at least, be determined by political goodwill, judicial interpretation, and our own strategic and creative advocacy.

Housing and Homelessness

These issues to one side, in the area of housing and homelessness, s 13 has the potential to improve procedural safeguards from eviction, particularly where the eviction may result in homelessness. I know of at least one case already where the invocation of the Charter resulted in the withdrawal of a '120 Day No Reason Notice to Vacate', execution of which may have resulted in a pregnant mother of 2 becoming homeless.

The rights to life, the home and of families and children may also be invoked, in appropriate cases, to enforce a positive duty to provide accommodation. Sections 9 and 10 have similar potential to compel positive action to prevent destitution, particularly where the persons involved may be very vulnerable, such as children and people with disability.

Prisoners and Mental Health

In the area of prisoners' access to mental health care, the rights enshrined under ss 9, 10 and 17 will be relevant to ensuring access to adequate health care and healthy conditions for prisoners.

Further, it is clear under s 10, which is an absolute right not to be subject to limitation or derogation under international law, that the state's lack of resources or provisions will be no excuse for failing to provide such care and conditions.

Education for Kids with Disabilities

Finally and briefly on access to education for kids with disabilities.

It is immutable that adequate education, access to which may require special measures and supports, is necessary for the development and best interests of children under s 17.

It is also, in my view, clear that s 8(2) of the Charter requires such special measures and supports to be provided, education falling within the broad ambit of a number of Charter rights, including at least s 17 and probably also ss 13, 14, 15 and 18.

Value of Legislating ESC Rights



- ESC and CP rights are interdependent and mutually contingent
- Social and economic policy should be interpreted compatibly with social and economic rights
- Promotes more holistic and integrated policy and services
- Responds to needs and concerns of vulnerable and disadvantaged people

“Having freedom of movement and expression without the right to health and housing is like having icing without a cake” – Bill, 43, homeless

I want to now look forward briefly to 2011, and the future of ESC rights under the Charter.

Section 44(1) of the Charter requires that there be a review of the Charter after 4 years which considers matters including whether the human rights under Part 2 should be expanded to include rights under the ICESCR.

There are at least 4 good reasons why such rights should be enacted and justiciable.

First, the enjoyment of many human rights is dependent or contingent on, or contributes to, the enjoyment of other human rights. For example:

- meaningful exercise of the right to participate in public affairs requires access to information and realisation of the right to education;
- similarly, access to adequate health care, consistent with the right to the highest attainable standard of health, is necessary if a person is to remain able to exercise their rights to freedom of movement and association.

Reflecting this mutuality, the international human rights law framework recognises the ‘crucial interdependence’ of human rights. International law provides that civil, political, economic, social and cultural human rights are universal, interdependent, interrelated and indivisible.

Second, the dialogical model of the Charter, including particularly the interpretative obligation under s 32(1), is highly suited to the inclusion of ESC Rights. Social and economic policy should be developed, interpreted and applied compatibly with social and economic rights. It is more appropriate and preferable, for example, that the courts interpret and apply residential tenancies legislation, so far as possible, consistently with the right to adequate housing than in a manner that has no regard to or is inconsistent with this fundamental human right.

The third key point in favour of the inclusion of ESC Rights is that the legislative recognition of the interdependence of human rights has substantial benefits for decision-making and policy design processes. By seeking to identify the various civil, political, social, economic and cultural factors that contribute to policy 'problems', the framework promotes a more sophisticated analysis of social issues. By focusing on the conditions and capabilities that people need to meaningfully participate in society, the framework promotes an integrated and holistic response to the problems identified. To use the words of government, recognition of the interdependence of CP Rights and ESC Rights encourages 'joined up solutions to joined up problems'.

Finally, the arbitrary division of rights makes no sense to the rights holder and does not respond to the aspirations or needs of people, particularly people experiencing marginalisation or disadvantage.

As one homeless man, Bill, wrote in his submission to the Victorian Charter Consultative Committee, *"Having freedom of movement and expression without the right to health and housing is like having icing without a cake"*.

Addressing Myths and Concerns about Legislating ESC Rights



- False dichotomy between ‘negative’ CP rights and ‘positive’ ESC rights
- ESC rights *are* justiciable
 - *Government of South Africa v Grootboom* [2001] 1 SA 46
- Adjudication of ESC rights *does not* usurp parliamentary sovereignty
 - *Minister of Health v Treatment Action Campaign* [2002] 5 SA 271

If the Charter is to be amended to include ESC rights, it will be necessary for human rights advocates and activists to first address a number of myths and misperceptions regarding their nature and justiciability.

The key myths all arise by consequence of the dichotomy sometimes drawn between CP and ESC rights. According to this dichotomy, CP rights generally impose negative obligations and ESC rights impose positive obligations. This dichotomy is misguided.

Consider the example of a court reviewing conditions of detention. The argument goes that it is appropriate for a court to decide whether the person has suffered inhumane treatment because it can simply tell those responsible to stop the abusive treatment and such a decision is resource neutral.

By contrast, according to the dichotomy, it is inappropriate for a court to decide whether a person has a right to housing because this may require the court to make a decision that has financial implications and that is the job of the government not the judiciary.

However, this argument is misleading. It is true that inhuman treatment sometimes requires a court to simply order that the government stop the mistreatment - but sometimes a court will make an order that has financial implications such as that conditions of detention be improved through providing better facilities, as occurred in the recent Benbrika decision in the Supreme Court.

This is similarly the case in respect of ESC rights. Consider, for example, the right to housing. Sometimes the court will order the government not to evict a tenant, and sometimes an order to provide someone with housing.

So in relation to both rights, courts may make ‘positive’ or ‘negative’ orders – including orders that have financial implications

Both the prohibition against inhumane treatment and the right to adequate housing consist of *various* elements, some of which have fiscal implications and some of which do not.

So the conclusion that inhumane treatment is suitable for legislative protection and judicial scrutiny, while the right to housing is not, is misguided

The ESC jurisprudence of the South African Constitutional Court provides helpful guidance as to the role that Victorian courts could properly play with respect to ESC Rights if enacted in the Victorian Charter.

Appropriately, the South African Constitutional Court has, in its own words been 'slow to interfere with rational decisions taken in good faith by the political organs ... whose responsibility it is to deal with such matters': *Soobramoney v Minister of Health, Kwa-Zulu Natal* (1997) 12 BCLP 1696, [29]

The Court has, however, considered the issue of 'reasonableness' in determining the extent to which governments have acted or should act in respect of ESC Rights. According to the Court in the *Grootboom Case*, which concerned the right to adequate housing:

"A court considering reasonableness will not enquire whether other or more desirable or favourable measures could have been adopted, or whether public money could have been better spent ... It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these could meet the test of reasonableness." *Government of South Africa v Grootboom* [2001] 1 SA 46, [41].

In a further decision, the *Treatment Action Campaign Case*, which concerned access to anti-retroviral drugs in accordance with the right to health, the Constitutional Court held that:

"Determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging the budgets. ... All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights." *Minister of Health v Treatment Action Campaign* [2002] 5 SA 271, [38], [35].

The Canadian Supreme Court has taken a very similar approach when adjudicating ESC aspects of CP rights, reviewing policies, programs and practices for consistency with the Charter but deferring to government to then fashion an appropriate remedy.

I will leave the last word on the subject to the UN Committee on Economic, Social and Cultural Rights, which said in its *General Comment 9 on The Domestic Application of the Covenant* that

"The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts is arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It also drastically curtails the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society."

Hear, hear.

Key Resources



- www.hrlrc.org.au
 - Guide to the Charter
 - Searchable Database of Charter Case Law
 - Articles, Materials and Commentary
 - Monthly E-Bulletin
 - www.justice.vic.gov.au
 - www.humarightscommission.vic.gov.au
 - Evans & Evans, *Australian Bills of Rights: The Law of the Victorian Charter and the ACT HRA* (LexisNexis, 2008)
 - Pound & Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (Thomson, 2008)
-