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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

A New Vision for Equality

Late last year the Senate Committee on Legal and Constitutional Affairs released a major report on the *Sex Discrimination Act 1984*. The Report recommends a transformation in the way our laws deal with discrimination and promote gender equality.

We are surrounded by evidence of the need for change. Australia lags behind the United States, United Kingdom, South Africa, Canada and New Zealand in the representation of women in executive management positions. A quarter of all Australian teenagers are aware of domestic violence being committed against their mothers or step mothers. We are one of only two OECD countries without a national paid parental leave scheme. These are not indicators of a country that can afford to be complacent about discrimination against women.

Gender equality is an issue for men, too. For example, the stereotypes that women are primarily responsible for parenting and that men are the ‘breadwinners’ limits the autonomy and potential of men and women and is perpetuated to the detriment of both.

These problems are deeply entrenched in our institutions and social structures and are not adequately addressed by the existing legal framework. Currently, the *Sex Discrimination Act* is effective only in those areas where individuals choose to challenge specific instances of discrimination that fall within limited and defined spheres of activity. The Act is a blunt weapon in the fight to end systemic discrimination.

The Committee’s Report recommends a more comprehensive, robust regime which would have the capacity to attack systemic discrimination and promote substantive equality.

Recommendations include the introduction of a general prohibition of discrimination in all areas of public life to replace the ‘patchwork’ coverage of the current Act. This amendment, along with a freestanding guarantee of equality before the law – such as that already included in the *Racial Discrimination Act 1975* – would free the Act of its existing marks of anachronistic political compromise.

The Committee also recommends broadening the powers of the Sex Discrimination Commissioner to investigate instances of systemic sex discrimination and allowing remedies such as corrective and preventative orders which go beyond compensating an individual and require institutional change. If adopted, these reforms would open the eyes of the law to the entrenched issues that lie at the root of the individual instances of discrimination which are the focus of the current legislation.

Other recommendations, including broadening the prohibition of discrimination on the grounds of family responsibilities and imposing a positive duty on employers to reasonably accommodate requests for flexible working arrangements, would further contribute to building a real and effective blueprint for equality.

Such initiatives are not, as the Committee's dissenting report suggests, 'misguided attempts at social engineering'. Rather, they are necessary steps towards the fulfillment of Australia's human rights obligations to actively promote gender equality.

In the words of the Sex Discrimination Commissioner, Elizabeth Broderick, 'the *Sex Discrimination Act* matters. It matters as a tool for driving systemic and cultural change which is needed if we are to live in a country where men and women enjoy true gender equality in their daily lives.'

Any new laws will stand on the shoulders of the *Sex Discrimination Act* which, despite its shortcomings, has made an important contribution to Australian society. However, that Act was passed 25 years ago and it's time for our laws to reflect a stronger vision of equality for Australian men and women.

*Rachel Ball is a Lawyer at the Human Rights Law Resource Centre*

## News

### Centre Prepares Concept Paper on Disability Rights in the Pacific

The Human Rights Law Resource Centre has prepared a concept paper for the Open Society Institute Disability Rights Initiative regarding disability rights in the Pacific. The concept paper proposes a project to build capacity – and provide support, advice and expertise – to Pacific Island NGOs to:

- advocate for ratification and implementation of the *Convention on the Rights of Persons with Disabilities*; and
- monitor and report on implementation of the CRPD through the treaty-specific periodic review undertaken by the Committee on the Rights of Persons with Disabilities and the Universal Periodic Review undertaken by the UN Human Rights Council.

Of the estimated 600 million people with disability worldwide, it is estimated that over 350 million live in Asia or the Pacific. 20 per cent of the world's poorest people have a disability, and tend to be regarded in their own communities as the most disadvantaged.

Despite this, no Pacific Island countries have ratified or acceded to the CRPD. Indeed, the Pacific region has the lowest ratification rate of the seven core international human rights treaties of any region worldwide. There are a number of reasons for this low level of treaty ratification, including that in many Pacific Island countries both governments and civil society:

- have limited financial and human resources; and
- lack the technical capacity and expertise to fulfill treaty obligations, particularly monitoring and reporting requirements.

The Human Rights Law Resource Centre considers that promoting and supporting ratification of, and reporting under, the CRPD in the Pacific would very practically improve the protection of the human rights of people with disability in the region. In particular, civil society engagement with the CRPD could play a vital role in matters such as human rights standard setting, implementation, monitoring and scrutiny, and community education. The project should also mobilise disability and human rights advocacy groups and create networks between similarly focused organisations in the Pacific region.

*Phil Lynch is Director of the Human Rights Law Resource Centre*

### Victoria Police and the Melbourne Custody Centre: Who Will Speak up for Prisoners?

Russian novelist Fyodor Dostoyevsky wrote in 1862 that 'The degree of civilization in a society can be judged by entering its prisons.'

In early January 2009, a bomb threat at the Melbourne Magistrates' Court led to the evacuation of 200 people from the court building. However, despite the perceived risk to human life, remand prisoners in the Melbourne Custody Centre, which is located beneath the Melbourne Magistrate's Court, were not evacuated.

The decision of the Victoria Police not to evacuate the prisoners raises serious human rights questions. Most significantly, it makes us ask: who has human rights?

The answer to that question should be self-evident: human rights are rights that belong to *all* of us by virtue of the fact that we are human; men, women, children, Indigenous peoples, asylum seekers and also those individuals who are charged with a criminal offence. Human rights are about dignity, equality and fairness for everyone.

The Victoria Police's appalling disregard for the remand prisoners comes at a time when the State Government's responsibility to protect the lives of its citizens is under close scrutiny. The Victoria Police shooting of 15-year-old Tyler Cassidy late last year and the death in early January of a Cobram woman who died while suffering an ectopic pregnancy after waiting for more than two hours for an ambulance both raise serious questions about the duty of the State Government to respect and promote human life.

Under the Victorian *Charter of Human Rights and Responsibilities Act*, the State Government has the duty to ensure that every person has the right to life and the right not to be arbitrarily deprived of life. The fundamental human right to life is the supreme right from which no derogation is permitted, even in times of public emergency.

The Victoria Police has stated that its evacuation policies are designed to ensure the safety of all people. The decision not to evacuate the prisoners in the Melbourne Custody Centre is a stark implication that the lives of prisoners are somehow worth less than the lives of everyone else.

What makes the situation even worse is that the bomb threat was considered a sufficiently serious risk to human life such that a decision was made to evacuate some of the Melbourne Custody Centre staff. Yet the remand prisoners remained in their cells.

The attitude displayed by the Victoria Police towards those individuals being held at the Melbourne Custody Centre is, at best, negligent and, at its worst, callous and contrary to the values of our democratic society. The notion that one person's life is more important than another person's life undermines the fabric of our society.

In medieval Europe, people who committed an offence lost all of their civil rights upon their conviction. This 'civil death' often led to actual death, since at the time anyone could kill a felon with impunity.

Of course, we live in more civilised times now. Just because an individual is punished for criminal conduct no longer means that they must die a civil death. We must remember that, in relation to criminal conduct, detention is the punishment. Prisoners ought not be exposed to any further punishment or deprivation of their human rights, other than deprivation that is directly connected to detention itself.

This is the civilised approach of our justice system today. However, the treatment of the remand prisoners by the Victoria Police earlier this week may make us wonder whether this is really the case.

Human rights are often ridiculed because they are seen to be used by marginalised, disadvantaged and unpopular groups in society, such as prisoners, asylum seekers, people living in poverty and other minorities. However, human rights are most relevant for these groups precisely because they are vulnerable and often unable to assert their own rights.

Prisoners, by virtue of their detention, are often unable to speak for themselves. Indeed, those at the Melbourne Custody Centre at the time of the bomb threat were restricted, literally, from doing anything to assert their rights. Their mercy was totally in the hands of the Victoria Police.

In deciding not to evacuate the prisoners, the Victoria Police failed to discharge its responsibility to ensure a safe and secure society for *all* members of the Victorian community. Prisoners and people who are accused of criminal offences are human beings and members of our community too. Their right to life is every bit as worthy as your or my right to life and the lives of the 200 other people evacuated from the Melbourne Magistrates' Court.

*Ben Schokman is a Senior Lawyer with the Human Rights Law Resource Centre*

## National Charter of Rights Developments

### The National Human Rights Consultation: Engaging in the Debate

On 10 December 2008, the Federal Government launched a national public consultation about the legal recognition and protection of human rights and responsibilities. The National Human Rights Consultation is an historic opportunity for individuals and communities throughout Australia to improve our democracy and to have our say about the protection of fundamental values such as freedom, respect, dignity and a fair go.

The Human Rights Law Resource Centre, in conjunction with leading Australian law firm Allens Arthur Robinson, has produced a comprehensive report to enable individuals and organisations to participate in the National Human Rights Consultation in an informed and evidence-based way. The report is not intended to be a position paper or submission, but rather to provide information, evidence and background material.

The report, entitled *The National Human Rights Consultation: Engaging in the Debate*, begins by outlining the arguments for and against a Federal Charter of Rights (or Human Rights Act). The report then addresses the central issues in the debate by discussing three broad questions:

- Is a Federal Charter necessary? – This includes a discussion as to the current state of human rights, and the legal protection of rights and freedoms, in Australia.
- What would a Federal Charter do? – This includes a discussion as to what rights might be protected, whether those protections should be subject to limitations, whose rights would be protected and who would have to comply with a Federal Charter.
- How would a Federal Charter work? – This section considers the mechanics of a federal human rights law, and the principal issues that may arise in its drafting and implementation, including whether such a law would be part of the Constitution or an ordinary piece of legislation, the role of the courts, the impact on parliamentary sovereignty and democracy, potential constitutional issues, and what remedies might be available for people whose rights have been breached. The section also looks at the existing models for human rights laws in Victoria, the ACT, the United Kingdom, New Zealand, Canada, South Africa and the United States of America.

Submissions to the National Human Rights Consultation Committee are due by 29 May 2009 and the Committee has been asked to report to the Australian Government by 31 July 2009 on 'the issues raised and the options identified to enhance the protection and promotion of human rights': see [www.humanrightsconsultation.gov.au](http://www.humanrightsconsultation.gov.au).

The *Engaging in the Debate* report is available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under National Human Rights Consultation.

### The National Human Rights Consultation Resources Available Online

The Centre has recently updated its website with a range of resources to assist individuals and organizations to engage with the National Human Rights Consultation.

The website materials include:

- Overview of the National Human Rights Consultation (including 'Why Australia needs a Human Rights Act' and 'Myths and Misperceptions About a Human Rights Act')
- What You Can Do (including details as to making a submission, joining an email list, making a donation, joining the Australian Human Rights Group and attending a workshop)
- Materials and Resources (including case studies, reports, fact sheets and speeches)

Over the coming weeks, the Centre will produce a range of additional resources to assist individuals and organisations to participate in this important debate including:

- a submission on need for comprehensive national Human Rights Act;
- a separate submission on other initiatives and measures necessary to promote human rights;
- thematic fact sheets on how human rights are relevant to various sectors and population groups (such as women, people with disability, Indigenous people and people experiencing homelessness);

- a right-specific fact sheet on each of the rights contained in the *Universal Declaration of Human Rights*; and
- details as to forums and seminars, which will be particularly targeted in the following areas: community legal centres, disability, Indigenous, mental health, women, newly arrived migrants, asylum seekers and refugees, and older persons.

These resources will be made progressively available at [www.hrlrc.org.au](http://www.hrlrc.org.au).

The Centre welcomes any feedback on the resources that may be useful for individuals and organisations to participate in the National Human Rights Consultation.

## Victorian Charter of Rights Developments

### Two Years On: The Victorian Charter is Improving Lives

Critics of the Victorian *Charter of Human Rights* have abjectly failed in their predictions of a flood of litigation, the transfer of power from parliament to judges, or the end of democracy. The *Charter* is being used to improve lives.

Far from a tidal wave, the flow of cases has been barely a trickle. Every case litigated under the *Charter* was also brought on non-*Charter* grounds. The myth that Charters of Rights create a lawyers' picnic is unsubstantiated. With almost no exceptions, *Charter* cases for disadvantaged Victorians are run pro bono.

The *Charter of Rights* has not shifted power to the judiciary. Contentious social policy issues, such as same-sex marriage, abortion and access to IVF, have been determined by parliament.

Far from threatening democracy, the Victorian *Charter* entrenches democratic values such as free expression, peaceful assembly and public participation. The *Charter* does not give courts the power to strike down legislation, but merely to send a law back to parliament for reconsideration. Parliament can respond as it sees fit.

The most recent anti-*Charter* tactic is to hysterically highlight any misconceived Charter case, regardless of its outcome. You won't read it in the anti-*Charter* commentary, but Carl William's attempt to delay his criminal prosecution because his 'lawyer of choice', Peter Faris, was not available on the court dates fixed was quickly dismissed. Channel 9's reliance on the right to freedom of expression in its appeal against the suppression of 'Underbelly' was similarly rejected. So too was a doctor's reliance on the presumption of innocence in contesting his de-registration following charges of rape.

The *Charter's* impact in the courtroom to date is negligible. Far from being a failure, that is how it should be. Victoria's *Charter* minimises litigation by requiring that human rights are taken into account by parliament and public services when developing policy and delivering services.

Outside the courtroom, however, the Victorian *Charter* is being used to address disadvantage and promote dignity; a fact conveniently ignored by *Charter* critics.

The mainstream media did not report, for example, that the *Charter* prevented the eviction of a single mother and her kids from public housing into homelessness or that it assisted an elderly woman with brain injury to access critical medical assistance.

Nor did it report that a 19 year old woman with cerebral palsy relied on the *Charter* to obtain support services and case management.

In another case, resolved just a few weeks ago, children with autism were deemed eligible for disability support services after their advocates invoked the Victorian *Charter of Rights*. Announcing an additional \$2.75 million in support, the Community Services Minister said, 'this will make a major difference to the lives of many Victorian families facing the challenge of raising a child with an autism spectrum disorder'.

These are all common-sense decisions in real life cases which show how the *Charter* can improve lives and promote fundamentally Australian values like freedom, respect, dignity and a fair go.

Of course, the *Charter* is not a panacea for disadvantage in Victoria and the State Government still has some way to go to if the *Charter* is to truly improve accountability and embed a culture of rights and respect.

For starters, the Government should spend less money on defending human rights claims and denying *Charter* obligations, and more on public sector education and community advocacy and empowerment.

In the longer term, the *Charter* should be amended to enshrine not only civil and political rights, but also the economic and social rights – such as health, housing and education – that are necessary for all people to participate fully in our community.

*Philip Lynch is Director of the Human Rights Law Resource Centre*

### Case Studies: How a Human Rights Act can Promote Dignity and Address Disadvantage

Human rights belong to everyone. The Centre has developed a new web page which contains a series of real life case studies which illustrate how human rights laws can be used to encourage common-sense policies and decisions that promote human dignity and addresses disadvantage. The case studies demonstrate the ways in which the Victorian *Charter* and the UK *Human Rights Act* are being used in areas such as disability, aged care, education, mental health and homelessness. They show that human rights are not just for lawyers, celebrities and criminals; they are an important tool that can help create a more just society where everyone receives a fair go.

To share your story of where human rights have made a positive difference, please contact Rachel Ball at [rachel.ball@hrlrc.org.au](mailto:rachel.ball@hrlrc.org.au) or on (03) 8636 4433. Your privacy is respected and all stories are de-identified.

The case studies are available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under National Human Rights Consultation>Case Studies.

*Rachel Ball is a Lawyer with the Human Rights Law Resource Centre*

### Statements of Compatibility under the Victorian Charter

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

Below is an analysis of recent significant Statements.

#### **Criminal Procedure Bill 2008**

The Criminal Procedure Bill 2008 aims to overhaul Victoria's current criminal procedure laws by consolidating them into a single Act and updating them to be consistent with other jurisdictions and contemporary needs. It also implements policy changes, including a new notice to appear process for the Magistrates' Court and new rules for pre-hearing disclosure in summary proceedings.

The Statement of Compatibility accompanying the Bill notes that the Bill engages many of human rights protected under the *Charter of Human Rights and Responsibilities Act*. Most relevantly, it affects:

- the right to a fair hearing (s 24); and
- the rights afforded to persons subject to criminal proceedings (s 25).

#### Right to a fair hearing

The Bill includes provisions requiring an accused to notify the prosecution of the evidence he or she intends to lead at trial. The Statement of Compatibility suggests that, rather than infringing on a person's right to a fair trial, this is necessary to allow the prosecution sufficient time to investigate and test the evidence. The Bill also allows the Court to request that the accused disclose information about his or her evidence and witnesses for the purpose of case management. The Statement of Compatibility suggests that this is necessary to facilitate the efficient use of Court resources, and that it does not restrict the accused's right to a fair trial because the Court is unable to compel the accused to comply.

#### Rights in criminal proceedings

Section 25 of the Charter sets out a number of rights afforded to a person charged with a criminal offence. Relevantly, these include:

- the right to be informed promptly of the nature of the charge: s 25(2)(a);
- the right not to be compelled to confess guilt: s 25(2)(k); and

- the right to have a conviction reviewed by a superior court: s 25(4).

*The right to be informed promptly of the nature of the charge*

The Bill contains provisions allowing the accused to be found guilty of alternative offences that have not been included in the charge sheet or indictment. The Statement of Compatibility raises the possibility that this may restrict an individual's right to be informed promptly of the nature of the charge, but suggests that this is 'a longstanding and important part of the criminal justice system' and that there are adequate safeguards to protect the accused.

*The right not to be compelled to confess guilt*

Under the Bill, the Court can give the accused an indication of the sentence he or she would receive if they were to plead guilty. If the accused then pleads guilty, the Court is unable to impose a sentence that exceeds the sentence indication. Nevertheless, a sentence indication does not bind a Court constituted by a different judge, nor affects any right of appeal.

When the Scrutiny of Acts and Regulations Committee considered the Criminal Procedure Legislation Amendment Bill 2007, it raised the possibility that such indications may have the effect of coercing the accused into pleading guilty. The SARC was also concerned that because the sentence indication only binds the Court giving the indication, an accused may elect to plead guilty after receiving a lenient indication, only to receive more severe sentence on appeal or if the Court is reconstituted.

The Statement of Compatibility does not adequately address these issues. Although it states that a Court cannot give a sentencing indication unless the accused has requested it, this misrepresents the position in relation to summary offences, where the Court is able to give a sentence indication without the accused's consent. The Statement also neglects to consider the impact of the fact that a sentence indication is not binding on subsequent Courts dealing with the same proceeding.

*The right to have a conviction reviewed by a superior court*

The Statement of Compatibility considers whether requiring the accused to apply for leave to appeal to a superior Court conflicts with their right to seek review. Given that applications for leave to appeal a conviction require a consideration of the merits of the case, the Statement concludes that this requirement is compatible with the Charter. Similarly, although it may be possible for a single judge to refuse leave to appeal a sentence, the Statement describes this as 'a sensible case management tool to avoid the time and expense of fruitless appeals' and notes that such a decision is itself reviewable.

*James Kearney, Summer Clerk, and Jonathan Kelp, Solicitor, Mallesons Stephen Jaques' Human Rights Law Group*

### **Training Opportunity: Building a Human Rights Culture in Victoria**

The Victorian Equal Opportunity and Human Rights Commission has released its *Charter of Human Rights and Responsibilities* training calendar for January to June 2009 and offers a range of courses including:

- Introducing the *Charter of Human Rights and Responsibilities*
- An exploration of the *Charter of Human Rights and Responsibilities*
- The Advocates' *Charter*: A tool for individual and systemic change
- From Principle to practice: Implementing a human rights based approach in community organisations

Places are available for workers in the community sector and non-government agencies, but are strictly limited, so register soon to avoid missing out at:

[www.humanrightscommission.vic.gov.au/education%20and%20training/community%20workshops/](http://www.humanrightscommission.vic.gov.au/education%20and%20training/community%20workshops/)

## Victorian Charter Case Notes

### Staying Civil Penalty Proceedings when Criminal Proceedings are Threatened in Respect of the Same Conduct: Implications for the Right to a Fair Hearing

*Re AWB Limited* [2008] VSC 473 (12 November 2008)

The Supreme Court of Victoria (Robson J) has held that civil penalty proceedings against five former directors of AWB Limited should be stayed in the exercise of the Court's inherent jurisdiction. This was on the basis that criminal proceedings are threatened against them for conduct that is substantially the same as the conduct that is the subject of the civil penalty proceedings. Whilst the stay applications were not decided on the basis of the defendants' *Charter* right to a fair hearing, the principles discussed by the Court provide guidance as to how Victorian courts may give content to the right in other proceedings.

#### Facts

In 2006, a Royal Commissioner found that AWB Limited made improper payments to the Iraqi regime whilst participating in the UN Oil-for-Food Program. The Commissioner also found that, in so doing, the company and certain persons associated with it may have breached Australian law.

In December 2007, the Australian Securities and Investments Commission (ASIC) commenced civil penalty proceedings in the Supreme Court of Victoria against six former directors of AWB Limited. ASIC alleged contraventions of ss 180 and 181 of the *Corporations Act 2001* (Cth), which require company officers to act with care and diligence and to discharge their duties in good faith and for a proper purpose.

The defendants applied to stay the civil penalty proceedings pending decisions on whether criminal proceedings in respect of substantially the same conduct would be commenced. At the time of making their applications, ASIC, the police and the prosecutorial agencies were continuing to investigate and consider possible criminal charges against five of the defendants (ie all excluding Lindberg).

Section 1317N of the *Corporations Act* provides that if criminal proceedings are commenced in respect of conduct that is substantially the same as conduct that forms the basis of civil penalty proceedings, the civil penalty proceedings are automatically stayed pending resolution of the criminal proceedings.

However, here the defendants sought to stay the civil penalty proceedings even before the s 1317N 'trigger' came into effect, i.e. while criminal proceedings were under consideration but not yet commenced. This was on the basis that (amongst other grounds):

- having to defend civil penalty proceedings would infringe their right of silence in the ongoing criminal investigation and any future criminal proceedings;
- the continuation of the civil penalty proceedings would attract significant publicity which may adversely influence potential jurors in any future criminal proceedings;
- having to defend civil penalty proceedings would mean that the defendants would incur unnecessary and substantial costs in proceedings that would be automatically stayed if criminal proceedings were commenced; and
- court resources associated with hearing and determining the civil penalty proceedings would be unnecessarily wasted if criminal proceedings were commenced.

#### Reliance on the *Charter*

In *McMahon v Gould* (1982) 7 ACLR 202, the Supreme Court of Victoria held that it had an inherent power to stay civil proceedings if criminal proceedings could be commenced against a defendant in respect of substantially the same conduct. The overriding consideration was what the interests of justice required in the circumstances. This was to be determined by reference to a number of factors. However, generally speaking, it was a 'grave matter' to interfere with the entitlement of a civil plaintiff to have its action tried in the ordinary course of the procedure and business of the court, requiring justification on 'proper grounds'.

However, in *Reid v Howard* (1995) 184 CLR 1, the High Court confirmed the fundamental importance of the privilege against self-incrimination, holding that it may only be abrogated by statute, not by courts under any discretion or on a case management basis.

All parties agreed that the factors set out in *McMahon* ought be modified in light of the High Court's decision in *Reid*. The defendants submitted that so modified, the factors favoured the grant of the stay. After oral argument had concluded, two of the defendants (Flugge and Ingleby) sought leave to make further submissions to the effect that they would not receive a fair hearing within the meaning of s 24(1) of the *Charter* if they were forced to reveal in the civil penalty proceedings their defences to potential criminal charges. Those defendants submitted that under the *Charter*, the Court had a positive duty to enforce their right to a fair hearing by granting a stay.

### **Decision**

Robson J held that *McMahon* makes it clear that a civil plaintiff is not automatically prevented from pursuing their cause of action merely because to do so might result in the defendant having to disclose their likely defence to any existing or potential criminal proceedings. The Court is not concerned to preserve any tactical advantage a defendant to criminal proceedings may have as a consequence of their right of silence. Rather, the Court must consider whether there is a real danger of injustice if the defendant is required to reveal their criminal defence in the civil proceedings.

Robson J considered that, in the instant case, there was such a real danger of injustice in respect of five of the defendants, ie those for whom criminal proceedings were 'on the cards'. His Honour held that it would be neither fair nor just that they should have to expend resources defending civil penalty proceedings initiated by the state, when those proceedings were likely to be stayed as a result of a decision of the state to commence criminal proceedings in respect of substantially the same conduct. His Honour also considered that it would be neither fair nor just that the defendants should have to duplicate the defence of their actions.

Robson J also noted that the *McMahon* factors require the court to consider and weigh the effects of a stay on the plaintiff against the effects on the defendant. In the instant case, ASIC was not pursuing the defendants in satisfaction of a private wrong. Rather, it was a regulator seeking to advance the public interest by ensuring that alleged corporate wrongdoers were punished for contravention of their duties and restrained from managing corporations in the future. There would therefore not be any prejudice to ASIC's interests if a stay were granted.

His Honour therefore stayed the civil penalty proceedings against five of the defendants (excluding Lindberg) until such time as the state indicated to those defendants that no criminal proceedings would be commenced in respect of the same conduct. Lindberg was found by Robson J to be in a different position, in that criminal proceedings were not threatened against him, and hence his application for a stay was dismissed.

Robson J therefore found it unnecessary to consider the *Charter* arguments made by Flugge and Ingleby. Given that Lindberg did not make any submissions in relation to the *Charter* issues, his Honour considered that it would be inappropriate to consider whether his *Charter* right to a fair hearing would be affected by the continuation of the civil penalty proceedings against him.

### **Relevance to the Victorian *Charter***

In the course of his reasons for judgment, Robson J commented that, whilst it cannot be said that *McMahon* is no longer good law, it may be appropriate for an appellate court to review *McMahon* in light of the High Court's decision in *Reid*. To this it may be added that *McMahon* may require review in light of the enactment of the *Charter*. The *McMahon* factors may be considered to de-emphasise the primacy of the privilege against self-incrimination, undoubtedly one of the most important common law rights, which is arguably subsumed within right to a fair hearing (s 24(1)), as well as given some independent protection by the right of persons charged with criminal offences not to have to testify against themselves or confess guilt (s 25(2)(k)).

In the instant case, had the stay not been granted, the defendants' *Charter* right to a fair hearing may have been breached in two ways. If the civil penalty proceedings had continued and the defendants maintained their right of silence during those proceedings, they may not have received fair *civil* hearings. However, if the civil penalty proceedings progressed and they actively defended them in such a way that provided the prosecutors with additional evidence that could be used in later criminal proceedings, or revealed the defences that they were likely to adopt, they may not have received fair *criminal* hearings.

Robson J's recognition that the avoidance of unnecessary cost and duplication are two factors relevant to the grant of a stay where civil and criminal proceedings are likely in respect of substantially the same conduct is useful in elaborating what a 'fair hearing' constitutes. In addition, his Honour's reassertion of the central importance of the right of silence, even before the commencement of criminal proceedings, is useful to those seeking to argue that the right of silence is subsumed within the broader right to a fair hearing under s 24. This is particularly important given that s 25(2)(k) of the *Charter* only protects a person from self-incrimination once they have been *charged* with a criminal offence.

Additional matters of interest relating to the *Charter* in the instant case (which were not explored in the reasons for judgment) include:

- whether, given that the grant of a stay is almost certainly a judicial function, and hence the Court would not be a 'public authority' when considering such an application, the Court has a positive obligation to use its processes to give effect to the *Charter* right to a fair hearing and protection from self-incrimination; and
- the applicability of the *Charter* to proceedings in Victorian courts when they are exercising federal jurisdiction (as the Supreme Court was here).

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VICSC/2008/473.html>.

*Daniel Perkins is a student in the Master of Laws program at The University of Melbourne*

### Does the Right to a Fair Hearing Extend to Persons being Investigated for a Criminal Offence where Charges are Imminent?

*Seachange Management Pty Ltd v Bevnol Constructions & Developments Pty Ltd & Ors (Domestic Building)* [2008] VCAT 2629 (25 November 2008)

In this case, VCAT found that the *Charter* rights to a fair hearing (s 24) and the rights in criminal proceedings (s 25) do not extend to persons who are being investigated by police for possible commission of a criminal offence.

#### Facts

This case arose from a dispute about the development of a retirement village, in which the managing director of the applicant land owner (*Director*) was joined as a party by counterclaim of the respondent builder. The Director applied for a partial stay of the counterclaim as it related to him, arguing that if he was required to defend the civil proceeding this would necessarily prejudice his defence of an anticipated criminal proceeding relating to the same factual circumstances.

In deciding whether to grant the stay, the Tribunal considered the following key questions relating to the *Charter*:

- Whether, in determining a stay application, VCAT was acting in an administrative capacity and therefore subject to s 38 of the *Charter*.
- Whether s 32 influenced the interpretation of the *VCAT Act 1998* and the *Supreme Court Act 1986* such that the test for whether to grant a stay of civil proceedings required reformulation in light of the rights engaged.

#### Decision

In relation to its obligations under s 38, the Tribunal found that both the determination of the broader dispute, and the stay application that was an integral part of the dispute, involved the exercise of judicial rather than administrative power and therefore VCAT was not subject to the duties imposed on public authorities by s 38. This is because s 4(1)(j) of the *Charter* provides that a court or tribunal is not a public authority except when it is acting in an administrative capacity.

In determining the effect of the s 32 interpretive mandate on the test for whether to grant a stay, the Tribunal found that the relevant rights were:

- Section 24(1), which protects the right to a fair hearing for persons 'charged with a criminal offence' and for persons 'party to a civil proceeding'; and

- Section 25, which protects rights in criminal proceedings for 'a person charged with a criminal offence'.

In relation to the Director's right to a fair hearing in the civil proceeding before VCAT, the Tribunal held that these rights were already enshrined by the *VCAT Act* which requires the Tribunal to act fairly and with natural justice.

In relation to the Director's rights under ss 24(1) and 25 in respect of the criminal proceedings, VCAT found that these rights only applied to persons 'charged with a criminal offence' and that although charges were imminent, the Director had not yet been charged with a criminal offence and the right was not engaged.

Therefore, the Tribunal held that the test for whether to grant a stay was not altered by the interpretative mandate set out in s 32 of the *Charter*.

### Discussion

VCAT's finding suggests that the *Charter* rights in ss 24(1) and 25 are limited to protecting persons *charged* with a criminal offence, and do not extend to protect persons being investigated for possible commission of a criminal offence.

This finding is contrary to a number of European judgments in which a 'charge' has been found to include pre-charge investigations. For instance, in *Salduz v Turkey* [2008] ECHR 36391/02, the Grand Chamber of the European Court of Human Rights found that the right to a fair trial (particularly legal assistance) enunciated in art 6 of the *European Convention on Human Rights* was protected not only once the suspect had been charged, but during the period when the suspect was under investigation by police. The Court highlighted the importance of protecting certain aspects of the right to a fair trial (in this instance, the right to legal assistance) during the investigation stage of criminal proceedings, because evidence and preparation during this stage determines 'the framework in which the offence charged will be considered at the trial'. This is consistent with international and comparative human rights jurisprudence which establishes that rights must be interpreted and applied 'liberally and beneficially' (see, eg, *Hunter v Southam Inc* [1984] 2 SCR 145) so as to make them 'practical and effective, not theoretical and illusory' (see, eg, *Goodwin v United Kingdom* [2002] ECHR 28957/95).

VCAT's decision in this case is an unwelcome limitation on the right to a fair trial and rights in criminal proceedings that are enshrined in the *Charter*, and is contrary to established international jurisprudence.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VCAT/2008/2629.html>.

*Jessica Zikman is on secondment to the Human Rights Law Resource Centre from Lander & Rogers*

## Comparative Law Case Notes

### Right to Life and Use of Force by Police

*Leonidis v Greece* [2009] ECHR 43326/05 (8 January 2009)

In the case of *Leonidis v Greece*, the European Court of Human Rights considered art 2 of the *European Convention on Human Rights* in the context of the police shooting of an 18 year old male (Victim).

In making its decision, the Court considered whether:

1. the death of the applicant's son amounted to a breach of the substantive requirements of art 2 of the *Convention*; and
2. the investigation into the incident was adequate and effective, as required by art 2 of the *Convention*.

The Court unanimously found that there had been a violation of art 2 in that the use of lethal force by a police officer was not justified in the circumstances. With a vote of 6 to 1, the Court found that the investigation into the incident was adequate.

This case will be particularly informative for the interpretation and application of s 9 (right to life) of the *Charter*.

## Facts

The applicant's son was walking along a street with two friends. Two plainclothes police officers on patrol duty in an unmarked police vehicle noticed the three young men. One of the police officers, GA, decided to undertake a random identity check. As the police officers approached the three men, the men ran away. GA ran after the Victim and caught him. While holding a loaded revolver with no safety catch in his right hand, GA pushed the Victim against a car with his left hand and immobilised him by forcing him to raise his hands and place them on the car roof while he was aiming his gun towards the sky. With his left hand, GA twisted the Victim's left wrist behind his back to handcuff him. At this point, the Victim jabbed GA with his right elbow in the right side, causing him sharp pain. Reacting to the pain, GA bent forward, and while he was drawing himself back up, his revolver went off, firing a single shot in the lower part of the Victim's right ear, instantly killing him. In the meantime, the other police officer, CT, had arrived close to the two men and partially witnessed the incident.

A criminal investigation followed. A preliminary inquiry was undertaken within a few hours of the shooting. This involved an inspection of the area, the drafting of an inspection report and the drawing of a sketch plan. Also, a statement was taken from CT a few hours later, a crime scene reconstruction was conducted in the presence of the police prosecutor and a report was drawn up. On the same day, a forensic post-mortem examination was performed by a forensic medicine expert. The criminal police laboratory also published a report, albeit inconclusive, on the range at which the bullet had been fired, within about 6 weeks of the applicant's request.

The applicant contended that his son had been killed in circumstances where resort to lethal force was not justified. The applicant also complained that the authorities had failed to carry out an adequate, effective and prompt investigation into the incident.

## Decision

Two questions were before the Court:

1. Did the death of the Victim amount to a breach of the substantive requirements of art 2 of the *Convention*?
2. Was the investigation into the incident adequate and effective, as required by art 2?

### Right to Life and the Use of Lethal Force

The Court considered the general principles underlying the right to life, stating that art 2 safeguards the right to life and therefore ranks as one of the most fundamental provisions in the *Convention*, enshrining one of the basic values of democratic societies. In view of the fundamental nature of the right to life, the circumstances in which deprivation of life may be justified must be strictly construed. Any use of force by State security forces must be no more than 'absolutely necessary' and strictly proportionate in the circumstances.

Accordingly, the legitimate aim of effecting a lawful arrest can only justify putting human life at risk in circumstances of absolute necessity. The Court stated that there can be no such necessity where the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence, even if refraining from using lethal force means losing the opportunity to arrest the fugitive.

In addition to setting out the circumstances when deprivation of life may be justified, the Court considered that art 2 implies a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework defining the limited circumstances in which law-enforcement officials may use force and firearms, in light of the relevant international standards.

Furthermore, law enforcement agents must be trained to assess whether use of firearms is absolutely necessary with due regard to the pre-eminence of respect for human life as a fundamental value.

Applying these principles to the facts in this case, the Court made the following comments:

- After the Victim had been immobilised, the police officer had no reason to keep hold of his gun, especially with his finger on the trigger. This was especially so considering the Victim was not holding a weapon and was not in any way threatening the police officer's life or limb.
- The police officer had not shown the prudence and discipline expected from a police officer of his experience.

- The legislation which governed use of weapons by agents of the State, was recognised to be obsolete and inadequate. This lack of clear rules might also explain why the police officer acted rather irresponsibly, which he would probably not have done had he received the proper training.

The Court found that the State violated article 2 because it had not done all that could be reasonably expected of it to avoid the real and immediate risk to life in hot-pursuit police operations.

#### Adequate and Effective Investigation

The Court reiterated that art 2 of the *Convention* requires that some form of effective official investigation be undertaken when individuals have been killed as a result of force, the purpose being to secure the effective implementation of the domestic laws safeguarding the right to life.

In those cases involving State agents or bodies, investigation is also required to ensure their accountability for deaths occurring under their responsibility.

The authorities must have taken reasonable steps to secure the evidence concerning the incident, including eyewitness testimony and forensic evidence. Promptness and reasonable expedition is implicit in this context.

The Court considered that, in the present case, the procedural obligation to conduct an effective investigation had been discharged. It was relevant that three separate sets of proceedings were conducted in order to establish the facts, identify those responsible, and secure their appropriate punishment. Preliminary investigations were carried out promptly and were capable of ascertaining the circumstances of the case.

#### **Relevance to the Victorian Charter**

This case is relevant to the interpretation and application of s 9 of the *Charter* which provides that every person has the right to life and not to be arbitrarily deprived of life. In particular, it confirms that lethal force, particularly firearms, may only be used by law enforcement officers as a last resort, where absolutely necessary and strictly proportionate.

This is also consistent with the jurisprudence of the UN Human Rights Committee and several international instruments. For example, art 54 of the *UN Standard Minimum Rules for the Treatment of Prisoners* states that prison officers 'shall not ... use force except in self-defence or in cases of attempted escape, or active or passive physical resistance ... . Officers who have recourse to force must use no more than is strictly necessary'. Similarly, arts 4 and 5 of the *UN Basic Principles of the Use of Force and Firearms by Law Enforcement Officials* provide that law enforcement officials shall only use force and firearms where unavoidable and that where force is used, the officials must 'exercise restraint ... and act in proportion to the seriousness of the offence and the legitimate objective to be achieved ... [and] minimize damage and injury, and respect and preserve human life'. Article 9 further states that firearms should only be used 'when strictly unavoidable in order to protect life'.

The decision is available at <http://www.bailii.org/eu/cases/ECHR/2009/5.html>.

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#### **Are Mandatory Life Sentences without Parole Cruel, Inhuman and Degrading?**

*Wellington R, (On the Application of) v Secretary of State for the Home Department* [2008] UKHL 72 (10 December 2008)

The House of Lords has held that a mandatory sentence of life imprisonment without parole does not necessarily constitute inhuman or degrading treatment or punishment under art 3 of the *European Convention on Human Rights*.

#### **Facts**

The applicant was an international drug trafficker who, while staying with a woman in Kansas City, had money stolen from him. The applicant forced the woman to drive him and two other men to the house where the thief had been residing. There they killed two people, including a pregnant young woman, and injured another. The victims were unconnected with the theft.

Six years later, the applicant was arrested in London and the United States requested his extradition. The Missouri prosecutor undertook not to seek the death penalty. However, in Missouri the charge of murder in the first degree attracts a mandatory penalty of imprisonment for life without eligibility for probation, parole or release except by the act of the Governor. The Home Secretary ordered the applicant's extradition. The applicant challenged this decision in the High Court but lost. He then appealed to the House of Lords asserting that, as a mandatory sentence of life in prison without parole is 'inhuman or degrading punishment', the extradition order was incompatible with his rights under art 3 of the *European Convention on Human Rights*. Consequently, the applicant maintained that the order contravened s 6(1) of the *Human Rights Act 1998* (UK).

### **Decision**

The House of Lords unanimously dismissed the appeal, holding that a sentence of life imprisonment without parole does not necessarily constitute ill-treatment. Two distinct approaches emerged in determining whether punishment was inhuman or degrading in the context of extradition.

#### The Relativist Approach

Lord Hoffman (with Lord Carswell and Baroness Hale concurring) adopted what was termed a 'relativist approach' to the issue of what constitutes inhuman or degrading punishment. The fact that the applicant was to be extradited necessarily modified and heightened the threshold of what amounts to inhuman or degrading punishment.

In the domestic context, Lord Hoffman found that a life sentence that is *de jure* and *de facto* irreducible may raise an issue under art 3, but a reducible life sentence will not. However, depending on the circumstances of a particular case, an irreducible life sentence may nevertheless be permissible.

In an extradition context, art 3 does not apply such that the extraditing State is responsible for any punishment likely to be inflicted in the receiving State. Instead, Lord Hoffman maintained that art 3 applies only in a modified form in which the desirability of extradition is to be considered when deciding whether the punishment is severe enough to render it inhuman and degrading. Thus, punishment which is inhuman and degrading in a domestic context is not necessarily so when extradition is taken into account. Lord Hoffman held that punishment will only be inhuman and degrading in the context of extradition where it is 'grossly disproportionate' on the facts of the particular case.

On the facts, Lord Hoffman found that, because the Governor could reduce the sentence and considered all applications for reduction (i.e. the process was more than merely theoretical), no issue arose under art 3. Even if the sentence was found to be irreducible, the 'relativists' held that the sentence was not disproportionate given the heinous nature of the applicant's alleged crimes.

#### The Absolutist Approach

In contradistinction to the relativist approach, Lord Brown (with whom Lord Scott agreed) adopted an absolutist approach. He held that the right under art 3 is absolute and cannot be balanced against other considerations. There is nothing in art 3 to suggest that the standards required should differ depending on whether the case involves domestic law or extradition. Instead, what constitutes inhuman and degrading punishment is constant. Their Lordships held that the threshold of what amounts to inhuman and degrading punishment is high as a consequence of the absolute and constant nature of the right. An irreducible life sentence will only violate art 3 rights at such a time when further imprisonment could no longer be justified on any basis, whether punishment, deterrence, public protection or otherwise.

Thus, their Lordships held that in this case a mandatory sentence of life imprisonment, even if irreducible, was not a breach the applicant's art 3 rights.

### **Relevance to the Victorian Charter**

This case provides important guidance on when punishment may be deemed to be inhuman and degrading, particularly given the distinct absence of Australian authority on the issue. However, the utility of this case is tempered by two issues. First, while s 32(2) of the *Charter* states that international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision, a decision split in principle as this decision

was does not provide clear guidance to Victorian courts as to whether to adopt the 'relativist' or the 'absolutist' approach.

Second, because international extradition in Australia is governed by the *Extradition Act 1988* (Cth), consideration of comparable cases under the *Charter* will only potentially be relevant in the context of inter-State extradition. As a result, s 10 arguments (under the current and probable future positions under other State or Territory laws) are unlikely to arise in the context of potential death penalty cases, but may in the context of mandatory or maximum penalties applicable or available in other States or Territories which may constitute cruel, inhuman or degrading treatment.

The decision is available at <http://www.bailii.org/uk/cases/UKHL/2008/72.html>.

Alex Goddard and Peter Henley, *Human Rights Law Group, Mallesons Stephen Jaques*

### Balancing Freedom of Expression and the Right to Privacy

*Erdoğan v Turkey* [2009] ECHR 39656/03 (13 January 2009)

The European Court of Human Rights recently found that the Government of Turkey, having ordered lawyer Ayhan Erdoğan to pay compensation for remarks that he made against a public figure during court proceedings, had breached Mr Erdoğan's right to freedom of speech in violation of art 10 of the *European Convention on Human Rights*.

Article 10 of the *Convention* guarantees the right to freedom of expression, including the freedom to 'impart information and ideas without interference by public authority and regardless of frontiers' (art 10(1)), subject to such restrictions and penalties as are 'prescribed by law and are necessary in a democratic society... for the protection of the reputation or rights of others' (art 10(2)).

#### Facts

The applicant, Erdoğan, is a practising lawyer residing in Istanbul. Erdoğan's client, along with 136 others, had been dismissed from his employment and had brought an action against the Municipality which resulted in an order that he be reinstated. In spite of this, the workers were either not reinstated or reinstated for one day before being dismissed again. Erdoğan was alleging that the mayor of the Ümraniye district in Istanbul was attempting to fill vacancies at the Municipality without reinstating his client and the other dismissed workers, as ordered by the court. While administrative proceedings against the Municipality were still pending, the office of the mayor ran a competition in the *Akit* newspaper to fill the available posts and, it was alleged, only distributed editions of the newspaper containing this competition to associations affiliated with the *Refah* party, of which the mayor was a member.

Erdoğan filed an action on behalf of his client in the Istanbul Administrative Court. In a written submission to the court, he referred to the mayor as a cruel person (*zalim*) and a bigot (*yobaz*) with no regard for the rule of law (*hukuk tanımaz*). The mayor's office in turn brought an action against Erdoğan for the damage he had allegedly incurred as a result of the applicant's attack on his honour and integrity. Erdoğan defended the action on the grounds that his statements had not been a personal attack but rather mere observations, made in the course of his duties as an advocate, as to the proven conduct of the mayor, his administration and the now banned *Refah* party. The mayor maintained that Erdoğan's accusations were unfounded, insulting and an attack on his personal rights which transgressed the standards and boundaries of objective debate. The court found in favour of the mayor and ordered Erdoğan to pay a significant sum of compensation. The decision was maintained several times on appeal before the applicant instituted proceedings before the European Court of Human Rights.

#### Decision

The Government argued that its interference with Erdoğan's right to freedom of speech was permitted by art 10(2) of the *Convention*. The Government referred to domestic provisions in the Code of Obligations and the Civil Code of Turkey which confer a right to bring a civil action on individuals whose personal rights are violated, thus arguing that the penalties imposed on Erdoğan and/or the restrictions on his right to freedom of speech were 'prescribed by law'. The Government argued that the interference had been necessary with reference to Turkey's 'margin of appreciation' (at 19). Moreover,

the Government argued that its interference was legitimately aimed at protecting the rights and reputation of others, in particular the mayor.

Erdoğan maintained that his words were not a personal attack but rather observations of fact. For example, he illustrated his statement that the mayor had no regard for the rule of law by pointing out that he had refused to comply with court orders to reinstate the dismissed workers. Importantly, Erdoğan emphasised that his comments had not been disseminated in the press, but rather filed as part of defence submissions in domestic courts.

The question for the Court was whether, on the facts of the case as a whole, a fair balance was struck between the need to protect the reputation and rights of the mayor against the need to protect Erdoğan's freedom of expression. The Court held that there had been a violation of art 10 and in particular that the Turkish domestic courts had erred in omitting to set Erdoğan's remarks within the context and form in which they were expressed.

The Court underscored the importance of considering the circumstances surrounding Erdoğan's statements. It confirmed its view that the limits of acceptable critical comment are wider when the subject thereof is a public figure, since they inevitably and knowingly expose themselves to public scrutiny. Further, the Court had regard to the 'special nature' of the legal profession and confirmed that alongside certain obligations, officers of the court may enjoy certain privileges such as 'latitude regarding arguments used in court' (at 26).

The Court identified as a factor of particular importance the distinction between statements of fact and value judgments. Although the Court did not expressly agree with Erdoğan's argument that his remarks were mere observations, whereas facts can be proven, the Court confirmed that even where a statement amounts to a value judgment, 'the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statements' (at 24). It was held that Erdoğan's comments were value judgments, thus one can infer that the truthfulness of Erdoğan's accusations as to the mayor's conduct was a relevant consideration to the Court. Importantly, Erdoğan's value judgments were conveyed in a medium where his client's rights were 'naturally to be vigorously vindicated' (at 29).

The Court held that Erdoğan's remarks could not be construed as a gratuitous personal attack in the context of judicial proceedings in which he was acting in his capacity as a legal representative. Although the Court held that Erdoğan's comments were clearly of a nature to discredit the mayor, it reiterated that the mayor was not a private individual but a public figure. Moreover the negative impact of Erdoğan's words on the mayor's reputation would be limited, since they were confined to a courtroom rather than, for example, being voiced to the media.

The Court weighed Erdoğan's interest in voicing his criticism and in pleading his client's case against the mayor's interest in being protected against personal insult. The Court held that the interference with Erdoğan's freedom of expression was not based on sufficient reasons to show that it was 'necessary in a democratic society' and therefore that there had been a violation of art 10 of the *Convention*.

### **Relevance to the Victorian Charter**

This decision is relevant to ss 7, 13 and 15 of the *Charter*. On the one hand, s 15 states that everyone has the right to 'hold an opinion without interference' (s 15(1)) and the freedom to 'impart information and ideas of all kinds' (s 15(2)). However this right is subject to 'lawful restrictions reasonably necessary to respect the rights and reputation of other persons' (s 15(3)). Moreover, freedom of expression must be balanced against co-existing rights such as that not to have one's privacy unlawfully or arbitrarily interfered with (s 13(a)) or one's reputation unlawfully attacked (s 13(b)). In addition, each right in the *Charter* may 'be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society...' (s 7(2)).

This case is an example of how the judiciary must endeavour to balance the competing rights of freedom of expression and privacy/reputation. Although at first glance the right to freedom of expression may seem curbed by competing rights or interests, it is important to note that both art 10 of the *Convention* and s 7 of the *Charter* emphasise the need to establish that an interference with freedom of expression must be necessary or justified in a democratic society – and ultimately that is why the case against Erdoğan ultimately failed.

*Briohny Coglin is a lawyer with Minter Ellison*

## Freedom of Expression and Restrictions on Political Advertising

*TV Vest AS & Rogaland Pensjonisparti v Norway* [2008] ECHR 21132/05 (11 December 2008)

In this case, the European Court of Human Rights considered the right to freedom of expression in the context of political advertising in the media. This judgment again shows that there must be a reasonable relationship of proportionality between the legitimate aim pursued by a statutory prohibition and the means deployed to achieve that aim.

### Facts

Rogaland Pensjonisparti (Pensioners Party) is a small political party, which was contesting regional elections in Norway but receiving little mainstream editorial coverage. In order to reach a broader section of the electorate, it purchased television advertising from TV Vest AS, a local television station. However, s 3-1(3) of the *Broadcasting Act 1992* (Norway) read: 'Broadcasters cannot transmit advertisements for life philosophy or political opinions through television'.

TV Vest notified the State Media Authority of its intention to broadcast the political advertisements and argued that such broadcasting was protected by art 10 of the *European Convention on Human Rights*, which relevantly states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the protection of the reputation or rights of others, ... or for maintaining the authority and impartiality of the judiciary.

Following the broadcast of the political advertisements, the State Media Authority fined TV Vest. TV Vest appealed to the Oslo City Court and then to the Supreme Court, which both upheld the State Media Authority's decision to impose the fine. TV Vest then appealed to the European Court of Human Rights.

### Submissions

#### The applicants

The applicants argued that the existence of an absolute prohibition of political advertising on television combined with the absence of rules securing party political broadcast had the effect that the Pensioners Party had been prevented from communicating directly with its electorate on television. The absolute prohibition was neither supported by sufficient reasons nor proportionate to the aims pursued.

#### Norway

The Government submitted that the case did not primarily engage the freedom of expression but first and foremost the integrity of the democratic process and specifically the public's – the voters'- right to fair democratic elections, a right protected by the *Universal Declaration of Human Rights* and the First Protocol to the Convention. The very essence of democracy was fair elections in which all parties could compete on an equal footing without anyone being able to buy an undue advantage in the form of television advertising.

The governments of the United Kingdom and Ireland, given leave to intervene in the case, supported the Norwegian government's argument that the prohibition was a necessary measure for preserving central elements of Norwegian democracy.

### Decision

The Court held that the test of 'necessity in a democratic society' required the Court to determine whether the 'interference' complained of corresponded to a 'pressing social need', whether it was proportionate to the legitimate aim pursued, and whether the reasons given by the national authorities to justify it are relevant and sufficient. In assessing whether such a 'need' exists and what measures should be adopted to deal with it, the Court acknowledged that national authorities are left a certain margin of appreciation, but stated that this power of appreciation is not unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by art 10.

The Court considered a survey performed by the Secretariat of the European Platform of Regulatory Authorities, which compared the regulation of political advertising across 30 European countries. The EPRA report, discussed in some length in the Court's judgment, noted that there were a variety of means used by European governments to protect the integrity of political processes, including allowing political advertising (including restricted advertising during election periods) and allowing free or subsidised addresses on public broadcasters. The Court also considered recommendation No R (99)15 of the Council of Europe's Committee of Ministers on measures concerning media coverage of election campaigns, which provided standards for regulatory frameworks for paid political advertising.

In that context, the Court examined the justifications for the disputed interference in this case, whether it was supported by relevant and sufficient reasons and was proportionate to the legitimate aim pursued, regard being had to the balance to be struck between the applicants freedom of expression, on the one hand, and the reasons adduced by the Norwegian authorities for the prohibition of political advertising, on the other.

The Court held that there was not a reasonable relationship of proportionality between the legitimate aim pursued by the prohibition on political advertising and the means deployed to achieve that aim. The restriction (being the advertising prohibition and the fine imposed on TV Vest) could therefore not be regarded as having been necessary in a democratic society (as demonstrated by the different restrictions imposed in other European countries), within the meaning of art 10(2) for the protection the rights of others.

### **Relevance to the Victorian *Charter***

The factual issues in this case, being the infringement of the right to free speech by restrictions on political advertising, will have limited relevance in the Australian context, given the comparative lack of restrictions on political advertising (other than some 'blackout' periods preceding elections). While the Victorian *Charter* offers protection to the right to freedom of expression (s 15) and taking part in public life (s 18), these *Charter* rights are generally not impugned by the existing regulation of political advertising.

Arguably, this case is more relevant to the procedural aspect of s 7 of the *Charter*, which allows the human rights may be subject 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. This judgment further strengthens the view that there must be a reasonable relationship of proportionality between the legitimate aim pursued by the prohibition and the means deployed to achieve that aim. The 'balancing' test used by the Court is indicative of how courts might approach a similar conflict under the *Charter*, including particularly the availability of less rights-intrusive means of achieving a legitimate end.

*James Farrell is a lawyer with Corrs Chambers Westgarth*

## **HRLRC Policy Work**

### **Equality Rights: Centre Contributes to International General Comment on Non-Discrimination**

Late last year the UN Committee on Economic, Social and Cultural Rights called for submissions on its draft General Comment 20 on Non-Discrimination. The draft General Comment examines the various obligations contained in article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It also analyses the prohibited grounds of discrimination and makes comments on national implementation.

Article 2(2) is of particular importance as non-discrimination and substantive equality are essential pre-conditions for the effective protection and promotion of all human rights.

In December 2008 the Centre and the Public Interest Law Clearing House (PILCH) made a joint submission to the Committee. The joint submission addresses the draft General Comment's consideration of:

- systemic discrimination;
- temporary special measures;

- permissible limitations on the right to non-discrimination; and
- prohibited grounds of discrimination.

The joint HRLRC/PILCH Submission is available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under Policy Work>International Submissions> Equality Rights: Submission to UN CESCR on Draft General Comment on Non-Discrimination (Dec 2008).

The Committee expects the final draft of General Comment 20 to be adopted in May 2009.

*Rachel Ball is a Lawyer with the Human Rights Law Resource Centre*

### **Disability Rights: Submission on Proposed Amendments to the *Disability Discrimination Act***

In January 2009, the Human Rights Law Resources Centre made a submission to the Senate's review of the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008.

The submission commends the Australian Government on its commitment to improving the *Disability Discrimination Act 1992* (Cth), but states that the amendments do not go far enough. Even with the amendments in the Bill, the *Disability Discrimination Act* continues to fall short of Australia's obligations under international human rights law and leaves people vulnerable to disability discrimination in many walks of life. The Centre submits that a full scale comprehensive review of all federal anti-discrimination laws is required in order to protect society's most vulnerable and marginalised persons from all forms of discrimination.

The submission also makes recommendations that the following amendments proposed by the Bill be reconsidered and redrafted:

- the new definitions of direct and indirect disability;
- the duty to make reasonable adjustments to accommodate a person's disability;
- the requirement to provide genetic information; and
- the exemptions provided in the migration context.

The Centre's submission was prepared with substantial assistance from Melanie Schleiger and Julian Rieker of Lander & Rogers.

The Centre's submission is at [www.hrlrc.org.au](http://www.hrlrc.org.au) under Policy Work>Domestic Submissions>Disability Rights: Submission on Amendments to Disability Discrimination Act (Jan 2009). The Centre will appear before the Senate Committee to give evidence in late-January.

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

### **Disability Rights: Parliamentary Submission on Australia's Ratification of the Optional Protocol to the Disability Convention**

On 3 December 2008, following a consultation process, the National Interest Analysis on the Optional Protocol to the Convention on the Rights of Persons with Disabilities was tabled in Parliament. In line with previous submissions made by the Centre, the NIA recommends that Australia accede to the Optional Protocol.

The question of Australia's accession to the Optional Protocol was then referred to the Joint Standing Committee on Treaties in December 2008.

In January 2009 the Centre made a submission to the Committee, unreservedly supporting Australia's ratification of the Optional Protocol as it would:

- complement and strengthen existing domestic mechanisms designed to promote disability rights;
- foster and promote analysis and change;
- strengthen Australia's role within the international community;
- bolster Australia's commitment to constructive engagement with the United Nations human rights system; and
- enhance public awareness and understanding of the rights of people living with disabilities.

Further, the Optional Protocol does not require any domestic legislative or policy to changes in order to be implemented and is very unlikely to subject the Australian Government to a flood of complaints and investigations.

The Centre's submission is available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under Policy Work>Domestic Submissions.

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

### Equality Rights: Submission on draft Model Spent Convictions Bill

The Victorian Department of Justice, in conjunction with the Standing Committee of Attorneys-General, recently announced that it was working on a national model Bill for a spent convictions scheme and invited the Centre to make a submission in relation to a draft Bill. The purpose of a spent convictions scheme is broadly to limit the effect of a person's conviction for certain offences if the person completes a period of crime-free behaviour.

The Centre prepared a submission based on a statement of compatibility model – that is, the submission considered that if enacted in Victoria, the Bill would need to be *Charter*-compliant and therefore analysed the Bill and its impact on human rights by way of its compatibility with the *Charter*.

The submission noted that the human rights of non-discrimination, privacy and reputation, as well as children's rights, were engaged by the Bill. The submission proposed that where the operation of the Bill engaged and promoted these human rights, this is a positive outcome because past offenders would be given the opportunity to rehabilitate and reintegrate into society; as a result of which, society would then no longer be needlessly depriving itself of the talents and energies of people in whose positive development it has a distinct interest. Also, given the strong links between reduced recidivism, on the one hand, and rehabilitation and social re-integration through employment, stable accommodation and the like on the other hand, the public's interest in community safety is also addressed. In contrast, where rights were found to be limited, the Centre considered that there was scope for improving the operation of the Bill and made recommendations in this regard in the context of a human rights framework and analysis.

The Centre's submission is available at [www.hrlrc.org.au](http://www.hrlrc.org.au) under Policy Work>Domestic Submissions.

*Maryam Minai is on secondment to the Human Rights Law Resource Centre from Mallesons Stephen Jaques. Jessica Zikman is on secondment from Lander & Rogers*

## HRLRC Casework

### Centre Advises on Move-On Powers

Frankston City Council recently voted to amend local laws so as to grant 'move-on' powers to authorised officers. The amendments are intended to improve the amenity of Frankston City by addressing anti-social behaviour in public places.

The By-law was released for public comment and Youthlaw asked the Centre to advise whether, if passed, the By-law would be compliant with the Victorian *Charter*.

The Centre has provided advice in relation to the human rights engaged, and to the extent that any of these human rights are violated, the remedies available.

The Centre was of the opinion that the purpose of the by-law, being to improve the amenity of Frankston City, lacked sufficient merit to justify limitations on human rights.

Further, an analysis of the primary legislation pursuant to which the By-law is proposed to be passed, being the *Local Government Act 1989* (Vic), revealed that the LGA is capable of being interpreted in a way that is *compatible* with human rights. It follows that the LGA does not 'empower' the making of the By-law as a subordinate instrument which is *incompatible*; making the By-law likely to be ultra vires and therefore invalid on ordinary principles.

The Centre advised on the merits of each remedy, as well as the extent to which the remedies may be available as a result of an independent Charter breach. The potential remedies available included illegality under the LGA, injunction, mandamus and declaration of inconsistent interpretation.

*Maryam Minai is on secondment to the Human Rights Law Resource Centre from Mallesons Stephen Jaques*

## Seminars and Events

### 'The Human Rights Spoilers and What to do About Them' with Carroll Bogert, Associate Director of Human Rights Watch

**Date:** 5.45 for 6.00pm, Monday, 2 March 2009

**Venue:** Blake Dawson, Level 26, 181 William Street, Melbourne

**Cost:** \$25 / \$15 concession

**RSVP:** By 23 February 2009 using Booking Form at [www.hrlrc.org.au](http://www.hrlrc.org.au) under 'Seminars and Events'

Carroll Bogert is the Associate Director of Human Rights Watch. Human Rights Watch is one of the world's leading human rights research and advocacy organizations.

Human Rights Watch has recently released its *World Report 2009*, an annual review and summary of human rights issues around the globe. The *Report* calls on states like Australia and the USA to put human rights at the heart of foreign, domestic, and security policy.

Carroll is a human rights expert with particular expertise on Russia and China. She previously worked as a journalist, including as an Editor of Newsweek and as a correspondent and bureau chief in Moscow and South East Asia. She frequently publishes human rights op-ed pieces in papers including The New York Times, The Washington Post, the Financial Times and USA Today.

## Human Rights Resources

### What's New on the HRLRC Website?

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

- Rachel Ball, 'The Shame Game', ABC Online, 22 January 2009
- Lord Tom Bingham, former Senior Law Lord of the United Kingdom, 'Dignity, Fairness and Good Government: The Role of a Human Rights Act', Paper delivered at the Human Rights Law Resource Centre Seminar, Melbourne, 9 December 2008
- Philip Lynch (HRLRC), Nicolas Patrick (DLA Phillips Fox), Ed Santow (UNSW) and Mitchell Landrigan (Telstra), 'A National Charter of Human Rights: Why it Matters to Business', Board Room Radio, 19 December 2008
- Mike Steketee, 'Judges have their Place', *The Australian* (Sydney), 30 December 2008

## Human Rights Jobs

### Want to be Part of Human Rights Change in Australia?

### Want to Work with some of Australia's Leading Human Rights Organisations?

The Australian Human Rights Group is seeking a **volunteer Campaign Coordinator** to assist in the campaign for a federal Human Rights Act. The person can be based either in Melbourne or Sydney and is required 3 days per week. Preference is for availability prior to 20 February and commitment until early June (with further volunteer work required after this stage). Office space provided.

The coordinator will work with the AHRG's Steering and Executive Committees (comprising human rights experts and academics from different sectors) to design and implement the Group's campaign strategies, assist organisations to engage in the National Human Rights Consultation, build the network and membership and draft relevant resources.

The AHRG is a network of individuals and organisations from across Australia committed to campaigning for improved protection of human rights. More information is available from [www.humanrightsact.com.au/ahrg/](http://www.humanrightsact.com.au/ahrg/).

Contact **Ed Santow** at [e.santow@unsw.edu.au](mailto:e.santow@unsw.edu.au) or **02 9385 9656**.

## Foreign Correspondent

### UN Experts Address the Human Rights Implications of Climate Change

International human rights bodies such as the Special Procedures of the UN Human Rights Council are increasingly focused on the implications of climate change on human rights. The UN Special Rapporteur on Adequate Housing will visit the Maldives in early 2009 and report on the impact of rising sea levels.

A recent expert consultation considered that there are some serious gaps where climate change and international human rights law are concerned. It is uncertain whether there is any legal precedent for when sovereign nations disappear under the sea. Similarly, there is no clear legal basis for 'climate change' refugees in the *Refugee Convention*.

The experts concluded that existing international mechanisms – including the Special Procedures – were appropriate tools to monitor the impact of climate change. However, any legal, operational and capacity gaps in the international framework should be addressed.

The Special Rapporteur on Adequate Housing will focus on a number of issues during the upcoming visit to the Maldives. A human rights based approach to climate change could involve monitoring mitigation policies, the accountability of decision-makers, or the protection of the rights of the vulnerable.

In March, the Office for the High Commissioner of Human Rights (OHCHR) will present a general analytical study on climate change to the Human Rights Council.

The research will help determine how international mechanisms such as the Special Procedures should deal with the phenomenon of climate change, with the possible creation of a Special Rapporteur on Climate Change.

The evolving debate – with leadership by states who are directly affected – should propel human rights into the United Nations Framework Convention on Climate Change (UNFCCC), meeting in Copenhagen in October.

International climate change frameworks such as the UNFCCC have been reluctant to engage with human rights issues so far.

*Simon Levett is an Australian human rights lawyer who has worked with the Special Rapporteur for the Right to Adequate Housing at the Office for the High Commissioner for Human Rights. The Special Rapporteur for Adequate Housing visited Australia in 2007.*

## If I Were Attorney-General...

### Reforming Aboriginal Land Rights

If I were Attorney-General I would repeal of the *Native Title Act 1993* (NTA) and establish a new, non-adversarial, non-court-based system to recognise Aboriginal land rights.

The present system is not working. It takes too long and is too onerous to determine native title claims through the court process.

In the 14 years since the NTA was enacted, approximately 117 native title claims have been determined by court judgment, but of these only 22 were judgments after a contested hearing (the rest were by consent or unopposed). There remain approximately 497 claims to be determined. The Native Title Tribunal has estimated that, on current trends, it will take about 30 years to try the remaining claims. (See 'Native title claims: Overcoming obstacles to achieve real outcomes', paper for Native Title Development Conference, Brisbane, 27 October 2008, pp 6-7.)

The results have been less than satisfactory for all parties concerned. A fundamental difficulty is the high threshold that must be reached to establish native title. Under the NTA, claimants have to show that they have native title under traditional laws and customs which has its roots in a society that preceded the date on which the Crown asserted sovereignty, and that they have maintained a substantially continuous connection with the area under those traditional laws and customs.

The problem with setting such a high threshold is that many claims may well end in failure because the necessary proofs cannot be assembled. In this way, the purpose of the NTA – recognising and protecting native title – is not being achieved. Indeed, failure of a land claim, after a lengthy process of preparing for a court hearing and giving evidence in court, is likely to create great disappointment

because expectations have been raised. As Aboriginal Social Justice Commissioner Tom Calma was reported recently as saying, the native title system is a 'tough and often cruel system in need of urgent reform' (*The Age*, 2 January 2009).

There is also a fundamental unfairness in the way the NTA currently stands in light of the so-called 'Wik' amendments; that is, the amendments introduced by the *Native Title Amendment Act 1998*. The NTA, as introduced in 1993, represented an historic compromise by the Aboriginal community of the time. Following the High Court's *Mabo* decision, it appeared likely that many past acts of governments were invalid because they qualified or removed native title rights contrary to the provisions of the *Racial Discrimination Act 1975*. The Aboriginal community (through its political leaders) in effect accepted the validation of past invalid acts in exchange for a system that protected and recognised native title claims. However, the raft of amendments to the NTA introduced in 1998 made establishing native title that much more difficult and unfairly departed from the political compromise that had been reached in 1993.

Finally, the current system is very expensive to administer. In a 2005 report, it was stated that the Commonwealth, State and Territory governments had invested over \$1 billion in the native title claims system and that the Commonwealth continued to invest over \$100 million a year on the system. (See Richard Potok, 'A report into the professional development needs of Native Title Representative Body lawyers', 7 April 2005, p 1.)

Reforms to the current system have recently been announced. In October 2008, the Commonwealth Attorney-General announced that the Federal Court would assume control of native title claims from start to end. In July 2008, Native Title Ministers meeting in Perth endorsed an alternative pathway to settle native title claims which had been initiated by Victoria.

However, rather than merely looking at ways to improve the functionality of the current system, it is worth standing back and asking whether the whole model needs to be changed. With the best will in the world, negotiations to settle native title claims will inevitably take place against the backdrop of the legal rules contained in the NTA and in cases interpreting that statute. And whether mediations take place under the auspices of the Tribunal or the Federal Court, there is of course no power to direct a settlement.

The problem, or challenge, posed by Aboriginal land claims is arguably more about the relationship between present-day Indigenous and non-Indigenous Australians, and the way in which the current Australian community deals with past dispossession and other injustices, than about property law and proving continuous traditional ownership. In other words, Aboriginal land claims raise political issues that may best be dealt with by a political rather than legal process.

An alternative approach, for example, would be to establish a board of eminent persons who would assess Aboriginal land claims (the name 'native' title seems inappropriate) on behalf of Commonwealth and State Governments and recognise such rights as it considers appropriate according to specified criteria. The criteria would be set to promote a generous and practical resolution of claims, without requiring proof of continuous connection with the area under traditional laws and customs. The board would have the power to direct that compensation be paid in appropriate cases where recognition of land rights was not possible. Compensation would also be able to be awarded to non-Indigenous landowners affected by land claims. The money saved on fighting legal battles would probably cover much of the compensation that needed to be paid. And in any event, the money would be going to the people affected rather than lawyers.

The success of the process at the political level would depend on the reputation and impartiality of those comprising the board, the guidelines upon which the board would act, and the outcomes achieved by this process.

Building on the Prime Minister's historic apology to the stolen generations, the government should see the resolution of Aboriginal land claims as an opportunity to make amends for past injustices. We should devise a system that resolves land claims with a generosity of spirit in keeping with the *Mabo* decision and the apology. The way in which we deal with Aboriginal land claims now will set the tone for relations between Indigenous and non-Indigenous Australians well into the future.

*Mark Moshinsky SC is a barrister at the Victorian Bar specialising in constitutional and administrative law. He was Secretary of Liberty Victoria from 1998 to 2004.*