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The HRLRC aims to:

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

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Opinion

Australia Should Set the Global Agenda on Business and Human Rights

Google's recent announcement that it will not tolerate censorship of its search engine in China raises significant issues as to the relationship of business and human rights; a relationship in which regulation has not kept pace with practice or public expectations.

In his landmark 2008 report the UN Special Representative on Business and Human Rights, Harvard professor John Ruggie, noted that the globalisation of business *activity* has not been matched by a globalisation of business *regulation*. He acknowledged that while corporations have the capacity to harm the human rights of individuals and communities, they can also contribute to poverty alleviation, economic growth and human development. The regulatory challenge is to ensure less of the former and more of the latter.

The advancement of the business and human rights agenda presents both an international opportunity and a responsibility for Australia (and the rest of the world). On the opportunity side, Australia's adoption of the Special Representative's framework for regulation could become a centrepiece of our UN Security Council candidacy. We could also pursue the agenda through bodies such as the G20. Australian human rights leadership on this issue would build international credibility and diplomatic capital.

On the responsibility side, many Australian companies, particularly mining companies, can have a severe impact on the human rights of communities throughout the world, including the rights to food, water, health and a clean environment. Despite this, successive governments have not developed a clear framework of human rights obligations for Australian corporations operating transnationally. This is particularly problematic when Australian corporations operate in jurisdictions with lax or limited regulation or where local governments lack the capacity or will to monitor corporate conduct or enforce standards.

Our work in this area must be globally focused. As a major cross-party report tabled in the UK parliament in December 2009 stated, 'the impact of business on human rights is a global issue that ultimately requires a global solution'. The committee recommended that 'the UK play a leadership role in the global debate' on business and human rights. The same rings true for Australia. The committee called on the UK government to support the UN Special Representative, to 'encourage businesses and civil society to engage with his work' and to work on a 'regional level and globally to agree a consistent approach to business and

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human rights', including through the development of an international agreement.

Consistent with these recommendations, Australia should explicitly adopt the Special Representative's framework as a basis for our corporate human rights policy. We should actively engage with the work of the Special Representative, including by inviting him to undertake a mission to Australia to meet with government, business, NGOs and other key stakeholders. We should also actively support the mandate of the Special Representative, including through financial and diplomatic assistance.

In addition to pursuing a progressive agenda at the international level, we must also attend to unfinished business, such as by ratifying the UN Convention on the Rights of Migrant Workers. Australian bilateral trade and investment agreements should also be subject to human rights impact assessments and contain clauses to promote and protect human rights.

Australia must also do more on business and human rights at home. The range of policy measures should include both hard and soft power options, in line with the UK committee view that governments should not give 'undue priority to voluntary initiatives'.

First, government should use public procurement to reinforce the responsibility of business to respect human rights. Among other approaches, the Federal Government should consider whether tenderers participate in initiatives such as the UN Global Compact and the Global Reporting Initiative and also consider any relevant findings by the OECD National Contact Point. As the UK committee said, 'government has immense power as a purchaser and should take responsibility for human rights impacts in its supply chain'.

Second, governments and public authorities should conduct or require human rights impact assessments, particularly on large-scale projects. The UK committee recommended that this responsibility also apply to the private sector, including by amending the *Companies Act* to require that companies undertake an annual human rights impact assessment.

Third, the government should move to amend the *Corporations Act* to require (or at least explicitly permit) directors to consider human rights issues as an aspect of their duty to act in the best interests of the company. In the UK, the *Companies Act* was amended in 2006 to require that, in acting in the best interests of the company, a director must have regard to, among other things, 'the impact of the company's operations on the community and the environment' and 'the desirability of the company maintaining a reputation for high standards of business conduct'.

Fourth, governments and public authorities should promote ethical investment, including through their own investment approach and by supporting socially responsible market indices and certification programs.

Fifth, Australia should develop national guidelines for business on how to act compatibly with human rights. The UK committee found that business lacks clear guidance on human rights issues and recommended that government work closely with key stakeholders, including national human rights institutions, to develop such guidelines.

Sixth, Australia should improve access to complaints mechanisms for victims of corporate human rights violations. This includes promoting the development of company level grievance procedures and strengthening existing external mechanisms, such as the National Contact Point under the OECD Guidelines for Multinational Enterprises.

The Rudd Government has made much of its commitment to international human rights, multilateral engagement, strong economic institutions and continued business and human development. This is to be congratulated. The robust advancement of the business and human rights agenda at the international level and through innovative domestic measures presents a unique opportunity to blend these strengths and commitments for good.

Phil Lynch is Director and Emily Howie is a Senior Lawyer of the Human Rights Law Resource Centre

News

Australia Moves to Comprehensively Prohibit Torture and the Death Penalty

Consistent with recommendations by the UN Human Rights Committee and the UN Committee against Torture, Australia has recently moved to comprehensively prohibit torture and the death penalty.

The Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) 2009, which is currently before Parliament, seeks to amend the *Criminal Code Act 1995* to replace the existing offence of torture in the *Crimes (Torture) Act 1988* with a new offence of torture in the Criminal Code to fulfil Australia's obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It also amends the *Death Penalty Abolition Act 1973* to provide that the death penalty cannot be reintroduced anywhere in Australia.

In a statement on the death penalty on 20 February 2010, Attorney-General Rob McClelland stated:

Successive Australian Governments have maintained a long-standing policy of opposition to the death penalty.

The death penalty has been formally abolished by all jurisdictions in Australia.

It was abolished for Commonwealth and Territory offences in 1973 by the Commonwealth *Death Penalty Abolition Act*.

Each State has also independently and separately abolished the death penalty and there are no proposals by any State Government to reinstate it.

The Australian Government has also introduced legislation – which has been supported by the Opposition – to amend the *Death Penalty Abolition Act* to extend the application of the current Commonwealth prohibition on the death penalty to State laws.

The passage of this comprehensive federal legislation, which is currently being debated in the Parliament, will ensure that the death penalty cannot be reintroduced anywhere in Australia in the future.

Internationally, Australia is also a party to both the International Covenant on Civil and Political Rights and the Second Optional Protocol which requires all necessary measures be taken to ensure that no one is subject to the death penalty.

UN Special Rapporteur Releases Report on Northern Territory Emergency Response: Calls for Urgent Amendment to Comply with Human Rights

The United Nations Special Rapporteur on the human rights of Indigenous peoples, James Anaya, has released an advance copy of his Observations on the Northern Territory Emergency Response. The report follows Mr Anaya's official visit to Australia in August last year.

While the Special Rapporteur acknowledges Australia's efforts to address the conditions faced by many Aboriginal communities in the Northern Territory, he expresses serious concerns about several problematic aspects of the Northern Territory Emergency Response that breach Australia's international legal obligations.

The Special Rapporteur's report states that the Northern Territory Emergency Response measures:

1. are incompatible with Australia's human rights obligations, including the rights to non-discrimination and self-determination;
2. cannot be viewed as proportional or necessary to achieve the stated objectives of the Emergency Response;
3. limit the capacity of Aboriginal people to control or participate in decisions affecting them;
4. have had the effect of generating or heightening racist attitudes among the public and the media against Aboriginal people;
5. are not improving the lives of Aboriginal people in the Northern Territory; and
6. have implications for the direction of the relationship between Australian Governments and Aboriginal people.

The Special Rapporteur has chosen to devote special and urgent attention to the matter of the Northern Territory Emergency Response in advance of proposed legislation being considered by the Senate that seeks to partially reinstate the operation of the *Racial Discrimination Act 1975*, but expand the income management provisions to apply across the entire country.

The Special Rapporteur's full report on his country visit will be released in the coming weeks.

For further information, including a copy of the report, see

<http://www.hrlrc.org.au/content/topics/equality/indigenous-rights-special-rapporteur-releases-report-on-northern-territory-emergency-response-feb-2010/>.

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Major Reports on Social Justice and Native Title Reveal More Promising Future

Recently retired Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma released his sixth and final Social Justice and Native Title Reports on 22 January, 2010.

The reports recognise a marked shift in the Indigenous policy landscape since the National Apology to the Stolen Generations and suggests a more inclusive and promising future for Aboriginal and Torres Strait Islander peoples.

The Social Justice Report 2009 focusses on three themes: justice reinvestment to reduce Indigenous over-representation in the criminal justice system; the protection of Indigenous languages; and sustaining Aboriginal homeland communities.

The first theme outlines a convincing argument for an alternative to incarceration offered by the 'justice reinvestment' model, which diverts a portion of the funds planned for prison expenditure to local communities where there is a high concentration of offenders.

The second theme provides vital reading for anyone interested in the perilous state of Indigenous languages in Australia and argues that, without intervention, Indigenous language knowledge will cease to exist in Australia in the next 10 to 30 years.

The final theme of the Social Justice Report 2009 highlights the importance of 'Homelands' in providing social, spiritual, cultural, health and economic benefits to residents. It outlines how policies that fail to support the ongoing development of Homelands will lead to social and economic problems in rural townships that could further entrench Indigenous disadvantage and poverty.

The Native Title Report 2009 comprehensively reviews developments in native title law and policy from 1 July 2008 to 30 June 2009 and considers principles and standards that should underpin cultural change in the native title system.

The Report argues for significant improvements to be made to the native title system if we are to close the disadvantage gap between Indigenous and non-Indigenous Australians and to achieve reconciliation.

In his final Report, Commissioner Calma outlines principles and standards that should be used to guide a new approach to native title and explains how the native title system ought to be viewed in the context of broader reforms to promote and protect the rights of Aboriginal and Torres Strait Islander peoples.

The Report makes 27 recommendations for reform of the native title system concerning several key areas, including shifting the burden of proof, more flexible approaches to connection evidence, and promoting broader and more flexible native title settlement packages. The Report also comprehensively reviews land tenure reform.

The reports can be accessed online at

www.humanrights.gov.au/social_justice/sj_report/sjreport09/index.html

www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html

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Australia to Host Major UN Conference on Global Health

On 17 February 2010, the Foreign Minister, Stephen Smith MP, announced that Australia will host a major annual United Nations Conference on global health issues.

The 63rd UN Department of Public Information/Non-Governmental Organisation Conference will be held in Melbourne from 30 August to 1 September 2010. This is only the third time in the history of the conference that it has been held outside of UN headquarters in New York.

The conference will bring together UN agencies, NGOs, governments and academics from across the world to discuss global health as it relates to the Millennium Development Goals (MDGs).

A major aim of this year's Conference is to attract participation of NGOs in the Asia-Pacific region.

Australia Nominates Indigenous Academic and Activist to UN Permanent Forum on Indigenous Issues

The Australian Government has nominated Megan Davis, Director of the Indigenous Law Centre and a Senior Lecturer in Law at UNSW, to the UN Permanent Forum on Indigenous Issues. The Permanent Forum is an advisory body to the UN Economic and Social Council with a mandate to discuss and advise on Indigenous issues related to economic and social development, culture, the environment, education, health and human rights.

Elections for the Forum will be held in April 2010.

Australia Appoints New Ambassador to the UN in Geneva

Australia has appointed Peter Woolcott as Ambassador and Permanent Representative to the UN in Geneva and to the Conference on Disarmament. Mr Woolcott will also be Australia's Ambassador for Disarmament. He replaces Caroline Millar who was Ambassador from 2006.

According to the Foreign Minister, Stephen Smith MP, Mr Woolcott's priorities will include contributing to the work of the UN Human Rights Council, and engaging with a range of UN and other specialised agencies and forums on disarmament, human rights, humanitarian, refugee, health and labour issues.

National Charter of Rights Developments

A Human Rights Act to Unite Us

With the Rudd Government's response to the recommendations of the National Human Rights Consultation reportedly imminent, the rhetoric of the anti-human rights brigade has reached fever pitch. With their myths of a Human Rights Act creating floods of litigation, usurping parliamentary sovereignty and empowering a radical judiciary busted by an absolute absence of evidence, the naysayers have once more shifted attack. Now, they claim, a Human Rights Act would be electorally unpopular and divisive. It is, they say, not an issue that concerns most Australians, who 'are happy with their lot' (Henderson, *SMH*, 26 January 2010), but is the concern only of 'lobbyists, activists and special interest groups' (Parham, *The Australian*, 4 February 2010). So confident have they become that Gerard Henderson triumphantly trumpeted that the Rudd Government seems to have 'junked the human rights agenda'.

Fortunately for those concerned with the promotion of fundamental rights and freedoms, however, these assertions ignore at least five inconvenient truths.

First, the recognition and protection of human rights is an issue that matters deeply to Australians. The Consultation Committee's report was released following one of the most extensive exercises in participatory democracy in Australian history. The independent committee received a record 35,000 submissions and hosted 66 roundtables throughout metropolitan, regional and rural Australia. The committee found that, 'after 10 months of listening to the people of Australia, [there is] no doubt that the protection and promotion of human rights is a matter of national importance.'

Second, while, as Henderson wrote, most Australians may be 'happy with their lot', most Australians are also informed and empathetic enough to recognise that their lot is not everyone's lot. Reflecting this, the report found that the patchwork of human rights protection is 'fragmented and incomplete and its inadequacies are felt most keenly by the marginalised and vulnerable'. There was a strong view that 'we could do better in guaranteeing fairness for all within Australia and in protecting the dignity of people who miss out'. This was corroborated by independent research commissioned for the report which demonstrated very strong support, up to 75 per cent, for further measures to protect the human rights of people with mental illness, the elderly, Aboriginal Australians and people with disability.

Third, support for a Human Rights Act runs much deeper than 'lobbyists, activists and special interest groups'. The committee's report demonstrated widespread public support for legislative and institutional action to promote human rights. There was very strong support for a Human Rights Act. 87 per cent of submissions to the Committee which considered the issue supported a Human Rights Act, while independent research demonstrated 57 per cent support and only 14 per cent opposition.

Fourth, far from being 'junked', there is widespread public and political consensus on the implementation of many of the recommendations made by the National Human Rights Consultation Committee, including enhanced human rights education and strengthened parliamentary scrutiny of fundamental rights and freedoms.

Fifth, while there is less consensus regarding a Human Rights Act, the opposition to such an Act is often overstated, particularly that of religious groups. Many religious groups, leaders and churches support a Human Rights Act, including the Anglican General Synod and the Uniting Church. So do many past and present leaders from all sides of politics and all corners of the nation, among them Malcolm Fraser, Gareth Evans, Fred Chaney, Steve Bracks, Michael Lavarch, Rob Hulls and Natasha Stott Despoja.

The naysayers have taken particular heart from the Attorney-General's recent observation that 'the enhancement of human rights should be done in a way that as far as possible unites a community rather than causes further division'. This should not be read as 'dooming' a Human Rights Act. The Rudd Government is a government that recognises the unifying power of bold leadership and the deep resonance of Australian values such as dignity, respect and fairness. It is apposite to recall that polling immediately prior to the historic Apology to the Stolen Generations indicated that it remained a contentious and potentially divisive issue, with 55 per cent of Australians supporting the Government's decision to say sorry and 36 per cent opposed. Just a week after the Prime Minister said sorry, support for the Apology had risen to 68 percent, while opposition had fallen dramatically to 22 per cent. Later polls showed an even more drastic shift, with a *Sydney Morning Herald* poll putting support at 78 per cent and opposition at just 16 per cent.

Two years on, the Government's response to the recommendations of the National Human Rights Consultation, in particular the enactment of an Australian Human Rights Act, present the Prime Minister with another opportunity to exercise responsible leadership and unite us around fundamentally Australian values.

The federal Attorney-General is correct in expressing a preference for the enhancement of human rights in a way that unites rather than divides us. As demonstrated by the Apology, however, political leadership and vision can unite people, even on controversial issues. That is particularly the case when what is being proposed is good, evidence-based policy that resonates deeply with our Australian commitment to respect, tolerance, fairness, freedom and the rule of law.

Far from being divisive, political leadership on an already popular Human Rights Act would unite us through legal protection and institutional strengthening of those Australian democratic values we hold in common.

Phillip Lynch is Director of the Human Rights Law Resource Centre

The Conservative Case for a Human Rights Act: Lessons from the UK

Twelve years ago the UK Parliament enshrined in law for the first time a number of fundamental and important human rights. The *Human Rights Act 1998* (HRA) has rightly been seen as a shining example of how human rights can be protected while maintaining parliamentary sovereignty. Indeed, Australia's own two human rights Acts – the Victorian Charter and the ACT HRA – were heavily modelled on the HRA. If, as is hoped, the Federal Government finally agree to bring Australia in line with all other comparable democracies and enact a human rights Act, it will likely be the HRA to which they turn to as a model.

However, despite receiving acclaim from abroad, the HRA has not been given much love at home, even from the political party that introduced it. Despite survey's showing that the vast majority of British people support the individual rights contained in the HRA, it constantly receives extremely bad press.

Around 90 per cent of Britons say they don't remember ever receiving any information from the Government explaining what the HRA did when it was introduced. As a result, most people's knowledge of the HRA is based on myth and misunderstanding. Liberty (the National Council for Civil Liberties) is currently running a campaign aimed at dispelling some of these myths and seeking to protect the HRA.

The Conservative Party has pledged to repeal the HRA if it is elected at the General Election which will be held in May or June this year. The Tories have said that they intend to replace the HRA with a British Bill of Rights. They have given little detail about the content of any Bill of Rights but have indicated they

intend to rewrite certain rights, which could quite conceivably lead to a reduction in rights, particularly for minority groups and non-nationals.

Liberty is leading the campaign to prevent this and, as part of our Common Values campaign, recently published a booklet written by two leading conservatives. *Churchill's Legacy: The Conservative Case for the Human Rights Act*, written by Jesse Norman (a Conservative parliamentary candidate) and Peter Osborne (a well-known political columnist for the *Daily Mail*), seeks, as its title suggests, to make out the conservative case for the HRA. It dispels some of the many myths surrounding the HRA and addresses its many critics. Importantly, it demonstrates that the HRA was inspired by Conservative lawyers, despite being introduced by the Labour Government. The HRA incorporates the European Convention on Human Rights. As such, a number of Euro-sceptic Conservatives are opposed to the HRA believing, wrongly, that it is some sort of European invention foisted on the British people. Norman and Osborne note that the Convention is not an instrument of the EU and indeed was mainly drafted by British lawyers. Winston Churchill specifically advocated for a Charter of Human Rights 'guarded by freedom and sustained by law'. Further, the rights within the Convention were largely drawn from British common law traditions and go right back to the Magna Carta and the 1688 Bill of Rights.

Norman and Osborne also address some of the constant criticisms of the HRA: that certain people should forgo their human rights; that the HRA hampers the fight against terrorism; that it undermines Parliament and fuels rights inflation; and that it is ineffective. All of these criticisms are addressed and expertly dismissed, as are other unsubstantiated attacks on the HRA. One important chapter sets out some of the most common myths surrounding the HRA which have been used by politicians and commentators of all stripes to criticise the HRA. One of the most prevalent myths, consistently cited by Tory leader David Cameron, is that the HRA led to prisoners being given the right to access hard core pornography. Norman and Osborne pick apart this myth and show that, on the contrary, a prisoner's claim under the HRA was struck out at the first instance and no such access was ever given.

At a time when the HRA is under serious attack, *Churchill's Legacy* is a timely and passionate defence of fundamental rights from the conservative perspective. We hope that all politicians of every party come to recognise the importance of the HRA and any attempts to repeal such an important piece of legislation are roundly rejected. This is not only of the upmost importance for the UK but is also vitally important in Australia's debate surrounding a Human Rights Act. The lessons from Britain are clear: public understanding of human rights is essential in gaining and maintaining support. Fundamental human rights are too important to be left to the tabloid media and used as a political football – they must be owned and understood by us all.

Churchill's Legacy is available www.liberty-human-rights.org.uk/publications/pdfs/churchills-legacy.pdf.

Anita Coles is a Policy Officer at Liberty, one of the UK's leading civil liberties and human rights organisations. Liberty's Common Values campaign seeks to dispel the myths around the HRA, broaden understanding and promote the importance of human rights in the UK (www.commonvalues.org.uk).

Victorian Charter of Rights Developments

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 Statements.

Liquor Control Reform Amendment (ANZAC Day) Bill 2010

The Liquor Control Reform Amendment (ANZAC Day) Bill 2010 aims to ensure that Anzac Day is commemorated appropriately and respectfully by reducing the availability of liquor on Anzac Day, whilst balancing this objective with Victoria's commercial interests.

To achieve this, the Bill proposes a number of reforms to the *Liquor Control Reform Act 1998* (Vic). The most notable of these reforms forces licensed venues including cafes, bars, pubs, and nightclubs, to cease supplying alcohol and shut at 3:00am on Anzac Day. These venues will not be able to resume supplying alcohol until noon.

The Hon Tony Robinson MLA, Minister for Consumer Affairs acknowledged in the Bill's Statement of Compatibility, that the Bill engages two rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic). These are the *Charter* rights to protect the deprivation of property (s 20), and the right to a fair hearing (s 24).

Property Rights (s 20)

The Charter protects deprivation of property rights unless in accordance with the law. The prohibition on serving alcohol after 3:00am will alter the conditions and rights of existing licence holders, a licence potentially being a property right.

However, the alteration of a licence will not amount to a deprivation of property where the licence-holder did not have a reasonable expectation of the lasting nature of the licence. First, the Statement asserts that s 58 of the Principal Act means that there exists no reasonable expectation of the lasting nature of the licence, and consequently there can be no deprivation of property. Second, the Statement asserts that even if there has been a deprivation of property, this deprivation would be 'in accordance with the law' for the purposes of s 20 of the *Charter*.

Right to a fair hearing (s 24)

The *Charter* protects the right for a party to have a proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

The Bill results in some minor changes to the scope of licensing decisions made by the director of liquor. The Statement contends that even taking into account these changes, there exists an opportunity for individuals adversely affected by a decision to seek review by VCAT, and that there is an additional process by which contested applications can have a public hearing before the liquor licensing panel under s 45, 46, and 163 of the Principal Act. Therefore the requirements under s 24 are said to be met.

Andrew Roe, Mallesons Stephen Jaques Human Rights Law Group

Statutory Interpretation under the Victorian Charter and the ACT Human Rights Act

The Centre has recently published a new paper by Priyanga Hetteriachi, Acting Assistant Secretary in the Department of Prime Minister and Cabinet entitled 'New meanings, reading in and *Ghaidan* in Australia: perspectives on the operation of rights compatible rules of interpretation in Australian human rights legislation'. The paper sets out a range of observations about the rights compatible rule of statutory interpretation such as set out in s 32 of the Victorian *Charter*. Similar rules are set out in legislation in the United Kingdom, New Zealand and the ACT.

The paper, together with other materials and resources on the Charter, is available at <http://www.hrlrc.org.au/content/topics/victorian-charter-of-human-rights/articles-materials-and-commentary-on-victorian-charter/>.

Comparative Law Case Notes

Canadian Court Declares that Prison Conditions Violate Fundamental Human Rights

Trang v Alberta (Edmonton Remand Centre), 2010 ABQB 6 (11 January 2010)

The Court of Queen's Bench of Alberta has declared that conditions under which untried prisoners were held in Edmonton Remand Centre ('ERC') pending trial for conspiracy to traffic illicit drugs resulted in a breach of their right not be deprived of liberty except in accordance with the principles of fundamental justice (s 7), the right not to be subjected to cruel and unusual treatment or punishment (s 12) and the right to equality before and under the law without discrimination (s 15).

Facts

In 2001 a group of inmates brought an application against their imprisonment. Initially the application sought a stay of prosecution, but was later amended to seek *habeas corpus* and declaratory relief on the grounds that the conditions of their incarceration violated the *Canadian Charter of Rights and Freedoms*.

By the time of the decision, the applicants were former inmates as the cases against them had been stayed by the Court or the Crown, or the applicants had pleaded guilty and completed their sentences. Nonetheless, the Applicants sought declarations pursuant to s 24 of the Charter. As a preliminary point, Marceau J found that the application was not moot as there was still a live issue as to whether the ERC had breached the Applicants' Charter rights when they were inmates. That decision was upheld by the Court of Appeal of Alberta.

The Edmonton Remand Centre was originally built as a 300 bed facility. By 1999, the ERC has been converted to a 734 bed facility, largely by changing single occupancy cells to double bunks. The ERC holds a variety of inmates either awaiting trial or sentencing, some for months at a time. Evidence was that gang activity was a problem and resulted in a complex arrangement whereby inmates had shortened rotations of time outside of their cells to avoid violent incidents between incompatible inmates.

The Applicants were accused of organized gang drug trafficking, and spent a varying amount of time in custody commencing in 1999. The Applicants leveled a long list of complaints that they said amounted to breaches of the Charter. In the Court's opinion, some of these complaints were not sufficiently seriousness to amount to a Charter breach, or there was insufficient evidence. Complaints of this nature included poor quality and small quantities of food, poor air quality and inadequate medical care.

However, the Court decided other complaints warranted detailed scrutiny for a breach of the Charter, in particular s 12 (cruel and unusual treatment or punishment), s 7 (right not to be deprived of liberty unless under law) and s 15 (equality under law without discrimination). Complaints in this category included:

- lock down in cells for up to 20-23 hours a day due to the ERC's rotation schedule;
- inmate access to open visits (where inmates and visitors can have physical contact);
- provision of stained and soiled communal underwear that is washed by inmate cleaners;
- policy of strip searches and cell searches and its application;
- allegations of racist taunts, jokes and actions by prison guards; and
- the ERC's method of changing an inmate's security classification without notifying the inmate of the reason for the change, which can result in heightened restrictions on time out of cells.

Decision

Preliminary issues: applicability of international standards and treatment of pre-trial prisoners

The Court held that the UN Standard Minimum Rules for the Treatment of Prisoners (SMRs) were only guidelines and did not constitute rules that prison officials were bound to apply.

The Applicants argued that pre-trial prisoners should be treated less severely than convicted prisoners. The Court held that a different standard should not apply because remand inmates are often already known criminals and it is therefore appropriate to err on the side of security and caution. Further, while these inmates may not be convicted, they have nonetheless failed to secure judicial interim release (bail), either because they are considered a continuing risk if left at large, or have violated the conditions of another bail by committing another offence.

Application of section 7 right to liberty

The Court determined that s 7 (right to liberty) and s 12 (freedom from cruel treatment) need to be read and applied in a complementary manner, and therefore where a complaint engages both – by being an arbitrary rule or condition that is grossly disproportionate – only s 12 needs to be examined because it is the specific right. The Court found that s 7 applies only to the ERC's decisions concerning classifications, placements, and the disciplinary process.

Right to liberty

The Court held that the right to liberty was engaged as some of the applicants 'were transferred from a unit with significantly more free time to one with a very restrictive lock up rotation.' The ERC's failure to establish a classification and selection committee was a breach of s 11 of the *Corrections Act*, but this of itself did not constitute a Charter breach. Rather, 'the Applicants were entitled to notice that their classification was to be changed, to know the basis for the proposed change, and to be able to respond

to the allegations against them. Failure to do so breached the principles of natural justice, a component of the principles of fundamental justice...and would amount to a breach of s 7.'

Cruel and unusual treatment or punishment

Double bunking, cell sizes, lock-up rotations and exercise

The Court reiterated the Canadian Supreme Court's criterion that punishment is cruel and unusual when it is 'so excessive that it outrages standards of decency', therefore punishment, including of prisoners, must not be grossly disproportionate to the offending conduct.

The Court held that the conditions under which the Applicants were confined to their cells for up to 20-23 hours each day was 'intolerable and degrading to human dignity and worth.' These conditions included that the cells were double-bunked and insufficient in size to accommodate two people for extended lock up, the strict rotation schedule which only allowed inmates to leave their cells for very short periods of time, limited access to exercise and recreation inside and outside the cell, lack of privacy inside the cells, and the prolonged period of time – months in some cases - that the applicants had to endure these conditions.

Stained underwear

Of the ERC's practice of using inmate cleaners to wash laundry, the Court stated that it was still the responsibility of the ERC to ensure that clean underwear was provided to inmates. In finding a breach of s 12, the Court held that the provision of stained underwear was 'grossly disproportionate in that it does not accord with public standards of decency and propriety, and shocks the general conscience. It is degrading to human dignity and worth.'

Strip searches

The Court held that the ERC's policy of strip searching was authorised under the common law and under a SOP specifically implemented to deal with the trial of the Applicants, which required them to be strip searched prior to transfer to court. The Court determined that the law authorising such searches was reasonable and the Applicants' argument that the searches were not supported by 'individualized reasonable suspicion' (a new constitutional standard) was not an applicable standard in a corrections setting. Further, the actual searches conducted were reasonable.

Equal before and under the law without discrimination

The Court noted that the Applicants needed to prove that the guards responsible for the instances of racist slurs could be characterised as government actors in order to breach the Charter. The Court held that 'here the nature of the COs [corrections officers] employment, that is their exercise of discretionary power over inmates, renders them government actors for the purposes of the Charter.' The Charter was engaged by the guards' actions because, while not amounting to 'the law' they had the authority of the law (that is, 'the statutory and regulatory framework surrounding correctional institutions that grants them authority over inmates.'). The Court held that the guards' actions met the test for discrimination because it created a 'distinction based on race', and 'a disadvantage by perpetuating prejudice or stereotyping.' In examining discrimination in a normal workplace, the Court determined that a lower threshold for discrimination applied in a coercive corrections environment because 'a prisoner has no choice regarding their environment.'

Relevance to the Victorian Charter

This decision has relevance to the Victoria Charter on a number of levels. It is worth noting that the Alberta Court proceeded with making declarations because determining whether a Charter breach had taken place in the past was in itself enough of a practical outcome. The ERC had argued against such a course because the Applicants were no longer imprisoned, and were really running a public interest inquiry.

Substantively, the decision is likely to present interesting comparisons: s 21 of the Victorian Charter protects a person's liberty and states that a person must not be subjected to arbitrary arrest or detention. Section 10 protects a person from torture and cruel, inhuman or degrading treatment, while s 22 is a specific right requiring humane treatment of persons deprived of liberty. Section 22(2) requires unconvicted prisoners to be segregated from convicted prisoners 'except where reasonably necessary.'

Section 8 provides the right to equal recognition before the law, and the right to enjoy human rights without discrimination.

Unsurprisingly, this decision mirrors critical issues affecting Victoria's system of incarceration. The judgment considers overcrowding, strict administrative measures put in place to manage potential risks of violence, prison-based disciplinary systems that are not subject to external review, and an underlying culture of intolerance that is tolerated on the 'inside'.

The Australian Bureau of Statistics found that as at 30 June 2009, Australia had 6,393 remand prisoners, representing 22 percent of Australia's prison population. On average, they spent 2.7 months in custody. That figure increased to 8.4 months for persons charged with homicide offences, and 4.4 months for persons accused of illicit drug offences. The majority of Victoria's remand prisoners are held in Melbourne Remand Centre, which is a 600 bed facility.

The decision is available at <http://www.albertacourts.ab.ca/jdb/2003-/qb/civil/2010/2010abqb0006.pdf>.

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Human Rights and Foreign Policy: Supreme Court Considers Canada's Obligation to Protect the Human Rights of Citizens Abroad

Canada (Prime Minister) v Khadr, 2010 SCC 3 (29 January 2010)

The Canadian Supreme Court has confirmed that Canadian officials breached Omar Khadr's right to liberty and security of the person under s 7 of the *Charter of Rights and Freedoms*. However, the Supreme Court held that it does not have the power to order that the Canadian Government seek Mr Khadr's repatriation from Guantanamo Bay, because such a request falls within the Canadian Government's prerogative power in foreign affairs.

Facts

Mr Khadr has been detained in adult detention facilities at Guantanamo Bay since 2002, when he was 15 years old. He was captured by US forces in Afghanistan after allegedly throwing a grenade which killed a US soldier. Mr Khadr has been charged with war crimes, but his trial before a military commission is still pending.

Mr Khadr has been given no special status as a minor. For the first two and a half years of his incarceration Mr Khadr had virtually no communication with anyone outside of Guantanamo Bay and did not have access to legal counsel or any adult who had his best interests in mind.

In February and September 2003, Canadian officials interviewed Mr Khadr and shared the content of these interviews with US authorities.

As a means of making Mr Khadr more willing to provide intelligence, Mr Khadr was subjected to the so-called 'frequent flyer program'. This involved depriving Mr Khadr of rest and sleep by moving him to a new location every three hours over a period of weeks. In March 2004, Canadian officials again interviewed Mr Khadr, knowing that he had been subjected to the 'frequent flyer program'.

Mr Khadr made repeated requests that the Canadian Government ask the US to return him to Canada. Mr Khadr alleged that the Canadian Government's refusal to seek his repatriation infringed his rights under s7 of the *Charter*, which states:

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

The Federal Court found in Mr Khadr's favour and ordered that Canada must request his repatriation as soon as practicable. The Federal Court of Appeal upheld the order, but defined the breach more narrowly. According to the Federal Court of Appeal, the Canadian Government infringed Mr Khadr's right to liberty and security of the person when its officials interrogated him in March 2004, despite knowing that he had been subjected to cruel and abusive treatment under the 'frequent flyer program'.

The Canadian Prime Minister asked the Supreme Court to reverse the order.

Decision

The Supreme Court held that the Canadian Government breached s7 of the *Charter* for the following reasons.

1. The *Charter* applied to the conduct of the Canadian state officials that interrogated Mr Khadr. International customary law and the principle of comity of nations generally prevent the *Charter* from applying to extra-territorial conduct of Canadian officials. However, there is an exception when this conduct is incompatible with Canada's international obligations or fundamental human rights norms. This exception applied in this instance because the Canadian officials assisted the US authorities at Guantanamo Bay despite US Supreme Court rulings that the US military commission regime violated fundamental human rights.
2. The conduct of the Canadian Government deprived Mr Khadr of the right to liberty and security of the person. This is because the Canadian Government's active participation in the illegal regime (including by interviewing Mr Khadr and providing this information to US authorities) is contributing to Mr Khadr's continued detention.
3. This deprivation of Mr Khadr's right to liberty and security of the person does not accord with the principles of fundamental justice. The Supreme Court held that the Canadian Government's interrogation of Mr Khadr about serious criminal charges in circumstances where he did not have access to counsel and had been subjected to sleep deprivation, and when the Canadian officials knew that the results of the interrogations would be shared with US authorities, 'offends the most basic Canadian standards about the treatment of detained youth suspects'.

However, the Supreme Court held that it was not appropriate to instruct the Canadian Government to repatriate Mr Khadr because this involves making representations to a foreign government, which is a Crown prerogative. The Court defines prerogative power as 'the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown... It is a limited source of non-statutory administrative power'. The Supreme Court held that the executive is entitled to determine whether and how to exercise its prerogative powers, although courts can determine if the asserted power exists and whether its exercise infringes the *Charter* or other constitutional norms.

As a result, the Court held that the appropriate remedy is to declare that Canada infringed Mr Khadr's rights under s 7 of the *Charter*, and let the Canadian Government decide how best to respond. The Court declared that:

... through the conduct of Canadian officials in the course of interrogations in 2003-2004 ... Canada actively participated in a process contrary to Canada's international human rights obligations and contributed to Mr Khadr's ongoing detention so as to deprive him of his right to liberty and security of the person guaranteed by s 7 of the Charter, contrary to the principles of fundamental justice.

Following this decision, the Canadian Government has asked American prosecutors to exclude Mr Khadr's statements to Canadian investigators from evidence in his upcoming US military trial, but has not asked the US to return Mr Khadr to Canada.

Relevance to the Victorian *Charter*

This decision is instructive about the obligation that the *Charter* imposes on government authorities to not contribute to a breach of the right to liberty and personal security by another State. Although the Victorian *Charter* has limited application to Australian detainees overseas, this principle may be applied to the dealings of Victorian authorities with persons interstate.

This decision also illustrates the need to take into account the age of young detainees and may have implications for the interpretation of s 23 of the Victorian *Charter*, which provides obligations towards children in the criminal process.

Finally, the *Khadr* decision demonstrates a judicial reluctance to interfere with the executive's prerogative powers in foreign affairs. This is unlikely to be relevant to remedies sought under the Victorian *Charter*. However, it is worth noting that the Canadian government's response to the Supreme Court's declaration was minimal.

The decision is available at <http://www.canlii.org/en/ca/scc/doc/2010/2010scc3/2010scc3.html>.

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Torture, Executive Accountability and the Rule of Law

Mohamed v Secretary of State for Foreign & Commonwealth Affairs [2010] EWCA Civ 65 (10 Feb 2010)

On 10 February 2010, the Court of Appeal (the Lord Chief Justice, the Master of the Rolls and the President of the Queen's Bench presiding) published its decision in the protracted and highly publicised litigation involving Binyam Mohamed. The decision addresses a number of important legal issues that derive from the working relationship between the intelligence services of the UK and the USA, including the appropriate balance between non-disclosure and public-interest immunity, and principles of open justice. As the Chief Justice astutely concluded (at [57]), the decision also engages 'concepts of democratic accountability and, ultimately, the rule of law itself'.

Set out below is a brief summary of the factual and procedural history, and of the decision itself. In discussion, I consider the potential scope of the decision, and note a number of developments that followed its release.

Facts

Mr Mohamed, a resident in the UK between 1994 and 2001, was arrested in 2002 on the basis of suspected terrorist activity. He was shuttled between interrogation facilities in Pakistan, Morocco and Afghanistan for more than two years, before being transported to Guantanamo Bay in 2004 where he remained until he was released and returned to the UK in February 2009.

The present appeal arose out of an application for disclosure brought by Mohamed in May 2008, seeking documentation and information from the UK Government in order to assist in his defence against charges that he anticipated would be brought against him by the US. Mohamed intended to claim that his confessions were false, and were made as a consequence of torture, or at least inhuman treatment. The disclosure application was based on the court's jurisdiction to order a third party to disclose documents, where that party had been involved in the wrongdoing (see *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133). It was alleged that the UK was involved, by way of the participation of the Security Service, in the alleged wrongdoing. On 21 August 2008, the Divisional Court granted Mohammed access to the documents sought. The draft judgment of the Court was first shown to officials of the Security Service, to provide the Secretary of State for Foreign and Commonwealth Affairs an opportunity to argue that certain passages should not be included in the public version of the judgment. As a result (and over Mohamed's objections) seven paragraphs were removed from the public judgment, on the basis that there would be a further hearing to determine whether they should remain redacted.

Between this first decision of the Divisional Court, and the decision of the Court of Appeal, the Foreign Secretary issued three public interest immunity certificates (the vehicle by which the Government claims that the public interest prohibits disclosure of documents), and there were a further five decisions concerning the status of the 'seven redacted paragraphs'. There was also, relevantly a decision of the District Court for the District of Columbia (Civil Action No. 05-1347 (GK) in *Farhi Saeed Bin Mohamed v Barack Obama* where it was recorded that 'the [US] Government does not challenge or deny the accuracy of Binyam Mohamed's story of brutal treatment'. The Court further stated (at 64):

[Mr Mohamed's] trauma lasted for 2 long years. During that time, he was physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one foreign prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell. All the while, he was forced to inculcate himself and others in various plots to imperil Americans. The Government does not dispute this evidence.

Back in the UK, the essence of the UK Government's claim was not that there was anything in the redacted paragraphs which would, of itself, harm the national interest, but rather that the inability of the Government to maintain absolute confidentiality of intelligence information provided by the USA (referred to as the 'control principle'), would result in a review of the intelligence sharing arrangements between the USA and the UK, and could result in those arrangements becoming less 'productive'. This claim, reasserted in various formations in the three certificates, was rejected by the Divisional Court, which held that the seven redacted paragraphs should be made publically available. This formed the context of the appeal the subject of this note.

Decision

In three largely concurring judgments, the Court of Appeal dismissed the appeal of the Foreign Secretary. Although there were differences in emphasis, the reasoning provided in the three judgments was largely consistent.

All three Judges stressed that the purported 'control principle' was not 'inviolable'. Any avoidance of disclosure obligations was dependent on well-established public-interest immunity principles. As the Lord Chief Justice emphasised (at [45]), 'the confidentiality principle is...subject to the clear limitation that the government and the intelligence services can never provide the country which provides intelligence with an unconditional guarantee that the confidentiality principle will never be set aside if the courts conclude that the interests of justice make it necessary and appropriate to do so'.

The Court was required to make a two-stage assessment. The first step required it to determine whether the publication of the redacted paragraphs would be contrary to the national interest. The second step (which may not arise) required the Court to weigh that aspect of public interest against the public interest that derived from the first judgment being openly available.

In undertaking this assessment, the Court was heavily influenced by the publication of the Opinion of the District Court for the District of Columbia. Indeed, Lord Neuberger MR expressly states (at [137]) that, prior to receipt of that Opinion he had ('albeit with severe misgivings') reached the conclusion that the Divisional Court had erred in not deferring to the Foreign Secretary's opinion re non-disclosure. That conclusion changed, however, as a result of reading that opinion (at [138]):

It is therefore now in the public domain, as a fact found by a US court in proceedings in which the US Government was a party, that he was mistreated, indeed tortured, in the way in which he has described, when under US control and interrogation, and that representatives of the US intelligence services knew of the mistreatment and must have observed the effect of such mistreatment of him. Whatever may have been the position before the Opinion was published, details of Mr Mohamed's mistreatment, and their effect on him, have been publicly recorded by Judge Kessler, and cannot be said any longer to be in any way confidential information, or information which is somehow in the control of the US Government.

Sir Anthony May PQBD expressed similar sentiments (at [295]) noting that, on publication of the Judge Kessler's Opinion, the Foreign Secretary's case became based on 'a principle entirely devoid of factual content on which to hang it'. It followed, therefore, that any balancing exercise (the second stage of assessment) was unnecessary, and the appeal was dismissed.

Discussion

Although significant, it is important that the scope of the decision of the Court of Appeal is not overstated. The Court was at pains to stress that it endorsed the application of public interest immunity, and the maintenance of confidentiality over secret information (see, eg [51]). Indeed, Lord Neuberger MR went so far as to say (at [139]) that it was a 'very rare' case that the court cannot accept a minister's view as regards a risk to national security. It may be (as Lord Neuberger MR expressly suggests) that, if not for the decision in *Farhi Saeed Bin Mohamed v Barack Obama*, the Court of Appeal would have reached a contrary conclusion.

That said, although upholding the application of public interest immunity, it is important to stress that the Court has not upheld the 'control principle'. This is to be contrasted against the statement of Foreign Secretary David Miliband to the House of Commons on 10 February 2010, following the publication of the decision (which also formed the public basis of the Government's decision to not appeal the decision).

Crucially Mr Speaker, the Court has uphold the [sic], upheld the control principle today. The judgement [sic] describes that principle as integral to intelligence sharing. It specifically vindicates the careful assessment that releasing the seven paragraphs without the consent of the United States would have damaged the public interest.

It seems that the Foreign Secretary is continuing – to quote from the judgment of Sir Anthony May PQBD – to elevate the control principle 'into something that it is not' (at [287]).

Two other aspects of the decision are worth noting briefly. The first relates to the particularly eloquent discussion on the importance of 'open justice'. This will, no doubt, be of assistance in contexts well beyond the purview of this particular litigation. For example, at [38] the Lord Chief Justice stated:

Justice must be done between the parties. The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law. For that reason, every judge sitting in judgment is on trial. So it should be, and any exceptions to the principle must be closely limited. In reality very few citizens can scrutinize the judicial process: that scrutiny is performed by the media, whether newspapers or television, acting on behalf of the body of citizens. Without the commitment of an independent media the operation of the principle of open justice would be irremediably diminished.

The second aspect relates to the publication of the Court of Appeal decision. After a draft judgment was released to the parties, and prior to open publication, Counsel for the Foreign Secretary wrote *privately* to the Court (without providing a copy to the other parties) describing a number of the observations in the judgment as 'an exceptionally damaging criticism of the good faith of the Security Service as a whole'. A copy of that letter is available at www.scribd.com/doc/26659700/Letter-from-Jonathan-Sumpton-Q-C-Re-R-Binyam-Mohammed-v-Secretary-of-State-for-Foreign-and-Commonwealth-Affairs. A number of changes were subsequently made to the draft judgment, however the letter became public after lawyers for Mohamed and a number of media organisations intervened. The Court has since convened to reconsider whether or not it should have published the original criticisms.

The decision is available at <http://www.bailii.org/ew/cases/EWCA/Civ/2010/65.html>.

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European Court Holds that Stop and Search Powers Violate Privacy and are 'Not in Accordance with Law'

Gillan and Quinton v United Kingdom [2009] ECHR 28 (12 January 2010)

The European Court of Human Rights held that stop and search powers granted to police under the ss 44-47 of the *Terrorism Act 2000* (UK) were neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. As such, the Court found the powers not to be 'in accordance with the law', in violation of art 8 of the *European Convention on Human Rights*.

Facts

Under ss 44-47 of the *Terrorism Act 2000*, police in the United Kingdom gained power to stop and search people without any requirement to first form a reasonable suspicion of unlawful behaviour.

The Act empowers certain high ranking police officers to issue authorisations allowing uniformed police to stop and search any person within a defined area in circumstances where the senior officer believes searches to be 'expedient for the prevention of acts of terrorism'. Whilst there is no requirement to first suspect any wrongdoing, the Act specifies that searches only be performed 'for articles of a kind which could be used in connection with terrorism'.

Under the Act police are empowered to conduct searches in public. Failure to submit to a search when requested to do so constitutes a criminal offence.

Kevin Gillan and Pennie Quinton are both British nationals who live in London. During September 2003 Mr Gillan and Ms Quinton were stopped and searched by police on their way to a demonstration near an arms fair taking place in East London. A journalist, Ms Quinton was also prohibited by police from filming.

The applicants sought judicial review. In 2003 the High Court dismissed their application. In 2004 the Court of Appeal refused to make any order on the applicants' claims against the Commissioner of the Police. In 2006 the House of Lords also dismissed the applicants' appeals. The Law Lords questioned whether a basic search of a person in a street involved such a lack of respect for private life so as to invoke art 8 of the Convention (right to respect for private and family life).

Before the European Court, the applicants protested that the searches to which they were subjected pursuant to s 44 of the Act breached their human rights under arts 5 (right to liberty and security), 8 (above), 10 (freedom of expression) and 11 (freedom of assembly and association) of the European Convention.

Decision

Does the basic search of a person in the street interfere with human rights?

The Court held that the search powers under the Act constituted an interference with the right to respect for private life. Further, in a unanimous judgment, the Court held that the public aspect of the searches, including the risk of humiliation and embarrassment which may result should private information be revealed in a public space, could be reasonably considered to exacerbate the significance of the interference. Rejecting submissions by the Government that the searches could be likened to routine searches of air passengers, the Court held that air passengers gave free consent to the searches by electing to travel. The Court considered searches under s 44 to be fundamentally different in that individuals can be searched at any place, at any time, without their consent.

Is any interference 'in accordance with the law'?

The Court held that the extraordinary breadth of power given to police under the Act lacked appropriate legal safeguards capable of protecting individuals against arbitrary interference.

The Court was concerned that there was no requirement under the Act that searches be considered 'necessary'; rather it was merely required that they be 'expedient'. The Court considered 'expedient' to mean no more than 'advantageous' or 'helpful'. As such, the Court was concerned that there was no requirement of any assessment of the proportionality of the measure.

Further, the authorisation granted by senior police is subject to confirmation by the Secretary of State within 48 hours, valid for 28 days unless an earlier expiry time is substituted, and renewable. The Court noted that whilst the Secretary of State may not alter an authorisation's geographical coverage, she or he may refuse confirmation or substitute an earlier time of expiry, but in practice this had never been done. This was highlighted by the fact that an authorisation covering the Metropolitan Police District had been constantly renewed under a 'rolling programme' which commenced when the powers were originally introduced.

The Court also noted that while the exercise of the powers of authorisation and confirmation can be subject to judicial review, the width of the statutory powers is such that applicants will always encounter great difficulty establishing that any authorisation and/or confirmation is ultra vires.

An additional safeguard was intended to be provided by the Independent Reviewer (IR) appointed to oversee the operation of the Act. However, the Court highlighted that the powers of the IR are restricted to reporting on the general operation of the statutory provisions and do not include the right to cancel or amend authorisations, despite the fact that in every report from May 2006 onwards the IR expressed concern that s 44 searches were conducted far too frequently.

Significantly, the Court was struck by a body of evidence which showed extraordinary frequent use of s 44 powers. Further, while the present case did not involve black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons was acknowledged and statistics accepted by the Court showed that black and Asian persons were disproportionately affected by the powers.

The Court was also concerned by the significant discretionary power bestowed upon individual police officers. The Court noted that the decision to search is one based exclusively on the 'hunch' or 'professional intuition' of the individual officer concerned. On this point the Court referred to the earlier decision in this case of Lord Brown in the House of Lords in which His Honour held that the Act 'radically departs from our traditional understanding of the limits of police power'.

In conclusion, the Court held that the powers of authorisation and confirmation as well as those of stop and search under ss 44 and 45 of the 2000 Act were neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They were not, therefore, 'in accordance with the law', in violation of art 8 of the Convention. Given the violation of art 8 was established, the Court held that it was not necessary to examine the applicants' complaints under arts 5, 10 and 11.

The applicants were awarded 33,850 euros (EUR) for costs and expenses.

Relevance to the Victorian Charter

This case is relevant to the interpretation of s 13 of the Victorian *Charter*, which similarly to art 8 of the European Convention enshrines the right to respect for a person's private life. Further, the case is also

relevant to s 21(2) of the Victorian *Charter* which states that 'a person must not be subjected to arbitrary arrest or detention'.

The decision is available at <http://www.bailii.org/eu/cases/ECHR/2010/28.html>.

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Control Orders, the Right to a Fair Hearing and Compensation for Unlawful Deprivation of Liberty

Secretary of State for the Home Department v AF [2010] EWHC 42 (Admin) (18 January 2010)

The England and Wales High Court recently held that non-derogating control orders imposed on two UK citizens under anti-terrorism legislation were void ab initio. This resulted in a more favourable damages outcome for the complainants in their litigation against the Secretary of State for the Home Department, who had imposed the orders.

Facts

AE and AF were subject to control orders under the *Prevention of Terrorism Act 2005* (UK) ('PTA'). During the administrative process which led to the imposition of the control orders, the Secretary of State relied on closed material, which was not disclosed to AE and AF on the grounds of national security.

The complainants were successful in petitioning the House of Lords to revoke the control orders on the basis that the Secretary of State had failed to comply with the complainants' right to a fair hearing under art 6 of the *European Convention on Human Rights* (as well as several other human rights breaches). In the subsequent calculation of damages by the High Court, the issue then arose as to whether the control orders should be regarded as revoked from the date of that decision, or revoked ab initio.

Decision

The Secretary of State argued that the court did not have power to quash the control orders ab initio, on the basis that art 6 was not listed in the PTA among the matters listed for mandatory review. However, the Court observed that s 3(11) of the PTA provided that 'in determining [the listed matters] the court must apply the principles applicable on an application for judicial review'. Such principles would include the conventional judicial review ground of challenge by reason of errors of law, which could lead to a decision being quashed. Here, the control order decisions were tainted by an error of law in failing to comply with the complainants' art 6 rights.

The Secretary of State also argued that the court, and not itself, was responsible for the breach of art 6, on the basis that the duties owed under art 6 relate to the court's functions and duties, not to the prior administrative decision. The Court disagreed, finding that non-derogating control orders of the kind made against AE and AF were not court orders. Rather, they were orders made by the Executive. The PTA empowered the Secretary to make, revoke, relax or remove obligations in control orders without the court's intervention. This distinguished the role of the Secretary of State from its role in bringing, for example, a private law claim for an injunction.

The Court also rejected an argument that the interim nature of control order applications meant that art 6 is not engaged. Although, traditionally, preliminary proceedings were not considered to be determinative of civil rights, and thus not within the purview of art 6, the Court held that there are exceptions where the interim measure 'has such a clear and decisive impact upon the exercise of a civil right that article 6 does apply'. As the control orders limited the rights of AE and AF in such a radical manner, 'fairly close to house arrest', the Court held that art 6 was clearly engaged.

Relevance to the Victorian *Charter*

Section 24 of the Victorian *Charter* provides for the right to a fair hearing.

Administrative powers curbing movement and association of subjects are a feature of recent legislative efforts in Australian jurisdictions; for example, in anti-bikie and anti-terrorism legislation. Clearly, s 24 would be engaged by the relevant decision process, particularly where the effects of the powers have a 'clear and decisive' impact on human rights.

The decision is available at <http://www.bailii.org/ew/cases/EWHC/Admin/2010/42.html>.
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Serious Criminal Offences, Deportation and the Right to Family Life

A W Khan v United Kingdom [2009] ECHR 27(12 January 2010)

The European Court of Human Rights has held that the deportation of a convicted heroin trafficker, who had not re-offended since release from prison and had developed strong ties with a country based on long-term residency, family and children, constituted a violation of the applicant's right to private and family life.

Facts

Section 3(5)(a) of the *Immigration Act 1971* (UK) allows the deportation of non-British citizens where the Secretary of the Home Department deems this conducive to the public good. UK migration law permits appeal on grounds of incompatibility with the *European Convention of Human Rights*. Article 8 of the Convention protects the 'right to respect for private and family life' from State interference beyond what is 'necessary in a democratic society... for the prevention of disorder or crime, [or] for the protection of health or morals'.

The applicant was convicted of trafficking 2.5 kilograms of heroin. A month after his early release from a 7-year prison sentence, the British government sought to deport him. The applicant argued the decision was not proportionate, and did not appropriately weigh against his good conduct, closeness of his family ties and length of his residency in the UK.

The Government disagreed. Although accepting that deportation would interfere with the applicant's private life, the Government asserted that the right to family life was not engaged because the applicant's siblings were all adult and not dependent. Further, it argued that European Court jurisprudence permitted 'great firmness' given the serious nature of drug offences, and submitted the decision to deport was proportionate.

Decision

Was there interference with the right to respect for family and private life?

The Court found that 'private life' contemplates 'the totality of social ties between settled migrants... and the community in which they are living', and engages art 8 independently of 'family life'. It was clear that expulsion interferes with this right.

Immigration case law establishes that there will be no 'family life' between parents and adult offspring without demonstrating dependence. The Court was therefore not satisfied that the applicant's cohabitation with his mother and brothers was sufficient, nor did their illnesses demonstrate that the applicant was an indispensable carer.

However, the applicant had a long-term relationship with a British citizen, who gave birth during the hearing. The Court recognised that 'family life' exists between parent and child, and that children of a cohabitating couple become part of the family upon birth. While the applicant's bail conditions prevented him from cohabitating, the relationship had continued since August 2005, with near-daily contact, and the applicant was acknowledged as father on the child's birth certificate. The Court held that this showed 'sufficient constancy to create *de facto* family ties'.

Was this interference 'necessary in a democratic society'?

The Court agreed that the applicant's conviction and seven-year sentence for importing 2.5 kilograms of heroin was very serious. The Government's 'great firmness' was understandable, 'given the devastating effects of drugs on people's lives'. However, also relevant was that the applicant had not previously or subsequently committed serious criminal offences, suggesting that he posed a minimal risk to society.

The Court found the applicant's private life to be established solely in the United Kingdom. The applicant had emigrated at the age of three, had not since visited his native Pakistan, and had no family or idea of his origins there. Regarding his family life, the Court weighted the 'stable relationship' and 'regular contact' against the likely 10-year minimum period of deportation. The applicant's partner was not willing to relocate to Pakistan: she had never lived outside the UK, did not speak Urdu or Punjabi

and had no family or friends there. However, the applicant had failed to mention his pregnant girlfriend in fresh representations to the Home Office. The applicant's partner was also fully aware of his criminal record when beginning the relationship. The Court found that 'accordingly, no decisive weight can be attached to this family relationship'.

On balance, however, the Court was not satisfied that deportation was proportionate, and therefore found a violation of the applicant's art 8 rights.

Relevance to the Victorian Charter

While deportation decisions are made pursuant to Commonwealth jurisdiction, this case may assist interpretation of the Victorian *Charter*. Section 13 enshrines a person's right not to have their 'privacy [or] family... unlawfully or arbitrarily interfered with'. This case suggests that 'family' should be interpreted expansively. It may include couples in a long-term relationship involving frequent contact, but who are not cohabitating due to imposed circumstances. Also relevant is whether the couple have children. Further, this may include parents and adult siblings where a relationship of dependency exists. It is unclear what standard might be sufficient for dependence, beyond the Court's references to incapacitating health problems combined with sole carer status.

Similar to Article 8 of the Convention, Victorian *Charter* rights are subject 'only to such reasonable limits as can be demonstrably justified in a free and democratic society' (s 7). As well as clearly enumerating a set of relevant criteria, this case provides guidance as to what factors may combine to render certain State responses to even the most serious criminal offences unreasonable.

This case also highlights that, in Victoria, the interests of the child and not just the applicant may be considered. Section 17 recognises children's rights to protection of their 'best interests'. Arguably, removing a child's father may conflict with these rights, and so weigh against the reasonableness of such a decision.

The decision is available at <http://www.bailii.org/eu/cases/ECHR/2010/27.html>.

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Legality of Detention Pursuant to Prisoner Transfer Agreement when Original Trial Unfair

Orobator v HMP Holloway & Anor [2010] EWHC 58 (Admin) (20 January 2010)

In this case, the England and Wales High Court rejected a British citizen's challenge to her detention in the UK after being convicted of drug offences in Laos. While the Court accepted that the claimant had been treated unfairly, it was not satisfied her trial and conviction in Laos amounted to a 'flagrant denial of justice' such as to justify her release from prison.

Facts

The claimant, a British citizen, claimed she had been coerced by two Nigerian men, who assaulted and raped her, to smuggle 680 grams of heroin to Australia via Laos. The claimant had attempted to discard the drugs at the Lao airport, however, was apprehended and then arrested by authorities.

The claimant, was convicted in Laos of exporting heroin, and was subsequently sentenced to life imprisonment.

The claimant consented to be transferred back to the UK to serve her life sentence pursuant to the Treaty between the United Kingdom and the Lao People's Democratic Republic on the Transfer of Sentenced Persons. After returning to the UK she was detained at HMP Holloway under the *Repatriation of Prisoners Act 1984* (UK).

The claimant sought judicial review of the decision of the Secretary of State not to release her from detention. The claimant challenged her detention in the UK on the grounds that the trial in Laos was a flagrant denial of justice and a flagrant breach of art 6 of the *European Convention of Human Rights*. She argued that as result her conviction was not by a 'competent court' within the meaning of art 5(1)(a) and therefore her continued detention in the UK was arbitrary and unlawful.

Decision

The Divisional Court (Dyson LJ and Tugendhat J) dismissed the application for judicial review, concluding that the claimant had not suffered a flagrant denial of justice.

Article 5(1)(a) of the *European Convention* provides that:

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court...

Article 6 of the Convention protects the right to a fair trial and provides the minimum rights that must be accorded to everyone charged with a criminal offence.

In order to establish that detention is unlawful under art 5 because art 6 rights have been violated, the 'flagrant denial of justice' test must be satisfied. The relationship between art 5 and 6 was considered by Lord Phillips in *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2009] 2 WLR 512 at [138]:

the court has also held that if a 'conviction' is the result of proceedings which were a 'flagrant denial of justice', that is, were 'manifestly contrary to the provisions of article 6 or the principles embodied therein', the resulting deprivation of liberty would not be justified under article 5(1)(a): *Stoichkov v Bulgaria* (2005) 44 EHRR 276, para 51

The applicant's primary contention was that the lack of independence and impartiality of the judiciary in Laos, of itself, amounted to a flagrant denial of justice.

While the Court recognized that 'judicial independence and impartiality are cornerstones of a democratic society and that their absence will without more involve a breach of art 6', it rejected the proposition that a lack of judicial independence and impartiality, on its own, can amount to a flagrant denial of justice. The Court considered that 'even where the judiciary are not fully independent and impartial, it is possible for a trial to take place which does not involve the complete nullification or destruction of the very essence of the right guaranteed by article 6.'

After considering the circumstances of the trial, the Court accepted that the claimant was treated unjustly in Lao and opined that if she had been tried and convicted in a similar fashion in the UK a complaint under art 6 would have succeeded. However, the Court concluded that the extent that the Lao court lacked independence and impartiality, did not of itself give rise to a flagrant denial of justice. It also concluded that other factors relating to her trial and conviction did not amount to the high standard of a *flagrant* denial of justice.

The Court noted the significance of the public policy reasons for setting the flagrant denial of justice test very high:

The test is rightly set very high. That is because it is important not to jeopardise or undermine the treaties for the repatriation of prisoners which the UK now has with many countries, so that those who are convicted abroad can serve their sentences here. If persons who have been convicted and sentenced abroad and have procured their transfer to the UK were easily able to obtain their liberty by challenging the fairness of their convictions, there would be a grave danger that these important treaties would be set at naught. That would be highly regrettable.

Under s 273 of the *Criminal Justice Act 2003* (UK), the Court is required to make a sentencing order for 'transferred life prisoners'. The Court considered that under UK law the claimant, as a drug courier, would be given a determinative sentence of seven years. However, after taking into consideration a number of mitigating factors such as the threats and coercion the claimant was subjected to, her history of mental health problems, her history of sexual and physical abuse from men and the appalling conditions of her custody in Laos, the Court set a minimum term of 18 months imprisonment.

Relevance to the Victorian Charter

It should be noted that Australia has an International Transfer of Prisoners scheme which is regulated by a federal legislative framework.

However, the case does have general relevance for the interpretation of s 24 of the *Charter* which protects the right to a fair trial and provides guidance in relation to what is required to establish that there has been a flagrant denial of justice.

The decision is available at <http://www.bailii.org/ew/cases/EWHC/Admin/2010/58.html>.

Prabha Nandagopal is on secondment to the Human Rights Law Resource Centre and Amnesty International from DLA Phillips Fox

Right to a Fair Hearing and Legal Representation in Disciplinary Proceedings

G, R (on the application of) v X School & Ors [2010] EWCA Civ 1 (20 January 2010)

The English Court of Appeal has held that proceedings that are not by themselves determinative of civil rights or obligations may still be subject to the requirements of art 6(1) of the *European Convention on Human Rights* where the outcome of the proceedings will have a substantial influence or effect on the determination of those rights or obligations.

Facts

The claimant was a teaching assistant at X School. A complaint was made that he kissed and had sexual contact with a 15 year old boy. After an investigation, the governors of X School convened a disciplinary panel. The panel dismissed the claimant for abuse of trust and stated that it would report his dismissal to the appropriate agencies (as it was required to do). The claimant was not allowed legal representation before the panel.

The claimant appealed the disciplinary panel's decision to an appellant committee. He was informed that he would not be allowed legal representation before the committee.

The claimant challenged the governors' decisions not to allow him legal representation before the disciplinary panel or at the forthcoming appeal on the grounds that these decisions violated his rights under art 6 of the Convention. Relevantly, art 6(1) states that a person facing the determination of their civil rights and obligations or any criminal charge is entitled to a fair and public hearing by an independent and impartial tribunal established by law.

Decision

The decision rested on two questions. First, did art 6 apply to the disciplinary proceedings? Second, if it applied, did it follow that art 6 required that the claimant have the right to legal representation?

Did article 6 apply?

Laws LJ (with whom Wilson and Goldring LJ agreed) held that art 6(1) applied to the disciplinary proceedings. Where there is a nexus between one proceeding and a proceeding that determines a civil right or obligation, the first proceeding is covered by art 6(1). The relevant nexus will exist if the outcome of the other proceeding has 'a substantial influence or effect' on the determination of the civil right or obligation.

In this case, the disciplinary proceedings were determinative of the claimant's right to continue his employment with X School, which was not a right protected by art 6(1). Once, however, the disciplinary panel reported the claimant's dismissal, the appropriate agencies would decide whether the claimant should be placed on the Children's Barred List. If placed on the list the claimant would be prohibited from practicing his profession as a teaching assistant, which was a protected right.

The Court concluded that there was a sufficient nexus between the disciplinary proceedings and the appropriate agencies' decision to place the claimant on the Children's Barred List, observing that the disciplinary panel's finding of abuse of trust was likely to have a 'profound influence' on the appropriate agencies' decision. While the appropriate agencies might independently consider the matter, and the claimant would be entitled to make representations through a lawyer, oral hearings with cross-examination would not be held. The claimant's civil right to practice his profession might, therefore, be 'irretrievably prejudiced' by the disciplinary panel and appeal committee's findings.

The defendants argued that art 6 did not apply to earlier proceedings where an art 6 compliant court or tribunal would give fair consideration to the case at the end of the overall process (see, eg, *Bryan v UK* (1995) 21 EHRR 342 and *Alconbury Developments Ltd* [2003] 2 AC 295). The Court distinguished those cases from the present case. In *Bryan v UK* and *Alconbury Developments Ltd*, 'the subjection of the first (administrative) decision to the second (judicial) decision' was 'sufficient to ensure compliance with art 6' because the final court controlled the earlier decision and corrected any errors. In this case, however, the Children's Barred List procedure did not control the disciplinary proceedings or provide an opportunity to correct errors made during those proceedings. Rather, the outcome of the disciplinary proceedings drove the Children's Barred List procedure.

Further, the claimant's right to appeal the appropriate agencies' decision to the Upper Tribunal did not change the outcome. The Upper Tribunal did not have the jurisdiction to deal with the critical issue, 'namely whether on the proved or admitted facts the quality of the claimant's act should be judged severe enough to put him on the barred list'. Accordingly, art 6(1) applied to the disciplinary proceedings.

Did article 6 require that the claimant be allowed the opportunity of legal representation in the disciplinary proceedings?

The court held that the claimant was entitled to legal representation in the disciplinary proceedings. While art 6(1) does not guarantee legal representation in all cases, legal representation was guaranteed in this case because of the potential consequences of the appropriate agencies' decision. Further, the presence of a legal representative might have had an impact upon the decision makers' construction of the facts during the disciplinary proceedings and may have influenced the outcome of any contest as to the facts. The determinations of the disciplinary panel and, ultimately, the appropriate agencies may therefore have been affected by the involvement of a legal representative.

Relevance to the Victorian Charter

This case may be relevant to s 24 (fair hearing) of the Victorian *Charter*, particularly the requirement of 'a fair and public hearing'.

The decision is available at <http://www.bailii.org/ew/cases/EWCA/Civ/2010/1.html>.

Amanda Hicks-McLean is a lawyer with Allens Arthur Robinson

Anonymity in Court Proceedings: Balancing the Right to Privacy and Journalistic Freedom

Guardian News and Media Ltd & Ors, Re HM Treasury v Ahmed & Ors [2010] UKSC 1 (27 January 2010)

The press challenged orders protecting the identity of the appellants from publication based on the right to freedom of expression. The appellants claimed that would breach their right to respect for private and family life.

The court held that there was sufficient general, public interest in publishing a report of proceedings which identified the appellant, Marteen, to justify any resulting curtailment of his right and his family's right to respect for their private lives.

Facts

Five men, the appellants, challenged their designation as suspected terrorists under the Terrorism (United Nations Measures) Order 2006. This designation meant that their assets were frozen, save for a daily living allowance. The appellants commenced proceedings challenging the validity of the government regime under which the freezing orders were made. At the outset of the proceedings, the administrative court made orders keeping the appellants' identities anonymous.

Media groups challenged the anonymity orders, on the basis that they restricted the press's right to freedom of expression under art 10 of the *European Convention on Human Rights*.

The Court unanimously ruled that the anonymity orders were not justified for any of the men. The identities of two of the appellants had been made public at an early stage, when the Bank of England published notice of the freezing orders naming them.

The other three appellants were brothers. Only one of them, Michael Marteen, appeared before the Court. The Court held that there were no compelling reasons to keep his brothers' identities secret, but withheld its final decision until Marteen's arguments were heard.

Marteen argued that the revelation of his identity would interfere with his art 8 Convention right to respect for private and family life.

Decision

In a single judgment, the court unanimously set aside the anonymity orders.

The Court held that neither art 8 nor art 10 rights prevailed over the other as such. After considering English and European cases, the Court concluded that it had to balance the factors and rights at play to determine 'whether there [was] sufficient general, public interest in publishing a report of the proceedings which identifie[d] M[arteen] to justify any resulting curtailment of his right and his family's right to respect for their private life'.

Article 8 arguments in favour of the anonymity orders

Marteen claimed that his designation as a suspected terrorist could lead to loss of contact for himself and his children with the local Muslim community. Marteen also argued that publication of his name would cause serious damage to his reputation, as he had not been charged with or convicted of any criminal offence and could not challenge the substance of the allegations against him. The court found this to be the strongest argument in favour of the anonymity orders.

The premise behind Marteen's arguments was that the public would not appreciate that the freezing orders were made by reason of mere suspicion of facilitating terrorism, as opposed to proven guilt. The Court held that the community was aware of the continuing public dialogue regarding control and freezing orders, and could distinguish between a suspected terrorist and a convicted one.

The Court also concluded that it would not be acceptable to restrict the press from reporting what is factually true, due to the possibility of misinterpretation by some readers.

Article 10 arguments against the anonymity orders

The Court noted that where a publication concerns a question of 'general interest', there is little room for restriction on freedom of expression.

The Court focused on the public interest in accessing information about proceedings challenging the system of freezing orders, a system which was created in the public's name and for its protection. The Court recognised the important role of the press in providing access to that information. The Court also ruled that a more open attitude to freezing orders would be consistent with the view that such orders indicate mere suspicion and not guilt.

The Court held that the right to freedom of expression encompassed not only the substance of ideas and information, but also the form in which they are conveyed. Publishing stories in which the appellants were anonymous would not attract reader interest, resulting in less editorial focus and, consequently, less public debate about the issues.

The Court also considered important that a press release had been issued by Marteen's solicitors, outlining the detrimental effects of the freezing order on his private life and alleging that the Government had dishonoured its pledge of accountability and oversight through Parliament. The court observed that the public could not make an informed assessment of Marteen's arguments without knowing his identity. If the anonymity orders were to remain in place, the press would be prevented from publishing a complete account of an important public matter for fear of an incidental impact on Marteen's private life in circumstances where Marteen was challenging the whole system of freezing orders based on suspicion.

Relevance to the Victorian *Charter*

The right to respect for private life under s 13, and the right to freedom of expression under s 15, are each protected under the Victorian *Charter*.

This decision reaffirms the importance of public court proceedings that are openly reported. Where the competing rights of freedom of expression and right to respect for private life are under consideration, the Court's decision seems to make clear that the public interest in obtaining information on important public issues may prevail over a person's right to private life.

This particular aspect of the balancing act between the two rights is not enunciated in the Convention or the Victorian *Charter*, although the *Human Rights Act 1998* (UK) states that the right to respect for one's private life can be curtailed in favour of public interest, a view which is consistent with European Court cases considered by the Court.

The decision is available at <http://www.bailii.org/uk/cases/UKSC/2010/1.html>.

Stuti Sethi is a lawyer with Allens Arthur Robinson

HRLRC Policy Work

Public Housing and the Right to Adequate Housing in Victoria

In January 2010, the Human Rights Law Resource Centre made a submission to the Victorian Legislative Council Family and Community Development Committee's inquiry into the adequacy and future directions of public housing in Victoria.

The Centre submits that the future direction of public housing requires a holistic rights-based approach from government, based on the legislative entrenchment of the right to adequate housing. The Victorian Government has the opportunity to be a leader in the protection of housing rights, by introducing legislative protection of a right to adequate housing and a principled and workable framework in which to address the future of public housing and interconnected issues, such as homelessness, disadvantage and poverty. It would also provide a comprehensive and coherent framework within which to address other issues identified in the terms of reference, including access to public housing, impacts on marginalised and disadvantaged groups, and safety and location.

The legislative right to adequate housing would not create a right to housing on demand, but instead would be implemented by:

- requiring the provision of emergency housing to people with priority needs;
- preventing arbitrary, unlawful or forced evictions from public housing;
- ensuring the participation of people living in public housing or experiencing homelessness in the decision making and policy that affects them;
- addressing the intersecting issues of discrimination suffered by people in public housing or experiencing homelessness; and
- providing remedies for the violation of the right to adequate housing.

The Centre's submission is available at www.hrlrc.org.au/content/topics/esc-rights/housing-rights-submission-on-the-adequacy-of-public-housing-in-victoria-jan-2010/.

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

Indigenous Rights: Proposed Amendments to the Northern Territory Intervention

The Senate Community Affairs Legislation Committee is conducting an inquiry into legislation currently before Parliament that seeks to reinstate the operation of the *Racial Discrimination Act 1975* and expand income management to apply across the whole of Australia.

The Centre has made a submission to the Inquiry that considers the human rights principles and standards that are most relevant to the Northern Territory Intervention and the proposed amendments. In particular, the submission states that any measures imposed as part of the Northern Territory Intervention must:

- respect the fundamental right to equality and non-discrimination;
- involve the genuine participation of affected Aboriginal communities, respect the right of self-determination, and involve the free, prior and informed consent of those communities; and
- recognise that the rights of Aboriginal communities, women and children are closely linked and that women and children must be protected in a way that is racially non-discriminatory.

The Centre is extremely concerned that:

- while the reinstatement of the *Racial Discrimination Act* is welcomed, its reinstatement will not take effect until 31 December 2010;
- there is a clear lack of evidence to demonstrably justify the effectiveness, and thus the necessity, of many of the Northern Territory Intervention measures, particularly income quarantining;
- the Federal Government's consultations with affected communities have been manifestly inadequate and cannot be used to justify the continuation, and indeed the expansion, of the Northern Territory Intervention measures; and

- there has been a complete absence of any meaningful involvement by affected Aboriginal communities in both the formulation and the amendment of the Northern Territory Intervention measures.

As a result, the HRLRC considers that the Government's Bills in their current form will:

- continue to breach a number of Australia's international human rights obligations;
- not be effective in addressing Aboriginal disadvantage;
- continue to undermine the relationship between Australian governments and Aboriginal Australians; and
- arbitrarily impact on the human rights of disadvantaged and vulnerable groups within our society, with the effect that they will become further isolated and excluded.

The Committee is due to report by 9 March.

The Centre's submission is available at <http://www.hrlrc.org.au/content/topics/equality/indigenous-rights-proposed-amendments-to-the-northern-territory-intervention/>.

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

Equality Rights: A Human Rights-Based Approach to Income Management

Proposed legislation has recently been introduced to Parliament that seeks to reinstate the operation of the *Racial Discrimination Act 1975*, but expand income management to apply across the whole of Australia.

The Australian Human Rights Commission has issued Draft Guidelines to provide practical assistance to Parliament and the Government in designing and implementing income management measures that protect human rights and are consistent with the *Racial Discrimination Act 1975*. On 11 February 2010, the HRLRC made a submission providing feedback on the Draft Guidelines, which welcomes the Commission's development of the Draft Guidelines and strongly endorses a human rights approach to income management.

The Centre's submission is available at <http://www.hrlrc.org.au/content/news/latest-news/indigenous-rights-a-human-rights-approach-to-income-management-feb-2010/>.

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

HRLRC Casework

Centre Awaits Decision on Application to be Heard in Inquest into Police Shooting of Youth

On 11 February 2010, the Centre appeared before the Coroner, Judge Coate, to apply for leave to make submissions as an 'interested party' in the coronial inquest into the death of 15 year old Tyler Cassidy. Tyler was shot by the Victoria Police in a Northcote park in December 2008. The Centre is seeking to make submissions regarding the relevance of the Victorian *Charter of Human Rights*, together with international and comparative human rights law and practice, to Tyler's death.

Youthlaw and Victoria Legal Aid have also applied to appear as interested parties.

The Coroner reserved her decision on the application to 4 March 2010.

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

Seminars and Events

Protecting and Promoting Women's Rights in Australia: A Seminar for Women's Rights Advocates

This seminar, jointly hosted by PILCH and the Queen Victoria Women's Centre, will explore the international mechanisms available to protect women's rights and examine how community advocates can use those mechanisms to improve the position of women in Australian society. It will focus on such

issues as: gender-based violence against women; access to health care services and information; and, gender stereotyping in work and family life.

The seminar will be presented by Simone Cusack and Lucy McKernan of the Public Interest Law Clearing House (Vic) Inc.

Date: Thursday, 4 March 2010 at 9.30am – 12.30pm

Venue: Queen Victoria Women's Centre (Victoria Room), 210 Lonsdale St, Melbourne

RSVP: By 28 February 2010 at www.pilch.org.au/womensrightspromotionseminar/. Places are limited.

For further information, contact Simone Cusack on (03) 8636 4415 or at simone.cusack@pilch.org.au.

Resources and Reviews

HRLRC in the News

The Centre has published the following opinion pieces since the last Bulletin:

- Philip Lynch, '[The Inconvenient Truth](#)', *ABC Online*, 11 February 2010
- Rachel Ball, '[Equality in the Workforce would be Good for Us All. So Let's Make It Happen](#)', *The Age* (Melbourne) and *Sydney Morning Herald* (Sydney), 29 January 2010
- Philip Lynch and Emily Howie, '[Time for Business to Lift Its Game](#)', *Sydney Morning Herald* (Sydney), 16 January 2010
- Philip Lynch and Emily Howie, '[Regulations that Lead to Freedom](#)', *The Age* (Melbourne), 16 January 2010
- Philip Lynch, '[Human Rights as Australian Foreign Policy](#)', *ABC Online*, 12 January 2010

The Centre has featured in the following news reports since the last Bulletin:

- Yuko Narushima, '[Intervention in NT Racist: UN Envoy](#)', *The Age* (Melbourne), 25 February 2010
- Claire Chaffey, '[Human Rights Proposal Still Afloat](#)', *Lawyers Weekly* (Sydney), 23 February 2010
- Jill Stark, '[Plan to Lock up Drunks, Drug Users](#)', *The Age* (Melbourne), 21 February 2010
- Daniel Flitton, '[Talk of Refugee Crisis Rejected](#)', *The Age* (Melbourne), 19 February 2010
- Kate Hagan, '[McGorry May Appear at Teen Inquest](#)', *The Age* (Melbourne), 12 February 2010

New Issue of *Alternative Law Journal* – 'When Laws Fail to Protect'

The *Alternative Law Journal* is a quarterly refereed journal which focuses on social justice, human rights, access to justice, progressive law reform and legal education. The *Journal* has a diverse readership among legal practitioners, judges, policy makers, law students and legal studies students.

The latest issue, themed *When Laws Fail to Protect*, contains articles on highly topical issues such as human rights and foreign policy, homelessness, hate crime laws, anti-terrorism laws and powers, access to legal aid, and the case of Stern Hu.

For further information, including subscription and submission details, see www.altlj.org.

Human Rights Jobs

Community Legal Sector Development Officer, Federation of Community Legal Centres

Improve the lives of disadvantaged Victorians by helping to build a strong, effective and well-resourced community legal sector.

The Federation of Community Legal Centres is the peak body for Victoria's 51 community legal centres. Ongoing full-time employment based in Carlton. This role will draw on your experience in capacity building, management and/or professional development. Legal sector experience is desirable.

Package up to \$77,522 (includes super, leave loading). Generous additional tax benefits available, together with 5 weeks annual leave.

Position description and application details: www.communitylaw.org.au.

Applications close Friday 5 March 2010.

Foreign Correspondent

Developments from the UN and in International Human Rights Law and Practice

Haitian Earthquake

The Human Rights Council began its 13th Special Session late last month with an expression of solidarity with Haiti. This was the first Special Session to be convened in response to a natural disaster, and the first where specialized agencies were involved in a formalized manner in providing expert input into the discussion. However, the session highlighted that, although it is a positive development that the Human Rights Council has a mechanism for convening meetings at short notice to respond to emergency situations, the outcome of these sessions really has to be improved if it is to have any lasting impact upon the human rights situation in a particular country. The session on Haiti achieved little more than providing States with a forum to express solidarity with the people of Haiti and issue repetitive reminders regarding the importance of a human rights-based approach to disaster relief and reconstruction. The main criticism in terms of outcome was that the adopted resolution failed to mention the role the Independent Expert on the human rights situation in Haiti (a pre-existing mandate) could play in assessing and reporting on the implementation of a human rights approach. One useful outcome, however, another first for the Human Rights Council, was the postponement of Haiti's UPR by a year.

Universal Periodic Review

This month, Fiji, Iran, and Iraq have had their time in the spotlight at the Human Rights Council Special Working Group on UPR sessions. Of particular interest to Australia, Fiji came under a fair amount of pressure from the US, Australia and New Zealand who voiced concerns about the abrogation of Fiji's Constitution in April with the dismissal of the Court of Appeal after that court demanded free elections no later than this year. They also raised concerns about lack of freedom of movement, assembly, association and expressed their dismay at the clear lack of judicial independence, reinforced by Fiji's refusal to allow the International Bar Association to visit the country to report on the state of the judiciary.

Iran was the country on everyone's radar during this session and this review was extremely well attended. There were relatively large protests all week outside the Palais des Nations (the UN headquarters) contesting the validity of the Iranian regime, and their concerns were certainly justified considering the dismissive nature of the government when questioned on the usual issues of summary executions, the execution of minors, the lack of due process and fair trials, persecution of minority groups including the Baha'i, as well as women's issues. The Iranian UPR was also closely followed by the international media, who were there to witness the vocal and uncharacteristically undiplomatic interventions by States such as the US, Canada and Australia. The adoption of the recommendations was no less controversial, with a significant number of recommendations rejected by Iran on the basis that they were 'inconsistent with ... internationally recognized human rights' ... including the recommendation that they accept a visit from the UN Special Rapporteur on Torture, and take other measures such as amend or repeal laws that discriminate against women or ethnic or religious minorities.

Human Rights Council Advisory Committee

The HRC's Advisory Committee has just wrapped up its 4th session, working on six subjects of interest: discrimination and the right to food; the rights of older persons; missing persons; protection of human rights of civilians in situations of armed conflict; rights of persons with leprosy; and human rights education and training. The committee was extremely positive about Brazil's recent incorporation of the right to food as a fundamental social right in its constitution. All members agreed that Advisory Committee, now four years old, has become an integral part of the Human Rights Council structure and

an important human rights mechanism, and expressed their commitment on behalf of the regional groupings they represent to continuing support of the body.

Committee on Elimination of All Forms of Discrimination Against Women

The CEDAW Committee held its 45th session in Geneva from 18 January to 5 February. During its session, in addition to examining eight States under its periodic review, the Committee also adopted several important statements, in particular a statement calling for an active role for Haitian women as a key resource in Haiti's recovery; a statement on the inclusion of Afghan women in the process of peace building, security and reconstruction in Afghanistan; and a statement on the relationship between the Committee and NGOs, which reaffirmed the important role of NGOs in advancing the Committee's work.

UN Conference on Disarmament

This year's Conference on Disarmament has focused on three major areas: nuclear issues, the prevention of an arms race in outer space and the Cluster Munitions Treaty. The nuclear arms issue is twofold; first it involves efforts to prevent non-nuclear powers from developing warhead capabilities, and the reduction of stockpiles of existing (declared) nuclear powers. This year, Bangladesh's Ambassador, Abdul Hannan, is President of the Conference and has more of a vested interest than most previous Presidents. Bangladesh is situated close to three declared nuclear powers (India, Pakistan, China) and is in close proximity to Iran. Despite recent developments, efforts to reach a consensus about how best to approach a global ban on the production of fissile material and development of new launch capabilities are not likely to achieve any groundbreaking results.

Right to Water

The right to water and implications for management of water and sanitation is important in many countries, not least of all Australia. So it may be of interest to some working on these issues in Australia to know that the UN Independent Expert on human rights obligations related to access to safe drinking water and sanitation, Ms Catarina de Albuquerque, is conducting a study of good practices. Those with experience in applying a human rights perspective in the fields of water and sanitation should complete the questionnaire available at http://www2.ohchr.org/english/issues/water/lexpert/good_practices.htm.

EU and the European Convention on Human Rights

Finally of note, the European Union acceded to the European Convention on Human Rights, a landmark step towards the implementation of a binding human rights treaty that has provisions for enforcement – and the first such instance of a regional integration organization acceding to binding human rights obligations.

Claire Mahon is an Australian international human rights lawyer based in Geneva, Switzerland, where she works as a consultant for NGOs and the UN. She is the Coordinator of the Project on Economic, Social and Cultural Rights at the Geneva Academy of International Humanitarian Law and Human Rights, Special Advisor to Mary Robinson, and an Adjunct Clinical Professor of Law at the University of Michigan Law School. This Foreign Correspondent column was prepared with the assistance of ANU law student Benjamin Pynt.

If I Were Attorney-General...

Law, Order and the Australian Way

In *Democracy Inc*, Sheldon Wolin, professor emeritus of politics at Princeton University, constructs a political theory of the United States as an inverted totalitarianism. The theory describes a populace that is relatively uninterested in political participation; a politics dominated by concerns of patriotism brought on by the influence of an amorphous terrorist threat; power distributed amongst an elite that revolves between employment with big business, the military and government and acts, in each role, and sees no contradiction between the various roles; electoral campaigns that are directed exclusively at the undecideds; corporate and military sectors that utilise the benefits of science for their own purposes but cooperate with fundamentalist religion to lower the esteem of science in the public imagination; the absence of any concern to promote and implement policies that reduce social inequality and might provide power or hope to the poor; and the dismantling of environmental safeguards built up by past

struggles. Although very different to past totalitarian regimes of the right or left, the system outlined by Wolin minimises any meaningful involvement by those elements of the populace that are not part of the ruling elite in politics or the possession of power.

Whether or not Australian politics would be amenable to a similar analysis, Australia is strongly influenced by developments in the United States. In particular, the war on terrorism was fulsomely adopted by Australian politicians and political parties as a unifying theme and a source of political rhetoric. In one respect at least, Australia, at all levels of government, deserves and reflects the description that Wolin reserved for the Bush administration of the last decade:

No previous administration in American history had demanded such extraordinary powers in order to muster the resources of the nation in pursuit of an enterprise as vaguely defined as 'the war against terrorism' or demanded such an enormous outlay of public funds for a mission whose end seemed far distant and difficult to recognise if and when it might be achieved.

The fashions of politics operate similarly to other memes. Developed in one area, ideas spread without obvious effort on the part of their purveyors. In this way, travelling in the wake of the anti-terrorist hysteria, the depiction of Australia as ungovernable unless governments provide rapidly accelerating police powers continues even as the events of September 2001 recede into the past.

Greg Barns, republican activist and member of the Victorian and Tasmanian Bars, writes insightfully on a range of issues of interest to human rights activists. In a *Crikey* article of 21 January 2010, he brought together a number of the expansive 'law and order' actions by various State governments. Barns pointed out that Victorian Premier, John Brumby, was whipping up more hysteria (my interpolation) about heavy drinking by young people at the same time as he was accusing retired General, Peter Cosgrove, of being a liar (again, my interpolation) for daring to suggest that racism might be a problem in Australia and the likely cause of at least some attacks on Indian students.

Barns also pointed out that Brumby's government had, a month earlier, legislated to add to the police arsenal random stop and search powers (exercisable without any requirement of reasonable suspicion of any wrongful behaviour). He pointed out that similar powers in the UK had led to police targeting particular ethnic communities giving rise to racial tension. (I revisited the story just after leaving a national office holder of a respected international NGO who had regaled me over lunch with stories of police repeatedly stopping the car that he was driving (and which he owned) to accuse him of stealing it. My lunch time companion just happens to be of a Palestinian heritage.)

Barns' story went on to mention that the Government of Western Australia is allowing WA police to enforce a total legal ban on drinking in public and planning to legislate prohibited behaviour orders that can ban people from going to particular places. These laws also have a UK provenance and have been used in that country to target mentally ill people and the homeless.

The legislative actions described in Greg Barns' article comprise just part of the domestic law and order wave that is sweeping Australia post a decade of legislating draconian anti-terror laws.

After Anna Bligh's surprise win in the 2009 election, Cameron Dick was appointed Attorney-General of Queensland. Cameron had just been elected to his first term of Parliament. Cameron is well respected among his colleagues at the Bar, and also among those with whom he had contact while working as a ministerial adviser, as a thoughtful and conscientious person with progressive values.

One of Cameron's first tasks as the new Attorney-General was to shepherd through Parliament the *Criminal Organisation Bill*, the Queensland version of the 'anti-bikie legislation' which has been spreading from State Parliament to State Parliament. Seeming to take its cue from much of the content of the anti-terrorist legislation enacted over recent years, this legislation offends most of the principles that comprise the rule of law, the central characteristic of our legal system on which we pride ourselves. It enshrines guilt by association by providing for the proscribing of organisations. It tramples on equality before the law by allowing for members of proscribed organisations to be subject to control orders and 'public safety orders' by which the subjects of the orders commit criminal offences by doing what is a legal act for every other member of the community. And these powers are not to be exercised in open court by direct evidence about which the person accused may meet and challenge his or her accusers. Rather, the Courts may receive criminal intelligence, an arcane and unreliable substance, which is to be kept secret from the person who is the subject of the applications under the Act and their legal advisers. A Criminal Organisation Public Interest Monitor ('the COPIM') will be there to assist the court but, of

course, the COPIM, who is supposed to represent the public interest, will not be able to receive informed instructions from the person or organisation accused.

Most human rights lawyers who have had experience with 'criminal intelligence' have concluded, at the end of the day, that most claims made about it by its proponents turn out to be unjustified and that much of it turns out to be unreliable. Much of it turns out to be gossip sourced from persons with an axe to grind. It will be that criminal intelligence on the basis of which people will be banned, on pain of committing a criminal offence, from talking to friends or attending the fireworks displays on New Year's Eve.

What does all this mean for my hypothetical career as the Attorney-General of Queensland? It means that it will be short. With desperate parties fighting one another for the undecided voter by running a new line of law and order auctions, any Attorney-General is likely to be under huge pressure to introduce more and more draconian legislation infringing, even further, upon civil rights principles that were once held sacred, even by politicians.

I can envisage my excited trip to my first Cabinet meeting with a bundle of proposals to make our legal and justice systems more friendly, more accessible and more successful in keeping disadvantaged groups out of prison and rehabilitating those who find themselves incarcerated.

Equally clearly, I can envisage my doleful walk to the Premier's office, immediately afterwards, to give her my beautifully crafted resignation letter.

'Ah well', I will say to myself as I trudge away from that one on one, 'we are here for a good time not a long time.'¹

Stephen Keim SC is a Queensland barrister. In 2009, he received the prestigious Australian Human Rights Medal for his outstanding and long-term involvement in 'many cases aimed at furthering the human rights of individuals and groups such as prisoners, refugees, people with disabilities and people experiencing discrimination – work he often undertook on a pro-bono basis'.

¹ Apologies to Canadian rock band, *Trooper*. Their web site is <http://www.trooper.com/default.php>.