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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

It's Coming! Australia in the International Spotlight

Next February, Australia's human rights performance will be under the spotlight at the United Nations Human Rights Council. The Australian delegation, likely led by the Attorney-General, will be questioned about what Australia does and why it does it. The Government will receive bouquets and brickbats – and a long list of recommendations about what it should do better and how. It will be Australia's turn under the Universal Periodic Review.

The Universal Periodic Review (UPR in UN-speak) is the newest international mechanism for the promotion of State compliance with international human rights law. It was adopted as part of the package of changes to the UN human rights system in March 2006 that included the establishment of the Human Rights Council. For the first time all UN member States – all 192 of them – are being examined on their overall human rights performance. Until now, international examinations have been treaty based and so are restricted to those States that have ratified a particular human rights treaty and relate only to the human rights obligations under the particular treaty. This new review is universal and comprehensive.

There are similarities with the existing process of examination by treaty monitoring bodies. The Government prepares a report on its performance – invariably trumpeting successes and disguising deficiencies. The national human rights commission and non-government organisations – and anyone else in fact – can make their own reports, usually casting a different light on the situation from that of the Government report. Reports from UN agencies and officials and from treaty bodies are also brought into consideration. The actual examination takes place in a question and answer session over several hours. The process ends with a report with conclusions and recommendations that the Government can accept or reject or ignore.

There are significant differences too, however. The treaty body examinations are conducted by independent experts but the UPR is a State driven and State based review. The UPR is political, not legal, and Governments find themselves praised by their friends and criticised by their foes. The Cold War may have ended two decades ago and the old bipolar world with it but, I assure you, the Human Rights Council is still deeply divided into two camps, friends and foes.

Ironically the stakes for any State in the UPR, as a political process, are much higher than in the more legal treaty monitoring forum. Criticism of one State by another is taken more seriously than independent expert legal criticism.

Recommendations that come from other States are given more weight too because they come with international political implications, not mere legal arguments. And the whole examination is broadcast live to the world through the UN's webcasting system.

Because of the international politics, heightened for Australia by its candidacy for election to the UN Security Council, the recommendations that come from the UPR are important. They are made by individual States and so those States have a direct interest in following them up. The Australian Government will be required to report again and be examined again in another four years and the focus next time will be on how it implemented the recommendations from this first round. But even before the next round, its implementation of the recommendations and of other commitments it makes during the process will be closely monitored. The recommendations will be taken seriously, domestically and internationally, and so it is important to work to ensure that they are good recommendations.

But it's a long way off, isn't it? Preparations are underway already. There is a lot to be done before the Australian delegation sits on the platform in a big UN assembly room in Geneva in February 2011 in front of hundreds of people – diplomats, UN officials, NGOs and others – and a live international audience to explain themselves. The timetable is tight.

On 1 March, the Australian Human Rights Commission and the Asia Pacific Forum brought together a large number of Australian NGOs and officials of the Department of Foreign Affairs and Trade and the Attorney General's Department for the first detailed discussion of what is involved. They were joined by representatives from eight Asia Pacific human rights commissions that have already been through the UPR process. These commissions spoke about their experiences and, on that basis, made suggestions about how it could work best for us.

The UN will soon release the timetable for the submission of information for the review. Usually information from NGOs and human rights commissions needs to be submitted four to six months before the examination and the deadline is strict. That means about August-September. The Government has a little longer but it is required to consult broadly on its report and so needs to begin soon. The guidelines for the submission of information are also strict – especially in relation to length. Because reports cannot be long, they have to be carefully prepared to ensure inclusion of the most important issues and well drafted to ensure that uninformed diplomats in Geneva can understand the critical points being made.

The UPR is a great opportunity for Australia. It is an opportunity to showcase what we do well, to reflect honestly on what is problematic and to invite others to offer their proposals for how we can do better.

It's coming! And coming fast!

Chris Sidoti is an international human rights expert and has been head of a range of national and international human rights bodies

News

Australian Government and NGOs Commence Consultation for Universal Periodic Review of Australia in February 2011

Australia is scheduled to be reviewed under the Universal Periodic Review (UPR) in February 2011. The UPR is a mechanism of the UN Human Rights Council which involves a review of the human rights records of all 192 United Nations Member States. The review is intended to be a cooperative mechanism, based on interactive dialogue with the full involvement of the country concerned, together with other States, NGOs and national human rights institutions.

The Australian Government has recently invited NGOs to submit initial views on information that they would like to see included in the Australian Government's report by **16 April 2010**. Further details are available on the Attorney-General's Department website at www.ag.gov.au/www/agd/agd.nsf/page/Humanrightsandanti-discrimination_InternationalHumanRights_UniversalPeriodicReview.

NGOs have the opportunity to provide information to the UN Human Rights Council on Australia's human rights record. NGOs must limit their submission to **5 pages**. Experience in the review of other States has shown that the most effective way for NGOs to influence the UPR is to develop a single 5-page report that is developed and endorsed by a large coalition of NGOs.

A working group of interested NGOs has been established to coordinate the preparation of the 5-page NGO Report.

Further information on the NGO working group is available at

www.hrlrc.org.au/content/topics/international-human-rights-mechanisms/universal-periodic-review-of-australia-in-february-2011/.

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

UN Special Rapporteur on Indigenous Rights Releases Report on Australia: Calls for Action on Self-Determination, Participation and Poverty Alleviation

The United Nations Special Rapporteur on the human rights of Indigenous people has released a key report on the severe disadvantage suffered by Australia's Aboriginal and Torres Strait Islander peoples.

The Special Rapporteur's report focuses on the need for the Australian Government to ensure that Aboriginal people are included in decision making about matters that affect them. The report highlights that Government laws and policies must advance the right of self determination and respect the important aspects of Aboriginal culture and way of life.

The report makes 37 conclusions and recommendations, including in areas relating to:

- legal and policy framework;
- lands, territories and resources;
- overcoming Aboriginal disadvantage, including in relation to health, education, employment and housing;
- the protection of Aboriginal women, children and families;
- the administration of justice;
- Aboriginal organisations and management; and
- the Northern Territory Intervention.

The report follows an official visit to Australia by the United Nations independent expert in August 2009. The Special Rapporteur's report will be tabled at the UN Human Rights Council in September this year.

For a copy of the report, visit www.hrlrc.org.au/content/topics/indigenous/indigenous-rights-special-rapporteur-releases-report-on-country-visit-to-australia-march-2009/.

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

Australian Statements to 13th Session of UN Human Rights Council

On 3 March 2010, Australia's Ambassador and Permanent Representative to the UN in Geneva made a national statement to the 13th Session of the UN Human Rights Council.

In summary, the statement:

- reaffirmed Australia's commitment to human rights as 'a paramount obligation of each and every State';
- welcomed the creation of the first regional human rights mechanism in the Asia-Pacific – the ASEAN Intergovernmental Commission on Human Rights;
- highlighted the establishment of a National Congress of Australia's First Peoples and the National Human Rights Consultation;
- noted that 'Australia welcomes international scrutiny of its human rights record as a means to improve our implementation of human rights where we can. No country has a perfect human rights record – we all stand to benefit from constructive engagement with the UN human rights system';
- discussed the forthcoming UPR of Australia, stating that Australia is 'encouraged by the example set by those states that have taken a constructive approach to their review: genuinely reflecting on how they might do better, embracing the participation of civil society, and accepting and acting on constructive recommendations made by others'; and

- reiterated its commitment to the Human Rights Council being 'as effective as it can in protecting and promoting human rights'. Australia noted that 'the upcoming review is an opportunity to reflect on the successes and challenges of the Council's work, and to ensure it can better serve the human rights of all. Australia looks forward to engaging with other delegations on the review in the coming months.'

The full statement, together with other Australian statements and contributions to the 13th Session of the Council, is available at www.geneva.mission.gov.au/gene/statements.html.

Treaties Committee Calls for Human Rights Safeguards in Extradition and Mutual Assistance Agreements

The Joint Standing Committee on Treaties has called for the inclusion of explicit human rights safeguards to be included in Australia's extradition arrangements with other countries.

In a report on a proposed extradition treaty between Australia and India, the Committee recommended that 'new and revised extradition agreements should explicitly provide a requirement that the requesting country provide annual information concerning the trial status and health of extradited persons and the conditions of the detention facilities in which they are held.'

In making this recommendation, the Committee stated:

Australia has a moral obligation to protect the human rights of extradited persons beyond simply accepting the undertakings of countries making extradition requests. Australia must never be a party, directly or indirectly, to any injustice or abuse of the human rights of persons it has extradited, and regardless of whether the persons concerned are Australian citizens or not. While the Committee acknowledges that the risk of such an occurrence may be small, Australia currently has no formal process to ensure that, following extradition, a person's human rights are protected.

Monitoring the conditions of extradited persons could also enhance public confidence in Australia's extradition framework. Public confidence in Australia's approach to extradition could be severely damaged if abuses of an extradited person's human rights were to occur and Australia was found to have done nothing to try to prevent it.

The Government is yet to respond to the recommendation.

The report is at www.aph.gov.au/house/committee/jsct/25november2009/report1/fullreport.pdf.

National Charter of Rights Developments

'Developing a Bill of Rights for the UK': Equality and Human Rights Commission Releases Major Report

The UK Equality and Human Rights Commission has released a major research report to 'identify and explore best practice processes for developing a new Bill of Rights for the UK'. The report analyses evidence from related domestic and international experiences (including the ACT, Victoria and Australia) and identifies key principles to underpin the development of a Bill of Rights, regardless of which political party is in power.

The key finding and recommendations as to the process of creating a Bill of Rights include that it be:

Non-regressive: Any future UK Bill of Rights should not dilute existing protection provided by the HRA, either in relation to the specific rights protected, or by weakening the existing machinery for the protection of Convention rights. Any process that starts from a premise of going backwards would set a damaging precedent internationally.

Transparent: Politicians should be transparent about the purpose of a Bill of Rights and the terms of reference and methods of the process by which they propose to create it. This entails a clear procedural commitment to act on the results of public consultation and deliberation within clearly articulated parameters.

Independent: The body running the process should be demonstrably non-partisan, independent of government and have no vested interest in the outcome.

Democratic: For the outcome to be seen as having democratic legitimacy, the process must also be democratic. This principle recognises that Bills of Rights are not only a constraint on the exercise of

arbitrary power; they are also a positive instrument to enable relatively powerless groups to have an effective say in the democratic process.

Inclusive: The process should place the highest premium on eliciting the views and experiences of groups whose human rights are most vulnerable to being breached, and should give those voices an elevated status in the assessment of responses and in the final outcome.

Deliberative and participative: The process should be an exercise in building citizenship, not merely 'market research'. It should provide multiple opportunities for participation and, ideally, properly constructed forum(s) for deliberation which should be used to educate and invigorate the wider consultation.

Educative: The public should be informed to the greatest extent possible about existing human rights protections and options for building on them, and about their duty to respect the rights of others. A minimum requirement is the provision of accessible and impartial information and the correction of myths and misperceptions about human rights and the HRA.

Evidence-based: Actors concerned with the protection and promotion of human rights should advocate for a concordat that would bind all parties that signed it to certain rules of engagement; principally, an agreement not to use language or bring stories into the public domain that knowingly distort the purported impact of human rights and the HRA. This would help to ensure that all parties commit themselves to a process which is avowedly educative and non-partisan and does not trade in myths or seek to use the Bill of Rights as a proxy for unrelated issues.

Reciprocal: The process should be a two-way dialogue in which the government, too, is educated. The imprint of the process must be visible and acknowledged in the final outcome.

Timed: Any process should have a clear timeframe with, at a suitable juncture, a momentum-building phase. It should not be indeterminate.

Political commitment: The process should be adequately resourced and there should be a political commitment to act on the outcome of consultation.

The report is available at www.equalityhumanrights.com/legislative-framework/bill-of-rights/developing-a-bill-of-rights-for-the-uk-research-report/.

NB: The Human Rights Law Resource Centre was interviewed for the report and is positively cited throughout.

Former WA Premier Calls for Government to Commit to a National Human Rights Act

In a major speech to the Human Rights Arts and Film Festival, former Western Australian Premier, Geoff Gallop, has called for the Australian Government to commit to the implementation of the Brennan Committee's report, including by enacting a Human Rights Act.

Professor Gallop concluded:

What the Brennan Committee has proposed for Australia is measured and consistent with our parliamentary system of government but at the same time it places at the centre of our political equation the rights and liberties of our people. That won't guarantee their full realisation but it will certainly help fill in the legislative and procedural gaps that currently exist in Australia. Just as importantly it will help focus the energies and priorities of the nation around the rights and liberties of the people. It gives us a philosophy of unity and hope rather than a culture of division and despair.

The full speech is available at <http://www.humanrightsact.com.au/ahrg/>.

Victorian Charter of Rights Developments

A New Equality Law: Victoria Moves in the Right Direction

On 9 March, the *Equal Opportunity Bill 2010* was introduced into Victorian Parliament. The proposed legislative reforms include the establishment of new mechanisms designed to respond to systemic discrimination and promote substantive equality.

The reforms respond to a major review of the *Equal Opportunity Act 1995* conducted by Julian Gardner in 2007-2008 which found that Victoria's anti-discrimination legislation is ineffective in addressing the

systemic discrimination that is entrenched in our institutions and social structures. As the Attorney-General recognised in the Bill's second reading speech, 'Victorians are competing on uneven ground... we need to level the playing field'.

In order to respond to this problem, the Bill introduces an express positive duty to eliminate discrimination, strengthens the Victorian Equal Opportunity and Human Rights Commission's role in issuing guidelines and action plans and provides new powers for the Commission to conduct investigations and public inquiries into serious instances of systemic discrimination.

Disappointingly – and contrary to the recommendations contained in the Gardner Report – the Bill fails to provide protection from discrimination on the basis of homelessness and irrelevant criminal record.

The Bill also retains many of the permanent exceptions in the *Equal Opportunity Act 1995*, (including those for religious groups and same sex clubs). The HRLRC has consistently argued that permanent, blanket exceptions to the operation of equal opportunity legislation perpetuate harmful discriminatory practices and are inconsistent with the *Charter* and international human rights law.

The HRLRC's submission to the Scrutiny of Acts and Regulations Committee is at www.hrlrc.org.au/content/topics/equality/a-new-equality-law-victoria-moves-in-the-right-direction-18-march-2010/.

Rachel Ball is a lawyer with the Human Rights Law Resource Centre

Statements of Compatibility under the Victorian Charter

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

Below is an analysis of recent significant Statements.

Credit (Commonwealth Powers) Bill 2010

The *Credit (Commonwealth Powers) Bill 2010* seeks to adopt the *National Consumer Credit Protection Act 2009* (Cth), along with the *National Credit Code*, into Victorian law. The Bill also refers power to the Commonwealth to allow it to amend the Act, effectively giving it overall control over regulation of consumer credit and consumer leases.

This Bill is a result of the National Credit Law Agreement 2009, which aims to create a national uniform licensing scheme for people who engage in credit activities, which will be administered by the Australian Securities and Investments Commission ('ASIC').

Operation of the Charter on adoption of a Commonwealth Act

As this Bill operates by adopting Commonwealth legislation, or referring legislative power to the Commonwealth, the Victorian *Charter of Human Rights and Responsibilities Act 2006* has limited application.

According to the Statement of Compatibility ('SOC'), provisions of the Commonwealth legislation will not be subject to the interpretative obligation under the *Charter*, or the power to make declarations of inconsistent interpretation.

ASIC's powers

The main rights engaged by the Bill relate to ASIC's enforcement powers. Significantly, most of the licensees (credit providers) under the Act will be corporations. As a result, many of the provisions might rarely be applied to persons (who, unlike corporations, have rights under the *Charter*).

Power to compel answers

The Act gives ASIC the right to compel a person to answer questions for the purposes of an investigation ASIC is conducting. This limits a person's right (s 25(2)(k) of the *Charter*) not to be required to 'testify against oneself'.

However, if the person claims at the time of providing information that the information may be self-incriminating, they will receive an immunity from direct use of the information in prosecution (s 295(3)).

Presumably, this means that a person who is subject to investigation has to be aware of the need to make such a claim at that time in order to (partially) protect their rights.

As the SOC identifies, the immunity does not extend to information derived indirectly from the particular statement, or to information in documents which are required to be produced.

The Government justifies these limitations on the basis that ASIC can only compel evidence for the specific purpose of monitoring compliance with the credit legislation, which serves the purpose of maintaining public confidence in the credit industry. Additionally, the SOC points out that examinees will be people who have chosen to participate in a regulated industry in which they have to comply with certain requirements.

The SOC argues that as the right in the *Charter* refers to testifying, requiring someone to produce incriminating documents which are already in existence is not a significant infringement of the right.

The Scrutiny of Acts and Regulations Committee report into this Bill identifies that ASIC's powers are not strictly limited in the way the SOC describes: it would be possible under s 247(1) for ASIC to use these powers to investigate offences other than the credit offences in the Act, and s 253 allows investigation of anyone who ASIC suspects has information relevant to an investigation, which might be a person who has not chosen to participate in the regulated credit industry, and might be more likely to be a physical person rather than a company.

Reverse onus of proof for some offences

The SOC observes that some of the criminal offences under the Act have defences for which a burden of proof is placed on the defendant. This effectively reverses the presumption of innocence for the purposes of those defences. The particular offences relate to misleading and deceptive statements and destruction of books relevant to an investigation. The SOC justifies imposing the burden of proof on the basis that the offence is of a regulatory nature and the reversal strengthens the deterrent effect of the offence provisions.

The SARC report identifies that s 151(1) of the Act imposes a reversal of the onus of proof which relates to an offence, not a defence. It requires a person to prove to a court that they were not responsible for publishing an infringing advertisement which mentions their name or contact details. This is a potentially serious infringement of the right to be presumed innocent (s 25(1) of the *Charter*), and it is relatively easy to imagine situations in which it may be misused.

Alex Bowen, Law Graduate, Mallesons Stephen Jaques Human Rights Law Group

Victorian Charter Case Notes

Court of Appeal Makes Declaration of Inconsistent Interpretation and Considers Statutory Interpretation and Limitations on Rights under the *Charter*

R v Momcilovic [2010] VSCA 50 (17 March 2010)

In a landmark decision, the Victorian Court of Appeal has unanimously held that:

- s 32(1) of the *Charter* is not a 'special' rule of statutory interpretation, but rather a statutory directive that requires all persons engaged in the task of statutory interpretation to 'explore all possible interpretations of the provision(s) in question, and adopt that interpretation which least infringes *Charter* rights';
- the issue of 'justification' pursuant to s 7(2) arises only if it is not 'possible' to interpret legislation compatibly with human rights;
- any infringement of human rights should be 'demonstrably justified' by clear, cogent and persuasive evidence;
- where an infringement can not be demonstrably justified, the Court should grant a Declaration of Inconsistent Interpretation, such declarations being 'central' to and 'exemplifying the dialogue model of human rights legislation'.

In the present case, the Court of Appeal found that a reverse onus provision infringed the right to the presumption of innocence in a purposive manner that could not be cured by s 32 or justified by s 7.

Accordingly, the Court indicated its intention to issue a Declaration of Inconsistent Interpretation, which would effectively remit the provision to parliament for reconsideration but give parliament 'the final say'.

Facts

The applicant, Vera Momcilovic, was convicted of one count of drug trafficking in the County Court. The drugs were found in the applicant's apartment. Pursuant to s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ('DPCS Act'), the applicant was deemed to be in possession of the drugs unless she 'satisfie[d] the court to the contrary'. Thus, s 5 of the DPCS Act imposes on a defendant the legal burden of disproving possession and, when read in conjunction with s 73 of the Act, means that 'upon proof by the prosecution that a drug of dependence was found "upon any land or premises occupied by" that person, then unless he/she satisfies the Court to the contrary, he/she is deemed to be in possession of that drug.'

The applicant appealed against conviction and sentence. The appeal against conviction proceeded on the ground, among others, that s 32 of the *Charter* requires that s 5 of the DPCS Act be interpreted as placing only an evidentiary burden on an accused.

The Human Rights Law Resource Centre was given leave to appear as amicus curiae and make written and oral submissions on the application of the *Charter*. The Attorney-General and the Victorian Equal Opportunity and Human Rights Commission also intervened in the proceeding, pursuant to ss 34 and 40 of the *Charter*, respectively.

Decision

The Court refused the appeal against conviction, holding that it was not 'possible' to interpret s 5 consistently with the right to the presumption of innocence. Accordingly, the Court notified the Attorney-General and the Commission of its intention to issue a Declaration of Inconsistent Interpretation.

Statutory Interpretation under the *Charter*

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

The Court held that this provision does not 'create a "special" rule of interpretation, but rather forms part of the body of interpretive rules to be applied at the outset, in ascertaining the meaning of the provision in question'.

Instead, the Court characterised s 32(1) as a 'statutory directive' that requires all persons engaged in the task of statutory interpretation to 'explore all possible interpretations of the provision(s) in question, and adopt that interpretation which least infringes *Charter* rights'. The Court concluded that:

We reject the possibility that Parliament is to be taken to have intended that s 32(1) was only to operate where necessary to avoid what would otherwise be an unjustified infringement of a right. The Human Rights Law Resource Centre's submission to this effect was correct.

In reaching this conclusion, the Court endorsed the decision of Elias CJ in *Hansen* [2007] 3 NZLR 1.

Accordingly, the Court held that, when it is contended that a statutory provision infringes a *Charter* right, the correct methodology is as follows [35]:

- Step 1: Ascertain the meaning of the relevant provision by applying s 32(1) of the *Charter* in conjunction with common law principles of statutory interpretation and the *Interpretation of Legislation Act 1984* (Vic).
- Step 2: Consider whether, so interpreted, the relevant provision breaches a human right protected by the *Charter*.
- Step 3: If so, apply s 7(2) of the *Charter* to determine whether the limit on the right is justified.

If the limitation is not demonstrably justified pursuant to s 7(2), a Court may issue a Declaration of Inconsistent Interpretation.

The Court distinguished this approach from that of the House of Lords in *Ghaidan*, stating that, 's 32(1) was not intended to create a "special" rule of statutory interpretation' and concluding that:

our view that s 32(1) does not permit a departure from the intention of the enacting Parliament is reinforced by the fact that s 32(1) requires provisions to be 'interpreted' compatibly with human rights. 'Interpretation' is what courts have traditionally done.

In the present case, the Court held that the reverse onus established by s 5 of the DPCS Act was 'not so much an infringement of the presumption of innocence as a wholesale subversion of it', contrary to s 25 of the *Charter*. The Court iterated, however, that 'the choice between a legal burden and an evidentiary burden is a legislative choice' and that it is not 'possible' for a Court to substitute an evidentiary onus for the legal onus: 'If that substitution is to be made, it is a matter for Parliament'.

Reasonable Limitations under the *Charter*

The Court next considered whether the limitation on the presumption of innocence imposed by s 5 of the DPCS Act was 'demonstrably justified' in accordance with s 7(2) of the *Charter*.

On this issue, the Court endorsed the approach of Dickson CJ in *Oakes* [1986] 1 SCR 103, regarding the need for clear, cogent and persuasive evidence in order to demonstrably justify a human rights infringement. After highlighting that there was no evidence before the Court to 'establish that effective prosecution...depends on the reverse onus', the Court stated:

this was a case where evidence was required. The mere assertion that the reverse onus was essential to the effective prosecution of trafficking offences could never have been sufficient by itself to establish that fact. There may be circumstances where the justification for interfering with a human right – and for doing so by the particular means chosen – is self-evident, but they are likely to be exceptional. The government party seeking to make good a justification case under s 7(2) will ordinarily be expected to demonstrate, by evidence, how the public interest is served by the rights-infringing provision. The nature and extent of the infringement of rights sought to be justified will usually determine how much evidence needs to be led, and of what kind(s).

In the absence of evidence, the Court concluded that there was no demonstrable justification (or even a reasonable justification) for reversing the onus.

Declarations of Inconsistent Interpretation under the *Charter*

Having reached the conclusions above, the Court notified the parties of its intention to make a Declaration of Inconsistent Interpretation under s 36(2) of the *Charter*.

Significantly, the Court noted that, contrary to the approach under the *Human Rights Act 1998* (UK), such Declarations should not be seen as a 'last resort' but rather, as reflected in parliamentary debates about the *Charter*, as 'epitomising the intended relationship between the courts and the legislature' in the dialogue model. On this point, they concluded that

the making of a declaration of inconsistent interpretation accords more closely with this conception of dialogue, and in particular with the avowed purpose of 'giving Parliament the final say', than would an expanded view of 'interpretation' which allowed courts to depart from the plain meaning of a statutory provision and the intent of Parliament thereby conveyed. Under the *Charter*, the concept of the 'final say' is given direct expression in the obligation of the responsible Minister to table in Parliament a written response to a declaration of inconsistency.

If a Declaration is made, s 37 of the *Charter* requires that the Attorney-General table this Declaration, together with his written response, in Parliament within six months.

The decision is available at www.austlii.edu.au/au/cases/vic/VSCA/2010/50.html.

Phil Lynch is Director of the Human Rights Law Resource Centre

Right to Freedom of Expression Incorporates Positive Right to Freedom of Information

XYZ v Victoria Police [2010] VCAT 255 (16 March 2010)

In a significant decision, Bell J has held that the right to freedom of expression under s 15(2) of the Victorian *Charter* 'incorporates a positive right to obtain access to government-held documents'. His Honour found, however, that the *Freedom of Information Act 1982* (Vic) is substantively compatible with this right and that the *Charter* does not 'call for any different manner of applying' the public interest override where access to documents is refused.

Facts

XYZ was a senior constable with Victoria Police. He was investigated by the Ethical Standards Department on suspicion of money laundering. The investigation found no evidence of wrongdoing and he was not charged.

XYZ subsequently sought access to documents associated with the investigation under the *Freedom of Information Act* to 'totally exonerate' himself and 'expose unlawful and improper' aspects of the investigation.

Victoria Police gave access to some documents but not others on the grounds that they were exempt and that their disclosure would 'undermine the integrity of the system for investigating police corruption and misconduct'. In response, XYZ argued that the exempt documents should nevertheless be disclosed on the grounds of 'overriding public interest' (s 50(4) of the FOI Act). He further submitted that s 50(4) should be liberally applied in light of the right to freedom of expression under s 15(2) of the *Charter*, which he submitted subsumes a positive right to freedom of information.

Decision

In a significant decision, Bell J held that the right to freedom of expression under s 15(2) of the *Charter* 'incorporates a positive right to obtain access to government-held documents'. In reaching this decision, Bell J held that:

- Human rights should not be interpreted in a 'narrow or legalistic fashion', but rather in a 'purposeful' and 'generous' way by reference to the 'cardinal values' which the rights embody.
- The right to freedom of expression is foundational to democracy, the rule of law, and individual, social and cultural development.
- Freedom of information is 'a necessary constituent of freedom of expression, for the purposes of the right to seek, receive and impart information will be frustrated if the government, without justification, can simply refuse the information sought'.
- 'International jurisprudence is moving strongly in the direction of a positive obligation being part of freedom of expression' – his Honour cited the European Court of Human Rights, Canada, the UN Human Rights Committee, the Inter-American Court of Human Rights, and the Supreme Court of India in this regard.

In light of the above, Bell J concluded that:

the right to freedom of expression in s 15(2) of the *Charter* implicitly imposes a positive obligation on the government to give access to government-held documents (freedom of information). The obligation I am specifying does not extend to creating documents, collecting data or disseminating information which has not been sought. The right to obtain government-held documents is not absolute and is subject to justifiable exceptions for objective, proportionate and reasonable purposes. The government has a margin of appreciation in this regard.

In the present case, Bell J rejected the application for disclosure of the exempt documents. His Honour stated in this regard that s 50(4) of the FOI Act 'is not, in principle, incompatible with the human right to freedom of information' and that, on the facts, XYZ's 'personal interest in obtaining access to the documents in pursuance of his right to freedom of expression must yield to the superior interests of the public in protecting the integrity of investigations into alleged police misconduct and corruption'.

Comment

This decision was handed down one day prior to the decision of the Court of Appeal in *Momcilovic* (discussed above). Notably, in the present case, Bell J rejected XYZ's submission that, pursuant to s 32 of the *Charter*, the court's task is to 'search for the interpretation of s 50(4) which is most compatible with human rights and give the provision that meaning'.

With respect, subsequent to *Momcilovic*, Bell J's conclusion on the proper construction of s 50(4) may need to be re-visited given the Court of Appeal's unanimous view that s 32 requires the Court to 'explore all possible interpretations of the provision(s) in question, and adopt that interpretation which least infringes *Charter* rights'.

The decision is available at www.austlii.edu.au/au/cases/vic/VCAT/2010/255.html.

Phil Lynch is Director of the Human Rights Law Resource Centre

Coroner Considers Applications for Leave to Make Submissions on Charter of Rights in Police Shooting Inquest

Inquest into the Death of Tyler Cassidy: Ruling on applications to be granted leave to participate as Interested Parties pursuant to s 56 Coroners Act 2008 (4 March 2010)

The Coroner's Court of Victoria recently considered applications by three public interest bodies for leave to appear as interested parties in the inquest into the death of Tyler Cassidy. The applications were made pursuant to s 56 of the *Coroners Act 2008* (Vic), which states that the coroner may give a person leave to appear as an interested person at an inquest if the coroner is satisfied that the person: (1) has a sufficient interest in the inquest; and (2) it is appropriate for the person to be an interested party. In deciding whether or not to grant interested party status to the public interest organisations, the Coroner considered how the Court will approach the test in s 56.

Facts

Tyler Cassidy, a fifteen-year-old youth, was fatally shot by police on 11 December 2008 in Northcote Plaza. A coronial inquest into the circumstances surrounding Tyler's death is to be held in 2010. Issues to be addressed in this inquest will include (though are not limited to) the police approach to Tyler; what was known by the police involved in Tyler's death; what police could have reasonably known or ought to have known about him; police actions and the options available to them at the time; police policies, procedures and training; and the quality, nature and independence of the investigation into Tyler's death. Three public interest bodies, Victoria Legal Aid ('VLA'), Youthlaw and the Human Rights Law Resource Centre, applied for interested party status in the coronial proceedings on the basis that each could, by reason of their particular experience and expertise, assist the Coroner in exploring the issues to be raised during the inquest including, among other matters, the application of the Victorian *Charter*.

Decision

Under the 2008 *Coroners Act*, the new statutory test for a coroner to decide whether to exercise his or her discretion to grant of leave to interested parties is found in s 56. Section 56 provides that leave may be given where a coroner is satisfied that the person seeking the leave has a sufficient interest in the inquest, and it is appropriate for that person to be given interested party status. The test therefore has two limbs, both of which must be satisfied in order for leave to be granted. This differs to the previous statutory test, which only required the coroner to find that a person had a 'sufficient interest' in order to be granted interested person status.

Two of the bodies seeking interested party status submitted to the Coroner that, given the strengthened and broadened role of coroners under the 2008 Act (which includes a focus on the coroner making effective recommendations that address systemic issues in connection to the death), the test for 'sufficient interest' had also been broadened by the new Act.

The Coroner did not agree with this argument and instead found that while the test for the granting of leave had not been broadened under the new Act, the new provisions relating to coroner's recommendations had widened the pool of people likely to express interest in being granted interested party status, as well as widening the pool of those being able to establish sufficient interest. However, the Coroner found that the test under the new Act has an additional requirement, of 'appropriateness', meaning that even when a party can establish a sufficient interest in the subject matter of an inquest, if it is not considered 'appropriate' to grant that party interested party status, their application will be denied.

Appropriateness is not the subject of any further explication in the Act, but the Coroner outlined a number of issues which she felt should be taken into account when considering the 'appropriateness' of an application, including: ensuring the proceedings did not become unnecessarily protracted; assessing whether or not the interested parties were represented by competent counsel; whether there was clarity around the role the interested party wished to play; and whether, in the case of multiple public interest organisations seeking leave, each organisation would cover the same ground, or ground that would otherwise be covered by parties already represented at the bar table.

Discussion

The decision by the Coroner makes it clear that while a broader pool of public interest bodies may be able to show a sufficient interest in a coronial inquiry such to meet the first limb of the test for a grant of

interested party status, this will not guarantee leave is given. Instead, coroner's will look to the appropriateness of granting such leave in a way that considers the totality of the coronial proceedings, including the effect a granting of interested party status might have on the length of the inquest; whether the issues the interested party is seeking to instruct on will be adequately raised by other groups or individuals who are already represented; whether the delivery of expertise by the interested party can be done by way of appearing as a witness, rather than as a part of the bar table; and whether an applicant is represented by competent counsel. In addition, the coroner can also exercise his or her discretion, in the granting of interested party status, to limit the role an interested party given leave can play in the proceedings.

Having regard to these factors, the Coroner granted leave to VLA and limited leave to the HRLRC. Youthlaw was denied leave.

Penny Harris is a lawyer with Allens Arthur Robinson

Temporary Exceptions and the Right to Equality and Non-Discrimination: Exemptions should be Subject to Ongoing Monitoring and Evaluation

Wesley College (Anti-Discrimination Exemption) [2010] VCAT 247 (3 March 2010)

In this case, VCAT considered an exemption application pursuant to s 83 of the *Equal Opportunity Act 1995* by Wesley College. The exemption sought to enable Wesley to advertise for and give preference to prospective female students so as to promote a gender balance among students at the school.

Deputy President McKenzie granted the exemption, finding that its purpose was to 'promote coeducation' and that, without such an exemption, boys would tend to 'swamp' girls at the school and diminish the coeducational experience for all.

In deciding the application, McKenzie DP adopted the approach of Bell J in *Lifestyle Communities* [2009] VCAT 2221, which requires that in making a decision on an exemption application VCAT must give proper consideration to relevant human rights (s 38 of the *Charter*) and interpret s 83 of the EO Act compatibly with human rights (s 32 of the *Charter*).

In the present case, McKenzie DP held that the exemption application engaged the rights under s 8 of the *Charter*, being 'the right to equality before the law, to equal and effective protection against discrimination, the right to enjoy human rights without discrimination and to equal protection of the law without discrimination.'

McKenzie DP then considered whether granting Wesley an exemption under s 83 of the EO Act would comport with s 7(2) of the *Charter* and constitute 'a reasonable limit on those rights, a limit which can be demonstrably justified in a free, democratic society based on human dignity, equality and freedom'. She stated that:

Here, the nature of the rights in s 8 is important. They give basic equality before the law, and basic protection against discrimination. But the purpose of the limitation represented by the exempt conduct is also, in my view, very important. It is to enable children to experience coeducation, to have educational choice, to prepare for a mixed gender society, and to learn to better respect the equality and dignity of each sex. The limitation is proportionate to that purpose. It does not seek to achieve a majority of girls over boys or vice versa. It simply seeks to achieve a gender balance so that coeducation can succeed.

McKenzie DP further stated that she was 'satisfied that there is no less restrictive means of achieving this purpose' (s 7(2)(e) of the *Charter*) and concluded therefore that granting the exemption application would 'represent a reasonable limit on the human rights in the *Charter*'. Accordingly, she granted Wesley an exemption pursuant to s 83 of the EO Act for a maximum of three years.

As a final point, McKenzie DP emphasised that exemptions under s 83 of the EO Act are of a temporary nature only and should not be treated as permanent exceptions to the application of anti-discrimination law. She stated:

when seeking renewal of an exemption of this kind, the school or college must think carefully and realistically about whether coeducation will ever be ultimately possible without the underpinning of an exemption, and if this is the case, whether the coeducational model should be changed or even discontinued, or whether some new set of initiatives should be tried. *The longer an exemption lasts, the more renewals that have been given, the more likely it may be that what was once a reasonable limit on human rights will become an unreasonable limit.* In this case, I am not satisfied that this time has yet come, and I am also satisfied that the College actively monitors ratios and its exempt conduct.

This is consistent with the international human rights law approach to 'special measures', which requires that exemptions such as those available under s 83 of the EO Act be granted only for measures that are temporary, targeted, designed to address structural inequalities and proportionate. Further, special measures must have a clear objective and be subject to ongoing monitoring and evaluation: see, eg, UN Committee on the Elimination of Racial Discrimination, *General Recommendation No 32: Special Measures*.

The decision is available at www.austlii.edu.au/au/cases/vic/VCAT/2010/247.html.

Phil Lynch is Director of the Human Rights Law Resource Centre

Comparative Law Case Notes

'Act of State Doctrine' does not Apply when Grave Violations of Human Rights Alleged: Court Agrees to Consider Australia's Obligations to Citizens Abroad

Habib v Commonwealth of Australia [2010] FCAFC 12 (25 February 2010)

On 25 February 2010, the Full Court of the Federal Court delivered a significant judgment that will allow the Court to consider the Mamdouh Habib's claims against the Commonwealth for torts of misfeasance in public office and intentional but indirect infliction of harm.

The Court held that the Commonwealth could not rely on the common law act of state doctrine to have the applicant's claims dismissed. Chief Justice Black and Jagot J held that the doctrine does not apply where grave violations of international human rights law are alleged. Justice Perram found the application of the doctrine in this case to be inconsistent with Constitutional norms.

Facts

The applicant, an Australian citizen, alleges that:

- In October 2001 he was arrested in Pakistan and detained for approximately one month. During this period of detention he was mistreated by Pakistani and US officials.
- In November 2001 he was taken from Pakistan to Egypt where he was detained for about six months and again mistreated by Egyptian and US officials.
- In April or May 2002 he was taken to Bagram airbase in Afghanistan then to Guantanamo Bay where he was detained without charge until January 2005, when he was repatriated to Australia. Again during this period of detention the applicant alleged he suffered severe abuse.

The applicant alleges that Australian officials, among others, participated in interrogations of him, visited him in detention, witnessed his mistreatment and urged his detention to continue. He claims it would have been known to the Australian officials merely by looking at him that he had suffered mistreatment.

The applicant is claiming civil damages against the Commonwealth for torts of misfeasance in public office and intentional but indirect infliction of harm, as a result of Commonwealth officials aiding, abetting and counselling his torture and other inhumane treatment by foreign officials when detained in foreign countries.

In response, the Commonwealth sought to have the applicant's claims dismissed on the grounds that they are non-justiciable since the Court would be required to determine that the conduct of a foreign government constituted criminal offences against Commonwealth laws. The Commonwealth contended that the common law *act of state doctrine* prohibits the Court from sitting in judgement on the acts of foreign governments within their own territory.

Decision

Chief Justice Black with Perram and Jagot JJ held that the act of state doctrine was inapplicable and that Mr Habib's claims are justiciable.

Justice Perram

His Honour's judgment focussed on the Court's constitutional role to review the legality of administrative action. His honour held that no common law doctrine could preclude the judiciary from scrutinising the

limits of Commonwealth power. Accordingly, the act of state doctrine does not apply where the Court is asked to review conduct of Commonwealth officials that is allegedly outside their scope of authority:

to the extent that the act of state doctrine would confer immunity from suit on the Commonwealth it is inconsistent with the constitutional orthodoxy of this country and its application is to be rejected in a fashion as complete as it is emphatic.[29]

Justice Jagot

Her Honour's judgment focussed on the development of the act of state doctrine in cases involving grave breaches of international human rights law and the status of torture in international and domestic law.

Her Honour concluded that the development of the common law did not support the application of the doctrine where grave breaches of human rights were alleged. Her Honour was of the opinion that weight of the authorities did not allow alleged acts of torture to escape judicial review unless there was a valid claim for sovereign immunity.

In reaching the conclusion that the act of state doctrine does not apply to exclude the Court considering the applicant's claims, Her Honour placed significance on the jus cogens status of torture under international law, and the Parliament's reflection of this status through the extraterritorial application of the *Crimes (Torture) Act 1998* (Cth).

Chief Justice Black

The Chief Justice agreed with the reasoning of Jagot J. His Honour agreed that the authorities did not support the application of the doctrine in this case, adding that even if the common law was unclear the same conclusion should be reached:

the path chosen should not be in disconformity with moral choices made on behalf of people by the Parliament reflecting and seeking to enforce universally accepted aspirations about the behaviour of people one to another. [7]

The decision is available at www.austlii.edu.au/au/cases/cth/FCAFC/2010/12.html.

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Protection from Cruel Treatment and the Death Penalty: UK Breaches Convention Obligations by Transferring Prisoners to Iraqi Custody

Al-Sadoom and Mufdhi v United Kingdom [2010] ECHR 282 (2 March 2010)

The European Court of Human Rights has held that the United Kingdom breached a number of its obligations under the *European Convention on Human Rights* by handing over two suspected insurgents (the applicants) to Iraqi authorities.

The Court found that the UK Government had not done all in its power to ensure that the applicants would not be subjected to the death penalty once transferred, thereby breaching the prohibition against inhuman treatment. Although the applicants had already been handed over by the time of the Court's decision, the UK was ordered to do all that it could to prevent a possible death sentence being imposed.

Facts

The applicants were arrested in 2003 by UK forces in Basra on suspicion of orchestrating insurgent violence and being involved in the deaths of two UK servicemen. They were detained in UK facilities until their transfer to Iraqi authorities on 31 December 2008, the date of expiry of the UN mandate for occupying forces in Iraq.

In December 2005 the cases against the applicants were transferred to the Central Criminal Court of Iraq, and then eventually to the Iraqi High Tribunal (IHT). The IHT first requested transfer of the applicants in December 2007. The UK authorities did not initially comply with this, and later requests, due to concerns about the possible imposition of the death penalty, which was reintroduced in Iraq in August 2004, and because domestic proceedings initiated by the applicants in the English courts to prevent their transfer had not yet been completed.

The English Divisional Court held that although the applicants fell within the UK's jurisdiction for the purpose of the Convention, it considered itself bound by the English Court of Appeal decision of *R(B) v*

Secretary of State for Foreign and Commonwealth Affairs [2004] EWCA Civ 1344. This case held that where a fugitive is within the UK's jurisdiction but on another State's territory (such as in an embassy), the UK is obliged to surrender the fugitive unless it was clear that the fugitive would be subjected to inhuman treatment. A possible death penalty would not be characterised as such. Thus, despite the Divisional Court's being 'seriously troubled' by the proposed transfer, it found that the Convention did not apply because of *R(B)*. The proposed transfer would therefore be lawful.

An appeal to the English Court of Appeal was dismissed and a request for leave to the House of Lords was denied. The applicants were transferred from UK to Iraqi authorities on 31 December 2008. Once transferred, the applicants faced trial in the IHT. Although the initial charges were dismissed due to insufficient evidence, the case is being reinvestigated and the applicants are still in custody. As a result, the applicants still face a possible death sentence.

From the time of the initial IHT request to the transfer of the applicants, the UK Government approached the President of the IHT and Iraqi prosecutors to seek assurances that the death penalty would not be imposed. The Government also provided documentation voicing its opposition to the death penalty, pleas of clemency from the families of the UK servicemen, and a waiver by the UK embassy of any right to civil compensation. However, at the time of the Court's judgment, no binding assurance was obtained.

Decision

The applicants alleged to the Court that they fell within UK jurisdiction and that their transfer violated their rights under, *inter alia*, art 2 (right to life) and art 3 (protection from inhuman treatment) of the Convention.

The Court unanimously held that there was jurisdiction and that there had been a breach of art 3. As was recognised in the English rulings, there was 'a real risk' of the applicants being executed. The applicants therefore had a 'well-founded fear' that 'must have given rise to a significant degree of mental suffering'. This constituted inhuman treatment within the meaning of art 3.

Article 3 obliges a Convention State not to deport, extradite or transfer a person if he or she faces inhuman treatment (see *Saadi v Italy* [2008] ECHR 179, [125]). The UK therefore breached the article. This is especially since the Court believed that more efforts should have been taken to negotiate with the Iraqis. The Court also rejected the argument that the UK was excused from the operation of the Convention as it was legally obliged to transfer the applicants: a Convention State cannot enter into an agreement with another State which conflicts with Convention obligations. This is all the more the case given the 'absolute and fundamental nature of the right not to be subjected to the death penalty'. *R(B)* was distinguished as relating to persons seeking asylum, and not detainees in custody.

Given this finding, the Court did not find it necessary to rule on art 2, although it was discussed at length. The UK was ordered to take 'all possible steps' to obtain an assurance from the Iraqi authorities that the death penalty would not be imposed.

Relevance to the Victorian Charter

This case suggests that a court might place a weighty onus on Victorian law enforcement authorities when dealing with jurisdictions where the death penalty has not been abolished. If a suspect in Victorian custody faces a possible death sentence or inhuman treatment if transferred or extradited, this would raise serious questions under ss 9 (right to life) and 10 (protection from inhuman treatment) of the Victorian Charter.

The decision is available at www.bailii.org/eu/cases/ECHR/2010/282.html.

Michael Dunstan, Seconded Solicitor, Human Rights Law Resource Centre

Right to Liberty and Security and the Police Use of Force: Excessive Use of Force Results in Reduction of Sentence

R v Nasogaluak, 2010 SCC 6 (19 February 2010)

The Canadian Supreme Court has held that the excessive use of force by police officers in conducting an arrest was a breach of the accused's right to security of the person and warranted a reduction of his sentence.

Facts

In May 2004, the Royal Canadian Mounted Police arrested Nasogaluak for driving whilst intoxicated. While attempting to arrest the defendant, the police officers pointed a gun at him, punched him three times in his head, and then twice in his back whilst he was pinned to the ground and resisting arrest. The last two blows were strong enough to break the defendant's ribs, puncturing his lungs. The defendant was found to be over the legal blood alcohol limit and after release checked himself into hospital where he required emergency surgery to treat his broken ribs and collapsed lung. Nasogaluak subsequently lost his job as a result of the injuries.

At trial, the defendant pleaded guilty to the charges of impaired driving and flight from police. *Canadian Charter* matters were raised in relation to sentencing. The case was appealed to the Alberta Court of Appeal by the Crown, and then to the Supreme Court of Canada by both parties.

Trial judge's decision

The trial judge found that although there had not been any breach of s 12 of the *Canadian Charter* (relating to cruel and unusual punishment), the police actions breached s 11(d) (right to the presumption of innocence) and s7 (right to life, liberty and security of the person). The trial judge also found that there had been a use of excessive force in apprehending the defendant.

As a remedy for the *Charter* breaches, the trial judge granted a reduced sentence. The trial judge held that the breaches were 'so egregious as to justify taking Mr Nasogaluak from the realm of cases that require incarceration'.

Court of Appeal's decision

The Crown appealed to the Alberta Court of Appeal, where the majority upheld the trial judge's findings as to the use of excessive force. The Court of Appeal also upheld that s 24(1) of the *Canadian Charter* can validly be used to reduce sentences, referring to the Ontario Court of Appeal case in *R v Glykis* (1995) 84 O.A.C. 140, where the court held that where the breach of the *Charter* mitigated the seriousness of the offence or imposed additional hardship or punishment on the accused, then the *Charter* may be used to reduce sentences.

Decision

The Supreme Court held that the process of sentencing allows a large degree of discretion, and that although judges may weigh sentencing objectives in the tailoring of a decision, no single sentencing objective trumps the others. This process enables the court to balance and blend sentencing goals 'up or down the scale of appropriate sentencing [...] subject to the overarching guidelines and principles in the [Criminal] Code and in the case law'.

In this particular case, impaired driving prescribed a minimum sentence. Whilst certain minimum sentences have been successfully challenged for gross disproportionality (under s12 of the *Charter*), absent a declaration of unconstitutionality, minimum sentences must be given where prescribed by the *Criminal Code*. The trial judge was therefore held to have erred in his decision to reduce the sentence below the minimum prescribed.

This issue was separate to the matter of the use of s 24(1) of the *Canadian Charter* to reduce sentences. This *Charter* remedy does not actually have to be invoked for *Charter* breaches to be taken into account in sentencing, with breaches forming part of the normal factors judges are able to take into account when sentencing.

The Supreme Court outlined the circumstances where a *Charter* based remedy may be used in the sentencing process, as distinct from the normal sentencing factors that can be taken into account. The Supreme Court concluded that where factors are unable to be taken into account in mitigation of sentencing (that is, that the breaches do not relate to the offence itself), then Courts may use s 24(1) of the *Charter* to address factors unrelated to the offence and the offender. This would include circumstances such as abuse of process, misconduct by state agents, charges or other criminal procedures.

Relevance to the Victorian Charter

Unlike the *Canadian Charter*, the Victorian Charter does not possess a remedy provision. Further, although there is no express capacity for a court to award 'any remedy it seems fit' for a *Charter* breach, Victorian courts may deem unlawful any act by a public authority that is incompatible with a human right, or any decision that fails to give proper consideration to human rights (s 38(1)).

Section 39 of the Victorian *Charter* also provides the ability for a person to seek any relief or remedy on the basis of the unlawfulness of s 38(1). Given the dominant focus of the Victorian *Charter* on assessing the compatibility of acts of Parliament or acts by public authorities, the scope of s 24(1) of the Canadian *Charter* is not replicated. This case is useful, however, in analogising police officers' excessive use of force, and circumstances that may amount to unlawfulness under the Victorian *Charter*. Whilst a person is unable to seek damages under the Victorian *Charter* and courts are not given the power to remedy *Charter* breaches as in Canada, it may have applicability within the general sentencing provisions in Victoria as a mitigating factor as discussed by the Supreme Court of Canada, or as a basis of relief under s 39(1).

The decision is available at www.canlii.org/en/ca/scc/doc/2010/2010scc6/2010scc6.html.

Alexandra Phelan, Law Graduate, Mallesons Stephen Jaques Human Rights Law Group

Resisting Extradition Based on the Right to Private and Family Life

Norris v Government of United States of America [2010] UKSC 9 (24 February 2010)

The UK Supreme Court has held that the extradition of a mentally and physically fragile 66-year-old did not contravene the right to respect for private and family life under art 8 of the *European Convention on Human Rights*.

Facts

The United States sought the extradition of Norris in relation to criminal charges for price fixing and obstruction of justice. Norris resisted extradition on the basis that it would contravene his right to respect for private and family life.

Before retiring in 2002, Norris was the CEO of Morgan Crucible plc. Morgan and its subsidiaries became involved in an illegal price fixing scandal in the United States and were ultimately fined a total of \$11 million. While US authorities granted immunity to most of Morgan's senior executives, Norris was not granted any such immunity. A grand jury indicted Norris on one charge of price fixing and three charges of obstructing justice. The obstruction charges arose because, after becoming aware that the US authorities were investigating, Norris had methodically set about concealing or destroying the documentary evidence of the price fixing arrangement.

There was no question that the extradition would interfere with Norris' private and family life. Equally, there was no doubt that the extradition was in accordance with the law. The only issue that arose for the Court's consideration was whether the interference with Norris' right to private and family life was 'necessary in a democratic society...for the prevention of disorder and crime'.

Decision

The result turned on the question of proportionality; that is, did the interference with Norris' rights fulfil a 'pressing social need' and was it proportionate to the legitimate aim relied upon to justify the interference?

The Court noted that art 8 of the Convention had never been successfully invoked to prevent an extradition. Further, the Court referred to the importance of extradition as a means of ensuring retribution for criminal offenders and maintaining international law and order. Accordingly, it was held that 'public interest...in extradition weighs very heavily indeed' and the consequences of interference with art 8 rights would have to be 'exceptionally serious before [it could] outweigh the importance of extradition.'

The Court held that 'the gravity of the crime' of which the applicant was accused was a relevant consideration in determining whether the interference was proportionate. The Court noted that 'the significance [of rejecting an extradition request] will depend on the gravity of the offence'. Norris'

offences were considered to be very grave as, if convicted, he was likely to spend at least 21-27 months in prison.

In this context, Norris had to demonstrate that the consequences of interference with his art 8 rights outweighed the significant public interest in the extradition of those accused of criminal activities. Norris submitted that he was physically and mentally fragile, having suffered depression and prostate cancer in recent years. Additionally, the Court accepted that it was relevant that the extradition would have a negative effect on Norris' wife. She did not intend to accompany Norris to the US if he was convicted and, accordingly, the impact on her private and family life would be total.

Nevertheless, the Court held that the extradition of Norris was not disproportionate. Rather, if Norris were not extradited to face serious charges in the US, the 'public interest [in maintaining law and order] would be seriously damaged'.

Relevance to the Victorian Charter

While deportation and extradition decisions are made pursuant to Commonwealth jurisdiction, this case may assist interpretation of the Victorian *Charter*.

Section 13 of the *Charter* provides that a 'person has the right not have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with.' This decision may inform a Victorian Court's interpretation of whether the interference with private life is unlawful or arbitrary. The Court's consideration of whether the interference with Norris' rights was 'necessary in a democratic society' may also be relevant to the interpretation of s 7 of the *Charter*, which states that a human right may be subject to limits that are 'demonstrably justified in a free and democratic society'.

The decision is available at www.bailii.org/uk/cases/UKSC/2010/9.html.

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Right to Private Life and Protection of Children

AD and OD v United Kingdom [2010] ECHR 340 (16 March 2010)

The European Court of Human Rights has held that the United Kingdom breached its obligation to respect private and family life under art 8 of the *European Convention on Human Rights* because of errors made by a local child protection authority.

The errors lead to the removal of a child from his family for a period that was unnecessarily prolonged and in a manner that was overly disruptive way. The Court also held that there had been a breach of art 13 of the Convention because, at the time of the incident, no domestic redress was available for the child's mother.

Facts

The first applicant was the mother of the second applicant, who was born in 1996. When the second applicant was a baby, he suffered a number of fractured ribs which were investigated by authorities. The first applicant raised the possibility that the fractures could be the result of brittle bone disease, but this was dismissed by the doctor and subsequent experts. It was concluded that the fractures were sustained 'non-accidentally' and, on the application of the local authority, an interim care order was issued. The family was required to live in a resource centre 150 miles away from their home town while assessments were carried out. This took 12 weeks, although the required risk assessment was not done because of a communication error. On the family's return to their home town, the risk assessment was done and the second applicant was placed in foster care outside of the extended family. Whilst in foster care, the second applicant suffered another fracture and subsequent tests revealed evidence of brittle bone disease that was not evident when earlier tests were done. It was recommended in October 1997 that the second applicant be placed back with his family, but this was only done by the local authority six weeks afterwards.

The first applicant complained to the local authority, which undertook an investigation. Unsatisfied with the outcome, she undertook domestic legal proceedings alleging negligence against both her and her son. Their case was dismissed as it was held that the local authority did not owe her a duty of care, and her son had not suffered any recognisable harm.

Decision

The applicants alleged to the Court that their treatment violated art 8 (right to private and family life) of the Convention. They also alleged a breach of art 13 (right to effective domestic remedy) following their unsuccessful domestic legal action.

The Court unanimously held that art 8 was breached for both applicants. It was not disputed that the applicants' family life was interfered within the meaning of art 8. It was therefore for the Court to determine whether this interference was justified; ie, whether the interference was in accordance with the law, whether it had a legitimate aim, and whether it could be regarded as necessary in a democratic society. It was 'without question' that the intervention by the local authorities conformed to UK law and was done with the legitimate aim of protecting the second applicant. The Court therefore considered the third requirement in detail, which included assessing whether the reasons adduced to justify the measures were 'relevant and sufficient'.

The Court reiterated that 'authorities enjoy a wide margin of appreciation when assessing the necessity of taking a child into care', and that 'mistaken judgments or assessments by professionals do not *per se* render childcare measures incompatible' with art 8. This is because authorities 'cannot be held liable every time genuine and reasonably held concerns' about a child's safety are later proven to be misguided. With this in mind, the Court considered the local authority's actions in two parts: the initial decision to take action based on the perceived risk to the second applicant; and the subsequent handling of the case.

Regarding the initial decision to investigate, the Court held that the local authority could not be faulted on relying on the medical evidence at the time, given that this evidence was not 'inadequate, confused or inconclusive'. Therefore, the reasons to justify the decision to investigate were 'relevant and sufficient'. However, a number of subsequent actions amounted to failings that 'both extended and exacerbated the interference with the applicants' right to respect for their family life'. These failings included: the relocation of the family far from their home; the failure to ensure the correct risk assessment was done in the first place; dismissing without proper consideration the possibility of foster care with a relative; and the unreasonable length of time it took for the local authority to return the second applicant to the family after it was advised to do so. As a result, the Court held that the actions of the intervention were not necessary, and hence there was a breach of art 8.

Concerning art 13, the Court unanimously held that the first applicant's right to a domestic remedy was breached, given that she could not mount a claim for damages because the local authority did not owe her a duty of care, and the relevant section of the *Human Rights Act 1998* (UK) that would have allowed her to pursue her claim was not yet in force. However, the second applicant's right was not breached, as a duty of care to him did exist. This meant that he did have a means of domestic legal redress, even if the domestic courts found that any damage he suffered was non-justiciable.

Relevance to the Victorian Charter

This case suggests that a court might consider the human rights implications of actions taken by Victorian child-protection authorities as two separate issues: first, the initial investigation; and second, subsequent actions that might adversely affect a family in question.

Although such authorities could be granted a wide discretion to investigate without fear of prosecution for making a genuine error, they would need to ensure that any subsequent disruptions to privacy and family life are no more than what is necessary in the circumstances. Otherwise, there could be a potential breach of ss 13 (right to privacy and reputation) and/or 17 (protection of families and children) of the Victorian *Charter*.

The decision is available at <http://www.bailii.org/eu/cases/ECHR/2010/340.html>.

Michael Dunstan, *Seconded Solicitor*, Human Rights Law Resource Centre

Right to Public Participation Requires Reasonable Opportunity to be Heard

Poverty Alleviation Network & Ors v President of the Republic of South Africa & Ors [2010] ZACC 5 (24 February 2010)

In *Poverty Alleviation Network ('Matatiele 3')* the Constitutional Court of South Africa effectively held that constitutional obligations owed by South African legislatures to facilitate public involvement are

obligations of process rather than outcome. Thus, so long as the public has been given a reasonable opportunity to give its views or opinions to the legislature in relation to its legislative or other processes, and the legislature has given them due consideration, there is no requirement that the legislature follows or gives effect to such views in performing its functions.

Facts

Matatiele 3 is the final part of a series of South African cases in relation to the transfer of the Matatiele Municipality from the KwaZulu-Natal Province to the Eastern Cape Province. In brief, the establishment of the post-Apartheid Republic of South Africa involved the establishment of provinces (as principal sub-federal units) and municipalities (local government). The boundaries of provinces were drawn up on a different basis to those of municipalities, leading to certain cross-boundary jurisdictional issues. The Matatiele Municipality was not strictly a cross-boundary municipality but suffered similar issues as what the South African government termed a 'cross-boundary jurisdictional enclave'.

In 2005, the Twelfth Amendment Act was passed to amend the South African Constitution, altering provincial boundaries so as to rectify the issues that had arisen in relation to cross-boundary municipalities and the Matatiele Municipality. Under the South African Constitution, such a constitutional amendment requires a special majority vote in each of the National Assembly (the lower house) and National Council of Provinces ('NCOP' – the upper house) and, where the amendment only concerns certain provinces, the Legislatures of those provinces must each approve the amendment. The required votes in favour of the amendment were obtained including the approval of the KwaZulu-Natal and Eastern Cape Legislatures.

In *Matatiele Municipality & Ors v President of the Republic of South Africa & Ors* [2006] ZACC 2 and *Matatiele & Ors v President of the Republic of South Africa & Ors (No 2)* [2006] ZACC 12 the Matatiele Municipality and other organisations and groups contested the validity of the constitutional amendment (insofar as it applied to the Matatiele Municipality). It was contended that the KwaZulu-Natal Legislature, prior to its approval of the Twelfth Amendment Bill, had not facilitated adequate public involvement in the legislative process in accordance with the South African Constitution. It was common ground that the KwaZulu-Natal Legislature had not held any public hearings in relation to the Twelfth Amendment Act. Therefore, the Constitutional Court held in 2006 that the Twelfth Amendment Act, insofar as it applied to the Matatiele Municipality, was invalid.

In mid-May 2007, the federal government announced that it intended to bring a constitutional amendment in order to effect the alterations to provincial boundaries which had been struck down in 2006. At the federal level, the Minister for Justice and the relevant parliamentary committees each separately invited written submissions in relation to the proposed amendment. At the provincial level, a number of town-hall meetings and hearings at the KwaZulu-Natal Legislature were held in October 2007. The Thirteenth Amendment Bill was subsequently passed in December 2007. In 2008, *Matatiele 3* (the present case) was brought, to contest the validity of the Thirteenth Amendment Act.

Decision

Sections 59(1)(a), 72(1)(a) and 118(1)(a) of the South African Constitution require the National Assembly, the NCOP and each Provincial Legislature, respectively, to 'facilitate public involvement in the legislative and other processes of the legislature and its committees'.

The applicants' principal contention was that, whilst the Parliament and the KwaZulu-Natal Legislature had ostensibly facilitated public involvement in relation to the Thirteenth Amendment Bill, they did not properly consider the submissions made by residents of the Matatiele Municipality and their representatives 'but merely went through the motions in inviting submissions and arranging public meetings so as to secure constitutional compliance of the outcome of the process'.

Nakbinde J, with whom the other Justices concurred, noted that in determining whether the facilitation of public involvement was adequate for the purposes of the South African Constitution:

[T]his court's role is to embark on a reasonableness enquiry so as to determine whether 'there has been the degree of public participation required by the Constitution.' Striking a balance between the need to respect parliamentary autonomy on one hand, and the right of the public to participate in the legislative process on the other, is crucial.

Nkabinde J then quoted *Doctors for Life International v Speaker of the National Assembly & Ors* [2006] ZACC 11 where it was held that 'in determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being ... appropriate...'

Nkabinde J, held, as a matter of fact, that representations made in relation to the proposed constitutional amendments by residents of the Matatiele Municipality were duly considered by the relevant legislatures and did not comment further as to the lack of good faith that the applicants had alleged. Having made this finding, she continued:

[T]he applicants' argument suggests that compliance with the Constitution depends on the outcome of the participation, which must have an impact on the final decision. Although due cognisance should be taken of the views of the populace, it does not mean that Parliament should necessarily be swayed by public opinion in its ultimate decision. Differently put, public involvement and what it advocates do not necessarily have to determine the ultimate legislation itself.

The fact that the process of engagement is not reflected in a change to the legislation, or in the accommodation of the representations submitted to Parliament, does not necessarily mean that reasonable public participation did not take place or that the views of the public were not considered.

For these reasons, Nkabinde J held that the Thirteenth Amendment Act had been passed in accordance with the Constitution.

Relevance to the Victorian Charter

This decision provides useful guidance for the interpretation of s 18 of the Victorian *Charter* – the right to take part in public life.

Section 18 of the *Charter* is itself modelled on art 25 of the *ICCPR*, which enshrines the right of persons to participate in public affairs, including in decision making processes that affect them. In a General Comment on art 25, the Human Rights Committee has highlighted that special strategies and measures may need to be developed to facilitate the meaningful participation of people who are disadvantaged or have special needs (such as people who are homeless or people with disability): *General Comment No 25*, [9]-[21].

The present decision highlights the difficulty for courts in enforcing the right to public participation in terms of substantive legislative outcomes rather than in terms of due process and procedure. It must be noted that the South African Constitution enshrines this concept as a positive obligation upon the legislature to facilitate public involvement in the legislative process rather than a general right of the individual to take part in public life.

The decision is available at www.constitutionalcourt.org.za/site/PovertAlleviation.htm.

John Leung is a lawyer with Allens Arthur Robinson

Hate Speech and the Limits of Freedom of Expression and Religious Belief

Whatcott v Saskatchewan (Human Rights Tribunal), 2010 SKCA 26 (25 February 2010)

The Court of Appeal for Saskatchewan has unanimously held that four flyers, which contained anti-gay sentiments, were not so extreme as to violate that prohibition on hate speech under *The Saskatchewan Human Rights Code* ('Code'). In arriving at this decision, the court emphasised the importance of protecting the right to freedom of expression, which is protected by the *Code*, the *Canadian Charter of Rights (Charter)* and the common law.

Facts

Under the name Christian Truth Activists, William Whatcott distributed four flyers (two of which were identical) to various homes in 2001 and 2002. The flyers were headed 'Keep Homosexuality out of Saskatoon's Public Schools!', 'Sodomites in our Public Schools' and 'Saskatchewan's largest gay magazine allows ads for men seeking boys!' Four persons who received these flyers complained to the Saskatchewan Human Rights Commission ('Commission') alleging that the flyers promote hatred against individuals based on their sexual orientation.

The Commission upheld these complaints, finding that the flyers violated s 14(1)(b) of the *Code*, which prohibits any publication or display:

that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.

This prohibition is limited by s 14(2), which provides that 'nothing in subsection (1) restricts the right to freedom of expression under the law upon any subject'.

Whatcott appealed the Commission's decision to the Court of Queen's Bench. The Queen's Bench considered whether the Commission erred in concluding that the flyers contravened s 14(1)(b), and whether s 14(1)(b) of the *Code* contravened Whatcott's freedom of religion pursuant to s 2 of the *Charter*. Section 2 of the *Charter* protects freedom of conscience and religion as well as freedom of thought, belief, opinion and expression.

The Queen's Bench dismissed the appeal, having found that the flyers make 'clear references to homosexuals as paedophiles or molesters of children', thereby 'expos[ing] the homosexual community to hatred in the extreme sense', and that s 14(1)(b) imposed a justifiable limit on religious speech under s 2 of the *Charter*. Whatcott appealed this decision on the basis that the flyers did not violate s 14(1)(b) of the *Code* and, alternatively, that the flyers were directed toward sexual behaviour, not sexual orientation, and were therefore not unlawful.

Decision

The Court of Appeal for Saskatchewan upheld the appeal on the basis that the flyers did not violate s 14(1)(b) of the *Code*.

The court held that s 14(2) should not be interpreted literally, but does require the limitation in s 14(1)(b) to be balanced with the protection of freedom of expression. To do this, Hunter J held that s 14(1)(b) requires an objective examination of the publication, taking into account the context of the publication and the circumstances in which it was presented.

Justice Smith expanded on Hunter J's discussion of context. Justice Smith agreed that it is first necessary to consider the abstract meaning of the words complained of in the context of the flyer and the principles and aims of the *Code*, considered as a whole. However, Smith J held that it is also necessary to consider the broader context of historical disadvantage and vulnerability of the target group (being primarily gay men), and the historical and political context in which the expression was made.

The Court held that context is particularly important when balancing freedom of expression and the right to protection against discrimination on the basis of sexual orientation because of the underlying issues of morality, which is an acceptable topic for public debate. Justice Smith held that questions of sexual morality are intricately involved in public policy and therefore 'lie near the heart of speech worthy of protection'.

The court held that the flyers did not meet the test for breaching s 14(1)(b) described in *Canadian (Human Rights Commission) v Taylor* [1990] 3 SCR 892, which requires the words complained of to objectively express feelings of 'an ardent and extreme nature' and 'unusually deep-felt emotions of detestation, calumny and vilification'. The Court reached this view in the context of one flyer being too ambiguous to 'expose or tend to expose homosexuals to hatred' and two of the flyers comprising part of an ongoing debate about teaching about homosexuality in public schools. While one of the flyers contained a number of offensive phrases that did not contribute to this debate, Hunter J held that 'one phrase does not change the overall effect of the flyer'.

The Court of Appeal did not consider it necessary to consider in detail Whatcott's ground of appeal based on a distinction between sexual conduct and sexual orientation because the court found that the flyers did not violate the *Code* in any event. Nevertheless, the Court noted that this distinction must 'ring hollow' because it is the intolerance of sexual conduct that marginalises those with same-sex sexual orientation. However, the Court held that the distinction between the activity and the individual was relevant when considering the broader context of the flyers, which involved comment on questions of sexual morality and public policy.

Relevance to the Victorian Charter

This case may assist the interpretation of the *Racial and Religious Tolerance Act 2001* (Vic) in light of the *Charter*, particularly s 15, which protects freedom of expression. Section 15 explicitly states that the right to freedom of expression may be subject to lawful restrictions reasonably necessary to respect the

rights and reputation of others, or for the protection of national security, public order, public health or public morality.

The emphasis on the context of the expression is also instructive. The importance of context has been raised in federal jurisprudence on racial hatred provisions. Specifically, in *McLeod v Power* (2003) 173 FLR 31, a Caucasian prison officer complained that an Aboriginal woman called him a 'fucking white piece of shit' and said 'fuck you whites, you're all fucking shit'. Federal Magistrate Brown considered that it would be 'drawing a long bow' to find that 'whites' are a group protected by the *Racial Discrimination Act 1975* (Cth), given the historical and cultural dominance of white people within Australia and the fact that they are not in any sense an oppressed group.

The decision is available at www.canlii.org/en/sk/skca/doc/2010/2010skca26/2010skca26.html.

Melanie Schleiger is a lawyer with Lander & Rogers and a Board member of the Human Rights Law Resource Centre

HRLRC Policy Work

Setting the Agenda: Policy Brief on Business and Human Rights

The Human Rights Law Resource Centre is preparing a series of policy briefs designed to inform and advance the human rights agenda in Australia. Each brief identifies a human rights problem or opportunity, discusses the imperative for action, adduces and analyses relevant evidence, and makes concrete recommendations for Australia to advance the agenda at the international and national levels.

The first policy brief focuses on 'Business and Human Rights' and contends that the further development and operationalisation of the business and human rights agenda presents a significant opportunity and responsibility for Australia, both at the international and domestic levels.

The brief makes 6 concrete recommendations for Australian action at the international level, including explicitly adopting the Special Representative's framework as a basis for Australia's approach to corporate human rights law and policy, and conducting human rights impact assessments of proposed multilateral and bilateral trade and investment agreements, together with major public-private partnerships.

The brief makes 9 recommendations for Australian action at the local level, including using public procurement to reinforce the responsibility of business to respect human rights and to promote socially and environmentally responsible governance, developing guidance for companies on a human rights-based approach to business, and amending the *Corporations Act 2001* to require (or at the very least explicitly permit) directors to consider human rights issues as an aspect of their duty to act in the best interests of the company.

The policy brief is at www.hrlrc.org.au/content/topics/business/setting-the-human-rights-agenda/.

Phil Lynch is Director of the Human Rights Law Resource Centre

Parliamentary Scrutiny and the Promotion and Protection of Human Rights

The legal obligation to respect, protect and fulfil human rights applies to all arms of government – legislative, executive and judicial – and directly engages the parliament.

Notwithstanding Australia's international legal obligations, however, the Commonwealth has not established formal domestic mechanisms to ensure comprehensive parliamentary scrutiny of human rights.

On 5 March 2010, therefore, the Centre made a Submission to the Inquiry into the future direction and role of the Senate Scrutiny of Bills Committee, entitled 'Parliamentary Committees and the Promotion and Protection of Human Rights'.

The Centre's submission focuses on Terms of Reference 1(c) and 2, namely:

1. what, if any, additional role the Committee should undertake in relation to the human rights obligations applying to the Commonwealth; and
2. the role, powers and practices of similar committees in other jurisdictions.

As an overarching proposition, the Centre considers that parliamentary committees should play a more significant role in the promotion and protection of human rights in Australia.

This should occur in two primary ways:

1. the mandates of all relevant parliamentary committees should require that the committee give proper consideration to the Commonwealth's human rights obligations, including Australia's obligations under all international human rights treaties to which it is party; and
2. the Parliament should establish a Joint Committee on Human Rights to lead parliamentary engagement with and understanding of human rights issues.

The proposed Joint Committee on Human Rights should be mandated to:

1. scrutinise all Bills and subordinate legislation for compatibility with human rights;
2. conduct thematic inquiries into human rights issues;
3. monitor and report on the implementation of the Concluding Observations, Recommendations and Views of UN treaty bodies and the Recommendations of the Special Procedures and the Universal Periodic Review of the UN Human Rights Council; and
4. monitor and report on government responses to Declarations of Incompatibility (under any Australian Human Rights Act) and other relevant court and tribunal decisions and judgments.

The Centre's submission is at www.hrlrc.org.au/content/topics/international-human-rights-mechanisms/parliamentary-scrutiny-and-the-promotion-and-protection-of-human-rights-march-2010/.

Phil Lynch is Director of the Human Rights Law Resource Centre

Police and Human Rights: Submission on Victoria's Integrity and Anti-Corruption System

The excessive use of force by police or inhumane treatment of persons in police custody undermines the integrity of a State's operations. It also breaches the right to life and the right to freedom from torture and cruel, inhuman and degrading treatment (ill-treatment) which are protected by ss 9 and 10 of the Victorian *Charter*.

The Victorian Government is required by the *Charter* to ensure independent and effective institutions and procedures are established to investigate and monitor potential breaches of the rights to life and the right to freedom from ill-treatment by police with the aim of bringing to justice those who breach those rights and also preventing similar incidents from happening in the future.

Further, the *Optional Protocol to the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* envisages the implementation of monitoring bodies to monitor the treatment of persons deprived of their liberty in order to prevent deaths and ill-treatment in places of detention (relevantly including police custody facilities).

The Human Rights Law Resource Centre has made a submission to the Victorian State Services Authority's review into the integrity and anti-corruption system which sets out the human rights framework and principles which should guide reforms to Victoria's integrity and anti-corruption system.

The Centre makes a series of recommendations aimed at ensuring that the potential breaches of the right to life and the right to freedom from ill-treatment by the police, both in the context of the use of force and deprivations of liberty, are appropriately and adequately investigated and monitored by a truly independent body.

The Centre's submission is at www.hrlrc.org.au/our-work/law-reform/domestic/.

Susanna Kirpichnikov is on secondment to the Centre from Lander & Rogers

Equal Opportunity Bill: Submission to Scrutiny of Acts and Regulations Committee

In mid-March, the Centre made a submission to the Victorian Scrutiny of Acts and Regulations Committee on the *Equal Opportunity Bill 2010*. In summary, the submission welcomed those aspects of the Bill that recognise and respond to systemic forms of discrimination and aim to promote substantive, rather than merely formal, equality.

This submission raised two concerns to be considered by SARC, namely:

- the Bill fails to provide protection from discrimination on the basis of homelessness and irrelevant criminal record; and
- the Bill includes permanent exceptions that do not meet the requirements of s 7(2) of the *Charter* on permissible limitations on human rights.

The HRLRC submission is available at www.hrlrc.org.au/content/topics/equality/a-new-equality-law-victoria-moves-in-the-right-direction-18-march-2010/.

HRLRC Casework

Court of Appeal Adopts Centre's Approach to Charter of Human Rights in Landmark Case

In a landmark decision, *R v Momcilovic*, the Victorian Court of Appeal has clarified the operation of key provisions of the Victorian *Charter of Human Rights*.

The Human Rights Law Resource Centre was given leave to appear as amicus curiae and make written and oral submissions in the case. The Centre was represented on a pro bono basis by Allens Arthur Robinson, together with Mark Moshinsky SC and Chris Young of Counsel.

In a groundbreaking judgment, the Court of Appeal adopted the Centre's approach to the construction and operation of the *Charter*, unanimously holding that:

- although s 32(1) of the *Charter* is not a 'special' rule of statutory interpretation, it is a statutory directive that requires all persons engaged in the task of statutory interpretation to 'explore all possible interpretations of the provision(s) in question, and adopt that interpretation which least infringes *Charter* rights';
- the issue of 'justification' pursuant to s 7(2) arises only if it is not 'possible' to interpret legislation compatibly with human rights;
- any infringement of human rights should be 'demonstrably justified' by clear, cogent and persuasive evidence; and
- where an infringement can not be demonstrably justified, the Court should grant a Declaration of Inconsistent Interpretation, such declarations being 'central' to and 'exemplifying the dialogue model of human rights legislation'.

The Court concluded that:

the emphatic obligation which s 32(1) imposes – to interpret statutory provisions so far as possible compatibly with Charter rights – is directed at the promotion and protection of those rights as enacted in the Charter. We reject the possibility that Parliament is to be taken to have intended that s 32(1) was only to operate where necessary to avoid what would otherwise be an unjustified infringement of a right. *The Human Rights Law Resource Centre's submission to this effect was correct.* [Emphasis added]

The decision is also significant in being the first case in which a Victorian Court has found legislation to be incompatible with the *Charter* and issued a declaration to that effect.

Phil Lynch is Director of the Human Rights Law Resource Centre

Centre Granted Leave to Make Human Rights Submissions to Coronial Inquest into Police Shooting of Youth

The Human Rights Law Resource Centre has been granted leave to appear as an interested party in the Coronial inquest into the death of Tyler Cassidy. Tyler, a 15 year old boy, was fatally shot by the police in a Northcote park on 11 December 2008. His death is now being investigated by the State Coroner.

The Centre sought leave to be an interested party in order to provide the Coroner with submissions on the application of the Victorian *Charter* to the facts in the inquest, in particular the relevance of the right to life (s 9 of the *Charter*). One of the particularly important issues in the case will be the adequacy of the investigation into the death, given that the police investigation of the shooting was conducted by members of the same police force.

The Centre was granted leave to make submissions to the Coroner at the conclusion of the inquest. The Centre will not generally seek to cross examine witnesses or seek to have a witness called or adduce evidence, but if it does seek to do those things, it must be with the prior leave of the Coroner. Victoria Legal Aid was also granted leave to appear as an interested party.

The hearing of the inquest into Tyler's death has not been listed, but is expected to begin in the second half of 2010.

The Centre will be represented at the inquest by Allens Arthur Robinson, together with Brian Walters SC and Sam Ure of Counsel.

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

DLA PF Communication to UN Human Rights Committee in Extradition Case

In February 2010, DLA Phillips Fox submitted a communication to the Human Rights Committee on behalf of HG, who was extradited to the US in 2007. The Communication submits that Australia's extradition law and practice violated a number of HG's human rights under the *ICCPR*.

Facts

HG is a British citizen who has been a permanent resident in Australia since the age of seven. He was involved in an internet group which made copies of software and computer games available on the internet, which could be downloaded by the members of the group. The group was not alleged to be motivated by profit, and did not make any financial gain by their activities.

On 12 March 2003, HG was indicted with criminal copyright infringement and conspiracy to violate copyright laws by the US. The US argued that the relevant acts all occurred in West Virginia, US, because this is where the material was downloaded by end-users and where the breach of copyright thus occurred. Two months later the US requested HG's extradition. As a result, HG was placed in custody in Australia in August 2003.

HG opposed the extradition in the Australian courts by challenging the validity of the extradition order. However, despite the fact that his crime could not be said to be of notable gravity and that HG did not have the characteristics that would render him a flight risk, he was denied bail and incarcerated for two and a half years during the extradition process. Due to the provisions of the *Extradition Act 1988*, bail may only be applied for once and is refused in all cases unless exceptional circumstances can be shown. There are no substantive grounds on which to contest detention and the Australian courts cannot consider the necessity of detention or take anything into account beyond the stipulated criteria of special circumstances.

HG was unsuccessful at opposing extradition and was eventually extradited to the US in February 2007 where he was sentenced to 51 months imprisonment. He served 15 months in the US (the remaining months being deemed to have already been served by reason of his prior time in custody).

Submissions

The Communication submits that the treatment of HG in being unnecessarily detained denied his liberty without adequate judicial review, and that being denied the opportunity to respond to evidence against him in Australian courts constituted violations of the Covenant, specifically arts 2, 9, 13 and 14.

Article 9: Arbitrary Detention

The Communication submits that Australia arbitrarily detained HG by for almost two and a half years before extradition without consideration of the severity of the crime of which he was accused or his particular circumstances. This is contrary to art 9 of the Covenant, which maintains that pre-trial detention should be an exception and as short as possible.

Australia also failed to provide HG with substantive review of his detention. In particular, there was no possibility to review the overall appropriateness and proportionality of the detention. HG had no opportunity to put forward the facts that detention was unnecessary and unduly lengthy in light of the following facts: he was not a flight risk; he was suffering from depression; he had an elderly father to take care of; and he had already been incarcerated for a substantial amount of time. In *C v Australia*,

the Human Rights Committee observed that an 'inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4'.

Articles 13 and 14: Procedural Fairness of Extradition Decision

The Communication also asserts that Australia did not afford HG procedural guarantees and fairness during extradition proceedings by preventing him from challenging or responding to evidence against him. Section 19(5) of the *Extradition Act* provides that the person subject to the extradition request 'is not entitled to adduce, and the magistrate is not entitled to receive, any evidence to contradict the allegation that the person has' committed an offence. This conflicts with the case of *Äärelä and Näkkäläjärvi v Finland*, where the Committee found that failing to afford the authors of a communication an opportunity to comment on a brief containing legal argument submitted by the other party violated the duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party.

Article 2: Right to an Effective Remedy

Finally, the Communication submits that Australia failed to provide a remedy for violation of HG's Covenant rights by failing to adopt laws to give effect to the rights recognised in the Covenant. In particular, the Covenant has not been incorporated into Australia's domestic law and is therefore not justiciable.

Current Review of Extradition Law and Practice

The Attorney-General's Department of Australia's is currently undertaking a comprehensive review of extradition legislation and practice. However, the exposure draft proposes no amendments to the strict rules relating to bail; inadequate judicial review; or the inability to challenge or respond to evidence.

Nicolas Patrick is a partner, and Joanna Mansfield is a solicitor at DLA Phillips Fox in Sydney, and acted for HG in the final appeal against his extradition and in relation to the preparation of the Individual Communication to the UN Human Rights Committee. The matter is currently before the Committee.

Seminars and Events

Human Rights Seminar with the Rt Hon Baroness Valerie Amos

12.30 – 2.00pm, Wednesday, 21 April 2010

The Rt Hon Baroness Valerie Amos was appointed British High Commissioner to Australia in October 2009. Prior to her appointment, Baroness Amos was Leader of the House of Lords and Secretary of State for International Development. She was the first Black woman in Cabinet and only the third woman to lead the House of Lords.

For further details, including bookings, visit www.hrlrc.org.au/events/upcoming/ closer to the date.

Human Rights Arts and Film Festival

The Human Rights Arts and Film Festival (HRAFF) is back for 2010! Coming into the event's third year, we are thrilled to announce a stunning line up of film, art, music, dance, literature, speakers, poetry, forums and community initiatives which will illuminate for audiences a range of stories from people all over the planet.

Setting the tone for the Festival on opening night is *Pray the Devil Back to Hell*, an astonishing film that documents the story of a group of Liberian women who, tired of a bloody civil war, dress themselves in white, start a revolution and manage to overturn their corrupt government. The impressive Festival line up continues with a musical celebration of cultural diversity at Rhythm and Rights, a unique exploration of social justice at the HRAFF Poetry Slam and a creative contemplation of social change at the Art Exhibition.

Also not to be missed is the HRAFF Gala Film Screening and Cocktail Party which will take place at the Astor Theatre in the lead up to the Festival on 22 April. The night features a special screening of *The Day After Peace*, a live auction and a speech from event patron Julian Burnside QC.

HRAFF 2010 will take place in Melbourne from 23 April – 9 May and will then travel to Sydney, Canberra, Adelaide, Brisbane and Perth throughout May. For further information see www.hraff.org.au.

Resources and Reviews

HRLRC in the News

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

- Philip Lynch, '[Rights Bill is Long Overdue](#)', *The Age* (Melbourne) and *Sydney Morning Herald* (Sydney), 1 March 2010

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

- Melissa Fyfe, '[Push Comes to Shove for Drug Traffickers](#)', *Sunday Age* (Melbourne), 21 March 2010
- Michael Pelly, '[Action Urged as Drug Law and Charter Collide in Vera Momcilovic Case](#)', *The Australian* (Sydney), 19 March 2010
- James Eyers, '[Law Inconsistent with State Charter](#)', *Australian Financial Review* (Sydney), 19 March 2010
- Kirsty Needham, '[Labor Drops Terror Hoax Offence](#)', *The Age* (Melbourne), 19 March 2010
- Simon Lauder, '[Court Rules Drug Law Breaches Human Rights](#)', *ABC Online*, 18 March 2010
- The World Today, '[Victorian Court Orders Law Change](#)', *ABC Radio*, 18 March 2010
- Adrian Lowe, '[Judge Lays Down Rules for Inquest](#)', *The Age* (Melbourne), 5 March 2010
- AAP, '[Cassidy Inquest "Not a Trial": Coroner](#)', *The Age* (Melbourne), 4 March 2010
- National Indigenous Radio Service, '[RDA Amendments Only Window Dressing](#)', 26 February 2010
- Kate Hagan, '[Police Chief Changes Mind on Tasers](#)', *The Age* (Melbourne), 26 February 2010
- Mark Buttler, '[Police to Use Tasers in Country Victoria from July 1](#)', *Herald-Sun* (Melbourne), 25 February 2010

55,000 Visitors from 172 Countries – Thanks for your Support!

We are very pleased to announce that our website, www.hrlrc.org.au, has received over 55,000 visitors from 172 countries since its launch in March 2009.

To keep up-to-date on the latest postings on our site, which is updated at least weekly, you can subscribe to our RSS feed at www.hrlrc.org.au/feed/.

You can also become a 'fan' of the Centre on Facebook at www.facebook.com/pages/Human-Rights-Law-Resource-Centre/105610156282?ref=s or by clicking the Facebook icon on our homepage.

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 *New Laws – Same Old Problems*, contains articles on the NT Intervention, the stigmatisation of mental illness, the Convention on the Rights of Persons with Disabilities, sex discrimination, the UPR of Fiji, and book reviews of a range of human rights texts.

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

Human Rights Jobs

PILCH – Victorian Bar Pro Bono Scheme Lawyer

The Victorian Bar Pro Bono Scheme, administered by PILCH, is seeking a lawyer for a fixed term of one year. The lawyer will be responsible for assessing and making referrals to barristers and solicitors on a pro bono basis, undertaking policy, projects and law reform work and contributing to the ongoing promotion and development of the Scheme.

PILCH is an independent, not-for-profit organisation whose mission is to improve access to justice, protect human rights and address disadvantage and marginalisation in the community.

Interested applicants should read the recruitment pack online at www.pilch.org.au/jobs/.

Foreign Correspondent

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

13th Session of the UN Human Rights Council

March is Human Rights Council month in Geneva – besides from the annual international human rights film festival, it unfortunately often feels there is space for little else on the human rights agenda in this part of the world at this time of year besides the Council! The four-week session is seen as the most important in the year, beginning with the High Level Segment when various heads of State and Government and Ministers of Foreign Affairs make the trip to Geneva to give statements about their commitments to human rights. In the general debate, Australia was represented by its new Ambassador to the UN, Peter Woolcott, who spoke about the national human rights consultation and the ASEAN Intergovernmental Commission on Human Rights.

On its first day, the Council held a high-level panel discussion on the impact of the global economic and financial crises, and another on the second day on a draft declaration on human rights education and training.

After hearing the High Commissioner's annual report (in which she, inter alia, requested the creation of an OHCHR unit to assist in follow up to the recommendations of the Universal Periodic Review), the Council held interactive dialogues with many of the Special Rapporteurs. For example, the Special Rapporteur on Adequate Housing, Raquel Rolnik, shared her report on the impact of 'mega-events' in the realisation of the right to adequate housing. The study analyses the impact of hosting Olympic Games style mega-events on forced evictions, rental markets, affordability of housing and homelessness through a human rights lens. The Special Rapporteur presented impact data from previous games, including the Sydney Games, and explained how she hoped this would be a catalyst for new IOC bidding procedure that requires a study into impact on the right to adequate housing as well as conformity with other international obligations before bids are accepted.

James Anaya, the Special Rapporteur on the human rights of Indigenous people, presented the report on his visit to Australia, in which he commented on the native title land returns in Australia, the lack of real opportunities for self-supported development, and how government efforts to bring Aboriginal living standards up to those of the rest of Australia have been ineffective so far in ensuring Australia complies with its international obligations under the UDRIP, ICCPR and ICESCR. His report focused on how the Australian Government is violating its international obligations through a racially discriminatory legislative scheme that is not achieving its intended goals, and which is therefore incompatible with special measures provisions of the ICCPR.

Other Special Rapporteurs who presented reports included the Special Rapporteurs on countering terrorism, Torture, Human Rights Defenders, the right to food, and freedom of religion, amongst others. The Special Rapporteur on countering terrorism, Prof Martin Scheinin, focused on the protection of the right to privacy in the fight against terrorism and its erosion in the context of global terrorism. The Special Rapporteur on Torture, Prof Manfred Nowak, presented his final annual report, as well as a global study on torture that drew on his five years of experience as Special Rapporteur. He made several recommendations, including the establishment of a 'World Court for Human Rights' and a 'Global Fund for National Human Rights Protection Systems', and the drafting of a new international convention on the rights of detainees.

As usual, there was quite a bit of controversy over the reports and presentations of both of these rapporteurs, particularly the SR on Torture, who made some very frank comments to the Council as part of his last address, including strongly criticising the countries who had cancelled his missions at the last minute because of disagreements about the terms of the proposed visits. He was particularly critical of Zimbabwe, where he was detained for one night before being denied entry into the country. He also commented on how the Council had become 'antagonistic' towards Special Procedures, and criticised the 'growing disrespect' shown by some governments. As many governments have recently accused him and other the mandate holders of going beyond their mandates and breaching the newly adopted

code of conduct, the Special Rapporteur suggested that a code of conduct for States would be useful in overcoming the 'current attitude of confrontation and mistrust' and for greater common political will to promote and protect human rights. Some of this debate related to the Council's decision to defer its discussion on a joint study on secret detention tabled for early March. The report, formulated by the Special Rapporteurs on Torture and on Counterterrorism and Human Rights, as well as the Working Groups on Arbitrary Detention and on Enforced and Involuntary Disappearances, was deferred after objections were lodged by some 80 countries.

During the Council, other interactive debates and panel discussions held included one on the rights of persons with disabilities, and another on the right to truth, which explored the way this newly recognized right has developed beyond just missing and disappeared persons to encompass gross human rights violations like extra-judicial killings and torture. The Council also held its annual meeting on the rights of the child and discussed protecting boys and girls from sexual violence. Of particular concern to the Council was the fact that there is no single definition of sexual violence against children. The expert panel focused its remarks on the creation of an optional protocol to the Convention on the Rights of the Child to allow for individual communications; curbing demand in the child sex industry; and working on effective prevention mechanisms.

Besides the usual plethora of resolutions addressing a wide variety of human rights issues, the last weeks of the Council have been taken up with adopting the reports and recommendations of the Universal Periodic Review (UPR) working group sessions. The most controversial of these to date has been the Democratic Peoples' Republic of Korea (DPRK), as it is the only country to have gone through the UPR to have not accepted any of the Council's 167 recommendations. The DPRK had rejected 50 recommendations at the initial UPR Working Group phase, and failed to express a position on the full 117 pending recommendations prior to the Human Rights Council adoption. Although their ambassador stressed the government's willingness to cooperate, they did not specifically answer questions posed about whether or not they rejected the remaining 67 recommendations. France pushed for the Council to interpret the DPRK's actions as non-cooperation, and even after a suspension of the session to hold informal negotiations, the Ambassador of the DPRK simply reiterated that he 'took note' of the outstanding recommendations. Perhaps this will be seen as one of the most problematic reviews under the UPR: the recommendations themselves tackled the very serious issues of labour camps, arbitrary detention, collective punishment, and restrictions on religious practices, and many other human rights violations.

Throughout the Council session, and particularly in the parallel events, Haiti continues to be a focus, most recently with a panel discussion stressing the need for a rights-based approach to durable solutions for the 1.9 million people displaced as a result of the January earthquake.

Committee on the Elimination of Racial Discrimination

The Committee on the Elimination of Racial Discrimination recently concluded its 76th Session. The Committee addressed the recent ethno-religious tensions in Nigeria, drew attention to the lack of refugee protection laws in Cameroon, and discussed Japan's recent repeal of their Human Rights Bill and their long-standing failure to implement any anti-discrimination legislation. It was announced that Australia will be reviewed along with Iran, Cuba, Denmark, France and others in August this year.

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If I Were Attorney-General...

Promoting Access to Justice and the Protection of Human Rights

As Attorney-General, I have a key role to play in promoting access to justice. I fully support the recognition in my Department's report, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), that access to justice for all Australians – and particularly those who are the

most marginalised and disadvantaged – is fundamental to the effective protection and promotion of human rights, the rule of law and social inclusion. Access to justice is a key indicator of a healthy democracy.

I have a portfolio that will continue to grapple with the issue of access to justice. I applaud the commitment of my predecessor but believe that the critical question remains for government: what have we achieved? Two issues that I will continue to address as a high priority are:

- to improve our access to justice framework by radically rethinking the way in which Commonwealth funds are distributed to organisations that provide community legal services; and
- to make significant changes to substantive justice by ensuring that Australia's legal framework facilitates the promotion and protection of human rights of all Australians.

The provision of adequate funding for community legal services, by which I mean legal aid, community legal centres, and Aboriginal and Torres Strait Islander Legal Services, has presented one of the most significant challenges to access to justice for the most marginalised and disadvantaged people in our community: a challenge and responsibility that has not been met. Like my predecessor, this will be one of my primary endeavours.

A September 2009 report by my Department found that in 2007-08, over \$1 billion was spent by the Commonwealth to support the federal civil justice system. Only a little over a quarter of that amount, \$280 million, was spent on legal assistance programs with the rest spent on legal institutions such as courts and tribunals. In the same period, expenditure by Government agencies on legal services for themselves was over half a billion dollars. For the decade prior to 2007, community legal centres received no increase in recurrent funding from the Commonwealth, other than annual indexation of around 2% – less than the real increase in their costs. This meant an 18% reduction in funding over that period in real terms.

My concern though is not just about increasing funding. I am also concerned to ensure that funding is directed to areas of greatest need. Currently the Department measures met legal need (ie, services delivered). This does not tell us about unmet legal need, about the person or family that does not know of the availability of potential assistance, or cannot get to the door or the telephone.

As A-G, I would implement evidence based legal needs assessments of geographic areas and of groups with special needs, and ensure that the results are taken into account in future funding decisions.

The promotion and protection of human rights in Australia is another key challenge to promoting effective access to justice. Australia is the only developed democracy without a legislative or constitutional Charter of Rights which enshrines international human rights standards that our Government has made a political and legal commitment to uphold and promote at the UN level. Although Australia is a party to the core human rights treaties, which provide a framework for human rights protections, there is no legal guarantee that these rights will be protected.

As Attorney-General, I will introduce a Human Rights Act for Australia and promote its adoption by both Houses of Parliament. In doing this, I will be giving effect to the community expectations regarding the protection of human rights in this country: 87% of the 35,000 written submissions to the National Human Rights Committee that addressed the issue of statutory protection of human rights were in favour of a Human Rights Act. A Human Rights Act will also ensure that we have:

- a legal framework for the recognition and protection of the rights of all people, including the most marginalised and disadvantaged;
- improved public service delivery; and
- fulfilment of the legal and political commitments Australia has already made as a state party to international human rights instruments.

In the construction of a Human Rights Act, I will be generally led by the Committee's report, which represents one of the broadest community consultations by any government. However, I would also include more robust protections of the rights of Aboriginal and Torres Strait Islander peoples than suggested in the report. In addition to making specific reference in the Human Rights Act to Aboriginal and Torres Strait Islander peoples' rights in a way that reflects Australia's commitments under the UN Declaration on the Rights of Indigenous Peoples, I would also undertake an audit of all relevant federal

laws, policies and practices to determine their compliance with the rights of our Aboriginal and Torres Strait Islander communities.

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