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The Human Rights Law Resource Centre is a leading community legal centre.

The Centre promotes and protects human rights through policy analysis, advocacy, strategic litigation and capacity building at the national and international levels.

Through these activities, the Centre contributes to the alleviation of poverty and disadvantage and the promotion of freedom, dignity and equality.

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

Opinion

Australia’s New Human Rights Framework: Icing without a Cake

Human rights education and parliamentary engagement with human rights will be enhanced under a new ‘Human Rights Framework’ for Australia, announced by the Attorney-General on 21 April 2010 in response to the recommendations of the National Human Rights Consultation.

However, the Rudd Government’s failure to commit to a comprehensive, national Human Rights Act — a key recommendation of the Consultation which was supported by over 87% of a record 35,000 public submissions — is a missed opportunity to strengthen Australia’s democracy and build a fairer, more inclusive community.

A Human Rights Act deferred is human rights denied. The Government’s deferral of a Human Rights Act until at least 2014 — when the new Human Rights Framework will be reviewed — is a denial of the many benefits which demonstrably accompany such an Act.

Evidence and experience from Victoria and the Australian Capital Territory, both of which have their own Human Rights Acts, demonstrate that a national Act would promote more accountable government, improve public services, address poverty and disadvantage, and enshrine fundamental, unifying values. Instead, the homeless, the elderly, people with mental illness and children with disability — all of whom have been beneficiaries of human rights laws in Victoria and the ACT — must now wait at least another 4 years before their human rights are adequately protected and promoted at the national level.

The deferral of a Human Rights Act aside, there are a number of significant and valuable commitments contained in the new ‘Human Rights Framework’. These commitments include the establishment of a Joint Parliamentary Committee on Human Rights, which will be mandated to review legislation and conduct inquiries on human rights issues, and the development of a range of scrutiny mechanisms to ensure that Australian laws and policies are compatible with human rights. These measures will improve the development of laws, policies and practices and play an important role in ensuring that human rights are properly considered in both legislative and executive decision-making processes.

The Government has also committed to invest much needed funds in human rights education – providing \$2 million over four



years to the community sector and \$6.6 million over the same period to the Australian Human Rights Commission. This reflects the recommendation of the National Human Rights Consultation Committee that 'human rights education be the highest priority'. The Government will also engage in more extensive consultation on both international and domestic human rights issues with civil society. These are important initiatives and should not be discounted. If properly implemented, they will assist in further developing a culture of respect for human dignity and human rights in Australia.

Critically, however, the effectiveness of such measures will be substantially reduced without a robust enabling framework in the form of a comprehensive, judicially enforceable Human Rights Act. Without such an Act, many vulnerable people are left without human rights remedies and Australians are forced to continue to look to international human rights standards rather than seek inspiration and redress from local human rights laws. As one homeless man said to me, 'It is like icing without a cake'. Under the Rudd Government, he'll have to wait at least another four years for that.

In announcing the Framework, the Attorney-General was correct in stating that the 'enhancement of human rights should be done in a way that unites us' rather than divides us. Far from being divisive, however, a Human Rights Act would unite us through legal protection and institutional strengthening of those Australian democratic values we hold in common. As demonstrated by the Apology to the Stolen Generations, political leadership and vision can unite people, even on controversial issues. That is particularly the case when what is proposed is good, evidence-based policy that resonates deeply with our Australian commitment to respect, tolerance, fairness, freedom and the rule of law.

For the next four years at least, Australians will need to continue to look to international human rights laws and UN institutions in New York and Geneva for many of the human rights protections that should be enshrined in law here at home.

The campaign for a Human Rights Act that befits, protects and unites us has only just begun.

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

News

Human Rights Council Calls for Development of Individual Complaints Procedure for Violations of Children's Rights

In a significant resolution adopted at its 13th Session, the UN Human Rights Council has mandated the development of an optional protocol to the UN Convention on the Rights of the Child to enable the Committee on the Rights of the Child to receive and examine communications from children and their representatives alleging violation of their rights. The resolution calls for a Working Group to develop a proposal by September 2010.

Welcoming the resolution, the NGO Group for the Convention on the Rights of the Child said 'this is a great breakthrough for children's rights. The Convention on the Rights of the Child is the only core international human rights treaty that does not have a communications procedure. We have lobbied very hard for the past four years to get this result.'

According to the NGO Group, the new instrument could be adopted by the end of 2011.

DLA Phillips Fox Continues Strong Support for Centre

We are very pleased to announce that DLA Phillips Fox has agreed to extend the secondment of Ben Schokman for a further three years to 31 December 2012. Ben has been on permanent secondment to the Centre from DLA PF since 2007 and has recently been appointed to the role of Director of International Human Rights Advocacy.

The Centre takes this opportunity to thank DLA PF for its significant, longstanding and outstanding support.

For further information about DLA PF's Pro Bono and Community Care programs, see www.dlaphillipsfox.com/category/18/Community.

Victorian Department of Justice Increases Funding for Centre and Promotion of Human Rights

The Victorian Department of Justice has recently advised that it will increase its annual funding to the Human Rights Law Resource Centre by \$30,000 and provide a one-off payment of \$20,000 to assist in funding the Centre's amicus curiae interventions in *Charter of Rights* cases.

The Centre thanks the Department of Justice, together with the Attorney-General, the Hon Rob Hulls MP, for this valuable funding increase. Their support will provide the Centre with greater funding security and enhance our capacity to promote and protect human rights in Victoria.

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

National Charter of Rights Developments

Australian Government Announces New Human Rights Framework

On 21 April 2010, the Attorney-General launched the Federal Government's response to the National Human Rights Consultation, entitled 'Australia's Human Rights Framework'.

According to the Attorney, the Framework is based on five key principles and focuses on:

- **reaffirming** a commitment to our human rights obligations;
- the importance of human rights **education**;
- enhancing our domestic and international **engagement** on human rights issues;
- improving human rights **protections** including greater parliamentary scrutiny; and
- achieving greater **respect** for human rights principles within the community.

The Framework does not include a Human Rights Act or Charter, which was a key recommendation of the National Human Rights Consultation Report supported by over 87% of a record 35,000 submissions. According to the Attorney:

While there is overwhelming support for human rights in our community, many Australians remain concerned about the possible consequences of such an Act. The Government believes that the enhancement of human rights should be done in a way that as far as possible unites, rather than divides, our community. The Government is committed to positive and practical change to promote and protect human rights. Advancing the cause of human rights in Australia would not be served by an approach that is divisive or creates an atmosphere of uncertainty or suspicion in the community.

Notwithstanding the rejection of a Human Rights Act, the Government's Human Rights Framework does contain a number of significant commitments to strengthen the promotion and protection of human rights in Australia:

- establishing a new Parliamentary Joint Committee on Human Rights to provide greater scrutiny of legislation for compliance with Australia's international human rights obligations;
- requiring that each new Bill introduced into Federal Parliament is accompanied by a Statement of Compatibility with Australia's international human rights obligations;
- reviewing legislation, policies and practice for compliance with the seven core international human rights treaties to which Australia is party;
- investing more than \$12 million over four years in various education initiatives to promote a greater understanding of human rights across the community;
- developing a new National Action Plan on Human Rights to 'outline future action for the promotion and protection of human rights';
- consolidating and harmonising federal anti-discrimination laws into a single Act; and
- creating a 'Human Rights Forum' to enable whole-of-government engagement with non-government organisations on an annual basis.

The Government has committed to review the Framework in 2014 to 'assess its effectiveness in the promotion and protection of human rights in Australia'.

A copy of the 'Human Rights Framework' is available at www.ag.gov.au/humanrightsframework.

Further information about the National Human Rights Consultation, including the outcome of the Committee's report, is available at www.hrlrc.org.au/our-work/focus/national-consultation/.

The Church and the Charter: What Must Christians Do Better?

It will surprise many Christians that church leaders have led the 'No' campaign in the public debate about whether Australia should enact a national Charter of Rights. Others in the Church will feel that the adoption of a Charter would be another step along the path to a more secular, hostile environment for Christians and would be glad to know that Christian leaders are helping to block the measure. Still others in the Church probably have no specific view about a Charter of Rights, and would be wondering what the fuss is all about.

Given the significant role of Christian opposition to a federal Charter of Rights, it is worth asking what issues have led some Christians to vocally and publicly oppose one and what is guiding the Church debate.

Two forces have been driving opposition to a Charter from within the Church. First, there is a widespread view that Charters are part of a larger secularist agenda. Second, Charters raise fears among those of a conservative mindset who closely align Christianity with conservatism.

Charters and Secularism Concerns

Many Christians are concerned about an increasingly 'secular' society and secular-faith tensions have played a key role in motivating opposition to a Charter. Human rights – and Charters (or Bills) of Rights – are felt by some to accelerate the process of secularisation. In particular, it's claimed that secularists use Charters to undermine religious freedom. The *National Consultation on Human Rights* found that three Victorian examples which reflect secularism concerns were frequently cited in Christian opposition to Charters: (a) religious anti-vilification laws; (b) the 2009 abortion law reform; and (c) review of the Equal Opportunity Act.

Whether or not there is a generic link between secularism and human rights, these specific examples offer little evidence that Charters promote secularism. The religious vilification laws under which the controversial 'Catch the Fire Ministries' case was run, for example, has no link to Victoria's Charter for a simple reason: the law in question was passed 5 years before the Charter.

Objections to Charters on the basis that they neglect the rights of the unborn have been raised, as has the claim that a Charter did nothing to protect religious views in Victoria's recent abortion law reforms. Human rights treaties tend to avoid issues which are internationally unable to gain consensus since they are based on international agreement among many countries. This still allows individual countries to reach their own conclusions on contested issues like abortion and euthanasia.

In Australia, for instance, it's entirely possible for a state or federal Parliament to amend a Charter concerning abortion. In fact, this has happened. The Catholic church sought a special amendment to Victoria's Charter excluding the Charter from having effect on abortion. Ironically, a couple of years later, this section (s 48) turned out to hobble the Charter's power to protect religious conscience (with regard to Christian medical staff objecting to abortion procedures). This so-called 'failure' by Victoria's Charter was then cited as evidence for the secular nature of Charters. But the circumstances hardly justify this conclusion.

The most commonly cited issue identifying Charters with secularisation has been proposed amendments to Victoria's *Equal Opportunity Act*. What the precise link is between a Charter and the amendments is yet to be explained in detail. Consider, for instance, that reviews of equivalent legislation in jurisdictions without Charters routinely occur. Amendments of legislation which are described as 'secularist' are also commonplace in jurisdictions without Charters. How can we tell that a Charter is actually responsible and not other secular forces generally at work in society?

These examples from Victoria do not offer solid evidence that Charters promote secularism. This is not to deny the reality of tensions between secularist and faith communities nor the possibility that any Parliamentary law (and Charters are simply statutory laws) can be used or abused with respect to faith communities. The way Charters are interpreted and applied will depend less on the instruments than on the political consensus and institutions of the societies that apply them. For instance, the Victorian Government recently passed law and order legislation that it acknowledged was incompatible with its

Charter (the Bill passed with bipartisan support). If the legislation is later tested in the courts, they may find it inconsistent with the Charter and may issue a declaration to that effect. But unless the Parliament decides otherwise, the legislation will remain in force unless and until it is amended by Parliament. Charters cannot override Parliamentary power.

Conservatism and Christianity

Besides Christians, the strongest opposition to a Charter has come from those with a conservative outlook. In the media, for example, well known conservative columnists such as Janet Albrechtsen of *The Australian* newspaper have opposed a Federal Charter with gusto. Conservatism has played a role in Christian opposition, as parts of the evangelical and Catholic churches resonate with a conservative mindset on social issues. Conservatives seek to preserve long-standing institutions and values. They prefer change to be by way of 'evolution' not 'revolution'. Conservatively minded people regard Charters as radical and risky. For Christian conservatives, the risks are not only social and political, but also spiritual. They are concerned about advancing secularism leading to the erosion of Christian institutions. On the other hand, those with a progressive leaning are more sanguine about change generally, and tend to focus on the potential benefits it may bring, whilst downplaying the risks.

None of this pre-supposes that one or other disposition is inherently on the side of truth, justice or, indeed, God. It is to say that when, for instance, a progressive favours a Charter because changes to help the vulnerable 'must be good', they may be reaching a conclusion based on prior assumptions which have little to do with actual evidence about a Charter. Progressives, being favourable towards change, may too quickly discount alternative reform measures. On the other hand, conservatives may too easily treat a Charter as a 'radical' reform which puts society at risk. They neglect the evidence of how our existing Charters are operating in practice. Jumping to conclusions based on prior assumptions or dispositions typifies much of the debate so far.

One way to begin severing the Gordian knot of opposing social ideologies at work within Christian circles is by pursuing a more candid and complete discussion of the issues. The Church's critique of a Charter has yet to move beyond fears for religious protection, as a recent summary of the Church's concerns by Professor Patrick Parkinson (a Charter critic), shows. I was recently speaking with one man about the debate. Though not a Christian, I've found him to be particularly gracious in his approach to the Church. He commented, 'my difficulty with the way some Christian groups have approached this debate is that they've elevated one area of concern [religious protection] above every other'.

A more adequate discussion of human rights Charters within Christian circles should have at least four features:

First, the Church needs to reflect on the evidence from the *National Consultation on Human Rights*. One Christian leader labelled the Consultation as an exercise in 'transparently shallow and contrived activism'. This kind of rhetoric does no justice to the lengthy, detailed submissions on behalf of people with disability, the poor, homeless, mentally ill, the elderly, Indigenous and family support groups, among many others. It forgets that an independent committee produced the Report, one headed by the widely respected (and rather conservative) Jesuit priest, Father Frank Brennan.

Second, the Church needs more scrutiny of examples purporting to say how Charters work. The Victorian examples discussed earlier suggest the need for as much. Myth and rumour are in wide circulation in Christian email, websites, blogs, talks and media. Flawed overseas examples are being used to stoke fear. For instance, Zimbabwe and the Soviet Union have been used to predict how an Australian Charter would work. Comparisons with such vastly different societies are misleading. The same principle applies to examples from countries like the UK and Canada. More care is needed so that examples are meaningful, based on fact and used in context.

Third, the Church needs to discuss cases reporting benefits from Charters (I have seen none discussed by Christian groups opposing a Charter). Evidence from reviews, submissions and case studies show that families, the disabled, the mentally ill, refugees and the homeless are being aided by Charters.

Finally, the Church needs to re-assess its theology and practice in the public sphere. How does it distinguish conservative or progressive predilections from core Christian principles? When the Church plays a significant role in public debate, its motives, or the appearance of motives, will be under critique by wider society. How is God calling it to respond to the social changes in faith and ethics? In Jesus'

Sermon on the Mount (Matthew 5) Jesus affirms tradition when he says he did not come to abolish the Hebrew Scriptures. But their fulfillment by him was, at the same time, radically challenging. Where is a conservative 'habit of mind' preserving what needs respect and where should a 'holy restlessness' with the current structures call Christians to challenge them?

Polling suggests majority support for a Federal Charter of Rights (those opposed question the veracity of the polls, but the impression of support is widespread). If Church opposition has been decisive in blocking a Charter, many will query on what basis the Church has stymied reform which is supported by a majority of the community. In the light of this, the Church had better be sure that its principles are – and are seen to be – the gospel of Jesus, the proper fulcrum point in Christian debate.

Rev Angus McLeay is an Anglican minister based at St Hilary's Anglican Church in Kew, Victoria. He also directs *IsaiahOne*, which educates and advocates for human rights in Christian communities (see www.IsaiahOne.org).

Victorian Charter of Rights Developments

'Making Progress': Human Rights Commission Releases 2009 Report on Charter

The Victorian Equal Opportunity and Human Rights Commission's *2009 Report on the Operation of the Charter of Human Rights and Responsibilities* was tabled in Parliament on 13 April 2010.

The Report, entitled *Making Progress*, examines 'the growing impact of the Charter, human rights and Charter-related initiatives' and 'shows that rights protection is a positive force in ensuring fairer laws and policies and improving the delivery of services in Victoria'. Tabled together with the Report were Occasional Papers on women's rights, economic, social and cultural rights, and Indigenous self-determination.

The Report concludes that:

"Bearing in mind that Victoria is only three years into a process of extensive cultural change around human rights, progress has been considerable. The majority of public authorities contributing to this report are making steady progress in incorporating human rights into their work. Some are making slower progress (but can now look to their peers for an abundance of direction and ideas) and there are examples of impressive progress and innovative projects, policies and programs.

Importantly, the Charter is contributing to enriched public discourse around a range of issues. In some instances, the Charter assists in illuminating success and progress, helping to identify why certain initiatives work particularly well and providing guidance for emulating these initiatives. In other cases, evaluation against the Charter may be a source of discomfort and raise difficult questions, but this is one of the strengths of the Charter and the human rights dialogue model – with debate around 'difficult' issues identifying more effective responses to these issues and encouraging improvements in services and practices across government.

There is clear evidence about the practical benefits being delivered by the Charter. Significant improvements have been made to the support provided to marginalised and vulnerable Victorians, including Indigenous Victorians, people with a disability and those with a mental illness. Consumers are being engaged more often and more effectively in designing and planning services. Human rights considerations are being used in diverse areas, from reviewing taxation policies for people affected by the February 2009 bushfires to improving pay equity in local councils and providing better protection for international students. Changes are being made to the daily operations and processes of many organisations that are making it easier for people to access information and services, and ensuring that services are fair and effective.

These outcomes indicate that the Charter has much to offer Victorians in improving their interaction with government, from relatively minor transactions to matters with a potentially profound impact on their wellbeing, health and quality of life."

The Report and Papers are available at

www.humanrightscommission.vic.gov.au/publications/charter%20reports/.

News Case Studies on the Role of a Charter of Rights in Promoting Dignity and Addressing Disadvantage

The Human Rights Law Resource Centre continues to collect and publish case studies which demonstrate the ways in which a Charter of Rights or Human Rights Act can improve transparency and accountability in government, promote dignity and address disadvantage.

There are now more than 35 case studies from Victoria, the ACT and the UK available at www.hrlrc.org.au/content/topics/national-human-rights-consultation/case-studies/.

Below are six recent case studies from Victoria and the UK.

Victoria

Threatened eviction of father and 3 year old son from public housing breaches human rights

A Somali refugee and his three year old son who lived in a home owned by the Director of Housing were threatened with eviction. The home was leased to the man's late mother in 1998 by the Victorian Department of Housing and he continued to occupy the premises after his mother died from cancer. The Director of Housing applied for a possession order under the *Residential Tenancies Act*. The case was brought before the Victorian Civil and Administrative Tribunal which found the Director's decision to seek eviction without any justification or evidence was in breach of the right to family and home under s 13(a) of the *Charter*. The Director's application for a possession order was dismissed. This case will affect 70,000 public housing applicants in Victoria.

Source: *Director of Housing v Sudi* [2010] VCAT 328

Relevant Human Rights: Right to family, right to privacy and right to home.

Making the Bushfire Royal Commission accessible to victims and their families

Members of the Victorian Bar provided advice to Bushfire Legal Help (which provides free legal assistance and information to victims of the 2009 Black Saturday bushfires) regarding the impact of the *Charter* on the Commission's obligation to promote the participation of individuals in its inquiry.

Based on the advice, Bushfire Legal Help urged the Commission, in accordance with *Charter* principles, to promote effective participation in the inquiry by affected individuals and to adopt a broad approach to applications for permission to appear before the Commission (the most direct way of participating).

The right to life in the *Charter* was used to support the argument that the Commission had a legal duty to facilitate appropriate involvement by next of kin and families of those who died and those whose lives were endangered by the fires.

Following the advocacy, the Commission made improvements to its communications about public participation and adopted a practice of hearing oral evidence daily from a person affected by the fires. While the Commission refused permission to appear to a number of individuals and groups, it granted limited permission to appear to fire victims involved in a class action arising out of the fires.

Source: Bushfire Legal Help & the Federation of Community Legal Centres (Victoria) Inc

Relevant Human Rights: Right to life

Corrections Victoria's Mothers and Children Policy Program reform

Corrections Victoria's Mothers and Children Policy Program operates to support family ties to assist successful reintegration once women are released from prison. The *Charter* was influential in a two-year transformation of the organisation's program, policies, procedures and regulations relating to correctional services. The Mother and Children Program was revised to consider *Charter* principles in the assessment of applications for children to participate in the program, to provide greater protection of children from safety or security risks and to keep information confidential during the application process. The Department of Justice amended policy as one of the initiatives citing the *Charter's* influence on policy and service.

Source: Victorian Equal Opportunity and Human Rights Commission, *2009 report on the operation of the Charter of Human Rights and Responsibilities*

Relevant Human Rights: Right to protection of families and children and the right to privacy and reputation

Department of Sustainability and Environment reforms policy

The Department of Sustainability and Environment (DSE) revised its rules and guidelines taking human rights into account by establishing a Diversity (Inclusion) Action Plan 2009-2012 to provide equal access by the public to DSE employment and service. The *Charter* was cited as influential in reforms including protecting the rights of people with a disability, Indigenous Australians, women, people from culturally and linguistically diverse backgrounds and young people. *Charter* principles now guide the department in the implementation and delivery of natural resource management.

Source: Victorian Equal Opportunity and Human Rights Commission, *2009 report on the operation of the Charter of Human Rights and Responsibilities*

Relevant Human Rights: Cultural rights, right to equality and non-discrimination

United Kingdom

Domestic violence survivor uses Human Rights Act to keep her children and access safe accommodation

A female victim of domestic violence moved multiple times with her children to avoid being discovered by an abusive husband who was attempting to track the family down. When the family arrived in London they were denied housing after social workers determined that the woman was an unfit parent for intentionally placing her children into homelessness. The woman challenged the claim, arguing for her right to respect for family life under the *Human Rights Act*. Social services considered the woman's rights and the importance of taking actions that are necessary and proportionate in regard to her children and, as a result, the family remained together and the social service department offered to provide a deposit for any secure private rented accommodation.

Source: BIHR, London Irish Women's Centre (February 2010)

Relevant Human Rights: Right to respect for family life

Human Rights Act used to enable a mental health patient to get married

A long-term resident mental health patient's capacity to consent to marriage was being considered by staff at the hospital where he was committed. The staff identified and considered human rights concerns protected under the *Human Rights Act* including the man's right to respect for private and family life under art 8 and his right to marry and found a family under art 12. Using the framework of ensuring people can access their rights and only limiting these human rights when necessary and proportionate, staff agreed that it was in the man's best interests to support him to marry.

Source: BIHR (February 2010)

Relevant Human Rights: Right to private and family life and right to marry

For further case studies from the UK, see the new micro-website, 'Our Human Rights Stories' at www.ourhumanrightstories.org.uk/.

If you have a story of where human rights have made a positive difference, please contact Rachel Ball from the HRLRC at rachel.ball@hrlrc.org.au or on (03) 8636 4433. Your privacy is respected and all stories will be de-identified.

Rachel Ball is Director of Policy and Campaigns with the Human Rights Law Resource Centre. **Loren Days** is a volunteer with the Centre and LLM candidate at Melbourne Law School.

Victorian Charter Case Notes

Eviction of Vulnerable Tenant from Public Housing without Adequate Justification a Breach of Human Rights

Director of Housing v Sudi [2010] VCAT 328 (31 March 2010)

Justice Bell, sitting as President of the Victorian Civil and Administrative Tribunal, has held that the Director of Housing acted unlawfully under s 38(1) of the *Charter* in seeking, without adequate justification, to evict a refugee family from social housing in breach of their right to family and the home under s 13(a). His Honour further held that this unlawfulness invalidated the Director's application for a possession order under s 344 of the *Residential Tenancies Act*.

Facts

Warfa Sudi, a Somalian refugee, and his three year old son live in a home owned by the Director of Housing. The tenancy agreement for the home was originally made with Mr Sudi's mother, Qamar Ali, but Mr Sudi and his son continued to occupy the premises after Ms Ali died from cancer. The Director of Housing subsequently made application under s 344(1) of the *Residential Tenancies Act* for a possession order to enable him to evict Mr Sudi.

It was common ground that the Director of Housing is a public authority under the *Charter* and, as such, is required by s 38(1) to act compatibly with human rights and give proper consideration to human rights in making decisions.

Mr Sudi argued that the Director's decision to seek to evict him breached his human rights under s 13 (right to privacy, family and the home), s 17 (protection of families and children) and s 19 (cultural rights) of the *Charter*. Mr Sudi further argued that, by consequence of this unlawfulness, the Director was not entitled to seek to evict him.

The Director of Housing did not seek to justify the application for a possession order as a permissible limitation on human rights under s 7(2) of the *Charter*, but instead submitted that the Tribunal had no jurisdiction to consider the lawfulness of his actions under the *Charter*, that being a matter reserved to the Supreme Court.

Decision

Summary

Justice Bell held that the Tribunal had jurisdiction to consider the *Charter* issues in the case. His Honour further held that the decision and conduct of the Director of Housing in seeking to evict Mr Sudi and his son without justification was a breach of the right to family and the home under s 13(a) of the *Charter* and thus unlawful pursuant to s 38(1). As the Director's making of an application for a possession order was 'unlawful' under the *Charter*, it was not a valid application properly made under s 344 of the *Residential Tenancies Act*. The Director's application was therefore dismissed.

Human Rights Jurisdiction of Tribunal

Justice Bell held that the Tribunal had jurisdiction to consider and determine the *Charter* issues in the case, stating that 'when issues under the *Charter* legitimately arise in applications before the Tribunal, it should resolve them if it can properly do so'.

His Honour pointed out that 'human rights remedies must be accessible in order to be effective' and that, were the Tribunal not to have jurisdiction in the first instance, litigants in circumstances such as Mr Sudi would be forced to have their matters partly heard in the Tribunal and partly heard in the Supreme Court. This would be a 'bad outcome' for access to justice and contrary to the principles of 'finality and complete dispute resolution'.

Right to Family and the Home: s 13(a)

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

The requirement of 'legality' requires that any interference with this right be governed by 'clear and publicly accessible rules of law' and by procedures that are 'predictable and foreseeable'.

The prohibition against 'arbitrary interference' is in addition to the requirement of lawfulness, and requires that any interference be reasonable, necessary and proportionate.

After considering jurisprudence from the UN Human Rights Committee, the European Court of Human Rights, the United Kingdom and South Africa, Bell J held that evicting or seeking to evict someone from public or social housing constitutes an interference with their right to home and, where a family is living in the premises, also amounts to an interference with their right to family:

Evicting people living in public housing is a severe infringement of their human rights, especially those which protect the family and the home. Unless interference is demonstrably justified, it breaches human rights and is 'unlawful' under the *Charter*.

Given the 'serious interference' with s 13(a) in this case, Bell J did not consider it necessary to determine whether other human rights were engaged by the circumstances.

Limitations on Rights: s 7(2)

Section 7(2) of the *Charter* provides that any limitation on human rights must be reasonable and demonstrably justifiable. Following the decisions of *DAS v VEOHRC* [2009] VSC 381 and *R v Oakes* [1986] 1 SCR 103, Bell J held that:

- the onus of establishing that a limitation of human rights is reasonable and justified is on the party seeking to uphold the limitation;
- in many cases, this requires evidence;
- the standard of proof is high; and
- the evidence must be cogent and persuasive.

In the present case, the Director of Housing failed to provide any justification or evidence in support of the interference with s 13(a) constituted by the possession order application. Accordingly, Bell J held that the making of the application was 'unlawful' under s 38(1) of the *Charter*.

Consequence of Unlawfulness

Justice Bell then turned to the question as to the consequence of the Director's unlawfulness under the *Charter* in the context of an application for a possession order under the *Residential Tenancies Act*. On this issue, His Honour held that:

An application which the director has purportedly made under s 344(1) of the *Residential Tenancies Act* in breach of his human rights obligations under s 38(1) of the Charter, and which is therefore 'unlawful', is not a valid and proper application... It is in law no application at all and does not enliven the jurisdiction of the tribunal to make the possession order sought. The making of the director's application was itself an 'unlawful' act... In a proceeding under s 344(1), the tribunal cannot just shut its eyes to the unlawfulness of the making of the application, as the director suggests I do. That would rob "unlawful" of the potent force of its natural meaning, create confusion about the consequences of breaching human rights and mock the rule of law, including the human rights protections in the Charter, which parliament has wisely obliged public authorities to respect, on pain of their actions being 'unlawful'.

Accordingly, Bell J dismissed the Director's application for a possession order.

The decision is available at www.hrlrc.org.au/files/R2009-1177-R2009-3264-and-R2009-33454-Director-of-Housing-v-Sudi.pdf.

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

Comparative Law Case Notes

Right to Privacy and Protection of Children and Families

MAK and RK v United Kingdom [2010] ECHR 363 (23 March 2010)

The European Court of Human Rights has held that restrictive hospital visiting conditions imposed on a father, the first applicant, suspected of abusing his daughter, the second applicant, breached the right to private and family life under art 8 of the *European Convention on Human Rights*. Conducting a blood test and taking photographs of the child without first obtaining parental consent were also considered a violation of art 8.

Considering art 13, the Court held that the father's right to an effective domestic remedy was violated as there was no domestic redress available to him against the local authority. The withdrawal of legal aid from the child, however, was not considered to breach art 13.

Facts

In 1997 the child, then aged 8, first visited a doctor after the father and his wife noticed bruising on her legs. No medical abnormality was identified at that appointment. Five months later, after her swimming teacher raised similar concerns about bruising, the parents returned to the doctor who referred the child to a paediatrician. Shortly before the appointment with the paediatrician, the child had complained to her mother that she had hurt herself in the genital area while riding her bike.

The paediatrician concluded that the bruising was not symptomatic of a skin disease and admitted the child to hospital for further tests. At the hospital, the father (who had to leave to go to work) instructed the paediatrician that no testing should be conducted until the child's mother arrived and provided consent. Prior to her mother arriving, the child was nonetheless given a blood test, photographs were taken of her legs and a notification of suspected abuse by the father was made to the local authority.

When the father returned later that day to visit the child, he was told by a nurse that there were orders that he not be allowed to see her. The following day, hospital staff were correctly informed that they could not prevent the father from visiting the child and he was allowed to see her, albeit under supervision. Later that day the wife informed the paediatrician of the child's complaint about her injury while riding her bike.

A couple of days later, the mother noticed bruising on the child's hands so she arranged for the child to see a dermatologist. A rare skin disease was diagnosed and the child was discharged from hospital. The paediatrician subsequently wrote to confirm that she now considered there was insufficient evidence to suggest the child had been abused and, as such, the father could no longer be implicated in that suggestion.

The applicants issued domestic proceedings against the local authority and hospital trust, alleging negligence. The County Court found that the local authority did not owe the father a duty of care. This was confirmed on appeal. The County Court also found that the hospital, but not the local authority, had owed the child a duty of care. Despite having been granted leave to appeal this decision, the child's legal aid certificate was withdrawn because the likely costs were disproportionate to the value of the claim.

Decision

Art 3 (prohibition on torture, inhuman or degrading treatment or punishment)

Before the European Court, the father claimed that the accusation that he abused the child had caused him to suffer distress and humiliation, which was a breach of art 3 of the Convention. The Court rejected this argument, observing that the authorities had an obligation to take measures to protect children from abuse and it would be counter-productive to the effective protection of children's rights to hold authorities liable whenever a mistake was made, whether or not the error was reasonable. There was no special element in this case that took the level of distress to the father beyond that which inevitably flowed from the execution by the authority of its duty.

Art 8 (right to private and family life)

The Government accepted that the initial decision to prevent the father from visiting the child in hospital constituted an interference with both applicants' right to family life. However the applicants also alleged that the visiting restrictions imposed on the father subsequently, and the hospital's failure to obtain parental consent for the blood test and photographs of the child, violated art 8 of the Convention.

The Court determined that the interference caused by requiring the father's remaining visits to be supervised was clearly imposed in pursuance of the legitimate aim of protecting the child. Considering whether the interference could be regarded as 'necessary in a democratic society' for the purposes of art 8, the Court emphasised that 'mistaken judgments or assessments by professionals do not *per se* render childcare measures incompatible' with art 8 and it was satisfied there were sufficient reasons for the authorities to suspect abuse. However it considered that the authorities' failure to consult a dermatologist as a matter of urgency was not proportionate to, and had undermined, the legitimate aim of protecting the child. Further, there was no justification for conducting a blood test and taking the photographs of the child without parental consent. Accordingly, there was a violation of the applicants' rights under art 8.

Art 6 (right to a fair and public hearing)

The child alleged that the withdrawal of legal aid had violated her rights under art 6 § 1 of the Convention. The critical question for the Court was whether the Government's restrictions on her right to access a court were legitimate and proportionate. The Court accepted the Government's justification for deciding to withdraw funding. It was relevant to its decision that there were avenues to appeal the decision to withdraw legal aid.

Art 13 (right to an effective domestic remedy)

As there was no domestic redress available to the father against the local authority at the relevant time (the *Human Rights Act 1998* (UK) was not yet in force) the Court accepted there had been a violation of his human rights under art 13 of the Convention. However the Court did not accept that the withdrawal of legal aid from the child was a breach of art 13 as she was still able to pursue her claim, albeit without legal aid.

Relevance to the Victorian Charter

This decision may inform the Court's interpretation of s 13 (respect for a person's private life) and s 17 (protection of families and children) of the Victorian *Charter*. In particular, the analysis of whether the interference, although considered legitimate, was 'necessary in a democratic society' provides useful guidance for the application of s 7 (reasonable limitations) of the *Charter* to the rights enshrined in these sections.

While authorities will not be held responsible for erroneously implementing protective measures for suspected incidents of child abuse, this case emphasises that such protective measures must not interfere with private and family life beyond what is considered necessary.

The decision is available at www.bailii.org/eu/cases/ECHR/2010/363.html.

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Balancing the Right to Non-Discrimination and Freedom of Religious Belief in the Provision of Charitable Services

Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales & Anor [2010] EWHC 520 (Ch) (17 March 2010)

The England and Wales High Court has held that it is for the Charity Commission to determine whether discrimination against same-sex couples by a charitable organisation is justified.

Facts

In 2007, the *Equality Act (Sexual Orientation) Regulations 2007* ('Regulations') were introduced in England. One significant effect of the Regulations was to make it unlawful for a person to discriminate on the grounds of sexual orientation in the provision of goods, facilities or services to the public, subject to certain exceptions.

Catholic Care is a charity that carries out a range of charitable activities, including the provision of adoption services. This adoption service focuses on 'hard to place children', being children who, for reasons of disability, age, ethnic origin or otherwise, it is harder than usual to find willing adoptive parents. Catholic Care carries out its adoption agency activities in accordance with the tenets of the Roman Catholic Church. As a result, Catholic Care refused to provide adoption services to same-sex cohabiting couples or civil partners.

In order to avoid contravention of the Regulations, Catholic Care sought to take advantage of an exception in reg 18 that applies to charities ('Exception'). The Exception makes it lawful to provide benefits only to persons of a particular sexual orientation where the charity is acting in pursuance of a charitable instrument which itself restricts the enjoyment of benefits to persons of that sexual orientation. A 'charitable instrument' in this context refers to the instrument establishing or governing the charity.

Catholic Care was governed by a Memorandum of Association, which did not restrict the enjoyment of benefits to persons of a particular sexual orientation. Therefore, Catholic Care sought to amend its Memorandum of Association to restrict the availability of its charitable services to heterosexual people in accordance with the tenets of the Church. However, in order to give effect to the proposed amendments, Catholic Care needed approval by the Charity Commission.

The Commission refused to approve the amendments to the Memorandum of Association. This is because the Commission considered that the Exception only enables charities and charitable instruments to restrict the class of persons who receive benefits from the charity based on the sexual orientation of those beneficiaries. The Tribunal reasoned that Catholic Care provides 'benefits' only to adopted children and not the parents. As a result, the Charity Tribunal concluded that the Exception allows Catholic Care to limit the provision of benefits to children of a particular sexual orientation, but not prospective adoptive parents of a particular sexual orientation. Therefore, any discrimination on the

basis of the sexual orientation of prospective parents would be unlawful. In these circumstances, the Commission did not consider it necessary to deal with the human rights issues.

Catholic Care appealed to the Charity Tribunal. For different reasons to the Charity Commission, the Charity Tribunal dismissed the appeal. Catholic Care then appealed to the England and Wales High Court.

Decision

As a starting point, the High Court noted that the human right to non-discrimination was a qualified rather than absolute right. Justice Briggs noted that 'some forms of differential treatment may be justified...if undertaken for a legitimate aim and in a manner where the means employed are proportionate to the aim sought to be realised'. To this end, Catholic Care argued that through its adoption services, it served the legitimate aim of providing suitable adoptive parents for a significant number of children that would otherwise not be provided for. Further, the differential treatment by reference to the sexual orientation of prospective adoptive parents was a proportionate means of achieving that legitimate aim as there were other agencies willing to provide similar services to same-sex couples.

The Equality and Human Rights Commission intervened in this case and in response argued that it cannot be in the public benefit for a charity to discriminate in a way that breaches human rights. Whilst the High Court did consider these issues, the case was not decided on this basis.

The decision by Briggs J primarily focused on the correct interpretation of the term 'benefits' contained in the Exception to the Regulations at reg 18. As indicated above, the Charity Commission argued that the Exception only allows charities to restrict the provision of services based on the sexual orientation of the adopted children who are beneficiaries of those services. However, Briggs J found that limiting the interpretation of 'benefits' to apply only to adopted children 'was neither logical [nor] rational'. In rejecting the Commission's interpretation, Briggs J stated that 'Catholic Care...serves needy children by making benefits available to prospective adoptive parents'. He noted that while charities can loosely be described as serving a beneficial class, 'it is by no means uncommon for them to achieve that purpose by conferring benefits on persons outside that class'. As a result, Briggs J concluded that the term 'benefits' contained in the Exception to the Regulations had a broader meaning than was relied upon by the Charity Commission.

Justice Briggs therefore held that the Exception at reg 18 may apply to Catholic Care's practices, but this application is limited to the extent that such practices are justified according to the right to equality under the *European Convention on Human Rights*. It is therefore necessary to conduct an analysis of whether the refusal to provide services to same-sex couples is a justified limitation on the right to non-discrimination. Justice Briggs remitted the decision back to the Charity Commission to conduct this analysis and reconsider whether Catholic Care should be permitted to adopt the proposed changes to its Memorandum of Association.

Relevance to the Victorian Charter

Under reg 14 of the Regulations, religious organisations may discriminate against a person when providing services on the basis of the person's sexual orientation, if this is necessary to comply with the doctrine of the organisation or to avoid conflicting with strongly held religious convictions. However, this exemption does not apply to religious organisations that provide services or fulfil functions on behalf of a public authority.

Catholic Care was a publicly funded body so it did not enjoy protection from reg 14. As a result, it was necessary for Catholic Care to rely on the Exception at reg 18 instead.

This situation can be contrasted to the situation under the *Equal Opportunity Act 1995* (Vic) ('EO Act'). The EO Act contains a broad exception for religious organisations, which on its face allows all religious bodies to discriminate on the basis of various attributes, including sexual orientation, regardless of whether the organisation receives public funding or is performing of a contract for government.

However, this case adds to existing jurisprudence which supports the proposition that such an exception is not consistent with the broad right to equality under the *Charter*. As indicated in *Ladele v London Borough of Islington* [2009] EWCA Civ 1357, whilst there is an absolute right to hold a religious belief,

some limitations on a person's ability to manifest their religious beliefs are necessary for the protection of the rights and freedoms of others.

The decision is available at www.bailii.org/ew/cases/EWHC/Ch/2010/520.html.

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Same-Sex Relationships: Right to Non-Discrimination and Succession to Public Tenancy

Kozak v Poland [2010] ECHR 280 (2 March 2010)

The European Court of Human Rights has held that Poland violated arts 8 and 14 of the *European Convention on Human Rights* by denying a man living in a homosexual relationship the right to succeed to a tenancy after the death of his partner.

The Court rejected the notion that the definition of marriage as a union of a man and a woman in the Polish Constitution could be used to justify the denial of certain family rights to cohabiting same-sex partners and held that in Poland 'de facto marital cohabitation' must be understood to include persons in a same-sex relationship.

Facts

Kozak, a Polish national, lived in a municipality flat rented by his partner for around nine years. After his partner died, Kozak applied to the municipality to succeed to the tenancy of the flat. The request was denied on the basis that the applicant had not lived in the flat before his partner's death and Kozak was ordered to move out.

Kozak brought proceedings against the municipality, arguing that he had a right to succession on the basis that he satisfied the requirements of the housing legislation in force at the time, having run a common household, and thus having lived in a de facto relationship, with his partner for many years.

The claim was dismissed by the District Court, and subsequently by the Regional Court. Both courts held that regardless of whether Kozak could establish that he had lived permanently in his partner's flat, he could not meet the statutory requirements of the housing law as only de facto relationships between partners of different sex were recognised by Polish law.

The Regional Court also denied the applicant's request to have the question of whether the term 'de facto marital cohabitation' in the relevant housing law also concerned persons living in a homosexual relationship referred to the Supreme Court, or (in the alternative) for the Regional Court to obtain a ruling of the Constitutional Court as to whether the term, understood as including only heterosexual partners, was compatible with the Polish Constitution and the *Convention*.

Kozak subsequently lodged an application with the European Court of Human Rights, alleging that he had been discriminated against on the ground of his homosexual orientation in breach of arts 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the *Convention*.

Decision

The Court agreed with Kozak's submission that the domestic courts had focused on the homosexual nature of his relationship in establishing whether he fulfilled the conditions of the housing legislation. It found that both courts had rejected his claim on the grounds that under Polish law only a relationship between a woman and a man could qualify as de facto marital cohabitation.

Although the Court noted that not every difference in treatment will amount to a violation of art 14, it held that when the distinction in question operates in the sphere of sexual orientation, an 'intimate and vulnerable sphere of an individual's private life', particularly weighty reasons need to be advanced before the Court to justify the measure complained of. To be lawful, any such measure should pursue a 'legitimate aim' and the state must demonstrate 'reasonable proportionality between the means employed and the aim sought to be realised'. In particular, the Court held:

Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen is in general suited for realising the aim sought but it must also be shown that it was necessary in the circumstances.

The Court found that the essential objective of the difference in treatment of the applicant by the domestic courts had been to ensure the protection of the family founded on 'a union of a man and a woman', as stipulated by the Polish Constitution. However, although the Court accepted that this was in principle a legitimate reason which might justify a difference in treatment, it held that when striking the balance between the protection of the family and the rights of sexual minorities under the *Convention*, a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy could not be accepted by the Court as necessary for the protection of the family.

The Court held that in its choice of means designed to protect the family and secure, as required by art 8 (respect for family life), the State must take into account developments in society and changes in the perception of social, civil-status and relational issues, 'including the fact that there is not just one way or one choice in the sphere of leading one's family or private life'.

On this basis the Court unanimously concluded that there had been a violation of art 14 when considered in conjunction with art 8.

Relevance to the Victorian Charter

The *Statute Law Amendment (Relationships) Act 2001* (Vic) and the *Statute Law Further Amendment (Relationships) Act 2001* amended many Victorian Acts of Parliament, including laws relating to property rights and inheritance matters, to ensure that all couples are treated equally, irrespective of gender.

However, this case emphasises that any difference of treatment based on sexual orientation will breach s 8 of the *Charter* (right to recognition and equality before the law) unless it can be proved to be absolutely necessary, and that attempts to justify differential treatment of same-sex couples on the basis of the protection of families and children afforded by s 17 of the *Charter* are unlikely to succeed.

It is also interesting to note that in this case, like in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, the Court went beyond the express terms of the legislation and effectively reinterpreted the Polish definition of 'spouse'. In light of the Victorian Court of Appeal's differing approach to the interpretative provisions of the *Charter* recently elucidated in *R v Momcilovic* [2010] VSCA 50, it is likely that express provisions (like those in the Polish Constitution) will be the subject of declarations of inconsistency by Victorian courts, rather than a reinterpretation of the provisions to make them more compatible with human rights. However, adopting the *Momcilovic* methodology, in the absence of express provisions to the contrary it is likely the courts would interpret the term in the way that is most compatible with human rights, thereby extending it to include same-sex couples.

The decision is available at www.bailii.org/eu/cases/ECHR/2010/280.html.

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Possession Orders and the Right to Privacy and the Home

Salford City Council v Mullen [2010] EWCA Civ 336 (30 March 2010)

In this case, the England and Wales Court of Appeal considered the impact of House of Lords decisions on the rights of tenants occupying premises under 'introductory' or 'homeless' accommodation legislation. In considering the ability of tenants to raise arguments under art 8 of the *European Convention on Human Rights*, the Court of Appeal clarified the scope of the 'gateway b' defence. This decision provides an important component of the proposed Supreme Court appeal *Pinnock v Manchester City Corporation* [2010] 1 WLR 713 in which 9 Supreme Court Justices will consider these issues in relation to 'demoted tenant' legislation.

Facts

In *Salford City Council v Mullen*, the England and Wales Court of Appeal considered the position of five public housing tenants who had been provided with accommodation either as 'introductory tenants' or 'homeless persons.'

Justice Waller of the Court of Appeal noted this decision was required to assist lawyers and judges to interpret decisions of the House of Lords in relation to similar issues (namely, *Kay v Lambeth London Borough Council* [2006] UKHL 10 [2006] 2 AC 465 and *Doherty v Birmingham City Council* [2008] UKHL 57 [2009] 1 AC 367). Further, it was noted that the newly constituted Supreme Court (formerly the

House of Lords) was due to revisit *Kay* and *Doherty* in the context of 'demoted tenants' when it hears the matter of *Pinnock v Manchester City Corporation* in July 2010.

Rather than stay the appeals under consideration until *Pinnock* is resolved, the Court of Appeal was persuaded to hear the matters urgently on the basis that the Supreme Court in *Pinnock* may benefit from the ability to also address 'homeless persons' and 'introductory tenants' as considered in *Salford*.

The Salford decision relates to art 8 of the *European Convention on Human Rights* which grants every person the right to respect for his or her 'home'. In *Kay* and *Doherty*, the majority of the House of Lords held that the County Court was *unable* to rule on the proportionality of possession orders under art 8(2) of the Convention. Article 8(2) states that:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In the leading majority speech of Lord Hope in *Kay*, it was established that the County Court might only decline to make a possession order (in circumstances where the law was otherwise satisfied) in two situations:

1. where it was seriously arguable that the law which enabled the County Court to make the possession order was itself incompatible with art 8 (referred to as 'gateway (a)'); or
2. where the defendant wishes to challenge the decision of a public authority to recover possession as an improper exercise of its powers on the ground that it was a decision that no reasonable person would consider justifiable (referred to as 'gateway (b)').

Without considering each of the five individual *Salford* appeals in detail, it is worth noting the facts of the following two appeals:

- In *Powell v Hounslow* (the *Powell* appeal) – this appeal related to 'homeless accommodation' provisions. The facts were that Ms Powell had failed to provide information to the department responsible for her housing benefit and was in arrears due to the non-payment of this benefit. In the County Court proceedings Ms Powell sought to rely on the 'gateway b' defence.
- In *Hall v Leeds* (the *Hall* appeal) – this appeal related to the 'introductory tenancy' provisions. The facts were that Mr Hall was alleged to have breached his introductory tenancy by making excessive noise and engaging in anti-social behaviour. Mr Hall did not dispute the alleged breaches of his tenancy agreement but sought to argue they were due to his mental illness. Further, Mr Hall sought to raise a 'gateway b' defence and claimed the County Court needed to consider whether it was reasonable and proportionate to make a possession order.

Decision

The Court of Appeal noted the *Housing Act 1985* (the 1985 Act) established that, unless an exception applied, tenancies granted by local authorities were generally 'secure' and that Parliament intended to provide significant procedural and substantive protection against eviction. By contrast provisions relating to 'homeless accommodation' and 'introductory tenancies' provided much less security.

Homeless accommodation and introductory tenant accommodation

Homeless accommodation: The *Housing Act 1996* (the 1996 Act) established the duties of local authorities in relation to homeless persons. The Court of Appeal noted that the 1996 Act established non-secure tenancies for people regarded as homeless and that Parliament had intended to 'exclude such tenancies from the procedural and substantive protections that apply in the case of secure tenancies.' The rationale for such legislation was said to enable local authorities to swiftly recover possession of homeless accommodation and 'make efficient and cost-effective use of their limited resources in the housing field.'

Introductory tenant accommodation: The 1996 Act also established an 'introductory tenant' regime enabling local authorities to grant non-secure tenancies to new tenants as a system of 'probation' in order to assist local authorities to tackle anti social behaviour. This legislation established that the County Court had no ability to assess the merit or validity of reasons underlying an application for possession. The Court of Appeal noted that the decision of *R (McLellan) v Bracknell Forest Borough*

Council [2001] EWCA Civ 1510 had established that the introductory tenancy regime was compatible with art 8 of the Convention.

'Gateway b' defence

In relation to 'homeless accommodation' the Court of Appeal held that the decision of *Barber v London Borough of Croydon* [2010] EWCA Civ 51 established that a 'gateway b' defence may be raised by tenants in County Court proceedings.

In considering the 'introductory tenant accommodation' the Court of Appeal followed its decision in *Pinnock v Manchester City Corporation* [2010] 1 WLR 713, where it was held the County Court only had power to adjourn proceedings to enable an application to be made for judicial review, if such a point were seriously arguable.

In considering the scope of the 'gateway b' defence the Court of Appeal noted this did *not* involve a full proportionality review provided for in art 8(2) of the Convention. Further, the Court referred to the majority speech of Lord Hope in *Doherty* where he concluded

In my opinion the test of reasonableness should be... whether the decision to recover possession was one which no reasonable person would consider justifiable.

The Court of Appeal referred to comments of Lord Bingham in *Kay* where he stated '[c]ourts should proceed on the assumption that domestic law strikes a fair balance and is compatible with art 8.' In these circumstances it stated that only 'highly exceptional circumstances' would justify a 'gateway b' defence in relation to homeless accommodation.

Applied to the individual appeals it was held:

- In relation to the *Powell* appeal – if a 'gateway b' defence were arguable the appropriate venue for this was the County Court. The Court of Appeal stated that in its view a 'gateway b' argument should have been summarily dismissed and that the appeal should also be dismissed.
- In relation to the *Hall* appeal – the Court of Appeal held that the County Court was not entitled to consider a 'gateway b' defence. If it were considered that such a defence was arguable the possession proceedings should have been adjourned to enable an application for judicial review by the Administrative Court.

Of the five tenants before the Court of Appeal in *Salford*, ultimately only two appellants (Powell and Hall) were granted leave to appeal to the Supreme Court and may have their matters heard together with the *Pinnock*.

Relevance to the Victorian Charter

Fortunately, Victoria does not have separate residential tenancies legislation for probationary tenants, introductory tenants or homeless tenants. The *Salford* decision is nonetheless of interest in light of its consideration of jurisdictional issues relating to human rights arguments and the recent Victorian Civil and Administrative Tribunal judgment of Bell J in *Director of Housing v Sudi* [2010] VCAT 328.

In *Sudi*, the Director of Housing applied to evict Mr Sudi and his three year old son from their public housing premises. The Director refused to provide any justification for this action under the Victorian *Charter* and argued that VCAT had no jurisdiction to consider this issue.

In considering human rights implications under the *Charter*, Bell J rejected the argument that VCAT was unable to consider whether the Director breached the *Charter*. On this issue, His Honour stated, 'the Tribunal has both the jurisdiction and the obligation to determine whether it has jurisdiction in a proceeding, including the validity of provisions which impact on that jurisdiction.'

The *Salford* and *Sudi* decisions represent different approaches to the issue of jurisdiction in relation to human rights. In *Sudi*, Bell J referred to the decision of the Supreme Court of Canada in *Zurich Insurance Co v Ontario (Human Rights Commission)* [1992] 2 SCR 321, where human rights legislation was described as the 'final refuge of the disadvantaged and the disenfranchised' and the 'last protection of the most vulnerable members of society'. As a matter of access to justice, the approach of Bell J in *Sudi* is to be preferred to interpretations which push human rights towards the Supreme Court.

The decision is available at www.bailii.org/ew/cases/EWCA/Civ/2010/336.html.

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'Deeming' Traffic Offences Breaches Right to Presumption of Innocence and Silence

Krumpholz v Austria [2010] ECHR 341 (18 March 2010)

In *Krumpholz v Austria*, the European Court of Human Rights held that deeming the owner of a vehicle to have committed a traffic offence (by virtue of their ownership of the vehicle) breaches the European Convention right to a fair hearing and presumption of innocence.

Facts

In February 2003, the applicant's car was recorded by a radar speed detector travelling at a speed of 181 km in a 130 km zone. The district authority wrote to the applicant, ordering him to disclose the name and address of the driver of the car, but the applicant did not reply. The district authority then issued a penalty notice, ordering the applicant to pay a fine for speeding, and for failing to disclose the driver's identity.

The applicant objected, saying that he had not been driving the car and was not in the country at the time. He refused to disclose the driver's identity, as the car had been used regularly by a number of people. In dismissing the applicant's objection, the authority noted that the applicant had refused to disclose who had been driving his car at the time of the offence and concluded that he had been the driver.

The applicant appealed, maintaining that the obligation to disclose the identity of the driver and the inference drawn that he was the driver were incompatible with art 6 of the *European Convention of Human Rights*, which relevantly states:

1. In the determination of ...any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

The applicant reiterated that he had not been driving his car and that he had not even been in Austria at the relevant time. He further asserted that his car had been used regularly by a number of persons but that he had not kept any records and was therefore not in a position to provide the required information. However, the appeal was dismissed, as:

the obligation on the accused in criminal proceedings to cooperate means that he is not merely responsible for contesting the specific evidence against him, without submitting equally specific statements in reply and adducing the relevant evidence ... merely asserting that he was not driving the vehicle registered in his name at the scene of the offence and at the material time runs counter to the appellant's obligation to contribute to the establishment of the relevant facts.

Decision

Before the European Court of Human Rights, the applicant argued that the finding of guilt based on his refusal to disclose the identity of the driver violated his right to silence on the one hand and the presumption of innocence on the other. In addition, he asserted that the obligation to disclose the identity of the driver of the vehicle in itself violated the right to silence.

Austria submitted that the applicant had not been convicted of failure to disclose the identity of the driver, but convicted of the underlying traffic offence on the basis of evidence which had been freely evaluated by the authority. Referring to an earlier decision of the Court (*Murray v UK* 18731/91 [1996] ECHR 3), the Government stressed that the right to silence was not absolute and that it did not preclude the drawing of inferences from the accused's silence where, on the basis of the evidence obtained, the situation clearly called for an explanation.

The Court concluded that (para 32):

... the question of a possible violation has to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence before them and the degree of compulsion inherent in the situation.

The Court distinguished the *Murray* case on the basis that the earlier case concerned the application of a law which allowed the drawing of inferences from the accused's silence, where the prosecution had established a case against him which clearly called for an explanation.

However, in this case, the decisions were merely based on evidence of the speed recording of the car (and a policeman's statement that this recording had been duly made). There was no evidence giving any indication as to the identity of the driver, and the authority had a submission before it claiming that the applicant had not been driving the car, had not even been in Austria at the time and could not provide the name and address of the driver. The Court could not find that 'in such a situation the only common-sense conclusion was that the applicant himself had been the driver' (para 40). The Court concluded (para 42):

In sum, the drawing of inferences in a situation which did not clearly call for an explanation from the applicant and without sufficient procedural safeguards being applied violated the applicant's right to silence and the presumption of innocence.

The Court declared that there had been a violation of arts 6(1) and 6(2) of the Convention.

Relevance to the Victorian Charter

Last year, Victorian government agencies issued 2,385,175 traffic infringements. Many of the offences under the *Road Safety Act 1986* (Vic) are categorized as 'operator onus' offences, including exceeding speed limits, disobeying traffic signals and traveling in designated lanes detected by road safety cameras. If an owner or operator fails to nominate another driver, then they become liable and are 'deemed' to have committed the offence (see *Road Safety Act 1986* (Vic) pt 6AA).

This judgment questions the validity of traffic offence provisions which deem the owner of a vehicle to have committed an offence.

In earlier decisions, the European Court of Human Rights has held that the obligation for vehicle owners to disclose the driver at the time when a traffic offence was committed did not violate the right to silence and the privilege against self-incrimination. In those earlier cases, the Court noted that direct compulsion was brought to bear on the respective applicants, but that this was an acceptable part of the regulatory regime in which car owners and drivers subjected themselves to certain responsibilities and obligations. The Court also had regard to the nature of the penalties, the limited nature of the inquiry permitted, and the procedural safeguards that provided that the registered keeper of the car was not left without any defence.

The question that arises, and is dealt with in this case, is the question of the procedural safeguards. Arguably, the procedural safeguards in Victoria are similar to those in Austria (as described in this judgement), in that applicants are required to make specific submissions to show that they were not driving the vehicle (supported by evidence) and there is no requirement for the matter to be heard unless the applicant requests a hearing. The European Court held that this process contains insufficient procedural safeguards to protect the substantive Convention rights, mirrored in ss 25(1) and 25(2)(k) of the *Charter*, and allowing similar criticisms to be levelled at the Victorian infringements system.

The decision is available at <http://www.bailii.org/eu/cases/ECHR/2010/341.html>.

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Refugee Rights and Non-Refoulement: Proposed Transfer of Asylum Applicant from UK to Greece did not Breach European Convention

Saeedi, R (on the application of) v Secretary of State for the Home Department & Ors [2010] EWHC 705 (Admin) (31 March 2010)

The England and Wales High Court recently held that the proposed transfer of an asylum applicant to Greece was not incompatible with art 3 of the *European Convention on Human Rights* or similar rights guaranteed under European Union law.

Facts

On 1 April 2009, the UK Secretary of State sought to transfer the claimant from the UK to Greece for determination of his application for asylum, pursuant to the Dublin Regulation (an EU instrument).

Under art 10(1) of the Dublin Regulation, the responsibility lies on a Member State to examine an asylum application where it is established that the applicant first entered that Member State's border

irregularly, having come from a third country. Accordingly, in this case, Greece was held responsible for processing the claimant's asylum application.

The claimant argued that transfer under the Dublin Regulation would place him at risk of treatment in violation of art 3 of the *European Convention*, which prohibits inhuman and degrading treatment. He also argued that the removal would be contrary to similar fundamental human rights recognised as general principles of European Union law. These claims were based on the conditions and procedures for asylum applicants in Greece, as well as the possibility of onward refoulement. The claimant advanced three key arguments in support of his claim, discussed below.

Decision

Argument 1 – incompatibility of the 'deeming provision' with the European Convention

The *Asylum and Immigration (Treatment of Claimants, etc) Act 2004* (UK) c 19 contains a so-called 'deeming provision'. Countries listed in Schedule 3 of the Act are deemed to be 'safe countries' as regards *Refugee Convention*-prohibited persecution, as well as onward refoulement in breach of the *European Convention* or the *Refugee Convention*. The Act restricts the ability of a claimant to appeal to the Asylum and Immigration Tribunal against the decision to remove him or her to a safe country.

The deeming provision does not apply to claims relating to treatment in contravention of the *European Convention* within the receiving country. However, para 5(4) of Schedule 3 requires the UK Secretary of State to certify these claims as being clearly unfounded unless satisfied that they are not clearly unfounded.

The claimant's first argument was that this deeming provision is incompatible with the *European Convention*.

In the 2009 case of *Nasseri*, the House of Lords held that the deeming provision (as it related to Greece) was not incompatible with the *European Convention* on the evidence before the Court. Hence, the deeming provision's incompatibility with the *European Convention* in this matter depended on the provision of fresh evidence indicating that the situation in Greece had deteriorated sufficiently.

Justice Cranston found that the evidence concerning the conditions and procedures for asylum applicants in Greece, as well as the risk of refoulement, was not materially different from the evidence in *Nasseri*. Thus, the deeming provision was held not incompatible with art 3 of the *European Convention*. It was held that there was no real risk that removal to Greece under the Dublin Regulation would result in the claimant suffering treatment prohibited under art 3. Citing Lord Hoffman's acknowledgment in *Nasseri* that the procedures for asylum applicants in Greece 'may leave something to be desired', the principle established by the Strasbourg Court in *KRS* (affirmed in *Nasseri*) was that these matters ought to be taken up with the Greek domestic authorities or the European Court of Human Rights if necessary.

Argument 2 – the Secretary of State's 'clearly unfounded claim' certificate ought to be quashed

The second key question for Cranston J was whether the Secretary of State's Schedule 3 para 5(4) certificate ought to be quashed. As mentioned above, this provision of the Act required the Secretary of State to certify an applicant's *European Convention* claims as clearly unfounded unless satisfied that they were not clearly unfounded.

On the evidence before the Court in this case, it was held that the Secretary of State's certification was valid. There was no basis for a conclusion that the *European Convention* claims were not clearly unfounded.

Argument 3 – the scope of the Secretary of State's obligations under Art 3(2) of the Dublin Regulation

Finally, Cranston J had to determine the scope of the Secretary of State's obligations under art 3(2) of the Dublin Regulation. This section gives a Member State discretion to process an asylum application within its own country, notwithstanding that responsibility for examining the claim lies with another Member State under the Regulation.

His Honour held that, in exercising the art 3(2) discretion, the Secretary of State was bound to consider the rights embodied in art 1 (human dignity), art 18 (guarantee of the right of asylum) and art 19(2) (prohibition on inhuman or degrading treatment) of the EU *Charter of Fundamental Rights*. This was because these human rights form part of the general principles of European Union law, and the

Secretary of State was applying a European Union law instrument. As there was found to be only an ad hoc policy regarding the application of art 3(2), there was no evidence that the Secretary of State had considered these fundamental rights.

However, despite this failure, Cranston J did not consider that the claimant's fundamental rights would be jeopardised by removal to Greece.

It followed from these three findings that the Secretary of State could validly return the applicant to Greece under the Dublin Regulation.

Relevance to the Victorian Charter

This decision may provide some guidance on the operation of s 10(b) of the Victorian *Charter*, which prohibits cruel, inhuman and degrading treatment.

In this case it was held that a risk the claimant would suffer destitution and homelessness in Greece, including by virtue of Greece's failure to provide subsistence or the opportunity to seek employment, could not form the basis of a claim against the Secretary of State for breach of art 3 of the *European Convention*. The High Court reiterated that the threshold for a contravention of art 3 of the *European Convention* was high, especially where the claim did not involve the deliberate infliction of pain and suffering. These principles might inform the interpretation of s 10(b) of the *Charter* by a Victorian court.

The decision is available at www.bailii.org/ew/cases/EWHC/Admin/2010/705.html.

Jesse Rudd, Law Graduate, Mallesons Stephen Jaques Human Rights Law Group

HRLRC Policy Work

Setting the Agenda: Policy Brief on Foreign Policy and Human Rights

The Human Rights Law Resource Centre is preparing a series of policy briefs designed to set the agenda for Australia in certain areas of human rights. 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 policy brief on 'Foreign Policy and Human Rights' contends that human rights should be both a key goal and a key instrument of Australian foreign policy. It sets out that, despite identifying ourselves as a 'principled advocate of human rights for all', and demonstrating significant commitment to human rights in practice, Australia has not developed a comprehensive, consistent and coherent policy on human rights and foreign affairs. Such a policy could integrate human rights in all areas of Australian foreign affairs and capitalise on the benefits of doing so.

The brief maintains that Australia's approach to human rights and foreign policy should be progressive, principled and persistent. It sets out 14 concrete recommendations for action at the international, regional and domestic levels under the headings of:

- a principled approach to universal human rights and accountability;
- multilateralism and engagement with the United Nations; and
- empowering communities and supporting NGOs.

The policy brief is available at www.hrlrc.org.au.

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

Enhancing Parliament's Role in the Protection of Human Rights: Insights from the UK

The Centre has provided a brief supplementary submission to the Inquiry into the future direction and role of the Senate Scrutiny of Bills Committee.

The Supplementary Submission draws the Senate Committee's attention to a recent report by the UK's Joint Committee on Human Rights, entitled *Enhancing Parliament's Role in Relation to Human Rights Judgments* (at www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/85/85.pdf).

The UK Report considers the role of parliament, and parliamentary committees, in monitoring and promoting the implementation of adverse decisions of the European Court of Human Rights and declarations of incompatibility by domestic courts under the *Human Rights Act 1998* (UK).

The UK Report is predicated on the view that parliament has a 'central role' in the promotion and protection of human rights.

Although Australia is, obviously, not subject to the jurisdiction of the European Court of Human Rights, we are subject to the jurisdiction of a range of quasi-judicial expert human rights bodies, including the UN Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, and the Committee on the Rights of People with Disabilities. At present, the Australian Parliament does not play any role in monitoring or overseeing the implementation of adverse decisions of these independent expert bodies. Further, as far as the Centre is aware, there is no comprehensive, coordinated departmental policy or approach to responding to and implementing such decisions.

In its submission to the Senate Committee, the Centre recommended that an Australian Joint Committee on Human Rights should, among other things, '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' (see para 5(c)). In its April 2009 Concluding Observations on Australia, the UN Human Rights Committee similarly recommended that Australia should 'establish appropriate procedures to implement' Views of the Committee under the First Optional Protocol to the ICCPR.

The UK Report contains a number of very useful recommendations as to 'the UK's system for monitoring and responding to Court judgments' (relevant, by analogy, to Australia's system for monitoring and responding to UN treaty body decisions) and also includes, as an Annex, a detailed guide for government and departments as to relevant roles, responsibilities and processes in this regard.

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

Submission to Australian Government on Australia's Report for the Universal Periodic Review

The Centre has made a submission to the Attorney-General's Department on information to be included in the Australian Government's report to the Universal Periodic Review by the UN Human Rights Council. The Australian Government requested two-page submissions from the public by 16 April 2010.

The Centre's submission:

- addresses positive developments to be included in the Australian Government's report; and
- identifies a number of areas of concern and challenge regarding the protection and promotion of human rights in Australia.

The submission is available at www.hrlrc.org.au/content/topics/international-human-rights-mechanisms/submission-issues-to-be-included-in-the-australian-governments-report-under-the-upr-april-2010/.

Further information on Australia's review under the UPR process is available at www.hrlrc.org.au/content/topics/international-human-rights-mechanisms/universal-periodic-review-of-australia-in-february-2011/.

Ben Schokman is Director of International Human Rights Advocacy with the Centre

Report of Review of the Equal Opportunity for Women in the Workplace Act

The Office for Women has released its *Review of the Equal Opportunity for Women in the Workplace Act 1999 Consultation Report* following a consultation process involving 136 public submissions, a survey of 744 reporting organizations and 859 employees, 21 expert and stakeholder interviews and five facilitated roundtables.

The review recommended a number of solutions for improving employment outcomes for women at both a cultural and operational level. These included implementing equal employment opportunity policies in the workplace as well as cultivating support of and commitment to equal opportunity at the senior management levels of organisations. Concrete measures such as the availability of flexible work arrangements, access to training and development opportunities, and the provision of equal and

transparent remuneration were also highlighted in the report's conclusions as positive steps in promoting workplace equality.

According to the report's findings, encouraging organisations to view equal employment opportunity as part of an overall business strategy by demonstrating the strong 'business case' for employing women and introducing family friendly policies is also important in securing gender equality, as is the need to involve employees in consultative processes. Outside individual workplaces, the introduction of targets, compliance audits, public recognition measures, accountability mechanisms and financial incentives for employers were all viewed as valuable tools for driving cultural change. Enforcement strategies and workplace regulation were also highlighted.

Findings in relation to the EOWW Act itself included some submissions for a tighter focus on achieving gender equality rather than merely securing equal employment opportunities. Contributors to the consultation also suggested the EOWW Act apply more broadly to include the Commonwealth public sector and small businesses. The development of workplace programs under the Act was met with general support, though it was noted that programs are often developed without the input or knowledge of employees, and need to be improved, for example, by setting measurable actions and goals. The reporting process under the Act, though viewed positively by stakeholders, needs improvement. In particular, the review found that an outcome-focused process which is more cost- and time-efficient and which involves employees would be more effective. The review also revealed general dissatisfaction with the enforcement of the EOWW Act, including lack of enforcement powers and weak sanctions such as the 'naming in Parliament' provision.

The review's conclusions on the Equal Opportunity for Women in the Workplace Agency indicated that it is fulfilling its role and is valued, especially in terms of its educational and awareness raising functions, despite limitations in terms of the legislative framework and resourcing. The focus of discussion about the EOWA was its structural organisation, with a small number of recommendations that it merge with another agency to improve efficiency.

Numerous recommendations from the HRLRC's submission to the consultation were positively discussed in the report, which is available at www.fahcsia.gov.au/sa/women/pubs/general/eowa_kpmg_rpt/Documents/EOWW_Act_Consultation_rpt.pdf.

Sarah Lenthall is a volunteer with the Human Rights Law Resource Centre

Freedom of Religion: Submission to Commission of Inquiry into the Right to Freedom of Religion in Samoa

The Samoan Government has appointed a Commission of Inquiry into the working of art 11 of the Samoan Constitution, which protects the right to freedom of religion. As it is currently drafted, art 11 provides that every person has the right to freedom of thought, conscience and religion, and that laws restricting this right are only valid if the restriction is reasonable and is for the protection of public order, health or morals, national security, or the rights of others. Although the exact nature of the Government's planned amendments to art 11 is at present not clear, it appears that it is intended that the freedom be limited so as to allow the restriction of new religions and denominations entering into the country.

On 31 March 2010, the Human Rights Law Resource Centre made a submission to the Commission. The submission outlines the rights to freedom of religion and non-discrimination as codified in the *International Covenant on Civil and Political Rights*, and considers the permissibility of limitations on human rights under international law. It is hoped that this general information will assist the Commission in its task, and that the Commission will seek further submissions once the specific nature of any proposed amendments is made known.

The Centre's submission is available at www.hrlrc.org.au/content/topics/asia-pacific/freedom-of-religion-submission-to-commission-of-inquiry-in-samoa-31-march-2010/.

Michael Dunstan is on secondment to the Centre from Mallesons Stephen Jaques

HRLRC Casework

Special Leave to Appeal to High Court Sought in Landmark Charter Case

On 14 April 2010, Vera Momcilovic applied for special leave to appeal from the judgment of the Victorian Court of Appeal in the landmark *Charter* case of *R v Momcilovic*. In that case, the Court clarified the operation of key provisions of the Victorian *Charter of Human Rights* and made a Declaration of Inconsistent Interpretation in respect of s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). The Human Rights Law Resource Centre made submissions as amicus curiae in the Court of Appeal.

In the special leave application, Ms Momcilovic contends that the Court of Appeal erred in, among other things:

- interpreting s 5 of the DPCS Act as casting on an accused a legal – as opposed to only an evidentiary – burden of disproof of possession of drugs; and
- concluding that it was not possible, within the meaning of s 32(1) of the *Charter*, to interpret s 5 of the DPCS Act as casting on an accused only an evidentiary – as opposed to a legal – burden of disproof of possession of drugs in circumstances where the Court also concluded (correctly) that, insofar as s 5 of the DPCS Act placed a legal burden of disproof on an accused, it was not compatible with the right to the presumption of innocence in s 25(1) of the *Charter* and did not, within the meaning of s 7(2) of the *Charter*, place a reasonable limit on that right.

If Special Leave is granted, the Centre will seek leave to appear as amicus curiae in the High Court.

Seminars and Events

2010 Human Rights Dinner – 14 May 2010

with Louise Arbour (President and CEO, International Crisis Group) and Rob Hulls (Deputy Premier of Victoria)

The Human Rights Law Resource Centre and the Public Interest Law Clearing House invite you to the 2010 Human Rights Dinner with Louise Arbour (President, International Crisis Group; former United Nations High Commissioner for Human Rights) and Rob Hulls (Deputy Premier and Attorney-General of Victoria).

Time: 7.00pm to 11.45pm

Date: Friday, 14 May 2010

Venue: Melbourne Convention and Exhibition Centre
1 Convention Centre Place, South Wharf
(Hilton South Wharf entrance, Rooms 210 and 211)

Tix: Full price: \$120

Subsidised: \$75 (for employees of non-profit and community organizations)

RSVP: 3 May 2010 (Use booking and payment form at www.hrlrc.org.au)

About Louise Arbour

Louise Arbour is President and CEO of the International Crisis Group, a leading global NGO working to prevent and resolve deadly conflict.

From 2004 to 2008, Ms Arbour held the office of United Nations High Commissioner for Human Rights.

Ms Arbour was a judge of the Supreme Court of Canada from 1999 to 2004, prior to which she was Chief Prosecutor for the International Criminal Tribunals for the former Yugoslavia and for Rwanda.

Among many other honours, Ms Arbour has received the United Nations Human Rights Prize, been made a Companion of the Order of Canada and been conferred with over 30 honorary doctorates.

The 2010 Human Rights Dinner is proudly supported by Qantas and Mallesons Stephen Jaques.

'The Rise of Targeted Assassinations and the Implications for International Law'
with Professor Philip Alston, UN Special Rapporteur on Extrajudicial Killings

This seminar is presently jointly by the Castan Centre for Human Rights Law and the Human Rights Law Resource Centre.

Time: 6pm to 7pm

Date: Wednesday, 19 May 2010

Venue: Monash University Law Chambers, 472 Bourke Street, Melbourne

RSVP: Free public lecture

Registration essential to castan.centre@law.monash.edu.au or (03) 9905 3327

About Philip Alston

Philip Alston is UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Special Adviser to the UN High Commissioner for Human Rights on the Millennium Development Goals and the John Norton Pomeroy Professor of Law at New York University. He co-chairs the NYU Center for Human Rights and Global Justice.

Professor Alston's other UN appointments have included stints as a member of the Group of Experts on Darfur appointed in 2007, Chair of the UN Committee on Economic, Social, and Cultural Rights from 1991 until 1998 and UNICEF's legal adviser during the drafting of the UN Convention on the Rights of the Child. He has held appointments at Harvard Law School, the Australian National University and the European University Institute. Professor Alston teaches, researches and publishes primarily in international law and international human rights law. He received degrees in Law and in Economics in Australia and a JSD from Berkeley.

Castan Centre 2010 Human Rights Conference – 16 July 2010

The Castan Centre is proud to announce that **Human Rights 2010** will be held on Friday, 16 July 2010 at the State Library of Victoria. Registration is now open.

Session 1 – The changing face of Australian human rights laws

- *The right to equality and the right to freedom of religion - not absolutes!*
Dr Helen Szoke, Commissioner, Victorian Equal Opportunity and Human Rights Commission
- *Charters of rights in Australia: recent developments and prospects*
Phil Lynch, Director, Human Rights Law Resource Centre

Session 2 – Current human rights issues in Australia

- *The race to the bottom: Understanding why our political leaders won't lead on refugee debates*
Associate Professor Peter van Onselen, Contributing Editor *The Australian*
- *Indigenous rights: where to after the National Human Rights Consultation?*
Megan Davis, Director, Indigenous Law Centre, University of New South Wales
- *Say 'YES' to same sex marriage in Australia*
Dr Adiva Sifris, Faculty of Law, Monash University

Session 3 – Limiting freedom

- *The rise of China and human rights*
John Garnaut, Fairfax China Correspondent
- *Internet Freedom*
Mr Iarla Flynn, Head of Public Policy and Government Affairs (Australia/NZ), Google

Session 4 – Human rights – the Latest from the UN

- *How the Convention on the Rights of Persons with Disabilities can improve the lives of those living with a disability*
Professor Ron McCallum AO, Chair, UN Committee on the Rights of Persons with Disabilities and Professor of Law, Sydney Law School, University of Sydney

- *Climate change and human rights: whose rights, what protection?*

Dr Jane McAdam, Director of International Law Programs, Gilbert + Tobin Centre of Public Law,
University of New South Wales

Registration:

Registration costs for the conference:

- Full registration - "early bird" to 1 June - \$160 (full registration from 2 June will be \$195)
- NGOs - \$95 (Multiple registrations \$80)
- Full-time students - \$45 (limited number available, ID will be requested at the conference)

For further information and to register, see

www.law.monash.edu.au/castancentre/events/2010/conference-2010.html.

Resources and Reviews

HRLRC in the News

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

- Philip Lynch, '[Human Rights Framework: Icing Without the Cake](#)', *ABC Online*, 22 April 2010
- Philip Lynch, '[Loose with the Truth?](#)', *ABC Online*, 8 April 2010
- Philip Lynch, '[Parliament Has Last Say on Rights](#)', *Australian Financial Review* (Sydney), 26 March 2010

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

- James Eyers, 'Bill of Rights Off the Table', *Australian Financial Review* (Sydney), 22 April 2010
- Selma Milovanovic, '[Drugs Law at Odds with Rights Charter: Judges](#)', *The Age* (Melbourne), 26 March 2010

New Issue of *Alternative Law Journal* – 'New Laws – Same Old Problems'

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

Senior Human Rights Advisor, Victorian Human Rights and Equal Opportunity Commission

The Commission is seeking a lawyer with a background in human rights law and experience working in a public policy environment. This position will play an instrumental role in the Commission's performance of its functions under the *Charter of Human Rights and Responsibilities*, with particular responsibility for developing the annual *Charter* report.

Applications close 2 May 2010. For further information, see

www.humanrightscommission.vic.gov.au/about%20us/employment/.

Foreign Correspondent

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

Human Rights Committee's new General Comment on freedom of expression and opinion

In March 2010, the Human Rights Committee held its 98th session in New York. In addition to the

review of states' periodic reports, including our Tasman neighbours New Zealand, the Committee discussed the drafting of a new General Comment on art 19 of the ICCPR, on the subject of freedom of opinion and expression. The new General Comment is in draft form, but is expected to be adopted at the Committee's next session.

Permanent Forum on Indigenous Issues

The 9th session of the UN Permanent Forum on Indigenous Issues began this week in New York. The theme of this session is *Indigenous peoples: development with culture and identity*, addressing articles 3 and 32 of the *United Nations Declaration on the Rights of Indigenous Peoples*. The start of the Forum was marked by two sets of exciting news.

First, in the opening session, the New Zealand Government announced its support for the *Declaration on the Rights of Indigenous Peoples*. This was met by cheers and a standing ovation from the approximately 2,000 people attending, including government delegates, NGOs, and Indigenous peoples. A Maori song of thanks was performed to celebrate. Whakamihi and congratulations to our Maori friends for the work they have done to shift the New Zealand Government's position on this important piece of international law!

The next day at the Forum in New York, the US Ambassador, Susan Rice, announced that the US Government will review its position on the Declaration. She explained that the US Government would consult with Indian tribes and NGOs in conducting a review of the US position on the Declaration.

This marks significant progress for the Declaration, which was adopted by the UN General Assembly by a large majority of governments in September 2007. Australia, New Zealand, the USA, and Canada were the most notable governments to not support the original adoption of this instrument, although Australia's position has since shifted, and now with the NZ Government's support and signs of change coming from the US, the strength of this Declaration becomes even greater.

Volcano halts UN missions but nothing can stop the Human Rights Council review talks

As with so many during this last week, the unpronounceable volcano in Iceland has interrupted plans for many in the human rights community. The UN Independent Expert on Extreme Poverty was to conduct the first mission by a UN expert to Vietnam in more than 12 years, but was grounded before she could even begin. Likewise, the Independent Expert on the right to water and sanitation had her mission to Slovenia cancelled this week.

However, even a volcano was not enough to stop the one topic of conversation that seems never ending, and which will dominate the agenda until late next year – the five year review of the Human Rights Council. Diplomats and NGO representatives gathered in large numbers at an event organised by the Swiss Government this week in Montreux to debate the ways in which the Human Rights Council could be assessed and improved. This meeting was but one of a number of events organised by governments, to complement the open-ending working group established in October 2009 to conduct the review.

Meanwhile, in New York, the President of the General Assembly, Ali Abdussalam Treki of Libya, has also been progressing the General Assembly's work on reviewing the Council (a parallel and similar review process). He informed governments recently that he had appointed two facilitators to conduct consultations on the review of the status of the Human Rights Council: Ambassador Christian Wenaweser of Liechtenstein and Ambassador Mohammed Loulichki of Morocco.

Whether or not the mandated five year review of the Human Rights Council will result in any great change is questionable at best, but it is hoped that some small improvements can be introduced and encouraged, for example greater use of human rights expertise. Watch this space, but don't hold your breath.

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

If I Were Attorney-General...

A Real Walk for Justice

If I were Australia's Attorney General for the day, I would begin the day with a walk for justice – a real one, taking in the sights and sounds of some of our most disadvantaged communities.

I would begin in the Alice Springs Town Camps and would spend the time talking to the Aboriginal people there and asking them how the Intervention is really affecting them and what they would have Government do to assist them.

Second on the itinerary would be some of the neighbourhoods identified in the *Dropping Off the Edge: the Distribution of Disadvantage in Australia* report – a joint project of Catholic Social Services and Jesuit Social Services, which maps national disadvantage and which found that just 1.7 per cent of postcodes and communities across Australia account for more than seven times their share of top rank positions on the major factors that cause intergenerational poverty. I would visit some of these people and ask them what their needs are and what they think can be done to address the high levels of crime and imprisonment that result from the unemployment, low income and low health that plague them.

Next would be the waiting rooms of our Children's Courts, lower courts and Family Courts – the areas where the unlucky people who appear before our courts sit and tremble before their encounter with our justice system. I would speak with these people and ask them what brought them there and what could have been done to prevent them needing to appear before a judge.

Finally, I would visit some schools – primary schools, high schools, schools in rich areas and in poor, minority schools, special needs schools and Indigenous schools and I would find out what civic education looks like in those schools and what the kids there think of government, of the law and of justice.

After this walk for justice I would go back to my office and call together smart people, social justice minded people, creative thinkers and people who make things happen. I would banish political advisers, risk managers and bean counters. Together we would map out actions that would respond to the needs of the people who had spoken to me. We would develop plans in direct response to what they said was needed.

These might include a robust national bill of rights, more funding for access to justice for the disadvantaged, more civic education programs, more court diversion and alternate dispute resolution. It would be very likely to include reintroduction of the *Racial Discrimination Act* with respect to the Northern Territory Intervention. However, I cannot be certain of any of those outcomes, as they will depend on what I find people want and need.

When we were finished developing the ideas fully (a quick business in this parallel universe) I would call in my media spokesperson and tell her to blitz television, radio and print media with interviews and statements of me announcing in great detail every aspect of the new programs, all of which would commence immediately. I would make sure to tell every interviewer that these were core undertakings.

Nicky Friedman is Head of Pro Bono and Community Services with Allens Arthur Robinson