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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.

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Opinion

International Treaty Body Reform Should Protect Human Rights on the Ground

The United Nations human rights treaty bodies constitute a cornerstone of the international human rights supervision system. The first of the ‘committees’ commenced its work in 1970. By now, there are 9 of them with a total of 145 elected members. We are just a handful of ratifications away from the creation of the 10th committee under the *International Convention for the Protection of All Persons from Enforced Disappearance*. All but one of the treaty bodies review periodic reports submitted by States, most issue General Comments or Recommendations regarding the provisions of the various treaties, and many consider individual communications and undertake inquiries, while one operates largely through field missions.

For all their effectiveness and accomplishments it has long been recognised that the treaty bodies would benefit from institutional and other reforms. The former UN High Commissioner for Human Rights, Louise Arbour, identified a litany of concerns, including:

- the extent to which States accept the human rights treaty system on a formal level, but do not constructively engage with it;
- the ad-hoc manner in which the treaty body system has grown, with an overlap of provisions and competencies;
- the growth in the number of treaties and ratifications, resulting in a steep increase in the workload of the treaty bodies;
- the low levels of public awareness of the treaty body system;
- the uneven levels of expertise and independence of treaty body members;
- the variable quality of State party reports to treaty bodies;
- the fact that treaty bodies often have insufficient information to enable them to undertake a full analysis of country situations; and
- the absence of effective, comprehensive follow-up mechanisms for recommendations.

Account needs also to be taken of the broader human rights protection environment that the treaty bodies inhabit. For instance, it remains unclear what relation they should have with UN Human Rights Council’s Universal Periodic Review procedure.

There have been repeated efforts to address the concerns and these have resulted in modest improvements in procedures and harmonisation of working methods. Efforts to achieve more sweeping changes have tended to fail.

For instance, former UN Secretary-General Kofi Annan got nowhere with his call for the eventual transition to a single state report that would meet a state's responsibilities to all treaty bodies. That idea was rejected by stakeholders, who feared that rights-holders such as children and women would be rendered invisible in a single homogenised report. In 2005, Louise Arbour proposed the unification of the various committees into a single unified treaty body. Her idea went nowhere. The need for a root and branches overhaul of the system did not, however, go away. Most recently, the current High Commissioner, Navi Pillay, has called for proposals which could enable the system to be more rational, coherent, coordinated and effective.

In response to her call, on 19 November 2009, a group of 35 serving or former members of the treaty bodies issued, the 'Dublin Statement on the Strengthening of the UN Human Rights Treaty Body System'. Signatories include members or former members of all the treaty bodies and come from all geographical regions of the world. The initiative was organised by the University of Nottingham Human Rights Law Centre, with the financial support of the Irish Government. You can download the statement at: www.nottingham.ac.uk/hrlc/documents/specialevents/dublinstatement.pdf.

The publication of the Dublin Statement was in recognition that the High Commissioner has opened an opportunity for a newly invigorated policy-level process of reflection and action. The statement does not present detailed solutions or specific reform outcomes. Instead it is intended as a recapitulation of the elements necessary for an effective process of reform, marking out what its authors consider to be key parameters, objectives and methods for such a programme. The statement seeks to identify what might be termed a 'road-map' for a reform that abides by identified standards of good practice. In identifying each of the elements of the road-map, the statement distils lessons from previous reform efforts and initiatives. This exercise can be illustrated with just a few examples:

- (a) 'Reform should enhance the capacity of the treaty body system to address the human rights contained in the respective treaties in a manner that respects the universality, indivisibility and the equal significance of all human rights'. At first sight this observation may appear innocuous. However, it addresses one of the dominant concerns in the discussions about unified reporting and the unified treaty body; that reform must not put at risk the specificity of protection provided to diverse rights-holders.
- (b) A lack of consultation prior to the publication of High Commissioner Arbour's Concept Paper may have contributed to the demise of the unification and related proposals. In any case, it is self-evident that reform must take account of all relevant points of view. This consideration is addressed in the statement where it is indicated that 'reform should always be undertaken in consultation among concerned stakeholder'. The text adds a number of observations regarding the nature of consultation, such as that it be on the basis of clearly formulated issues and questions, and adopt a human rights-based approach.
- (c) An area of risk that featured large in the previous reform discussions was that of the uncertainty inherent in any re-negotiation of the treaties. The statement recalls that a considerable degree of reform can be undertaken without any need for treaty re-negotiation. With regard to reforms that would demand treaty changes, it observes that any reform goals that require such a process must be of such an importance as to 'justify the protracted and sometimes unpredictable process of amendment'.

Many past reflections on issues of treaty body reform concentrated on the role and responsibilities of treaty body themselves, States, and sometimes the United Nations secretariat. However, systemic reform requires the engagement of all the relevant stakeholders, including NGOs and human rights defenders, national human rights institutions and academia. All of these are addressed by the Statement and specific reform areas are addressed for each of them.

The test of the effectiveness of the Dublin Statement will be its impact in stimulating a new round of reflection that avoids the mishaps of the past. Signs so far are encouraging. The statement has been debated in the committees themselves and in their periodic 'inter-committee' meetings. It has been centre-stage in various briefings organised by the High Commissioner's Office for NGOs and States. It has helped put treaty body reform back on the agenda for national human rights institutions and NGOs.

These are, of course, just first steps. The moment will soon arrive for some specific reform options to be put for review. That will lead to a very sensitive phase of debate, success or failure being determined by the capacity of States, NGOs, treaty body members and the other stakeholders to find common ground.

The facilitatory role of the High Commissioner will be of crucial significance. Only time will tell whether the efforts will lead to significant achievements. However, prospects will remain promising if all involved keep in sight what the Dublin Statement describes as the ultimate purpose of all reform: the enhanced protection of human rights at the domestic level.

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News

UN Special Rapporteur on the Right to Health Releases Report on Australia

On 3 June 2010, the UN Special Rapporteur on the Right to the Highest Attainable Standard of Health, Anand Grover, released his report following a mission to Australia in November and December 2009.

The report focuses on the standard of living and quality of health care and health services for Aboriginal and Torres Strait Islanders, people in prison and immigration detainees.

Section II of the report considers the international and national legal framework within which the right to health is considered in Australia, and discusses the recognition of international human rights under Australian law. On this issue, the Special Rapporteur concludes that the Australian Government should take steps to comprehensively enshrine human rights, including the right to health, in Australian law. He further recommends that such rights be recognized as enforceable and justiciable.

Section III of the report considers the issue of Indigenous health, including as to health status, the underlying social determinants of health (including severe socio-economic disadvantage and social exclusion), and access to health care services and primary health care.

Section IV of the report focuses on the right to health of detainees in Australia, including prisoners and immigration detainees, and notes that all persons deprived of liberty are entitled to the right to the highest attainable standard of health, to be treated with humanity and dignity, and to have equal access to health services as those in the community. The Special Rapporteur observed inconsistencies and inequalities in treatment and access to services across different facilities, and was particularly concerned with the disproportionate impact of incarceration on Indigenous populations, as well as persons with mental illness. He also observed that Australia's continuing policy of mandatory detention poses significant barriers to the realization of the right to health for asylum seekers and refugees.

Section V of the report sets out the Special Rapporteur's conclusions and recommendations pertaining to each of the areas discussed above, including that Australia should:

- ratify the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment*, and establish an independent national preventive mechanism to conduct regular inspections of all places of detention;
- pass legislation restoring the *Racial Discrimination Act vis-à-vis* the Northern Territory as a matter of priority, and introduce constitutional protection of the rights of Indigenous peoples;
- develop a national health policy which includes a detailed plan for the full realization of the right to health;
- implement legislative or other guarantees to ensure that the opinions of national representative Indigenous bodies, such as the National Congress of Australia's First Peoples, are taken into account;
- give priority to education in human rights throughout the country, particularly in respect of education for health professionals;
- address, as a matter of urgency, the qualitative and quantitative inadequacy of educational services for remote communities;
- ensure that Indigenous communities have control over allocation of resources, by providing local governance monitoring structures;
- allocate additional funding to health promotion programs throughout the Northern Territory;

- increase engagement with community health providers by prisons, which would improve continuity of care and facilitate reintegration into the community;
- increase resources for diagnosis, treatment and prevention of mental illnesses within prisons;
- assess and invest in the primary health care sector throughout the prison system;
- undertake research regarding indigenous incarceration issues as a matter of urgency, and ensure that new interventions concerning prevention of incarceration and treatment during incarceration are evidence-based and appropriately evaluated;
- reconsider the policy of mandatory detention of irregular arrivals;
- assess the viability of providing on-site interpreters in immigration detention facilities;
- place detainees with a history of torture and trauma in community detention or on appropriate visas in the community; and
- reconsider the appropriateness of detention facilities continuing to operate on Christmas Island, and assess provision of mental health services to this population as a matter of priority.

The report is at www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.Add4.pdf.

A Briefing Paper prepared by the HRLRC to assist the Special Rapporteur is at www.hrlrc.org.au/content/topics/esc-rights/right-to-health-briefing-paper-on-australia-to-un-special-rapporteur-on-the-right-to-health-sept-2009/.

Government Introduces Reforms to Strengthen Sex Discrimination Act

On 24 June, the Attorney-General, Robert McClelland, introduced legislation to amend and strengthen the *Sex Discrimination Act 1984* by:

- establishing breastfeeding as a separate ground of discrimination;
- extending protections from discrimination on the grounds of family responsibilities to both women and men in all areas of employment;
- ensuring that protections from sex discrimination apply equally to women and men; and
- providing greater protection from sexual harassment for students and workers.

Introducing the amendment, the Attorney stated that the Bill is part of the Government's response to the report of the Senate Standing Committee on Legal and Constitutional Affairs into eliminating discrimination and promoting gender equality. He further stated that the Government will consider other recommendations from the Committee's Report as part of its commitment in *Australia's Human Rights Framework* to consolidate anti-discrimination legislation into a single comprehensive law.

Australian Human Rights Commission Launches Major Reports on Gender Equality and Racism against African Australians

The Australian Human Rights Commission has recently launched major reports on gender equality and discrimination against African Australians.

The *Gender Equality Blueprint*, launched by Australian Sex Discrimination Commissioner Elizabeth Broderick, sets out 15 recommendations to progress gender equality in five priority areas:

- balancing paid work and family and caring responsibilities;
- ensuring women's lifetime economic security;
- promoting women in leadership;
- preventing violence against women and sexual harassment; and
- Strengthening national gender equality laws, agencies and monitoring.

A report on discrimination against African Australians, *In our own words – African Australians: A review of human rights and social inclusion issues*, was launched by Race Discrimination Commissioner, Graeme Innes. The report documents discrimination and both direct and indirect racism against African Australians. According to Commissioner Innes, 'The discrimination these people face, which is

sometimes inadvertent, takes place across the gamut of life's experiences, from employment to housing, education, health services and their connection with the justice system'.

In our own words presents issues, solutions and best practice initiatives, identified by African Australians throughout these consultations, as well as observations and suggestions from other government and non-government stakeholders.

Both reports are at www.humanrights.gov.au.

Tasmania Announces Proposed Enactment of Charter of Rights

On 22 June, the Tasmanian Attorney-General, Lara Giddings, announced that Tasmania will progress towards the enactment of a Charter of Human Rights and Responsibilities.

Ms Giddings said a 'Charter of Rights and Responsibilities was a key reform which would protect human rights in Tasmania'. She stated that, 'In recent years, the Victorian and ACT Governments have both introduced Charters of Rights and Responsibilities.'

Ms Giddings said she would progress the issue in Tasmania by developing a discussion paper before a proposal is taken to Cabinet.

'The discussion paper will help to dispel some of the myths surrounding Human Rights Charters and to identify where the Victorian or ACT legislation may be adapted to meet Tasmania's needs.'

Welcoming the announcement, Australian Human Rights Group stated that 'This positive step will be crucial in building a human rights culture in Tasmania's public service. For those whose human rights are violated, the Charter will provide an avenue for achieving justice. For Tasmanian law makers, the Charter will be a constant reminder of our international human rights obligations'.

UN Special Rapporteur Appalled by Level of Torture and Ill-Treatment in Papua New Guinea, Calls on International Donor Community to Act

In May 2010, the UN Special Rapporteur on Torture, Professor Manfred Nowak, conducted a country mission to Papua New Guinea. Following the visit, the independent and highly regarded international law expert expressed serious concern about widespread and grave human rights violations, including:

- a high level of crime and violence;
- entrenched gender discrimination, with 'women in Papua New Guinea holding a very low status in society, placing them at a very high risk of abuse both in the domestic and in the public sphere';
- evidence of systematic torture and ill-treatment in places of detention, including detention in 'overcrowded, filthy cells, without proper ventilation, natural light or access to food and water';
- evidence of excessive use of force by law enforcement and correctional authorities, and further evidence of 'a high level of corruption and unprofessionalism' among these authorities;
- 'insufficient or totally non-existent' access to 'medical care in detention facilities'; and
- a weak commitment to the rule of law and a culture of impunity, stemming from a 'lack of effective complaints mechanisms, independent investigation and monitoring and similar safeguards'.

Having regard to these findings, the Special Rapporteur recommended that 'the international donor community considers the protection of human rights in the criminal justice system, and in particular the prevention of torture, as the highest priority.'

This recommendation is particularly apposite to Australia, which is currently reviewing the PNG-Australia Development Cooperation Treaty. This review is a significant opportunity for Australia to enhance aid effectiveness, demonstrate leadership on human rights in the Asia-Pacific, and contribute to the realisation of human rights in PNG in practical and effective ways.

The Special Rapporteur's report is at

www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10058&LangID=E.

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

National Human Rights Framework Developments

Parliamentary Scrutiny of Human Rights to be Strengthened with New Bill

On 2 June 2010, the Attorney-General introduced the *Human Rights (Parliamentary Scrutiny) Bill 2010*, a key element of the Government's new 'Human Rights Framework', in the House of Representatives. The Bill was subsequently referred to the Senate Legal and Constitutional Committee for inquiry and report. The Human Rights Law Resource Centre welcomes the Bill and supports its expeditious passage.

The Bill establishes a Joint Parliamentary Committee on Human Rights, to be comprised of five members of the House of Representatives and five Senators, with two primary functions:

- first, to examine Bills, legislative instruments and existing Acts 'for compatibility with human rights and to report to both Houses of Parliament on that issue'; and
- second, to inquire into 'any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of Parliament on that matter'.

The Bill also introduces a requirement that each new Bill introduced to parliament be accompanied by a Statement of Compatibility which includes an 'assessment of whether the Bill is compatible with human rights'. For the purposes of both the Joint Committee and Statements of Compatibility, 'human rights' means those human rights and fundamental freedoms contained in the seven core international human rights treaties to which Australia is party.

The legislation gives effect to the finding of the National Human Rights Consultation Committee that:

Greater consideration of human rights is needed in the development of legislation and policy and in the parliamentary process in general. The primary aim of such consideration is to ensure that human rights concerns are identified early, so that policy and legislation can be developed in ways that do not impinge on human rights or, in circumstances where limitations on rights are necessary, those limitations can be justified to parliament and the community.

The UN Human Rights Committee – a body of independent international human rights experts – has similarly recently recommended that Australia establish a mechanism to consistently ensure the compatibility of domestic law with the *International Covenant on Civil and Political Rights* and establish appropriate procedures to implement views of the Committee in individual cases.

Consistent with these findings and recommendations, in introducing the legislation, the Attorney-General stated the purpose of the measures is to 'improve parliamentary scrutiny of new laws for consistency with Australia's human rights obligations and to encourage early and ongoing consideration of human rights issues in policy and legislative development'.

Details of the Bill and the Senate committee inquiry are at www.aph.gov.au/senate/committee/legcon_ctte/human_rights_bills/index.htm.

The HRLRC's submission to the inquiry is at www.hrlrc.org.au/content/topics/national-human-rights-consultation/submission-to-senate-inquiry-into-human-rights-parliamentary-scrutiny-bill-2010/.

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

Australia Defers Human Rights Act but Calls for Better Legal Protection of Human Rights Abroad

Despite ruling out the enactment of a Human Rights Act in Australia, the Government has recently pressed a number of countries abroad to improve the legal protection of human rights in their home jurisdictions.

In official interventions at the 8th Session of the UN Human Rights Council Universal Periodic Review, Australia called on:

- Lesotho to 'incorporate international human rights instruments into domestic law, including the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of Discrimination Against Women, and the Convention on the Rights of the Child' (5 May 2010); and
- Kiribati to 'ensure human rights are afforded full legal protection in Kiribati' (3 May 2010).

A range of UN human rights treaty bodies and Special Rapporteurs have consistently called on Australia to enact comprehensive legal protection of international human rights obligations in domestic law.

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

Victorian Charter of Rights Developments

Statements of Compatibility under the Victorian Charter

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

Below is an analysis of recent significant Statements.

Control of Weapons Amendment Bill 2010

The Control of Weapons Amendment Bill 2010 will amend the *Control of Weapons Act 1990* (Vic) by:

- creating the offences of (i) selling a weapon to a child and (ii) for a child buying a weapon;
- allowing for infringement notices to be issued for certain offences to people over the age of 16 and for weapons to be confiscated and disposed of; and
- relaxing the requirements for police to conduct searches by:
 - removing the requirement for police to keep records of searches, except for strip searches;
 - allowing for planned and unplanned designations of search areas to be made even if the likelihood of violence is not 'more likely than not';
 - extending the circumstances that can trigger a designation from 'violence or disorder involving weapons' to 'unlawful possession, carriage or use of weapons';
 - allowing designations relating to specific events to continue for the entire duration of the event;
 - requiring an independent person to be present during searches of children and people with impaired intellectual functioning only if practicable; and
 - modifying rules relating to exemptions for certain weapons.

The amendments will be automatically repealed after 3 years.

The SOC issued by the Minister for Police and Emergency Services identifies the following *Charter* rights which are affected by the Bill:

Increased police powers

The Bill will make it significantly easier for areas to be designated for the purposes of searches. The result of a designation is that police can conduct random searches, which engages the right to privacy under s 13 of the *Charter*.

The Bill will also relax the requirements with which police are required to comply when conducting searches. This is likely to increase the degree of intrusion in people's privacy as a result of those searches.

Both of these sets of amendments are likely to significantly infringe the right to privacy, over and above the imposition caused by previous amendments in 2009.

The SOC for the 2009 amendments, which introduced a first round of expanded police powers, concluded that the amendments were incompatible with the right to privacy under s 13 of the *Charter*. The new SOC reaffirms that incompatibility and admits that it will be exacerbated.

However, the Victorian Government has indicated that it still wants to proceed with the amendments. It asserts that the *public's concern* about crimes involving knives and other weapons has not abated, despite the strengthening of police powers by the previous amendments.

The Act already allows the police to detain people for the purposes of searches. The SOC states that because the powers of detention are strictly confined to what is necessary to conduct an authorised search, no separate question of incompatibility arises. To the extent that the search powers are arbitrary and incompatible with s 13, the deprivation of liberty is also arbitrary, and to the extent that the

Bill exacerbates the incompatibility with s 13, it will exacerbate the incompatibility with the right not to be subjected to arbitrary detention under s 21 of the *Charter*.

The SOC does not address the impact of infringement notices which can be issued under the Act for first offences, although the penalties range up to \$2000, or the fact that weapons can be confiscated if the fine is not contested in court.

Searches of children and offences relating to children

The Bill relaxes the requirement for an independent person to be present for searches of children (and people with an intellectual disability) in unplanned searches to situations where this is practicable. The SOC acknowledges that the Bill exacerbates the incompatibility of the Act with the right of children to be protected (s 17(2)). The government believes these powers are necessary for prevention and deterrence, including the protection of children.

The SOC also acknowledges that the Bill infringes the right to freedom from discrimination (s 8(3)) by making it an offence to sell weapons to children. However in the Minister's opinion, this is demonstrably justified within the meaning of s 7(2).

Conclusion of partial incompatibility

The SOC concludes that the Bill is partially incompatible with the charter but that it is 'ultimately in the best interest of the community'.

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

Victorian Charter Case Notes

Victorian Supreme Court Adopts Narrow View of Right to Privacy and Eschews International Jurisprudence

WBM v Chief Commissioner of Police [2010] VSC 219 (28 May 2010)

This case raises the rights to privacy (s 13) and freedom from retrospective punishment (s 27), interpretation of legislation (s 32) and declarations of inconsistency (s 36) under the *Charter*.

Summary

In August 2007, the Chief Commissioner advised the plaintiff, WBM, that his name had been placed on the Victorian Sex Offenders Registry under the *Sex Offenders Registration Act 2004* (Vic) ('Act'). WBM applied to the Supreme Court for a declaration that he is not a registrable offender under the Act and an order to the Chief Commissioner to remove his name. Alternatively, WBM sought a declaration of inconsistent interpretation in respect of the relevant sections of the Act under s 36(2) of the *Charter*.

WBM argued, among other things, that the registration was an arbitrary interference with his privacy and constituted a retrospective penalty.

The Court's findings in relation to the *Charter* may be questioned on three issues: first, the Court appeared to equate the making of a declaration of inconsistency under s 36 with judicial policy making; second, the Court failed to properly apply s 32 to consider international jurisprudence; and third, the Court defined 'arbitrary' in an overly narrow fashion in relation to the right to privacy and failed to follow internationally settled authority on s 13.

Facts

In April 2003, WBM pleaded guilty to property and possession and production of child pornography offences and was given an aggregate 12-month imprisonment sentence, suspended for two years. He did not breach that order and it ceased on 21 April 2005.

The Act commenced on 1 October 2004, being after WBM was sentenced but before his suspended sentence ended. The Act defines a registrable offender to be a person who immediately before 1 October 2004 is 'serving a sentence of imprisonment (in this case, for possession or making child pornography) that was wholly or partly suspended and who is in the community in accordance with that sentence'.

WBM argued that he did not fall within this definition; that he was not *serv*ing a sentence before 1 October 2004 and that the Act did not apply to an aggregate sentence imposed for offences unrelated to the Act. The Court did not accept these submissions and found WBM to be a registrable offender within the meaning of the Act: [31].

In the alternative, WBM had argued that if he was a registrable offender, the Court should make a declaration of inconsistent interpretation: s 36(2) of the *Charter*.

Application of the Charter

WBM argued that the definition of 'existing controlled registrable offender' under the Act is inconsistent with the right not to be subjected to unlawful or arbitrary interference with privacy (s 13) and not to be subjected to a retrospective penalty (s 27): [33].

Making a declaration of inconsistency – s 36

The Court commenced its analysis by correctly noting that a declaration of inconsistency would not immediately affect the operation or application of the Act in respect of WBM or 'vindicate or protect' his rights: [34] and s 36(5) of the *Charter*. While legally correct, this fails to recognise the important symbolic significance a declaration of inconsistency can have. It is a judicial statement that legislation has or may breach a relevant human right. Where the facts of this case involve the humiliation involved in being registered and the sense of injustice at double punishment, a declaration does have a role to play in protecting and promoting human rights through vindication.

The Court continued by outlining the principles of separation of powers and the judiciary's role to interpret and apply the laws as enacted by Parliament rather than be (or be seen to be) involved in legislative activity or policy making: [44]. This discussion gave context to the Court's obvious reluctance to invoke s 36 of the *Charter*. With all due respect, the Court erred in perceiving the making of a declaration to amount to 'judicial policy making' [47]. While the *Charter* does not 'license' or justify such policy making, Parliament protected separation of powers by empowering the courts to make a declaration of inconsistency without indicating how the inconsistency is to be resolved, a function preserved for Parliament in responding to the declaration. The mere making of a declaration is not to be seen as judicial policy-making, rather the exercise of the judicial function in applying s 36 of the *Charter*.

Privacy – s 13

WBM argued that the way in which the Act applied was arbitrary, submitting in particular that the reporting conditions of the Act, together with its retrospective application to WMB, constituted an 'arbitrary interference' with WMB's right to privacy. He submitted that 'in order to be an arbitrary interference under s 13 of the *Charter*, the interference must contain elements of inappropriateness, injustice and lack of predictability': see also *Nolan v MBF Investments Pty Ltd* [2009] VSC 244 and *Bell J in Kracke v Mental Health Review Board* [2009] VCAT 646.

The Court distinguished *Kracke* and held that the common usage of arbitrary is consistent with its Oxford English Dictionary's definition, being an action not based on any identifiable criterion but stemming from caprice or whim. The Court declined to follow relevant international jurisprudence on s 13, in particular from the UN Human Rights Committee. It stated that the Human Rights Committee's General Comment 16 did not accord with the plain meaning of arbitrary and as a non-judicial body comprising members from countries with different systems of democracy to Australia, its views were to be treated with care. Further, the Court stated that if the right to privacy required an interference to be reasonable in the circumstances and proportionate, this would involve unwarranted judicial policy-making.

This approach side-stepped the direction in *Charter* s 32(1) and 32(2) to explore all possible interpretations of the provision in question, and adopt that interpretation which least infringes *Charter* rights (*R v Momcilovic* [2010] VSCA 50, [103]) and to consider international jurisprudence. Section 32 is relevant to the interpretation of the *Charter* itself, including s 13. The Court's deference to the dictionary definition is inconsistent with s 32(2), international jurisprudence and the *Charter Explanatory Memorandum's* recognition that s 13 is based on the protection of the right to privacy in art 17 of the ICCPR. Article 17 of the ICCPR has a well-settled definition of arbitrary set out in General Comment 16

that incorporates a proportionality analysis. Parliament's adoption in s 13 of the language of art 17 of the ICCPR indicates its intention that the meaning accorded to art 17 be given to s 13.

The Court's emphasis on separation of powers and considering jurisprudence only from countries with similar systems of government resulted in a narrow interpretation of s 13, a failure to grapple with and apply s 32(2) and a reluctance to invoke s 36.

The decision is at www.austlii.edu.au/au/cases/vic/VSC/2010/219.html.

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Comparative Law Case Notes

Administrative Tribunals have Jurisdiction and Duty to Consider Human Rights Issues

R v Conway, 2010 SCC 22 (11 June 2010)

The Supreme Court of Canada has held that administrative tribunals with the authority to apply the law, have the jurisdiction to apply the *Charter* to the issues that arise in the proper exercise of their statutory functions. It has further confirmed that tribunals should play a primary role in determining *Charter* issues that fall within their specialized jurisdiction and that, in exercising their statutory functions, administrative tribunals must act consistently with the *Charter* and its values.

Facts

Paul Conway is a 56 year old man who, at the age of 30, was found not guilty of sexual assault with a weapon by reason of insanity. Since that verdict, Mr Conway has been detained in mental health facilities across Ontario and been diagnosed with a number of mental disorders.

At his annual review hearing by the Ontario Review Board in 2006, Mr Conway argued that there had been little regard for his living conditions in detention and this was negatively impacting on his mental and physical health. He further argued that his treatment and conditions of detention infringed his rights to liberty, safety, dignity and security of person under the *Canadian Charter of Rights and Freedoms* and that these violations resulted in him not being able to benefit therapeutically from the mental facility.

On this basis, Mr Conway sought an absolute discharge under s 24(1) of the Canadian Charter which provides:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Following the review hearing, the Review Board found Mr Conway was still a threat to public safety who, if released, would quickly return to police and hospital custody and was, as such, not a suitable candidate for an absolute discharge.

In ordering Mr Conway to remain in detention, the Review Board did not consider whether any of Mr Conway's Canadian Charter rights had been breached as it did not consider it had jurisdiction to consider those claims.

Mr Conway appealed the Review Board's decision.

Decision

The Supreme Court of Canada unanimously held that the Review Board was a court of competent jurisdiction under the Canadian Charter and could grant remedies under s 24(1). According to the Court:

administrative tribunals with the authority to decide questions of law and whose *Charter* jurisdiction has not been clearly withdrawn have the corresponding authority — and duty — to consider and apply the Constitution, including the *Charter*, when answering those legal questions.

The Court stated that Canada does not have one Charter for the courts and another for administrative tribunals. Instead, it is recognised there are practical advantages and constitutional bases for allowing Canadians to assert their Canadian Charter rights in the most accessible forum available, without the need for dividing proceedings between superior courts and administrative tribunals. In this regard, the Court stated that:

The denial of early access to remedies is a denial of an appropriate and just remedy...And a scheme that favours bifurcating claims is inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction

In exercising their statutory discretion, tribunals must both comply with the Canadian Charter and play a primary role in the determination of Canadian Charter issues falling within their specialised jurisdiction.

Accordingly, when a remedy is sought from an administrative tribunal under s 24(1), the first inquiry is whether the tribunal can grant Canadian Charter remedies generally. To do this, it is necessary to begin by determining whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, the tribunal is a court of competent jurisdiction and can consider and apply the Canadian Charter when resolving matters properly before it (unless it is clear that the legislature intended to exclude the Canadian Charter from the tribunal's jurisdiction).

In Mr Conway's case, the Review Board is a quasi-judicial body which is unquestionably authorised to decide questions of law for two reasons: (1) it operates as a specialised statutory tribunal with ongoing supervisory jurisdiction over persons found not criminally responsible; and (2) its decisions may be appealed on questions of law and fact thereby indicating it has power to decide legal questions. Accordingly, the Review Board is a court of competent jurisdiction which can grant Canadian Charter remedies generally.

The second inquiry, once this threshold question has been answered in favour of Canadian Charter jurisdiction, is whether the tribunal can grant the particular remedy sought in light of the relevant statutory scheme. This requires a consideration of legislative intent.

In Mr Conway's case, it would be inconsistent with Parliament's intent if the Review Board was entitled to grant Mr Conway an absolute discharge despite its view he was dangerous to society. This is because the Review Board is obliged to protect public safety and its statutory authority to grant absolute discharges only extends to non-dangerous not criminally responsible patients. Therefore, despite being a court of competent jurisdiction generally, the Board in this case could not grant the remedy sought by Mr Conway.

Relevance to the Victorian Charter

This decision supports the conclusion that administrative tribunals, such as VCAT, have jurisdiction to hear and determine Victorian *Charter* issues that properly arise in a matter: see also *Director of Housing v Sudi* [2010] VCAT 328. If this was not the case, there would be anomalous situation where a tribunal responsible for interpreting the law on the issue was unable to deal with the issue in its entirety, which is impractical, inappropriate and inconsistent with the interests of access to, and the administration of, justice.

The decision is at <http://www.canlii.org/en/ca/scc/doc/2010/2010scc22/2010scc22.html>.

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Obligation of Public Authorities to Provide Accommodation and Support to Destitute Family

City Council v Clue [2010] EWCA Civ 460 (29 April 2010)

In this case, the England and Wales Court of Appeal held that the Birmingham City Council's refusal to provide financial assistance and accommodation to a family while their immigration application was pending resulted in a breach of the family's right to respect for family and private life under art 8 of the European Convention of Human Rights.

Facts

Amalea Clue and her eldest daughter were Jamaican nationals. They were granted leave to enter the United Kingdom as visitors for six months in 2000. Ms Clue's later application for leave to stay in the UK as a student was dismissed on appeal in March 2003. Ms Clue remained in the UK and had three children with her British partner. No steps were taken to remove Ms Clue or her children and they were supported by her partner until 2007 when the relationship broke down.

In October 2007, Ms Clue applied to the UK Border Agency ('UKBA') for indefinite leave for herself and her four children to remain in the UK. This application relied on the Secretary of State for the Home Department's Policy DP 5/96, which provided that, where the child of a family had lived in the UK for seven years or more, there was a presumption that indefinite leave to remain would only be refused in exceptional cases. The UKBA withdrew DP 5/96 in December 2008, but it was in effect at the time of Ms Clue's application and was therefore relevant to her case.

While Ms Clue's application for indefinite leave to stay in the UK was pending, she applied to the Council for financial assistance under s 17 of the *Children Act 1989*. Under s 17, every local authority has a general duty to safeguard and promote the welfare of children within their area by providing appropriate services (including accommodation and financial or in-kind assistance).

However, under the *Nationality, Immigration and Asylum Act 2002* ('NIA Act'), however, a person is not eligible for assistance under s 17 of the Children Act if he or she is in the UK in breach of immigration laws (and is not an asylum seeker) ('Withholding Support Provision'). Importantly, the Withholding Support Provision does not prevent a local authority exercising a power or performing a duty where doing so is necessary to avoid a breach of a person's rights under the Convention.

On 14 August 2008, the Council provided a written assessment to Ms Clue's lawyers, stating that financial support and assistance would not be provided to Ms Clue under the Children Act. The assessment found that the Council's refusal to provide support and accommodation would not breach Ms Clue and her children's rights under the Convention, including:

- the right to respect for private and family life and home under art 8 – because Ms Clue and her children were able to return to Jamaica 'where they could continue to enjoy a family life'; and
- the right not to be subjected to torture or inhuman or degrading treatment or punishment under art 3 – because the Council was 'confident that the welfare of children in Jamaica is sufficiently protected'.

Ms Clue applied for judicial review of the Council's decision and the High Court upheld the challenge. The Council was granted leave to appeal to the Court of Appeal. The Secretary of State was added as an interested party and Shelter UK intervened in the case.

In October 2009, Ms Clue and her family were granted indefinite leave to remain in the UK by the UKBA, but the appeal proceeded because of its significance to future decisions by the Council.

Decision

The Court dismissed the appeal and rejected the Council's human rights assessment in relation to Ms Clue's request for assistance.

It held that, in determining whether withholding assistance would cause a breach of Ms Clue and her children's rights under the Convention, the Council should have considered the right to family life and private life as 'two distinct rights', with private life encompassing broader considerations such as relationships and social and cultural ties. The Council's failure to provide support in a way that prevented these social and cultural ties from being broken (by requiring the family to return to Jamaica) would result in a breach of art 8 of the Convention.

Scope of the right to private life

Citing the Grand Chamber of the European Court of Human Rights in *Uner v The Netherlands* (2007) 45 EHRR 14, the Court held that, in addition to 'family life', art 8 of the Convention protects 'the right to establish and develop relationships with other human beings and the outside world ... and can sometimes embrace aspects of an individual's social identity'. The Court also cited the finding in *Uner* that the concept of private life encompasses the 'totality of social ties' and the expulsion of a settled migrant may therefore constitute an interference with their rights under art 8 'regardless of the existence or otherwise of a family life'.

Relevant considerations for local authorities

The Court identified the following features as being key to Ms Clue's circumstance:

- she was unlawfully present in the UK (within the meaning of the NIA Act);

- she was destitute and would (if not for the Withholding Support Provision), have been eligible for support under the Children Act; and
- she had made an application to the Secretary of State for leave to remain, which expressly or implicitly raised grounds under the Convention.

The Court identified two steps in a local authority's consideration of the extent to which it is necessary to exercise a power or perform a duty to avoid a breach of a person's rights under the Convention:

- First, would withholding assistance cause a person to suffer from destitution amounting to a breach of his or her rights under the Convention (including under art 3)? This involves consideration of what other sources of accommodation and support are available to the claimant.
- Second, if adequate assistance is not otherwise available to prevent the claimant's destitution, is there an impediment to the claimant returning to their country of origin?

The Court stated that, where there is a practical impediment to return (for example, that the person cannot fund their return), it will be open to the local authority to avoid a breach of the person's rights by funding his or her return (such as flights and short term accommodation).

Where the barrier is legal, in that return would result in a breach of the person's rights under the Convention, the local authority's obligations will depend on whether the person has applied for leave to remain in the UK or not.

(a) No application for leave to remain

By way of obiter, the Court stated that, in considering whether art 8 is a barrier to returning a person to their country of origin, the local authority will need to:

- consider whether he or she enjoys a private or family life in the UK under art 8(1); and
- if such a private or family life is enjoyed, consider whether returning the person to their country of origin would interfere with this right.

While it will depend on the facts in each case, the Court stated that, prima facie, requiring the return of a family (particularly where children have spent their formative years in the UK) amounts to interference with their right to private life.

(b) Application for leave to remain

The Court then considered what the obligations of the Council were, given that Ms Clue had made an application for leave to remain in the UK based expressly or implicitly on Convention grounds. In this context, the Court emphasised the distinction between the social services functions of a local authority and the immigration functions of the Secretary of State.

The Court found that the Council's decision not to provide Ms Clue with support, effectively determined her application for leave to remain by making it impossible for her to stay in the UK. The Court held that, when applying the Withholding Support Provision, a local authority should not consider the merits of an outstanding application for leave to remain, beyond the question of whether the application is 'obviously hopeless or abusive'. Provided the application is not hopeless or abusive:

a local authority which is faced with an application for assistance pending the determination of an arguable application for leave to remain on Convention grounds, should not refuse assistance if that would have the effect of requiring the person to leave the UK by forfeiting his claim.

Balancing rights against resource constraints

Article 8(2) of the Convention provides that interference by a public authority with a person's personal or family life will be permissible only where it 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'.

The Council asserted that art 8(2) of the Convention required the Council to weigh Ms Clue and her children's rights to private and family life against the pressures on its budget by others who needed their rights protected. In response, the Court held that, where a person has an application for leave to remain on foot, the financial considerations of the local authority are irrelevant. The Court noted that, if this was

not the case, application of law and policy would be arbitrary and unfair, in that a person's immigration application could be effectively rejected on the basis of a local authority's budgetary constraints. The Court made a clear statement:

local authorities may not invoke article 8(2) by reference to budgetary considerations and the rights of others if the effect of so doing will be to require an applicant to return to his country of origin and thereby forfeit his claim for indefinite leave to remain.

If, however, a person does not have an outstanding application for leave to remain, the Court stated that the local authority is entitled to have regard to demands on its budget when identifying whether an interference with a person's rights to family and private life would be justified and proportionate within the meaning of art 8(2) of the Convention.

The Court acknowledged that the tension in this case was caused in large part by the significant delays in the Secretary of State's processing of applications for leave to remain and the failure of government to provide local authorities with sufficient resources to support people with pending applications. In response, the Secretary of State and the UKBA both made statements that policy changes had been made so that applicants who were supported by local authorities would be prioritised, having regard to the need to safeguard and promote the welfare of children in the UK.

Relevance to the Victorian Charter

This case is particularly relevant to the scope of the rights to family and privacy under s 13(a) of the Victorian *Charter*.

Although not identical to the rights under s 13(a) of the *Charter*, the UK Court's interpretation of the right to family and private life under art 8 of the Convention as 'two distinct rights' is relevant in a Victorian context. In particular, the Court stated that '[t]he right to private life entails considerations far wider than the right to family life ... private life includes relationships and the social, cultural as well as the family ties that a person forms'. This broad interpretation of the right to private life is particularly relevant to marginalised persons who are disconnected from traditional family networks.

The decision is at www.bailii.org/ew/cases/EWCA/Civ/2010/460.html.

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Threat of Torture during Interrogation Amounts to Inhuman Treatment

Gafgen v Germany [2010] ECHR 759 (1 June 2010)

The Grand Chamber of the European Court of Human Rights has found, by majority, that a threat of torture amounted to inhuman treatment, but was not sufficiently cruel to amount to torture within the meaning of the European Convention on Human Rights. The Court also considered that the applicant remained a victim of the violation, despite limited remedial actions taken by the State party. Further, it held that the applicant had been afforded a fair trial, because his confessions obtained by way of the breach had been excluded from evidence, even though real evidence obtained as a result of the confession evidence was not excluded.

Facts

On 27 September 2002, Magnus Gafgen, the applicant, lured the eleven year old son of a wealthy family into his flat and suffocated him. He then sent a ransom note to the boy's parents, claiming the boy was still alive and demanding one million euros.

Three days later Gafgen collected the ransom money. He was apprehended later that day at Frankfurt airport. During the arrest the police pinned him to the ground, causing shock and minor lesions.

Gafgen was taken to the police station for questioning. He was advised of his rights, including the right to remain silent and consult a lawyer. He was then questioned in an attempt to discover his victim's whereabouts. He had a thirty minute consultation with a lawyer. He subsequently indicated that two other people had kidnapped the boy and hidden him in a hut by a lake.

Early on 1 October 2002, having failed to elicit the boy's whereabouts, Mr Daschner, Deputy Chief of Frankfurt Police, ordered an officer, Mr Ennigkeit, to threaten Gafgen with the infliction of considerable pain if he did not reveal the boy's whereabouts. Daschner had previously ordered other officers to do so but they had refused. Ennigkeit, however, made the threats. Within ten minutes Gafgen revealed he

had killed the boy and disclosed the whereabouts of his body. Gafgen was then driven to the location of the body.

Immediately afterwards Daschner wrote a statement admitting that, in the belief that the child was still alive and in danger, he had ordered that Gafgen be threatened with considerable pain which would not leave any injuries. He confirmed that the treatment would be carried out under medical supervision. He had also ordered another police officer to obtain a 'truth serum' to be administered to Gafgen. Because Gafgen had revealed that the boy was dead and where his body was, these threats had not been carried out.

Gafgen claimed he had been physically assaulted and threatened with being sexually abused during the interrogation. He also claimed he was made to walk to the location of the boy's body barefooted.

While there was some evidence of bruising, lesions and closed blisters on Gafgen's feet, the Court found that his allegations of physical abuse were not proven beyond reasonable doubt, because the medical evidence could have supported a finding that the injuries occurred during the arrest.

The Court found that Gafgen had been threatened as described in Daschner's statement.

Decision

Inhuman treatment

The Court found that, while 'the fear of physical torture may itself constitute mental torture', the threat in this case was 'sufficiently serious to amount to inhuman treatment prohibited by Article 3, but...did not reach the level of cruelty required to attain the threshold of torture'.

Redress

It was held that sufficient redress for a violation of art 3 would be 'a thorough and effective investigation capable of leading to the identification and punishment of those responsible' as well as 'an award of compensation...where appropriate'.

The majority held that the investigation of the responsible officers had been appropriate, but their punishment of suspended sentences and fines was 'manifestly disproportionate to a breach of one of the core rights of the Convention', and did not 'have the necessary deterrent effect'. However, a minority of judges said it was not the Court's role to question the domestic court's decision as to appropriate criminal punishments.

The majority also criticised the domestic courts for not considering the merits of the applicant's compensation claim, after three years.

Because Gafgen had not had sufficient redress, it was held that he remained a victim of the violation of art 3.

Right to a fair trial

The applicant claimed that he was a victim of a breach of art 6, which guarantees the right to a fair trial. The basis of this claim was that, while his admissions under threat had been excluded from evidence during the domestic trial, the real evidence discovered as a result of those admissions was admitted. The majority noted prior decisions that 'incriminating real evidence obtained as a result of acts of violence, at least if those acts had to be characterised as torture, should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimise, indirectly, the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe'.

The Court noted the competing rights and interests at stake, the potential that the real evidence would have been discovered anyway and the fact that the applicant gave two confessions at trial after having been advised that his previous confessions were inadmissible. It observed that art 6, unlike art 3, did not enshrine an absolute right, although acknowledging that 'the admission of evidence obtained by conduct absolutely prohibited by art 3 might be an incentive for law-enforcement officers to use such methods notwithstanding such absolute prohibition'.

However, the majority concluded that:

it was the applicant's second confession at the trial which – alone or corroborated by further untainted real evidence – formed the basis of his conviction for murder and kidnapping with extortion and his sentence.

The impugned real evidence was not necessary, and was not used to prove him guilty or to determine his sentence. It can thus be said that there was a break in the causal chain leading from the prohibited methods of investigation to the applicant's conviction and sentence in respect of the impugned real evidence.

It was therefore held that the failure to exclude the real evidence had not denied the applicant his right to a fair trial.

This decision was criticised in minority judgments on the basis that it:

- weakens the absolute nature of art 3 of the Convention;
- provides an incentive for law enforcement officers to violate art 3; and
- is nonsensical in its finding that real evidence obtained by way of inhuman treatment could be admitted if it was not the basis on which the accused is convicted, because such evidence would, as a matter of logic, be irrelevant.

Damages

The applicant did not claim any award of compensation, he only sought a retrial. This application was denied on the basis that his art 6 rights had not been violated.

Relevance to the Victorian Charter

Section 10 of the Victorian *Charter* provides a right to be free from torture and cruel, inhuman or degrading conduct. This case underlines that this right is absolute and non-derogable, even in cases of extreme pressure or emergency. It also demonstrates that even relatively low level threats may violate this right.

However, this case may provide a basis upon which the absolute nature of the right under s 10 can be weakened. While it held that it would be a violation of the right to a fair trial to admit into evidence in a criminal trial admissions obtained by way of a violation of the right to be free from torture and inhuman treatment, it allowed real evidence, obtained by way of that violation, to be admitted. This may be able to be used to base an argument for admission of evidence, obtained in such a way, where a Victorian court is undertaking a balancing exercise with regards to such evidence under s 138 of the *Evidence Act 2008* (Vic). This would weaken the right to redress afforded to a victim of a violation of s 10 and would also provide incentive for law enforcement officers to engage in violations of s 10, if they believe that admissible real evidence might be obtained. As a result, it may also serve to weaken the nature of the right to a fair hearing provided under s 24 of the *Charter*.

The decision is available at www.bailii.org/eu/cases/ECHR/2010/759.html.

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Conviction for War Crimes Not a Violation of the Prohibition against Punishment without Law

Kononov v Latvia [2010] ECHR 667 (17 May 2010)

The Grand Chamber of the European Court of Human Rights considered whether criminal law was retrospectively applied to convict Mr Kononov, in violation of art 7 of the *European Convention of Human Rights*.

The Grand Chamber had to assess whether, at the time of the offence, international law provided a legal basis to convict Mr Kononov for war crimes and, furthermore, whether he could he have foreseen that his actions would make him guilty of those offences. Unless both tests were satisfied, the conviction would contravene art 7. The Grand Chamber also considered how the extension of statutory limitations should be treated under Article 7.

Facts

As a commanding officer in the Soviet Army in 1944, Mr Kononov and his unit brutally murdered nine Latvian villagers and burned down their houses and farm buildings. In 2004, the Latvian Criminal Affairs

Division convicted Mr Kononov of offences contrary to Article 68-3 of the 1961 Criminal Code. This provision states:

Any person found guilty of a war crime as defined in the relevant legal conventions...shall be liable to life imprisonment or to imprisonment for between three and fifteen years.

The 'relevant legal conventions' are the Hague Convention 1907, the Geneva Convention (IV) 1949 and the Protocol Additional to that Convention 1977. Also relevant was Article 45-1 of the 1961 Code, which specifies that no statutory limitation applies to war crimes.

At the time of the offence, however, the applicable law was the 1926 Criminal Code of Soviet Russia. War crimes were not offences under that code, which also contained a 10 year statutory limitation for criminal prosecutions. Mr Kononov appealed on the basis that Articles 68-3 and 45-1 had been retrospectively applied to convict him, in violation of art 7 of the Convention. That article relevantly says:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

Decision

Majority

The majority of the Grand Chamber affirmed that the guarantee against retrospective criminal liability is 'an essential element of the rule of law' (at 185) and should be applied to protect against arbitrary conviction and punishment. Article 7 embodies the principles that a crime and its penalty can only be defined and prescribed by law, and that the criminal law should not be broadly construed against an accused. Article 7 therefore requires that the law clearly define an offence.

An offence will be clearly defined in law if it can be known from the wording of a provision (and judicial interpretation and legal advice) which acts or omissions attract criminal liability. A law can be written or unwritten, but must be accessible and foreseeable. Gradual clarification of the criminal law through judicial interpretation is not caught by art 7, as long as it is consistent with the essence of the offence and is reasonably foreseeable.

Turning to Mr Kononov's case, the majority of the Grand Chamber said that Article 68-3 was based on international, not national law. It was therefore irrelevant that war crimes were not domestic offences at the time. After assessing the state of international law on 27 May 1944, the majority held that it provided a sufficiently clear legal basis to convict Mr Kononov for war crimes.

Furthermore, as Mr Kononov was a commanding military officer, it should have been foreseeable that his actions would constitute war crimes for which he could be criminally prosecuted. Interestingly, the majority held this despite noting that the relevant international laws and customs were not published in the USSR or the Latvian SSR at the time.

The majority also held that, as Mr Kononov was convicted under international law, the statutory limitation under the 1926 Criminal Code did not apply. At the time of the offence, international law did not prescribe a time limit for the prosecution of war crimes. Nor have subsequent developments introduced such limits. Therefore the conviction was not statute barred.

Accordingly, as Mr Kononov was convicted of an offence that was a crime under international law at the time it was committed, art 7 was not violated.

Concurring opinion

In a joint concurring opinion, four judges departed from the reasoning of the majority on the statutory limitation issue. They preferred to see it as a procedural issue relevant to fairness of proceedings and art 6 of the Convention, rather than art 7. They held that the belated conviction of Mr Kononov on the basis of laws existing at the time involved no question of retrospective application of substantive law.

It is questionable which is the better approach. On a literal reading, art 7 is concerned solely with whether an act or omission constituted an offence at the time it was committed. It is not concerned with whether prosecution of the offence was subsequently statute barred. However, as the majority pointed out, art 7 should be construed broadly to protect against arbitrary conviction and punishment.

Therefore, it is arguable that the courts should read into it a prohibition on the arbitrary extension of time limits for criminal prosecution.

Dissenting opinion

The dissenting opinion by three judges disagreed with the majority on the factual question as to whether international law at the time provided a sufficiently clear legal basis for Mr Kononov's conviction. They also held that the prosecution was statute barred under the 1926 Criminal Code. The overriding of this limitation by Article 45-1 of the 1961 Criminal Code involved the retrospective application of the criminal law in contravention of art 7. As discussed above, it is debatable whether art7 should apply to time limits on prosecution.

Relevance to the Victorian Charter

The guarantee in art 7 is substantively the same as the protection against retrospective criminal laws in s 27 of the Victorian *Charter*. Specifically, s 27(1) says that a person 'must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in'. Section 27(4) says that the section does not affect acts or omissions that were criminal offences under international law at the time.

Kononov's case adds to the jurisprudence on this fundamental protection. In particular, it should guide Australian courts in determining whether an act or offence was a criminal offence under international law at the time it was committed. The proper approach in such cases is firstly to determine whether an offence was clearly defined by international law at the time. It must then be assessed whether the law was sufficiently accessible and foreseeable. This will be satisfied if an accused could reasonably have been expected to know that their actions would make them criminally liable.

The decision is at www.bailii.org/eu/cases/ECHR/2010/667.html.

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Right to Privacy and the Interception and Surveillance of Communications

Kennedy v United Kingdom [2010] ECHR 682 (18 May 2010)

Whilst specific breaches of the *European Convention of Human Rights* were not ultimately upheld, this case provides insight into the application and scope of the right to privacy enshrined in art 8 of the Convention. Furthermore, the European Court of Human Rights discussed in depth the breadth of the requirement to exhaust domestic remedies and the jurisdiction available to courts that deal with legislative compatibility with human rights instruments.

Facts

Mr Kennedy was imprisoned in the early 1990s after a series of appeals and retrials relating to what he alleged was a false charge of murder by police of a cellmate after he was held overnight at a police station for drunkenness. The case attracted a large amount of public and parliamentary scrutiny of the police force and United Kingdom judicial system and after being released, Mr Kennedy actively campaigned against miscarriages of justice.

After his release, Mr Kennedy established a small business which was initially successful, however began to suffer as a result of interferences with his business telephone. Mr Kennedy suspected that this was due to his email, mail and telephone communications being intercepted as a result of his high profile case and involvement in campaigning against the police. Mr Kennedy alleged that interception warrants that were originally authorised for the criminal proceedings against him were being unlawfully renewed.

Decision

The Court found that no breaches of art 8 (right to privacy), art 6 (right to fair hearing) or art 13 (right to an appropriate remedy) of the Convention had occurred. The remainder of this note is concerned with the Court's discussion of art 8, as this right formed the substantial portion of the judgment.

In order to address Mr Kennedy's individual complaint under art 8, the Court was required to investigate the merits of whether there was an unlawful interference with Mr Kennedy's right to privacy.

The Court held that mail, telephone and email communications, even in business dealings, are capable of protection under art 8 to be included in interpretations of 'private life' and 'communications'. Whilst the Court's jurisdiction normally permits it to only determine whether the manner in which a law has

been applied gives rise to a violation of the Convention, legislation involving secret surveillance measures requires particular supervision and care, and as such, the Court had jurisdiction to broaden their scope of analysis. The Court was required to determine whether there was a 'reasonable likelihood' that Mr Kennedy's communications were being intercepted.

The Court found that this was enough to give rise to a complaint, however, it dismissed his individual complaint on the basis that the interference was justified. This accorded with the exception available in art 8(2) of the Convention, and required the Court to determine whether the domestic Act itself was proportionate, necessary and in accordance with the rule of law. The Court undertook extensive analysis to determine whether the intertwining roles of the relevant Commissioner, Code, Act and policy satisfied this outcome. The Court found that in this case there was sufficient clarity and effective safeguards to ensure that the Act, and the interference with Mr Kennedy's communication, was therefore not a breach of art 8 of the Convention.

Relevance to the Victorian *Charter*

The right to privacy is enshrined under section 13(a) of the Victorian *Charter*, which states that a person has the right not to have their privacy, home or correspondence unlawfully or arbitrarily interfered with.

The Court's ruling on the scope of the right to include email, telephone and mail correspondence, even in the course of business, is helpful for interpreting this section. If raising an individual complaint related to this right, it may be necessary for a similar, policy-based requirement of 'reasonable likelihood' to be raised by an application under the *Charter*.

The decision is at www.bailii.org/eu/cases/ECHR/2010/682.html.

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Right to Family and Protection of Children Relevant to Sentencing of Parent

R v Ashman [2010] ACTSC 45 (21 May 2010)

In this case, the ACT Supreme Court recognised that the right to family and the best interests of children under the *Human Rights Act 2004* (ACT) may be relevant to the sentencing of a parent or guardian.

Facts

In this case, Mr Ashman pleaded guilty to one count of using a carriage service (an internet service provider) to access child pornography and to one count of intentionally possessing child pornography. The court's task was to sentence him for these offences.

A search warrant had revealed that Mr Ashman was in possession of seven DVDs of child pornography, amounting to 'a significant but not very large amount of material depicting some hundreds of children, all disturbing and the majority being the more serious level of sexual activity'. A psychologist's report revealed that he was not, however, a paedophile and would not re-offend.

Mr Ashman had no prior criminal record and showed remorse for his actions. He was the father of three children and his wife suffered a debilitating post-traumatic stress disorder, which rendered her unable to be the principal carer for the children.

Decision

Refshauge J sentenced Mr Ashman to 27 months imprisonment in compliance. He then suspended this sentence and replaced it with 300 hours of community service work and a probation period of 3 years.

Both the *Crimes Act 1914* (Cth) and the *Crimes (Sentencing) Act 2005* (ACT) require the court to consider the effect that a sentence would have on the offender's family. To this effect, Refshauge J applied *Craft v Diebert*, which identified that whilst courts would be remiss to give undue weight to personal or sentimental factors, and must ultimately deliver an adequate punishment, they were not to disregard this consideration in all but the most exceptional cases either.

In addition, Refshauge J noted his statutory obligation to recognize the rights of children under s 11 of the HRA, citing *R v McLaughlin* (ACTSC, SCC 222 of 2008). This case held that the HRA mandates consideration of the potential hardship caused to children by sentencing decisions. The case also cited the South African Constitutional Court decision in *M v The State* [2007] ZACC 18, which construed this

right to mean that the interests of children must be taken into account, even where the offence is very serious.

The decision is at www.courts.act.gov.au/supreme/judgments/ashman.htm.

ACT Human Rights Act Project Team

Freedom of Religion and Conscience Objection to Military Service

Eu-min Jung & Ors v Republic of Korea, UN Doc CCPR/C/98/D/1593-1603/2007 (30 April 2010)

The UN Human Rights Committee has held that the Republic of Korea violated art 18, paragraph 1 of the *International Covenant on Civil and Political Rights* in convicting and sentencing to imprisonment, 11 individuals who refused to be drafted for compulsory military service as a direct expression of their religious beliefs.

The Committee held that the conviction and sentence amounted to an infringement of the complainants' freedom of conscience and a restriction on their ability to manifest their religion or belief.

Facts

Korea's Military Power Administration sent each of the applicants a notice of draft for military service requiring enlistment in the army. Each of the applicants refused to be drafted on account of their religious belief and conscience.

Subsequently, each of the applicants were arrested, charged, convicted and sentenced to one and a half years of imprisonment by the District Court under art 88 (section 1) of the *Korean Military Service Act*. On appeal, the Supreme Court upheld all of the convictions and sentences.

Appeals to the Supreme Court

Article 88 (section 1) of the *Military Service Act* provides for the offence of 'Evasion of Enlistment' which is triggered in circumstances where a person has received a notice of enlistment and fails to enlist in the army following the expiration of the report period, without justifiable reason. The offence is punishable by up to 3 years imprisonment.

It was argued by the applicants that the absence in Korea of an alternative to compulsory military service, under pain of criminal prosecution and imprisonment, breached their rights under art 18, paragraph 1 of the Covenant. The same argument was subsequently put to the Committee.

The Supreme Court relied on similar reasoning in each appeal to uphold the convictions.

Constitutional challenge

Although unrelated to the proceedings in this case, a constitutional challenge to art 88 of the *Military Service Act* was instituted in 2004 on the grounds of incompatibility with the protection of freedom of conscience under the Korean Constitution.

This challenge was rejected by the Constitutional Court on the basis that the Constitutional protection does not grant an individual right to refuse military service, and conscientious objection to the performance of military service can only be recognised as a valid right if the Constitution expressly provides for that right.

Decision

Korea raised the following issues in response to the applicants' argument:

1. National security – the need to build military means for the purposes of defense and ensure sufficient ground forces, and concern that alternative military service would jeopardise national security.
2. Equality between military and alternative service – the introduction of alternative service arrangements should be preceded by a series of measures:
 - a. stable and sufficient provisions of military manpower;
 - b. equality between people of different religions as well as those without;
 - c. in-depth studies on clear and specific criteria for recognition of an exemption; and
 - d. consensus on the issue among the general public.

3. Lack of a national consensus on the matter – introduction of an alternative arrangement at a premature stage within a relatively short period of time, without public consensus, would intensify social tensions rather than contribute to social cohesion.

The Committee commented that Korea's response to the applicants' submission reiterated arguments previously considered by the Committee (in *Yeo-Bum Yoon and Myung-Jin Choi v. the Republic of Korea*, Communication Nos 1321/2004 and 1322/2004) and as such, applied its earlier jurisprudence.

In particular, the Committee endorsed the following comments in *Yeo-Bum Yoon and Myung-Jin Choi*:

While the right to manifest one's religion or belief does not as such imply the right to refuse all obligations imposed by law, it provides certain protection, consistent with article 18, paragraph 3, against being forced to act against genuinely-held religious belief.

The Committee also recalls its general view expressed in General Comment 22[4] that to compel a person to use lethal force, although such use would seriously conflict with the requirements of his conscience or religious beliefs, falls within the ambit of article 18.

As to the issue of social cohesion and equitability, the Committee considers that respect on the part of the State for conscientious beliefs and manifestations thereof is itself an important factor in ensuring cohesive and stable pluralism in society. It likewise observes that it is in principle possible, and in practice common, to conceive alternatives to compulsory military service that do not erode the basis of the principle of universal conscription but render equivalent social good and make equivalent demands on the individual, eliminating unfair disparities between those engaged in compulsory military service and those in alternative service.

The Committee held that:

the [applicants'] refusal to be drafted for compulsory military service was a direct expression of their religious beliefs which, it is uncontested, were genuinely held and that the [applicants'] subsequent conviction and sentence amounted to an infringement of their freedom of conscience and a restriction on their ability to manifest their religion or belief. The Committee finds that the State party has not demonstrated that in the present cases the restrictions in question were necessary, within the meaning of article 18, paragraph 3 and that it has violated article 18, paragraph 1, of the Covenant.

The Committee held that Korea was under an obligation to provide the applicants' with an 'effective remedy', including compensation and to avoid similar violations of the Covenant in the future, pursuant to art 2, paragraph 3(a) of the Covenant.

The Committee reinforced the notion that by becoming a party to the Optional Protocol to the Covenant, Korea had undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant, as well as to provide an effective and enforceable remedy where a violation has been established.

Relevance to the Victorian Charter

This decision will be particularly relevant to the interpretation of s14 of the Victorian *Charter*, being the right to freedom of thought, conscience, religion and belief.

Whilst compulsory military service has been abolished in Australia since 1972, the approach taken by the Republic of Korea on the basis of defending national security is a prevalent theme in current debate surrounding the introduction of counter terrorism legislation in Australia.

The consideration of the 'necessity' of the restrictions on human rights in this case will also assist in interpreting the scope of permissible limitations under s7(2) of the *Charter*.

The decision is at <http://tb.ohchr.org/default.aspx>.

Kate Moore is a lawyer with Freehills and a volunteer with the Human Rights Law Resource Centre

Protection of the Family and the Right to Determination of Status without Unreasonable Delay

Gonzalez v Guyana, UN Doc CCPR/C/98/D/1246/2004 (21 May 2010)

The UN Human Rights Committee has held that an undue delay in judicial proceedings to naturalize Mr Gonzalez as a citizen of Guyana constituted unreasonable and arbitrary interference with the right to family in violation of art 17(1) of the *International Covenant on Civil and Political Rights*. The Committee

also opined the right to a fair hearing was compromised by procedural delays in violation of art 14(1) of the ICCPR. The delays were found to adversely affect Mr Gonzalez's application for citizenship.

Facts

Mr Gonzalez is a Cuban doctor who entered Guyana in May 2000 to provide medical services for a period of two years. He entered Guyana under a medical cooperation agreement between the Cuban and Guyanese governments. Mr Gonzalez worked for the Cuban Central Unit for Medical Cooperation (UCCM). The UCCM required him to obtain prior authorization from them before entering into contracts with third parties. It also provided that he must comply with the legal provisions in force for citizens of Cuba should he decide to marry during the period of his contractual obligations. Mr Gonzalez worked at a regional hospital a little over a year. In December 2001, Mr Gonzalez married a Guyanese woman and subsequently applied to the Ministry of Home Affairs for Guyanese citizenship. The Ministry of Home Affairs advised Mr Gonzalez that the Cuban Embassy warned of possible consequences of granting Mr Gonzalez citizenship or a work permit and that setting such a precedent could jeopardize the medical cooperation between both countries. The Ministry refused to process his citizenship and application for permanent residence. Mr Gonzalez filed a writ of *certiorari* in the High Court challenging the refusal of the Minister to register him as a Guyanese citizen.

The High Court granted Mr Gonzalez *certiorari* and quashed the decision of the Minister of Home Affairs as being unreasonable, arbitrary, in breach of principles of natural justice and based on irrelevant considerations. It ordered the office of the Minister to review the application for citizenship within one month of the date of the Court's decision. The Minister of Home Affairs failed to review the application by the Court's deadline.

Mrs Gonzalez subsequently filed a writ of *certiorari* in the High Court challenging the Minister's refusal to register her husband as a Guyanese citizen and their failure to comply with the Court's order to review his case within the one month deadline. She brought the challenge as a 'miscarriage of justice' and a violation of her husbands' constitutional rights as the spouse of a Guyanese citizen. She also claimed that, as a dissident, he would face long term imprisonment or execution if returned to Cuba. The High Court dismissed her motion but did not provide reasons for so doing for a further 28 months. The court's failure to issue a ruling prevented Mrs Gonzalez from filing an appeal with the Court of Appeals.

The Committee was asked to consider:

- whether the length of the judicial proceedings before the High Court and the presiding judge's delay in submitting his decision were unreasonable, in violation of the right to a fair hearing protected by art14(1) of the ICCPR; and
- whether the prolonged proceedings constituted an unlawful and arbitrary interference with Mr Gonzalez and his wife's right to family under art 17(1) of the ICCPR.

Decision

Admissibility: Exhaustion of Domestic Remedies

The Optional Protocol to the ICCPR requires that an author first exhaust domestic remedies in order for a complaint to be deemed admissible. The Committee determined that High Court proceedings were unduly prolonged and that the delay in issuing reasons was unreasonable. The Committee stated:

The Committee considers that, in the present case, domestic remedies have been unreasonably prolonged and that article 5 paragraph 2 (b), does not preclude it from examining the communication.

Article 14(1): Right to a Fair Hearing

The Committee determined the delays in the judicial proceedings constituted a violation of the right to a fair hearing under art 14(1) of the ICCPR. The Committee stated:

The Committee recalls the concept of a fair hearing, as enshrined in article 14, paragraph 1, of the Covenant, necessarily entails that justice be rendered without undue delay. The Committee concludes that the above delays were unreasonable and that article 14, paragraph 1, of the Covenant has been violated.

Article 17(1): Prohibition of Arbitrary or Unlawful Interference with Family

The Committee did not take a position on whether or not the interference with both spouses' family was unlawful within the meaning of art 17(1) of the ICCPR. However, the Committee concluded the manner

in which the Guyanese authorities dealt with Mr Gonzalez's request for citizenship was unreasonable and constituted an arbitrary interference with family under art 17(1) of the ICCPR. The Committee noted Mr Gonzalez was legally prohibited from residing in Guyana and forced to live apart from his wife during the prolonged judicial proceedings. The Committee determined Mr Gonzalez and his wife are entitled to an effective remedy, including compensation and appropriate action to facilitate family reunification.

Relevance to the Victorian Charter

The protection of families and children enshrined in s 17(1) of the Victorian *Charter* is similar to the prohibition of arbitrary or unlawful interference with family found in art 17 of the ICCPR. Thus, the Victorian Supreme Court may adopt a similar approach when considering the effect prolonged judicial proceedings have on the right to family. The procedural guarantees to ensure the right to a fair hearing, which encompasses the right to a hearing without unreasonable delay, found in s 24 of the *Charter* closely mirror art 14(1) of the ICCPR.

The decision is at <http://tb.ohchr.org/default.aspx>.

Loren Days is an LLM candidate at Melbourne Law School and a volunteer with the Human Rights Law Resource Centre

HRLRC Policy Work

Opportunity to Endorse Major NGO Report to UN Race Discrimination Committee

In August this year, Australia will be reviewed by the UN Committee on the Elimination of Racial Discrimination for its performance under the Convention on the Elimination of Racial Discrimination (CERD).

A broad based Australian NGO Coalition has prepared a report to the UN CERD Committee on the state of Australia's compliance with CERD. The endorsement draft of the NGO Report is available at www.hrlrc.org.au/content/topics/equality/ngo-report-to-cerd-call-for-endorsements/.

The NGO Report has been prepared over the last 5 months in consultation with a broad range of community organisations and NGOs in Australia and we hope that it will also be supported by an even wider range of organisations and individuals. The more support the better. The report will be presented to the UN in August 2010, when Australia formally appears for review.

The NGO Report covers key themes of racial discrimination in Australia including:

- Gaps in legal framework for protection (ie the need for constitutional protection from racism, limitation of Racial Discrimination Act, gaps in vilification laws and laws protecting from acts of racial hatred)
- Discrimination against Aboriginal and Torres Strait Islander people (ie the Northern Territory Intervention, suspension of the RDA, inequality in outcomes for health, housing, education and life expectancy, ongoing issues relating to policing and imprisonment, public space laws and native title)
- Discrimination against asylum seekers, refugees and non-citizens (ie mandatory detention, offshore processing, indefinite detention of stateless people, the 'asylum freeze', health rights)
- Discrimination against migrant and CALD communities (ie in accessing employment and culturally specific services, increased hostility and sometimes violence in policing young African communities)
- The impact of counter-terror laws on primarily Somali, Kurd and other Muslim Communities (ie the effect of proscribing organisations, increased policing of communities)

If you wish to endorse the report, or part of it, please email Emily Howie (emily.howie@hrlrc.org.au) and Louise Edwards (Louise_Edwards@clc.net.au) no later than 30 June 2010. The report will be sent to Geneva on 1 July 2010.

Emily Howie is Director of Advocacy and Strategic Litigation with the Human Rights Law Resource Centre

Implementation of the Concluding Observations of the UN Committee on Economic, Social and Cultural Rights

On 28 May, the Centre made a submission to the Department of Foreign Affairs and Trade regarding implementation of the 2009 Concluding Observations on Australia by the UN Committee on Economic, Social and Cultural Rights.

The Centre's submission outlines practical steps, including legislative, administrative and financial measures, for the Australian Government to improve the promotion and protection of social and economic rights, including in relation to:

- the legal protection of rights;
- anti-discrimination legislation and the mandate, functions and powers of the Australian Human Rights Commission;
- the Northern Territory Intervention, Indigenous self-determination and political participation, together with Indigenous health, education, language and land rights;
- gender equality;
- homelessness;
- mandatory immigration detention; and
- human rights education in Australia.

The Centre's submission is at www.hrlrc.org.au/content/topics/esc-rights/esc-rights-implementation-of-the-concluding-observations-of-the-un-committee-on-economic-social-and-cultural-rights/.

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

Parliamentary Scrutiny and Human Rights: Submission to Senate Legal and Constitutional Committee Inquiry

On 9 June, the Centre made a submission to the Senate Legal and Constitutional Committee in relation to the Human Rights (Parliamentary Scrutiny) Bill 2010, which establishes a Joint Parliamentary Committee on Human Rights and a requirement that legislation introduced to federal parliament be accompanied by a statement which assesses its compatibility with Australia's international human rights treaty obligations.

The Centre welcomed the Bill and called for its expeditious passage. The Centre also made the following recommendations to strengthen the Bill and its practical implementation and effectiveness.

Definition of 'Human Rights'

The Centre submitted that it is appropriate and imperative that 'human rights' be defined, as they are in s 3(1) of the Bill, to include *all* of the human rights and freedoms enshrined in *all* of the core international human rights treaties to which Australia is a party. The Centre further submitted, however, that s 3 should provide that:

- 'human rights' includes 'the rights and freedoms recognised by customary international law', such norms being binding on Australia and a critical component of our international human rights law obligations; and
- in determining the scope and content of 'human rights', 'proper consideration be given to international human rights law and the judgments of domestic, foreign and international human rights courts, bodies and tribunals'. This would encourage both policy-makers and parliamentarians to draw on extensive and illuminating international and comparative human rights jurisprudence.

Joint Parliamentary Committee on Human Rights

In the Centre's submission, the functions of the Committee should be expanded to include:

- the power 'to inquire into any matter relating to human rights which is referred to it by resolution of either House of Parliament'. This would enhance the independence and effectiveness of the Committee and ensure that its capacity to conduct thematic inquiries is not solely determined by the Government of the day.

- the power to monitor and report on the implementation of the recommendations and view of UN human rights bodies. This would enhance parliament's capacity, and assist to discharge its obligation, to play an active role in monitoring, overseeing and following up on the implementation of recommendations and decisions of international human rights mechanisms.

The powers, proceedings and modalities of the Committee are to be 'determined by resolution of both Houses of Parliament'. In the Centre's view, in determining the Committee's powers and working methods, Parliament should have regard to the following considerations.

- First, the Committee should be given broad and permissive powers. The broad mandate and modalities of the UK Joint Committee on Human Rights, recommended by the Council of Europe as an example of best practice in parliamentary human rights scrutiny, is one of its key strengths.
- Second, the Committee should 'screen' all Bills that come before parliament, but, as with the UK Committee, focus its inquiries and reports on those Bills which raise prima facie human rights concerns. This will ensure that the work of the Committee is appropriately targeted.
- Third, in assessing and reporting on the human rights compatibility of legislation, the Committee should consider Statements of Compatibility (together with other extrinsic materials), but should conduct its own independent analysis to ensure effective scrutiny of Bills. It should also consider relevant international and foreign human rights jurisprudence.
- Fourth, the Committee must have the power to call for submissions, convene public hearings and examine witnesses.
- Fifth, the Committee must be given sufficient time to conduct inquiries and produce reports so as to enable community engagement and actually inform parliamentary debate in a meaningful way. This is particularly important where a Bill raises major human rights issues, limits or intrudes on human rights in a significant way, or is developed urgently or hastily.
- Sixth, it is critical that the Committee have an adequately resourced secretariat with the requisite human rights law experience and expertise.

Statements of Compatibility

While the *Human Rights (Parliamentary Scrutiny) Bill 2010* specifies that Statements should include an 'assessment' as to the compatibility of a proposed Bill with the human rights in all seven core UN human rights treaties to which Australia is party, it is silent on the nature, scope and detail of this assessment. If Statements of Compatibility are to fulfil their purpose of 'improving parliamentary scrutiny of new laws for consistency with Australia's human rights obligations and to encourage early and ongoing consideration of human rights issues in policy and legislative development', they should have the following features.

- First, human rights should be considered, and Statements of Compatibility prepared, early in the policy development process.
- Second, Statements must be reasoned and include detailed and rigorous analysis of the human rights issues and interferences raised by a Bill. Statements of Compatibility should explain limitations in a rigorous and evidence-based manner which justifies the intrusion on rights.
- Third, Statements should not be too long, legalistic or technical as this will detract from their utility in informing parliamentary dialogue about rights. Neither, however, should they be too brief or cursory. The detail and length of Statements should be commensurate with the human rights implications of the proposed legislation or legislative instrument.
- Fourth, given the extensive international and comparative human rights jurisprudence from which Australia can draw, it would be useful for guidelines on the preparation of Statements to specify that, in considering the scope and content of the seven core human rights treaties, proper consideration be given to international and comparative human rights jurisprudence.
- Finally, to have the greatest impact and accessibility, Statements of Compatibility should be tabled with the Second Reading Speech and Explanatory Memorandum of a Bill.

The Centre's submission is at www.hrlrc.org.au/content/topics/national-human-rights-consultation/submission-to-senate-inquiry-into-human-rights-parliamentary-scrutiny-bill-2010/.

Submissions close on 9 July 2010:

www.aph.gov.au/senate/committee/legcon_ctte/human_rights_bills/info.htm.

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

Human Rights and Aid Effectiveness in PNG

On 27 May, the Centre wrote to the Foreign Minister, Stephen Smith, in relation to the current review of the PNG-Australia Development Cooperation Treaty.

In its letter, the Centre recalled the recent recommendation of the Joint Standing Committee on Foreign Affairs, Defence and Trade that AusAID 'adopt a human rights-based approach to the planning and implementation of development projects'. The Centre also drew attention to the call by the UN Special Rapporteur on Torture for 'the international donor community to consider the protection of human rights as the highest priority' in PNG.

Having regard to these developments, the Centre outlined that the treaty review is a significant opportunity for Australia to enhance aid effectiveness, demonstrate leadership on human rights in the Asia-Pacific, and contribute to the realisation of human rights in PNG in practical and effective ways. Further, the Centre called on the Australian Government to take advantage of this opportunity by explicitly committing to the promotion and protection of human rights as a primary goal and instrument of Australia's development cooperation with PNG.

The Centre's letter is at www.hrlrc.org.au/content/topics/asia-pacific/human-rights-and-aid-effectiveness-in-papua-new-guinea/.

An opinion piece by the Centre published in *The Age* on 4 June 2010 is at '[Australian Aid to PNG Must Also Foster Human Rights](#)'.

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

Right to Life: Submission on Investigation of Police Related Deaths

On 18 June 2010, the Centre made a submission to the Office of Police Integrity inquiry into the investigation of deaths associated with police contact. The HRLRC submitted that in order to discharge its obligations under the Victorian *Charter*, the Government needs to establish a human rights-compliant framework for the investigation of deaths associated with police contact.

The Victorian Government needs to establish an Independent Body which is hierarchically, institutionally and practically independent of the organisation being investigated, both in theory and in practice.

The Independent Body must be adequately empowered and resourced to, where necessary, conduct the primary investigation of the death, in place of the investigative role currently undertaken by the Homicide Squad. Investigations must be placed in the hands of the Independent Body as soon as practicable, ideally within one hour of a death associated with police contact.

Investigations must be conducted with genuine independence. This should involve procedural safeguards, such as separating police officers until they are interviewed by the Independent Body. It is important that police officers (either witnesses or suspects) are interviewed as soon as practicable, preferably within 24 hours after the incident, unless there are exceptional and justifiable circumstances. Interviews must be recorded electronically. Police officers involved in the relevant event should be required to cooperate with the investigation and provide all relevant accounts and documents regarding the event.

Finally, independent review mechanisms must be established to permit public scrutiny of investigations and their results. Specifically, the victim and/or next-of-kin must have an enforceable right to be involved in the investigation to the extent necessary to safeguard their legitimate interests.

The Centre's submission is at www.hrlrc.org.au/content/topics/victorian-charter-of-human-rights/right-to-life-submission-on-investigation-of-police-related-deaths-18-june-2010/.

Emily Howie is Director of Advocacy and Strategic Litigation with the Human Rights Law Resource Centre

Centre Influences New Framework for 'Australia's Law and Justice Engagement with the Pacific'

The Attorney-General and Minister for Foreign Affairs recently launched *Australia's Framework for Law and Justice in the Pacific*. The Framework is a high-level statement of priorities intended to guide Australia's work in the Pacific law and justice sector.

The Framework commits Australia to help Pacific countries strengthen the rule of law and protect human rights. It states that '[t]he performance of the law and justice system is critical to the preservation of fundamental human rights, promotion of the rule of law and access to justice, particularly for the poor and vulnerable. Without development in this area, achievement of the MDGs will be beyond reach'

The Framework emphasizes the importance of building partnerships with Pacific government and non-government agencies and building local capacity. It details specific commitments in areas including transnational crimes, gender equality and violence against women, public administration and access to justice.

The Human Rights Law Resource Centre provided comments on a draft of the Framework which were subsequently incorporated in the final document. The Centre's comments discussed ways in which the protection and promotion of human rights contribute to positive security, governance and development outcomes and recommended that the human rights framework play a central role in Australia's law and justice engagement with the Pacific.

The *Framework for Law and Justice in the Pacific* is available at www.ag.gov.au/pacificframework.

Rachel Ball is Director of Policy and Campaigns with the Human Rights Law Resource Centre

HRLRC Casework

Coronial Inquest into Police Shooting of Youth

In June, the Human Rights Law Resource Centre provided the Coroners Court with extensive submissions on the scope of the coronial inquest into the death of Tyler Cassidy, who was shot by members of Victoria Police in December 2008. The other interested parties also provided submissions on scope and any further witnesses that ought to be called by the Coroner.

The Coroner also requested that the HRLRC explain in detail how the facts in this case potentially enliven the provisions of the Victorian *Charter* and to identify relevant international jurisprudence. The HRLRC's submissions on scope therefore also explain in detail how the right to life and the right of children to protection are engaged by the facts in the inquest.

A directions hearing is listed for 8 July 2010, at which time the scope and witnesses are expected to be finalised and a hearing date set.

The Centre is being assisted in this case on a pro bono basis by Allens Arthur Robinson, together with Brian Walters SC and Sam Ure of Counsel.

Centre Makes Submissions in Case Regarding Health Care and Protection of Life

On 31 May 2010, the Centre made submissions on the human rights issues that arise from the death of Veronica Campbell, a woman who died tragically of an ectopic pregnancy whilst waiting for an ambulance in rural Victoria.

The HRLRC submits that the case engages the positive duty under the right to life (s 9 of the Victorian *Charter*), namely the requirement for public health services to have policies, practices, precautions and systems of work in place to protect life. The human rights law issues do not include the blame to be apportioned to individuals, but rather seek to address systemic issues in order to prevent the same tragedy from happening again. This role in relation to the *Charter* is consistent with the Coroner's enhanced preventative role under the new *Coroners Act 2008* (Vic).

The Centre is being assisted in this case on a pro bono basis by Mallesons Stephen Jaques, together with Chris Young of Counsel.

Emily Howie is Director of Advocacy and Strategic Litigation with the Human Rights Law Resource Centre

Seminars and Events

Castan Centre 2010 Human Rights Conference

16 July 2010, Melbourne

The Castan Centre Conference, *Human Rights 2010*, will be held on Friday, 16 July 2010 at the State Library of Victoria.

Keynote speakers include: Dr Helen Szoke (Commissioner, Victorian Equal Opportunity and Human Rights Commission), Associate Professor Peter van Onselen (Contributing Editor *The Australian*), Megan Davis (Director, Indigenous Law Centre, UNSW), Iarla Flynn (Head of Public Policy and Government Affairs, Google) and Professor Ron McCallum AO (Chair, UN Committee on the Rights of Persons with Disabilities).

For further information, see www.law.monash.edu.au/castancentre/events/2010/conference-2010.html.

'Human Rights as Foreign Policy' with Prof Alison Brysk, the Rt Hon Malcolm Fraser AC CH, Chris Sidoti and Daniel Flitton

16 August 2010, Melbourne

The Human Rights Law Resource Centre and the Australian Council for International Development present a public seminar on 'Human Rights as Foreign Policy'.

Time: 6.00pm to 7.45pm

Date: Monday, 16 August 2010

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

Cost: \$25 / \$15 concession or full-time students

RSVP: 9 August 2010 (Use booking and payment form at www.hrlrc.org.au)

Alison Brysk has authored and edited numerous books on human rights, foreign policy and globalization. Prof Brysk's most recent book is *Global Good Samaritans: Human Rights as Foreign Policy* (OUP, 2009).

Malcolm Fraser was Prime Minister of Australia from 1975 to 1983. He was Chairperson of CARE Australia from 1987 to 1992 and President of CARE International from 1990 to 1995.

Chris Sidoti is an international human rights expert and consultant. He has worked as Australian Human Rights Commissioner, Australian Law Reform Commissioner and Executive Director of the International Service for Human Rights in Geneva.

Daniel Flitton is Diplomatic Editor for *The Age* and writes on international affairs and foreign policy. He previously worked as an analyst at the Office of National Assessments and as an academic at the ANU and Deakin University.

'The Erosion of the Right to Privacy in the Fight against Terrorism' with Prof Martin Scheinin, UN Special Rapporteur on Human Rights and Counter-Terrorism

24 August 2010, Melbourne

The Human Rights Law Resource Centre and the Institute for International Law and the Humanities at Melbourne Law School present a seminar on 'The Erosion of the Right to Privacy in the Fight against Terrorism'.

Time: 5.30pm to 7.00pm

Date: Tuesday, 24 August 2010

Venue: Melbourne Law School, 185 Pelham Street, Carlton

RSVP: 23 August 2010 to vesnas@unimelb.edu.au.

Martin Scheinin is UN Special Rapporteur on the promotion and protection of human rights while countering terrorism and Professor of Public International Law at the European University Institute in Florence.

Educating for Human Rights, Peace and Inter-Cultural Dialogue

4-6 November 2010, UWS, Sydney

This conference will examine the contribution of human rights culture to the good functioning of civil society; highlight key trends and achievements in human rights education in particular, and aim to secure greater commitment for future human rights education.

Confirmed speakers include the Hon Michael Kirby, the Hon Catherine Branson, the Hon Robert McClelland, Julian Burnside QC and Dr Helen Szoke.

For further information, see www.humanrightseducationconference2010.com.au/.

Resources and Reviews

HRLRC in the News

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

- Rachel Ball, '[Boat Arrivals are a Drop in the Ocean](#)', *The Age* (Melbourne), 7 June 2010
- Philip Lynch, '[Australian Aid to PNG Must Also Foster Human Rights](#)', *National Times*, 4 June 2010

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

- Melissa Fyfe, '[Ambulance Delay May Have Breached Mother's Right to Life](#)', *The Age* (Melbourne), 13 June 2010
- Jeff Waters, '[Offshore Detention Faces High Court Challenge](#)', *ABC Online*, 2 June 2010
- ABC, '[Prisoner's Bid for Continuing IVF Treatment](#)', *ABC Online*, 2 June 2010
- Norrie Ross, '[Prisoner Says Refusal to Permit IVF Treatment is a Breach of Rights](#)', *Herald Sun* (Melbourne), 1 June 2010
- AAP, '[Inmate Wants Access to IVF Treatment](#)', *The Age* (Melbourne), 1 June 2010
- AAP, '[Prisoner Should Have IVF Access: Lawyer](#)', *The Age* (Melbourne), 1 June 2010

AHRC Launches New Human Rights Law Library

The Commission's human rights law resources can now be accessed as a one-stop shop on Austlii's Australian Human Rights Law Library.

In addition to Commission decisions from 1985-2001, the library links directly to AHRC reports to federal Parliament about complaints by individuals of human rights breaches by the Commonwealth.

The library will also assist practitioners to link directly to the Commission's flagship legal text, Federal Discrimination Law (FDL), which provides a detailed overview of relevant statutory provisions and judgments, as well as notes on practice, procedure and damages.

An updated FDL, including summaries of the latest federal discrimination cases, should be available on both the Austlii site and the Commission's website by the end of June at:

www.humanrights.gov.au/legal/FDL/index.html.

The Australian Human Rights Law Library is at: www.austlii.edu.au/au/special/hrights/.

Human Rights Jobs

There are a number of current human rights positions available within:

- The Community Legal Sector – see www.communitylaw.org.au/cb_pages/jobs_and_getting_involved.php
- Victorian Equal Opportunity and Human Rights Commission – see www.humanrightscommission.vic.gov.au/about%20us/employment/
- Australian Human Rights Commission – see www.humanrights.gov.au/about/jobs/index.html
- The aid and development sector – see www.acfid.asn.au/get-involved/job-vacancies.

Foreign Correspondent

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

Human Rights Council

Another June is coming to an end and so too another session of the Human Rights Council. Like most others, this one was not without its share of controversy. There were far too many issues discussed to cover in this brief report, so I'll focus on the key controversial ones.

The controversy began early into the session, which commenced over 3 weeks ago, with the calling of a Special Session on the issue of the Israeli attack on the humanitarian flotilla. A resolution was adopted, strongly condemning the Israeli attack, and requesting the dispatch of an international fact-finding mission to investigate violations of international law. It also demanded the release of those detained, requested that the International Committee of the Red Cross obtain information on those injured or detained, and called upon Israel to allow unimpeded humanitarian assistance to the Gaza strip.

During the Council session, a debate was held on the follow-up to and implementation of the Vienna Declaration and Programme of Action, where many broad issues were discussed. The Australian delegation made a statement on behalf of Canada and New Zealand, calling for the decriminalisation of consensual same-sex activities. The item became controversial when Norway read a joint statement on behalf of 54 countries on the situation in Iran, recalling the one-year anniversary of human rights violations following the Iranian elections, and calling on the government to live up to its Vienna Declaration commitments, including by allowing the High Commissioner for Human Rights to visit; guaranteeing freedom of expression, freedom of the media and of assembly; protection of religious minorities; respect for the human rights of prisoners and detainees; equal treatment of women and girls in law and practice; and to conduct an investigation into election-related killings. Iran, followed by Pakistan (which led a group of countries including Nigeria, Egypt, Algeria, Cuba, Nicaragua, China, Venezuela, Bolivia, Sudan, Malaysia, Syria, the Democratic People's Republic of Korea), intervened to object to the mention of a particular country situation under this agenda item at the Council. A long period of debate, including an adjournment for some off-the-record negotiations, took place. While Norway was eventually able to finish its statement, the governments that objected noted this should not serve as a precedent for raising country situations under this agenda item at the Council, and warned that this would be examined as part of the overall review of the Council to take place next year. When Amnesty International later tried to make a statement addressing the human rights situation in China, they were also interrupted, at which point the AI representative stated that stifling debate on country situations would make a mockery of the Council. It is becoming clearer that while the 2011 review of the Council may seem to many like just more navel-gazing on the part of Geneva-based diplomats, what is potentially at stake is the proper functioning of the UN's pre-eminent human rights body and its ability to seriously consider human rights violations around the world.

It had been expected that one of the controversial items at this Human Rights Council session would be the debate around the presentation of the joint study on secret detention, which was presented to the Human Rights Council by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Vice Chair of the Working Group on Arbitrary Detention; and the Chair of the Working Group on Enforced or Involuntary Disappearances. Many States had been unhappy with the initiative of these mandate holders to work on this issue, and most statements objected to the methodology the special procedures used in presenting the information, which was often based on anonymous sources. Some governments used this as an opportunity to attack the special procedures for allegedly failing to comply with their Code of Conduct, making it clear that the independence and strength of the special procedures would again be under threat as part of the Council review.

The Council did manage to appoint some new Special Rapporteurs. Sadly for Australia neither of its candidates, Chris Sidoti and Carolyn Evans, were successful in their bids, and neither were several of the candidates who had been selected by the President of the Council, due to last minute pressure and a refusal by some governments to ratify his selections. One NGO referred to this as 'outrageous political pressure' and accused the President of 'disappointingly caving in'. Although the mandates of the special procedures on freedom of religion or belief and on internally displaced persons were

renewed, the proposed mandate holder for the former of these, along with the Independent Expert on Burundi, were changed at the last minute due to pressure from the African Group and the Organisation of the Islamic Conference.

On the topic of special procedures, this Council session was the final session for Philip Alston in his role as Special Rapporteur on extrajudicial, summary or arbitrary executions. He presented his final reports, including a report focusing on the use of drones and the reports on his country missions such as the mission to the DRC. In doing so, he requested a minute of silence in memory of Mr Floribert Chebeya Bahizire, Executive Director of the DRC NGO Voix des sans Voix. Mr Bahizire had been one of the activists Mr Alston met during his mission, and it is widely suspected that his killing was linked to officials inside DRC. In his report on targeted killings, Alston focused attention on the expansive interpretation of the right to self-defence used by the US in its fight against terrorism and the problem of accountability, particularly in the context of drone killings carried out by the CIA. He called for the regularization of the use of armed drones. The US did not respond to the substance of this report, claiming that they had not had time to review the contents of the report.

Another controversial Special Rapporteur was Mr Anand Grover, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, who presented a report on how criminalisation of same-sex relations and same-sex orientation, sex work, and HIV/AIDs transmission impair the enjoyment of the right to health. Given the controversy surrounding these subjects it unsurprisingly attracted much criticism, including attacks upon his mandate and whether or not addressing such topics was in violation of the Code of Conduct. The Special Rapporteur also presented his report on his mission to Australia, and while the Australian Government broadly welcomed his visit and report, they did not commit to specific follow up to his findings and recommendations.

In terms of outcomes, two notable outcomes of this session were the adoption of a resolution requesting the Council to hold a workshop on the conceptual and practical dimensions of prevention of human rights violations, a new focus of the Council's work, and a requests that the Human Rights Council Advisory Committee begin work on drafting an international declaration on the right of peoples to peace.

Perhaps one of the most positive aspects of this session was a panel on the topic of maternal mortality, where the recently published OHCHR report on this issue was presented. A statement endorsed by 108 countries was read by Colombia – on behalf of Burkina Faso and New Zealand – inviting the High Commissioner to present OHCHR's study to the MDGs Summit to advance discussions on the importance of integrating a human rights perspective in realising targets such as MDG5 on improving maternal health (which remains the most difficult to achieve of the MDGs).

Millennium Development Goals Review Summit

Much of the human rights attention around the world is now turning to the lead-up to the UN Summit to be held in New York in September, at which a global action agenda will be adopted for accelerating progress towards the Millennium Development Goals. Amongst the many preparatory activities is an e-Discussion on 'Practical Examples and Policies in Furthering Human Rights and the MDGs', launched by the Deputy High Commissioner for Human Rights and Chair of the UNDG Human Rights Mainstreaming Mechanism, Kyung-wha Kang, and Geraldine Fraser-Moleketi, Director of the Democratic Governance Group, UNDP and Vice-Chair. To participate, go to the UN Human Rights Policy Network (HuriTALK) website.

South Africa and the World Cup

I'm assuming that life in Australia recently has been no different to the rest of the world – with plenty of time spent glued to TV screens watching the World Cup action from South Africa. However, human rights activists have been eager to point out that it is not all fun and games. The South African hosts have been plagued, like most mega-event hosts, with human rights problems directly arising as a result of being the world's playground. Displacements and evictions of local residents have taken place, with temporary camps being built to house undesirables away from the eyes of the international media. Labour rights have been a long standing concern, with strikes and protests over wages and conditions having been a hallmark of the last couple of years of construction efforts. Even rampant use of child labour in the production of the soccer balls has been reported, along with increased levels of police harassment and criminalization of homelessness. This is not a new phenomenon for the World Cup or

any other large-scale event of this nature, but prompts us to remember that what we see when watching the broadcast images of the football pitch is not the full story and that the impact on local communities needs to be more properly considered so as to ensure a positive legacy.

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If I Were Attorney-General...

Promoting and Protecting Fairness: Time for Comprehensive Equality Law Reform

If I were to assume, if only in imagination, the role of Attorney-General, I would try to make human rights more effective for all Australians. There is much to be done.

The Government has recently introduced legislation to establish a Parliamentary Joint Committee on Human Rights and to require statements of compatibility of draft legislation to be laid before Parliament (*Human Rights (Parliamentary Scrutiny) Bill 2010*). These measures take up, in part, the Report of the National Consultation (the Brennan Committee), but they create no new substantive rights. The Committee's recommendations for a comprehensive federal Human Rights Act have not been accepted. Undaunted by this, I would nevertheless start a process aimed at the enactment of a general protection of the right to equality and non-discrimination, as the precursor of a constitutional provision.

Australian law does not ensure or protect equality on a comprehensive basis. There are many gaps and inconsistencies in the current protection provided by federal anti-discrimination laws. They do not apply, for example, to discrimination on the basis of religion, nationality or sexual preference. There are exemptions and exclusions from the legislation, and it can be overridden, as occurred with the *Racial Discrimination Act* in 2007. Equality in the judicial process is an accepted norm, but express constitutional protection of equality applies only to State discrimination against residents of another State (s 117). The Constitution may actually authorise racial discrimination (s 51 xxvi).

The right to equality and non-discrimination is a basic human right, and is an essential element in the key instruments to which Australia is a party. Collectively, those instruments require States to provide equality before the law and the equal protection of the law, comprehensive protection from discrimination and the equal enjoyment of rights and freedoms, without distinction or discrimination on any ground. Equality rights apply to the full range of rights and freedoms, whether civil, political, economic, social or cultural.

Contrary to our international commitments, discrimination can occur in Australia for which no recourse or remedy is available. The UN treaty bodies have criticised the lack of comprehensive protection of human rights in Australia. The Human Rights Committee has, in particular, recommended the adoption of legislation providing comprehensive protection of the right to equality and non-discrimination (Concluding Observations, 2000, 2009).

Federal anti-discrimination laws need to be thoroughly overhauled to comply more fully with our international human rights obligations and to eliminate the current anomalies and inconsistencies. The Brennan Committee recommended this as a priority area for reform.

Such reform, though welcome, would fall short of a full guarantee of equality and non-discrimination, comprehensive both as to grounds and areas of application. To meet our international commitments and to provide protection of equality, and the remedies which attach to it, we need a legislative guarantee of equality and non-discrimination, with similar force and effect to that envisaged for the rights which would be protected under a general Human Rights Act. It should be the precursor to a constitutional guarantee.

A legislated guarantee of equality should be based on art 2(1) and art 26 of the ICCPR, which encompass equal enjoyment of rights, equal protection of the law and protection against any discrimination.

The ACT *Human Rights Act 2004*, s 8 and the Victorian *Charter of Human Rights and Responsibilities Act 2006*, s 8 echo the provisions of ICCPR art 26. Valuable models for the protection of equality rights can also be found in the Canadian Charter (s 15) and South African Bill of Rights (s 9).

A comprehensive Equality Act would guarantee equality before the law and under the law, equal protection and benefit of the law, protection against discrimination on any ground, and protection of the full and equal enjoyment of human rights and fundamental freedoms. Compatibly with the Covenant, the legislation should permit distinctions to be made on reasonable and objective criteria, in pursuit of a legitimate purpose consistent with recognised rights, and for affirmative action to eliminate conditions which contribute to prohibited discrimination. It would be aimed primarily at public authorities (including those of the States) and would have impact on subsequent legislation as far as is possible. It would act in conjunction with the reformed anti-discrimination laws.

The courts would have jurisdiction to consider whether a distinction was discriminatory; the outcome of any decision would depend on the model adopted. Where direct remedies are considered appropriate, these should be accessible and affordable.

No doubt difficult issues would arise from time to time, possibly with political overtones. However, jurisprudence under the ICCPR and in Canada and other countries show that the courts are equal to these challenges.

My first step would be to initiate a consultation process on the most appropriate mechanism for implementing a comprehensive statutory guarantee of equality along the lines outlined, to be introduced and adopted as soon as possible.

The enactment of such a law would be entirely consistent with the goals of any more comprehensive Human Rights Act which might follow, as it would be a part of such an Act. It would build on our existing protection of rights, advance compliance with our principal human rights obligations, overcome anomalies and gaps in current protection and would accord with the ideals of fairness and equality for which Australia likes to be known.

Elizabeth Evatt AC is a former judge of the Federal Court and Chief Justice of the Family Court, a former member of the UN Human Rights Committee and the UN Committee on the Elimination of Discrimination against Women, and a Commissioner of the International Commission of Jurists.