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Opinion

**The UK Election and the Future of the Human Rights  
Act: Australia Has Much to Gain**

The unusual result of the recent British general election appears to have saved the country’s Human Rights Act from immediate extinction. The Conservative Party had been clear about its intention to repeal the Act if elected into government. Passed in 1998 at the very start of Labour’s long tenure in office, the Act requires legislation to be compatible with the European Convention on Human Rights and equips the courts to re-interpret legislation to achieve this end. But it does not allow the judges to strike down laws on the model of the US constitution or any of the many analogous European systems. Instead the courts may issue ‘declarations of incompatibility’ in respect of such laws. These are unenforceable, requiring only that the other branches of government consider whether to bring the challenged law into line with human rights. So, the Act goes much further than the Australian Government’s new ‘Human Rights Framework’, but at the same time not nearly as far as fully-fledged constitutional rights systems like those of the US and Ireland.

The intention behind the British approach was to achieve a compromise between the tradition of UK parliamentary sovereignty and the current vogue for the infiltration of enforceable human rights standards into democratic culture. It has worked fairly well on the whole, with the judges being pretty robust in their interpreting of statutory provisions so as to ensure they fit with the Convention rights, while usually contriving to do this without leaving themselves open to the accusation of having overridden entirely Parliament’s wishes. So, rape trials have been rendered fairer for the accused, same sex couples have been given rights of succession to tenancies on the same basis as heterosexuals, and asylum-seekers have been required to be fed rather than left to starve on the streets. But other controversial matters where the statutes in question have been clearer (the indefinite detention of suspected terrorists, the rights of transsexuals, and certain controversial sentencing matters) have been made the subject only of declarations of incompatibility.

Under the Labour government, these declarations have usually provoked a response – the trend has been to accept the judges’ condemnation despite there being no legal obligation to do so. Even the very controversial ‘Belmarsh’ detention case (involving a ruling by Britain’s senior judges that the detention without trial of suspected terrorists was a breach of the right to liberty and was not warranted by the government’s derogation from that right) was



a breach of the right to liberty and was not warranted by the government's derogation from that right) was reflected in later legislation replacing the impugned system with a new framework rooted in control rather than imprisonment. For its part, the European Court of Human Rights in Strasbourg (which has of course retained its oversight role here in the UK as elsewhere in Council of Europe countries) is content that these declarations amount to an 'effective remedy' for breach of the Convention (a right under article 13 of the Convention) so long as there emerges a consistent practice of implementation. And there matters have rested for now.

So if it has worked quietly and well, why has the law been controversial? Relatively undefended by the Labour government (which while abiding by it gave the impression it regretted the initiative almost from the moment of its enactment) and fiercely unpopular with the right-wing media (it had the word 'Europe' in it), the Conservative Party in opposition chose to see it as a symbol of 'political correctness' gone mad, another example of unnecessary pandering to unpopular minorities, such as prisoners, asylum seekers, and – most of all – terrorists. It didn't help that the media reported various crackpot attempts to use the Act as evidence of what the Act had brought about: as every child could tell you, launching a case (which anyone can do) is different from winning (which depends on a sensible argument and a successful piece of advocacy), but neither antagonistic journalists nor Conservative critics allowed such an inconvenient truth to get in the way of their fury.

A particular source of anger which was, however, rooted in fact was the extra-jurisdictional reach of the Act. UK courts applied the Strasbourg authorities in a way that led to a number of high profile non-citizens, who were regarded with distaste by the state, being nevertheless allowed to remain in the country because there was nowhere to which they could be expelled without a serious risk of their being killed or tortured. The Conservatives have wanted to be able to throw people out where national security required it without having to worry about what happened to them afterwards. But curiously, despite this strong line, David Cameron was clear before the election that even with the Human Rights Act gone he was not against the continued oversight of the European Court of Human Rights. Now the Liberal Democratic Party has saved him from the embarrassment of having created a momentum for more, rather than less, European entanglement in British affairs.

Nick Clegg's Liberal Democrats are keen defenders of both Europe and human rights and, far from wanting the law repealed, they would like it expanded into more areas of policy. The Party hankers after a written constitution which they are almost certain not to get – but their enthusiasm for the Human Rights Act is likely to be tolerated by Mr Cameron and his team as one of the prices to be paid for partnership. It is the same with the more 'British' commitment to civil liberties which Clegg's party are so keen on and which historically the Conservatives care about only when in opposition. The strains will become evident when the media blames the Human Rights Act for this or that court decision which is said to be 'soft' on crime or on 'terrorists' – expect frequent wry comments from the Conservatives about how weak their partners are, how naively liberal and (if there happen to be more bombs) how dangerous to national security.

A further source of tension is likely to come from media efforts to tone down the respect for privacy which the Act has promoted and which has traditionally not been part of UK law. The lively tabloid press, in particular, despise this as a commercially damaging control on their endless intrusion into the lives of celebrities and footballers. The Conservatives will want to do their best to please the editors and owners of papers that delivered to them such hysterical support at election time, and which promises to do so again. But the Liberals cannot junk the Act (and therefore the law of privacy) as to do so would be to cut off a central aspect of their identity.

So against the odds, the Act survives the change of administration and in a British system so famously dependent on tradition and convention this means that it is much closer to being unassailable than it was when it was under the care of one party alone. A question-mark remains about what will happen to declarations of incompatibility under the new regime: like Labour before them, the Liberal Democrats will want to implement them, while the Conservatives will probably prefer to pretend they have never happened. This will confuse the European Court and lead almost certainly to findings of breaches of article 13. That is, however, for the future, and if Strasbourg's backlog continues to mount, for the very distant future. If the Act does indeed become a constitutional fixture then Britain will have cause to celebrate an approach to human rights which provides a unique synthesis between law and democratic politics, requiring the judges to act to guarantee rights but not at a price of disproportionate intrusion into

the political arena. No Australian government of any political colour has anything to fear from such a light-touch measure, and the Australian people – indeed all those within Australia – would have much to gain.

*Conor Gearty is Professor of Human Rights Law at London School of Economics and a Barrister with Matrix Chambers. He was a prominent opponent of the campaign for a UK Human Rights Act.*

## News

### UN Establishes New Women's Agency to Promote Gender Equality and Empowerment

In an historic move, the United Nations General Assembly has voted unanimously to establish a new UN agency to promote and accelerate gender equality and empowerment worldwide.

The new agency, to be known as UN Women, will have two key roles:

- First, it will assist in the development of policies, practices and norms to promote gender equality and empowerment.
- Second, it will assist Member States to implement these standards through technical and financial support, monitoring and partnerships.

Welcoming the establishment of UN Women, UN Secretary-General, Ban Ki-moon, said 'UN Women will significantly boost UN efforts to promote gender equality, expand opportunity, and tackle discrimination around the globe.'

The creation of UN Women, which will be operational by January 2011, was also welcomed by Australia, with the Foreign Minister, the Hon Stephen Smith, stating that the new agency will 'allow better coordination of global efforts to promote gender equality and empower women. Australia believes this will help women in developing countries through more streamlined responses by the UN system and donor countries.'

UN Women will be led by an Under-Secretary-General, who will be a member of the Secretary-General's cabinet. According to Human Rights Watch, 'So much of the promise of the new women's agency depends on finding a leader who can secure the funding and enhanced support that has been pledged. The Secretary-General should conduct an open and transparent search for a highly skilled champion for women's equality and rights capable of bringing this vision to fruition.'

For more on UN Women, visit: [www.unwomen.org](http://www.unwomen.org).

### Major Multi-Jurisdictional Report on the Links between Corporate and Securities Law and Human Rights

This month the Special Representative of the UN Secretary-General on Business and Human Rights, Harvard Professor John Ruggie, posted the results of a research project that examined whether and how corporate and securities law in more than 40 jurisdictions around the world currently fosters corporate respect for human rights.

To the Special Representative's knowledge, this is the first in-depth, comparative study of the links between human rights and corporate and securities law. More than 20 leading corporate law firms from around the world participated in the research on a pro bono basis, with Allens Arthur Robinson contributing a report on Australia as well as several other states in the Asia-Pacific region.

The project forms part of the Special Representative's work to operationalize what is now commonly known as the UN Protect, Respect and Remedy Framework for business and human rights. The Framework was welcomed unanimously by the UN Human Rights Council in 2008 and it enjoys broad support from all stakeholder groups. It rests on three differentiated yet complementary pillars: the **state duty to protect** against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the **corporate responsibility to respect human rights**, which in essence means to act with due diligence to avoid infringing on the rights of others; and **greater access by victims to effective remedy**, judicial and non-judicial. This project focuses on the role of states regarding corporate and securities law and policy, but it is also relevant to the concerns of the other two pillars.

An overarching trends paper from the project is available at [www.reports-and-materials.org/Ruggie-corporate-law-project-Jul-2010.pdf](http://www.reports-and-materials.org/Ruggie-corporate-law-project-Jul-2010.pdf). The main conclusions of the paper are that:

- Current corporate and securities law does not recognize human rights to a limited extent. Put simply, where human rights impacts may harm companies' short or long term interests if they are not adequately identified, managed and reported, companies and their officers may risk non-compliance with a variety of rules promoting corporate governance, risk management and market safeguards. Even where the company itself is not at risk, several states recognize through their corporate and securities laws that responsible corporate practice should not entail negative social or environmental consequences, including for human rights.
- At the same time, there is a lack of clarity in corporate and securities law regarding not only what companies or their officers are required to do regarding human rights, but in some cases even what they are permitted to do. Moreover, there appears to be only limited (to non-existent) coordination between corporate regulators and government agencies tasked with implementing human rights obligations. As a result, companies and their officers appear to get little if any official guidance on how best to oversee their company's respect for human rights.

Some of the jurisdiction-specific surveys are already available on the project website, including the survey for Australia.

To date, two consultations have been held to inform this project. The first, attended by participating law firms, was held in New York in June 2009. It explored current state practice, including implementation and enforcement in this area. The second was a multi-stakeholder expert consultation convened by York University's Osgoode Hall Law School in Toronto in November 2009. Participants discussed potential policy and legal reform in this area. Summaries of both consultations are available at [www.reports-and-materials.org](http://www.reports-and-materials.org).

The Special Representative is currently working on final Guiding Principles on the UN Framework to be presented to the UN Human Rights Council in June 2011. In doing so, he will consider what guidance might be appropriate to include on the issues explored in this project. Accordingly it is important that he continues to hear feedback from experts in both the corporate governance and human rights field from all stakeholder groups.

**Vanessa Zimmerman** works as a Legal Advisor to the UN Special Representative on Business and Human Rights. Questions about the project may be sent to: [vanessa\\_zimmerman@hks.harvard.edu](mailto:vanessa_zimmerman@hks.harvard.edu).

### Call for NGO Entries to the Australian Human Rights Register

The Human Rights Law Resource Centre, in conjunction with the Human Rights Working Group of the Victorian Federation of Community Legal Centres, has recently launched the Australian Human Rights Register. The Register provides a quick and easy opportunity for NGOs to record human rights developments. This database will be a useful tool in human rights advocacy and documentation.

Through the collation of human rights stories, the Register seeks to inform, build knowledge and capture the experiences of NGOs in the field, their observations arising from case work, service delivery and policy changes that affect the human rights of Australians.

The data collected from the Register will be compiled in an annual report to be used for the purpose of advocacy in documentation and submissions for change, public speaking and communication with key decision-makers, including the United Nations bodies responsible for advancing human rights, media and lobbying for improved outcomes and human rights.

Please encourage your agency and others Australia-wide to contribute to this very important audit of human rights to ensure the better protection and enhancement of human rights and to raise awareness of the reality of human rights for members of our community.

The Register only takes entries from NGOs and not from individuals.

The process for making an entry is quick and easy! Please take a few moments of your time to visit the Register's website at [www.hrlrc.org.au/australian-human-rights-register/](http://www.hrlrc.org.au/australian-human-rights-register/).

Entries to the Register will be accepted until 31 October 2010.

For further information, contact [HumanRightsRegister@hrlrc.org.au](mailto:HumanRightsRegister@hrlrc.org.au). We hope to hear from you!

**Loren Days** is a volunteer lawyer with the Human Rights Law Resource Centre

## HRLRC News

- You can now follow the Human Rights Law Resource Centre on Twitter, at @rightsagenda or by clicking on the Twitter icon at [www.hrlrc.org.au](http://www.hrlrc.org.au).
- The Centre has recently been formally associated and accredited with the UN Department of Public Information, give Centre staff access to UN facilities and all open UN meetings.
- Ben Schokman, the Centre's Director of International Human Rights Advocacy, has returned to the office following a three month placement with the International Service for Human Rights in Geneva. Emily Howie, the Centre's Director of Advocacy and Strategic Litigation, will commence a three month placement with ISHR on 26 July 2010.

## National Human Rights Framework Developments

### Coalition to 'Discontinue Human Rights Framework' if Elected

The Federal Opposition has announced that it will 'discontinue funding for Australia's Human Rights Framework' under an Abbott Government. The announcement was made in the context of a commitment to 'deliver budget savings' and 'take pressure off interest rates'. The Opposition also pledged to discontinue funding for Australia's UN Security Council Candidacy and law and justice programs in Africa.

### Australia's Human Rights Framework Education Grants

The Australian Government has launched a grants program to 'provide funding to non-government organisations to prepare and deliver human rights education programs to the Australian community'. Under the program, 'the Government will fund a range of community organisations to develop and /or deliver programs that are appropriately targeted and address the information needs of different groups'.

To be eligible for funding, projects must:

- promote in a practical way the rights and responsibilities of individuals as members of a tolerant, inclusive society, and
- promote community awareness of, engagement with and understanding of the rights and freedoms recognised and declared under the seven core United Nations human rights treaties to which Australia is a party.

Applications close 30 July 2010. For further information, see [www.ag.gov.au/hrgrants](http://www.ag.gov.au/hrgrants).

### Human Rights Rebuffed

On 21 April 2010, the Federal Government administered the quietus for an Australian Charter of Rights. Instead of a Charter, we now have a 'Framework' for better human rights protection in Australia. This 'Framework' comprises five parts:

- a re-affirmation of the nation's commitment to international human rights obligations;
- a new emphasis and expenditure on human rights education across the community;
- an enhancement of domestic and international engagement on human rights issues;
- an improvement in domestic human rights protections, including greater parliamentary scrutiny; and
- the achievement of greater respect for human rights principles within the community, including by the reform of current anti-discrimination legislation.

Needless to say, the foregoing innovations, although admirable on their own, did not satisfy those of us who hoped that Australia would at last take a step to join the rest of the civilised world with comprehensive human rights legislation. The expenditure of over \$12 million on education initiatives to promote a greater understanding of human rights is welcome. However, necessarily, it will do nothing to afford redress to those for whom the political process and other present legal remedies are unavailing. The proposed establishment of a new parliamentary joint committee on human rights within the Australian Parliament 'to provide greater scrutiny of legislation for compliance with international human

rights obligations' is also welcome. However, as Professor George Williams, has observed, 'It will make little difference to the protection of human rights at the community level. It will even more starkly demonstrate how self-regulation by politicians, when it comes to human rights, is the problem, and not the solution'.

The promise of reform of anti-discrimination legislation, including the rationalisation of current laws in a single statute, has obvious advantages, but it is significant that there are no new proposals for protection of minorities presently falling outside present federal law, including a general protection against discrimination on the grounds of a person's sexual orientation.

The commitment to reinforce engagement with international human rights obligations is certainly to be applauded. However, it can not escape criticism addressed to the suggested difference between governmental rhetoric and the actuality. Particularly so because the announcement closely coincided with another, envisaging mandated delays in administrative consideration of refugee applications originating from Afghanistan and Sri Lanka. The basis for such delays, whilst the applicants are typically held in immigration detention, finds no foothold in national obligations assumed by Australia under the *Refugees Convention and Protocol*. Instead, it appears to be based on considerations of political expediency in the face of electoral sensitivities about the arrival of 'boat people' and the approach of a national election in late 2010.

Comparing the extensive report of the National Human Rights Consultation and the sparse Framework announced by the Federal Government, it is difficult to sustain the contention that Australia has no need, and no demand, for a charter of rights. The report connected numerous areas of unrepaired disadvantage of, and discrimination towards, minorities. It did this in the case of Indigenous people; racial minorities; non-citizens; people of minority sexual orientation and gender identity; women. It also documented the failure of present laws and institutions to address problems of homelessness, police shootings, inadequate health care, prison conditions, arbitrary and extended detention, discrimination in police practice governing the use of arrest, official targeting of particular groups, inequality in the administration of immigration law, defects in protection of children, and significant failings in protection of individual conscience and religion in Australia.

Obviously Australia remains a generally well governed and diverse society with significant legal protections for human rights, protected by democratic elections and the rule of law administered in independent courts. Still, according to the former Chief Justice of the High Court of Australia, Sir Gerard Brennan, 'The exigencies of modern politics have sometimes led Governments to ignore human rights in order to achieve objectives which are said to be for the common good'.

A charter of rights would not have cured every defect or gap in the Australian legal system. There is significant evidence, however, that it would have contributed to good government, the alleviation of disadvantage, and the promotion of dignity and equality.

Why then did politicians on both sides of Australia's major political groupings, supported by large sections of the media, oppose the recommendations proposed by the national consultation?

In part, it was just a resistance to new ideas.

In part, it was the absence of a political champion.

In part, it appears to have been a case of the traditional hostility to the very notion that human beings have universal rights which should be respected.

In part, it was the objection of non-lawyers to any perceived enlargement of the power of lawyers.

In part, the resistance in Australia can also be traced to some who have a genuine admiration for the parliamentary institution; but fail to grasp its need for an occasional stimulus to require it to address injustices towards unpopular and forgotten minorities.

In part, it is simply the crude fact that those who presently enjoy power in a society such as Australia (politicians and media) are reluctant to surrender any part of that power or influence. As Professor George Williams put it, 'people with power don't want to give it up'. They do not relish the idea of independent courts responding to complaints of otherwise powerless individuals and making interpretative endeavours to respond to their complaints or declarations of a public kind that cannot be easily swept under the carpet. Courts are amongst the few sources of power in society that do not succumb to the seductions or bullying of politicians or of the media.

Far from undermining the parliamentary institution or process, the recommendation of the Australian consultation, based in part on the New Zealand and United Kingdom models before it, was aimed at enhancing the capacity of parliament to work more responsively to the concerns of ordinary people. Given the way in which the parliamentary institution in all Westminster democracies has fallen under the power of executive government and the discipline of party whips, the need for renewal of the parliamentary institution is plain. That need has been acknowledged, and in part met, in New Zealand and the United Kingdom. In Australia, once again, it has been rebuffed.

*The Hon Michael Kirby AC CMG is a former judge of the High Court of Australia and has recently been conferred with the prestigious Gruber Justice Prize 2010. This is an edited version of a paper delivered at Salsford University School of Law, UK, to mark the 10<sup>th</sup> anniversary of the Human Rights Act 1998.*

## Victorian Charter of Rights Developments

### From Compliance to Culture: A Toolkit for Local Governments

A new toolkit has been developed to help local governments meet their legal obligations under the *Charter of Human Rights and Responsibilities*. Developed by the Victorian Local Governance Association, the toolkit provides a practical framework for local government to implement human rights into their laws, policies, process and practices.

The toolkit was launched at a symposium hosted by the VLGA and the Victorian Equal Opportunity and Human Rights Commission, which looked at how local councils have embraced human rights practices in the three years since the Charter came into effect.

The toolkit is available at [www.humanrightstoolkit.vlga.org.au](http://www.humanrightstoolkit.vlga.org.au).

*Victorian Equal Opportunity and Human Rights Commission*

## Victorian Charter Case Notes

### Right to Humane Treatment in Detention and Prisoner Access to Health Care

*Castles v Secretary to the Department of Justice* [2010] VSC 310 (9 July 2010)

On 9 July 2010, the Supreme Court of Victoria found that the plaintiff, Kimberley Castles, is entitled under s 47(1)(f) of the *Corrections Act 1986* to undergo IVF treatment. The finding overturns a decision by the Secretary of the Department of Justice to deny Ms Castles access to IVF treatment and means that Ms Castles will be eligible for permits to leave prison on a visit-by-visit basis.

The judgment affirms the principle – well-established in international human rights jurisprudence – that prisoners should not be subjected to hardship or constraint other than that which necessarily results from the deprivation of liberty. Particular attention is paid to the fundamental importance of prisoners' access to healthcare and IVF treatment is recognised as legitimate treatment necessary for the preservation of health.

This matter was run on a pro bono basis by the Human Rights Law Resource Centre, together with Blake Dawson, Debbie Mortimer SC and Michael Borsky of Counsel.

### Facts

Ms Castles was convicted of social security fraud in November 2009 and sentenced to three years imprisonment, to be released on her own recognisance after 18 months. She is currently imprisoned at HM Prison Tarrengower, a minimum security women's prison with an emphasis on release preparation and community integration.

Prior to her incarceration, Ms Castles had been receiving IVF treatment for over a year. From 27 November 2009, Ms Castles and her lawyers made repeated requests for approval for Ms Castles to continue to access IVF at her own cost, emphasising that she would become ineligible for treatment from December 2010 by reason of her age. By late-April 2010, the Secretary for the Department of Justice had still failed to make a decision, despite the prospects of Ms Castles becoming pregnant through IVF decreasing significantly with the passage of time.

Ms Castles commenced proceedings on 23 April 2010 with an application for interlocutory relief which was refused.

On 3 May 2010, the Secretary of the Department of Justice made a decision to deny Ms Castles' request to access IVF treatment. The Secretary reasoned that Ms Castles 'does not have an entitlement to this form of medical treatment' and cited, among other things, resource constraints and the precedent that may be set by allowing Ms Castles to access treatment.

At the full hearing Ms Castles argued that she had a right under s 47(1)(f) of the *Corrections Act 1986* (Vic) to access IVF treatment. Section 47(1)(f) provides that all prisoners have a right to 'have access to reasonable medical care and treatment necessary for the preservation of health'.

Ms Castles also relied on her rights under the *Charter of Human Rights and Responsibilities Act 2006* to privacy and family (s 13), equality (s 8) and to humane treatment in detention (s 22) and on common law duties owed to her as a prisoner.

### **Decision**

Emerton J found that Ms Castles has a right under s 47(1)(f) of the *Correction Act* to undergo IVF treatment. The *Corrections Act* was found to entitle prisoners to 'do more than remain in a "holding pattern" with respect to their health while imprisoned.'

Her Honour held that IVF treatment is both necessary for the preservation of Ms Castles' reproductive health and reasonable given:

- the commitment to the treatment that Ms Castles has already demonstrated;
- her willingness to pay for further treatment; and
- her age and the fact that she will become ineligible for further treatment before she is released from prison.

Accordingly, Ms Castles will be eligible for permits to leave the prison on a visit-by-visit basis, providing that adequate consideration has been given to security and resource issues.

The Court recognised that IVF is 'a legitimate medical treatment for a legitimate medical condition'. In a landmark statement on the status of reproductive healthcare, her Honour held:

I see no proper basis to treat IVF treatment differently from other forms of medical intervention that are considered to be necessary to enable people to live dignified and productive lives, unencumbered by the effects of disease or impairment.

### **Application of the Victorian *Charter***

The *Charter* did not determine the issue before the Court. Nevertheless, the judgment includes extensive comment on various *Charter* provisions.

#### Right to humane treatment in detention (s 22)

The Court found that the right to humane treatment in detention:

[r]equires the Secretary and other prison authorities to treat Ms Castles humanely, with respect for her dignity and with due consideration for her particular human needs.

Her Honour took as a starting point that prisoners should not be subjected to hardship or constraint other than that which results from the deprivation of liberty and accepted that:

access to health care is a fundamental aspect of the right to dignity. Like other citizens, prisoners have a right to...a high standard of health. That is to say, the health of a prisoner is as important as the health of any other person.

The Court stated that the right articulated in s 47(1)(f) of the *Corrections Act* 'must be construed consistently with the requirement that prisoners be treated with humanity and with respect for their human dignity'. This right does not entail access to any treatment that a prisoner may want or have access to were he or she not imprisoned, but does require provision of 'a variety of facilities, goods, services and conditions necessary for the realisation of a high standard of health'.

#### Right to privacy (s13)

The Court found that while the right to privacy is a fundamental 'right of considerable amplitude', it was not engaged in the proceeding. Relying largely on the *Charter's* Explanatory Memorandum, which states that '[i]t is not Parliament's intention to create a right to found a family', her Honour held that:

the Charter rights which might otherwise have encompassed rights to ART, recognition of legal parentage and adoption should be construed as not encompassing such rights.

The Victorian Equal Opportunity and Human Rights Commission, intervening under s 40(1) of the *Charter*, argued against this interpretation and its submissions were adopted in full by the plaintiff. The Commission submitted that the omission of a right to found a family from the *Charter* was merely intended to ensure that the *Charter* did not pre-empt the results of a Victorian Law Reform Commission reference on assisted reproduction and adoption and should not restrict the scope of other rights that are protected in the *Charter*.

#### The right to equality (s 8)

The Court concluded that there had been no breach of the right to equality and non-discrimination on the basis of impairment. The Court found that Ms Castles had not received less favourable treatment than that afforded to a fertile prisoner who wishes to become pregnant. Further, infertility was found not to be 'a substantial reason' for the denial of a permit to access IVF treatment as required by the *Charter* read in conjunction with s 8(2) of the *Equal Opportunity Act 1995* (Vic).

#### Obligation to 'give proper consideration' to human rights (s 38(1))

The plaintiff submitted that the Secretary had failed to give 'proper consideration' to human rights, as required by s 38(1) of the *Charter*. In response, the defendants referred to briefings from Justice Health and Corrections Victoria which had been provided to the Secretary and which considered human rights (although relevant sections were redacted to remove legal advice from the Victorian Government Solicitor's Office).

In consideration of this issue, the Court held that the requirement to give proper consideration 'requires a decision maker to do more than merely invoke the Charter like a mantra' and to 'seriously turn his or her mind to the possible impact of the decision on a person's human rights', but 'should not be a sophisticated legal exercise'. Rather, proper consideration should be taken to involve:

understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made.

It was held that consideration of human rights in accordance with s 38(1) of the *Charter* should not be 'overly scrutinised by the courts'.

#### Use of international jurisprudence in defining rights (s 32(2))

In considering the content and application of rights, the Court affirmed the relevance of human rights decisions and commentary from overseas, referring to jurisprudence from the European Court of Human Rights, the UK House of Lords, New Zealand, UN treaty bodies and international human rights experts. Her Honour stated that consideration of international jurisprudence:

is a good thing, as it will expose Victorian jurisprudence to relevant jurisprudence from other parts of the world and, indeed, make Victorian jurisprudence more relevant in the international context.

This approach may be contrasted with that taken in another recent judgement of the Supreme Court, *WBM v Chief Commissioner of Police* [2010] VSC 219 (28 May 2010), in which Kaye J declined to rely upon international jurisprudence in his interpretation of the right to privacy under the *Charter*.

The decision is at [www.austlii.edu.au/au/cases/vic/VSC/2010/310.html](http://www.austlii.edu.au/au/cases/vic/VSC/2010/310.html).

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

### **Coroners Court Determines that Right to Life Requires Inquiries to 'Address Systemic and Prevention Issues'**

*Coronial Investigation of 29 Level Crossing Deaths – Ruling on the Interpretation of Clause 7(1) of Schedule 1 of the Coroners Act 2008* (Vic) (25 June 2010)

The Coroners Court has held that right to life under s 9 of the *Charter of Human Rights and Responsibilities Act* requires that questions as to jurisdiction and interpretation in the Coroners Court be resolved to enable inquiries to 'address systemic and prevention issues'.

In this case, the Coroner, Jane Hendtlass, was required to determine whether the old *Coroners Act 1985* or the new *Coroners Act 2008* applies to an investigation into 29 deaths that occurred in

circumstances where a train and a motor vehicle collided on a level crossing in Victoria. All of the deaths occurred between 2002 and 2009 when the old Act was in operation.

The relevant difference between the Acts is that the new Act requires the Coroner to give greater consideration to 'public health and safety issues'.

The Coroner ruled that the new Act applies.

In reaching this conclusion, the Coroner was fortified by the *Charter of Human Rights and Responsibilities Act*, holding that the obligation under s 32(1) to interpret all legislation compatibly with human rights required that, wherever possible 'interpretation of the law in the Coroners Court must give effect to the public health and safety provisions of the new Act.' The Coroner further stated that an interpretation of the law such that the new Act, with its preventative focus, be held to apply to the inquest is 'consistent with Australia's international obligations under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and s 9 (right to life) of the *Charter of Human Rights and Responsibilities Act*'. She rejected a submission that the old Coroners Act, which does not have such a preventative and systemic focus, 'satisfies the requirements of the right to life'.

The Coroner also drew on comparative human rights jurisprudence to support this conclusion, noting that:

The Court of Appeal in England (*Secretary of State for Defence v The Queen (on the application of Mrs Catherine Smith) & Ors* [2009] EWCA Civ 441) has determined that, in circumstances in which the government is responsible for providing appropriate safety measures, this obligation requires the coroner to conduct an Inquest that investigates not only the immediate circumstances of the death but also the possibility of systemic failure on the part of the authorities to protect life. In England this is called an Article 2 Inquest which refers to Article 2 of the *European Convention of Human Rights* (the right to life).

Therefore, by analogy, in order to comply with the State's requirement to protect the right to life, an Inquest in relation to the level crossing deaths must address broader systemic and prevention issues that may have contributed to the death as provided under the New Act.

The Ruling is at

[www.coronerscourt.vic.gov.au/wps/wcm/connect/justlib/coroners+court/home/case+rulings/coroners2+-+rulings+-+level+crossing+ruling](http://www.coronerscourt.vic.gov.au/wps/wcm/connect/justlib/coroners+court/home/case+rulings/coroners2+-+rulings+-+level+crossing+ruling).

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## Right to Equality and Anti-Discrimination Exemptions

*Members of Owners Corporation on Plan of Subdivision No 441923W (Anti-Discrimination Exemption)* [2010] VCAT 1111 (28 June 2010)

In this decision, McKenzie DP refused to grant a proposed exemption because it was not the least restrictive means of achieving the desired outcome, contrary to s 7(2)(e) of the *Charter*.

### Facts

This exemption application related to units built in Upper Ferntree Gully, which were designed specifically for use by the elderly. The units are designed for easy mobility, and located opposite an aged care facility. The owners' corporation (body corporate) of the property currently has an exemption from the EO Act allowing it to sell its units only to people aged over 55 years. This exemption expires in February 2011.

The members of the owners' corporation applied to have the existing exemption replaced with a new exemption enabling the owner of each unit to restrict occupation only to people aged over 55, when selling, leasing or offering to sell or lease the unit. This would allow them to sell their units to persons aged under 55, as long as the unit is occupied by an older person, and thereby more easily dispose of their units. Without an exemption, this conduct would constitute age discrimination under the EO Act.

### Decision

Deputy President McKenzie followed the reasoning of Justice Bell in *Re Lifestyle Communities Ltd* (No3), which was an (unsuccessful) application for an exemption to provide accommodation to people only over the age of 50. Accordingly, McKenzie DP held that VCAT's discretion to grant an exemption from the EO Act 'must be exercised in a way compatible with human rights'.

Deputy President McKenzie identified the rights to equality and freedom of movement as being engaged by the proposed exemption, and considered whether granting the proposed exemption would be demonstrably justified under s 7(2) of the *Charter*. Deputy President McKenzie held as follows.

1. The purpose of the proposed exemption is to ensure that homes designed for use by the elderly are used for that purpose, which in turn is likely to enable persons who are elderly and frail to live independently in the community for longer. This is an important purpose.
2. The proposed exemption may disproportionately interfere with the right to equality, even though it is restricted to occupants of the units. For example, it was accepted that a person under 55 could live in the unit as long as they were living with a person over 55. However, the younger person would not be able to continue to live at the unit if the older person were admitted to a nursing home.
3. There is a less restrictive means of achieving the purpose of the limitation. That is, the units could be offered for lease or sale with a statement that it was designed for and most suitable for those aged over 55. McKenzie DP granted the applicant liberty to apply for an exemption to this effect.

For the above reasons, the proposed exemption was held to be an unreasonable limitation on human rights and the application was denied.

The decision is at [www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2010/1111.html](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2010/1111.html).

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### Right to Equality and Anti-Discrimination Exemptions: Special Measures to Reduce Disadvantage

*Department of Human Services & Department of Health (Anti-Discrimination Exemption)* [2010] VCAT 1116

In this decision, McKenzie DP granted an exemption on the basis that it constitutes an appropriate special measure to reduce disadvantage caused by discrimination, as permitted by s 8(4) of the *Charter*.

#### Facts

The Department of Human Services and the Department of Health (Departments) applied for a three year exemption from the prohibition on race discrimination under the EO Act to enable the Departments to advertise for and employ up to 118 Indigenous people for positions within the Departments. The proposal is part of an Aboriginal Public Sector Employment and Career Development Plan (Action Plan), which aims to reduce disadvantage suffered by Indigenous Victorians by promoting the education and employment of Indigenous Victorians in the public sector. The Action Plan is the result of wide-ranging consultation with the Indigenous community, public sector officials and key union groups. It also has high-level endorsement, including from the Premier.

The Departments submitted extensive material setting out the proposal and the context of the proposal, including the following statistics.

- 76% of non-Indigenous Victorians complete high school, compared with 31% of Indigenous children.
- 18% of non-Indigenous Victorians enrol at university, compared to 3% of Indigenous Victorians.
- 73% of non-Indigenous Victorians of working age are in employment, compared to 54% of Indigenous Victorians.

Deputy President McKenzie acknowledged the compounding effects of disadvantage. For example, home ownership depends on financial resources, which in turn depends on employment, which in turn depends on educational qualifications.

#### Decision

Deputy President McKenzie applied the same legal principles discussed above, and determined that the exemption should be granted. She considered that the right to equality (ss 8(2) and (3)) and the right to have equal access to the Victorian public sector (s 18(2)(b)) were relevant *Charter* rights.

However, McKenzie DP held that s 8(4) of the *Charter* applies to this proposal. Section 8(4) provides that a measure does not constitute discrimination if it is taken to assist or advance a group that is disadvantaged because of discrimination. However, interestingly, McKenzie DP held that s 82 of the EO Act, which permits the provision of special services or benefits to a class of persons to reduce disadvantage, did not apply so clearly that the exemption is unnecessary. This indicates a potential view that s 8(4) of the *Charter* has a broader and more beneficial application than s 82 of the EO Act.

Deputy President McKenzie was also of the view that the proposal was a reasonable limit on human rights in the *Charter*. This is because the proposal is intended to redress disadvantage caused by discrimination, which is an important purpose, and relates to only a small fraction of the total public sector workforce. She also noted the strong and overriding 'public interest in addressing and reducing the clear disadvantage in employment from which Indigenous Victorians suffer'. She considered that the proposal, in conjunction with various other support mechanisms included in the Action Plan, would not just increase employment of Indigenous Victorians, but might also encourage Indigenous Victorians to stay longer at school and enter university.

The decision is at [www.austlii.edu.au/au/cases/vic/VCAT/2010/1116.html](http://www.austlii.edu.au/au/cases/vic/VCAT/2010/1116.html).

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### Application of Charter to Planning Schemes, Decisions and Considerations

*Smith v Hobsons Bay City Council* [2010] VCAT 668 (12 May 2010)

A recent VCAT decision establishes that a planning scheme provision limiting views into existing secluded private open space and habitable room windows is not incompatible with the *Charter*. VCAT also held that a local council does not act in a way that is incompatible with the *Charter* when exercising its discretion to maintain, modify or delete a planning permit condition requiring the overlooking of premises to be mitigated.

#### Facts

Gary Stooke obtained a planning permit from Hobsons Bay City Council, authorising a pergola and first floor balcony to be added to his premises. His architect, Rodger Smith, applied to VCAT to delete a condition of the permit. The condition required a screen to be built on the balcony to prevent it overlooking an adjacent property, owned by John and Sharon Davey.

During the merits hearing, Mr Davey alleged that the proposed balcony, if not screened, would breach his right to privacy under s 13 of the *Charter*. The issue was referred to Deputy President Dwyer for separate determination.

#### Decision

Deputy President Dwyer considered whether cl 54.04-6 of the Hobsons Bay Planning Scheme, which dealt with overlooking, infringed a *Charter* right. In doing so, the Deputy President utilised the 'three-step process' set out by the Court of Appeal in *R v Momcilovic* [2010] VSCA 50.

The first step was to ascertain the meaning of cl 54.04-6 by applying s 32 of the *Charter* in conjunction with common law principles of statutory interpretation and the *Interpretation of Legislation Act 1984* (Vic). Clause 54.04-6 provided for screens and other discretionary mitigation measures for balconies with direct views into existing secluded private open space and habitable room windows within 9 metres. The Deputy President held that cl 54.04-6 was unambiguous.

The second step was to consider whether cl 54.04-6 breached a human right protected by the *Charter*. The Deputy President found that cl 54.04-6 did not permit an unlawful or arbitrary interference with Mr Davey's right to privacy under s 13 of the *Charter*. Rather, it created an ambit of regulatory discretion within which some interference with the right to privacy was allowed. Deputy President Dwyer held that the discretion was not arbitrary, but was to be considered against appropriate guidelines that were responsive to the circumstances of a particular site and a particular planning decision.

The Deputy President also considered whether cl 54.04-6 infringed the property rights of Mr Stooke or Mr Davey, in contravention of s 20 of the *Charter*. It was held that any imposition of reasonable

restrictions on the use and development of their land was clearly in accordance with the law, and therefore not in breach of s 20.

Given that neither ss 13 or 20 of the *Charter* were infringed, the Deputy President stated that it was unnecessary to consider the third step of the process outlined in *Momcilovic*; that is, whether the limit imposed on the rights was justified under s 7(2) of the *Charter*. Nonetheless, the Deputy President held that if those rights were breached, the limits imposed by cl 54.04-6 were justified, as consideration of any overlooking, and the implementation of mitigation measures, allowed for a proportionate and reasonable response.

The Deputy President then considered the application of s 38 of the *Charter*. The issue was whether the Council or VCAT, in approving the proposed balcony without a screen, would act in a way that was incompatible with s 13, or, in making the decision, would fail to give proper consideration to the right to privacy.

A similar three-step process applied to the resolution of this issue. Deputy President Dwyer held that the scope of the right to privacy was limited, as s 13 only disallows unlawful or arbitrary interference with that right. Such interference did not occur in this case. The possible overlooking of Mr Davey's property was found not to be unlawful. There was no evidence of any intended nuisance. Nor would any potential interference have been arbitrary. A decision to delete or modify the planning permit condition was only permitted after the reasonable exercise of a regulatory discretion, based upon the particular circumstances of the particular site, and to which Mr Davey had third party rights of objection. Accordingly, the Deputy President held that an unscreened balcony and some overlooking of Mr Davey's property were unlikely to establish a breach of s 38 of the *Charter* in the main proceedings. Again, it was unnecessary to consider the third step, but the Deputy President held in any case that any limitation upon Mr Davey's right to privacy under s 13 was reasonable and proportionate.

The matter was referred back to Member Sibonis for final decision, having regard to the decision made by the Deputy President on the question of law.

#### **Consideration of the Victorian *Charter***

Deputy President Dwyer made two noteworthy comments about the application of the *Charter* more generally. The Deputy President stated that consideration of the *Charter* in circumstances of potential interference with a person's privacy or home is 'not something manifestly different to what is already required to be considered by a Tribunal member making a planning-based decision.'

The Deputy President also commented that despite each case turning on its own facts, it would be a 'rare and exceptional case' where a planning scheme provision was not compatible with the *Charter*, or where a planning discretion was not properly exercised within the limitations of the planning regulatory framework. This is a result of the qualifications on the right to privacy in s 13 of the *Charter*, the general limitations clause in s 7(2) of the *Charter*, and the structure of the planning regulatory framework and planning schemes in Victoria.

The decision is at [www.austlii.edu.au/au/cases/vic/VCAT/2010/668.html](http://www.austlii.edu.au/au/cases/vic/VCAT/2010/668.html).

*Brad Barr is a Law Graduate with Allens Arthur Robinson*

#### **Application of Charter to Guardianship and Administration**

*PJB (Guardianship)* [2010] VCAT 643 (17 May 2010)

Justice Billings in the Victorian Civil and Administrative Tribunal has held that the appointment of an administrator to the estate of a represented person, PJB, was a justifiable restriction on PJB's right to freedom of movement and right to privacy.

#### **Facts**

This was a rehearing of an application for an administration order under the *Guardianship and Administration Act 1986* to appoint State Trustees Limited as administrator to make decisions regarding PJB's financial affairs, particularly relating to his home.

PJB had a 20 year history of mental illness, including over 100 hospital admissions and had been diagnosed with a delusional disorder. He disputed that he had a mental illness and was resistant to

medical treatment. He had a history of discontinuing medication upon discharge from hospital, which resulted in the need for readmission.

PJB had lived alone in a home owned by the Office of Housing and had been making payments to acquire this home.

Significant emphasis was placed on PJB's mental health, and likelihood of successful treatment outside of supported accommodation. PJB intended to return to living alone in his home, whereas the applicant submitted that he was not able to do so as his mental illness and resistance to medication resulted in him not being able to adequately manage his affairs, including his financial affairs. Accordingly, the applicant considered it appropriate for an administrator to be appointed to PJB's estate to sell his home in order to fund the supported accommodation which it was submitted he required. It was agreed that it would not be possible for PJB to afford to keep his home and pay for the supported accommodation it was submitted that he required.

The applicant tendered numerous medical reports supporting the need for an administration order. Relevantly, the applicant tendered a psychologist report provided in December 2009 stating that PJB's mental state impacted on his ability to make informed choices about his physical and mental health.

The applicant suggested that PJB responded well to treatment during his admissions in hospital, but he was likely to discontinue this necessary medication once discharged, based on previous actions.

The applicant submitted that PJB had disregard for his obligations regarding necessary bills and general health and living requirements. Whilst it was agreed that PJB had demonstrated that he could understand and manage aspects of his finances, it was submitted that he could not manage 'the complexity of living on his own', including managing his house, debts and food on a daily basis and living within a budget.

The applicant agreed that PJB functioned 'extremely well' in hospital and that in principle he could receive his medication at home under a Community Treatment Order, but his history of admissions resulting from not taking his medication indicated that this was not appropriate in the circumstances.

It was submitted by the applicant that whilst the current application did not relate to PJB's mental health treatment as such, certain aspects of his mental and physical illness impacted on his ability to make informed decisions regarding his financial affairs, which resulted in the need for an administration order.

The respondent also submitted a psychiatrist report. However, when questioned, the psychiatrist revised his opinion such that he did not consider PJB to have the capacity to make rational decisions. He stated that he could not tell whether PJB would be able to make reasonable decisions regarding his property if compliance with his medication could be ensured through the provisions of the *Mental Health Act 1986*.

### **Decision**

The Tribunal found that an administration order was appropriate in the circumstances and appointed State Trustees Limited as the administrator of PJB's estate. It was held that decisions about PJB's home could not be separated from decisions about where it was in his best interests to live.

The Tribunal indicated that any decisions by an administrator about PJB's home would need to follow careful analysis, in accordance with the principles in the *Guardianship and Administration Act 1986*, however 'the issues surrounding that decision suggest a strong possibility that an administrator would decide to sell PJB's home'. Therefore, an administration order in the circumstances 'may have the ultimate result of severing of PJB's very strong connection with his home'.

The Tribunal agreed that the sale of PJB's home may be irreversible and extreme, but was appropriate given less restrictive options had failed previously and were likely to fail again.

### **Consideration of the Victorian Charter**

The respondent submitted that an administration order involved a limitation on PJB's right to freedom of movement under s 12 of the *Charter of Human Rights and Responsibilities Act* and his right to privacy under s 13.

Relevantly, s 12 of the *Charter* states that 'every person lawfully within Victoria has the right ... to choose where to live'. Section 13 of the *Charter* provides that a person has the right 'not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with'.

The respondent argued that the administration order, in the circumstances, involved a limitation on the freedom of PJB to choose where to live and also on his privacy, as this involved the management of his finances through the sale of his home.

The respondent also referred to the decisions in *Kracke v Mental Health Review Board & Ors (General)* and *AC (Guardianship)*. In addition the respondent referred to art 19 of the *Convention on the Rights of Persons with Disabilities*, which recognises the equal right of all persons with disabilities to live in the community with equal choices to others, including the opportunity to choose their place of residence.

The respondent submitted that the application for an administration order was disproportionate to the aims that were trying to be achieved, being to maintain mental and physical health, and this could be achieved in a less restrictive way. Further, it was submitted that the sale of PJB's home was an unworkable limitation on his rights as this was irreversible and extreme.

The Tribunal noted that both *Kracke* and *AC (Guardianship)* need to be reconsidered in light of *R v Momcilovic*.

It held that generally administration orders alone would not involve a restriction on the right to freedom of movement and right to privacy, although they may involve restrictions on a person's 'freedom of decision and action'. The Tribunal stated that this was so despite the fact that 'in practice restricted control of a person's funds may mean restricted choice about the person's accommodation'.

However, as the current administration order was ultimately directed at decisions regarding PJB's home, the Tribunal found that the administration order would involve a limitation on PJB's right to freedom of movement and right to privacy.

The Tribunal then considered whether this infringement on PJB's rights was justified under s 7(2) of the *Charter*. In doing so, the Tribunal stated that 'the question of proportionality is at the heart of the enquiry mandated by s 7(2) of the *Charter*', referring to the decision in *Momcilovic* and also the Canadian case of *R v Oakes*.

The Tribunal found that the measures were designed to protect PJB and others who were placed at risk due to his behaviour. Accordingly, it was held that those measures were rationally connected to, and proportional to, the objective. Therefore, the measures were justifiable under s 7(2) of the *Charter*.

The Tribunal also found that the administration order did not offend the principles of the CRPD read as a whole.

The decision is at [www.austlii.edu.au/au/cases/vic/VCAT/2010/643.html](http://www.austlii.edu.au/au/cases/vic/VCAT/2010/643.html).

**Mandy Lister** is a volunteer lawyer with the Human Rights Law Resource Centre

### What does Proper Consideration of Human Rights Entail?

*Director of Housing v Turcan* [2010] VCAT Ref No R201011922 (Unpublished, 4 May 2010)

The Victorian Civil and Administrative Tribunal has considered the meaning of 'arbitrary' and 'unlawful' in the context of s 13(a) of the *Charter of Human Rights and Responsibilities Act 2006*, as well as the relevance of a public authority's policy to an assessment of proportionality under s 7(2). Additionally, the Tribunal has held that in determining an application for possession in its Residential Tenancies List, the decision of Bell J in *Director of Housing v Sudi* [2010] VCAT 328 should be followed to the extent that it is relevant.

#### Facts

In this proceeding the Director of Housing made an application to the Tribunal for possession on the basis that the tenant had been trafficking drugs from the premises. The Director relied on s 250 of the *Residential Tenancies Act 1997* (Vic) which enables a landlord to apply for possession of premises where a tenant has used rented premises for an illegal purpose.

This decision raised issues recently considered by Bell J in *Sudi* where it was held the Tribunal had jurisdiction to consider whether a public authority landlord had acted consistently with the *Charter* in making a possession application. The Director sought to distinguish *Sudi* on the basis that the Tribunal was not bound by the doctrine of precedent and also argued that s 39 of the *Charter* prevented such an approach.

In relation to the substantive matter, the Director led evidence in relation to its policy which prescribed steps to be taken before any decision to evict a tenant for illegal use under s 250 of the Act. The policy notes a tenant should be provided with an opportunity to respond to allegations of illegal use and states:

- 'The Director acts in accordance with the provisions of the Residential Tenancies Act and its obligations as a public landlord including obligations under the Victorian Charter...'
- 'The human rights of the tenant, neighbouring residents and other potentially affected by the illegal use of the premises are also considered.'
- 'If after consideration of all the information, the Director decides to issue a Notice to Vacate under section 250, that action will be compatible both with the human rights of the tenant and neighbouring residents.'

The tenant contended that the Director had unlawfully limited his right to a home under s 13(a) of the *Charter* and that *Sudi* should be followed, not only because it is a decision made by a Justice of the Supreme Court, but because to do so would be in the interests of ensuring that the Tribunal's decision-making is consistent.

### Decision

In relation to the jurisdictional question, the Tribunal held that *Sudi* should be followed to the extent that it is relevant, and that it is relevant to the extent that it enables consideration to be given to *Charter* compliance as a preliminary matter in applications made by a public authority.

In *Sudi*, however, the Director declined to lead evidence as to the steps that were taken prior to the decision to limit the respondent's rights being made. This meant the Tribunal in that matter did not need to consider whether the limitation was 'arbitrary' or 'unlawful' so as to satisfy the internal qualifications of s 13(a). The Director in *Turcan* did choose to lead such evidence, and it consequently fell to the Tribunal to address the internal qualification before it could consider the relevance of the Director's internal policy to an assessment of proportionality under s 7(2).

The Tribunal held 'a decision is necessarily arbitrary unless there is a review mechanism.' In this respect, the decision to evict the tenant was not 'arbitrary' because the process leading up to service of the notice included a letter detailing the allegations and inviting the tenant to respond.

Considering the factors listed in s 7(2), the Tribunal remarked: 'the nature of Mr Turcan's rights are of the highest importance and the Director must take them into account.' Accordingly, the Tribunal considered the onus to be on the Director in establishing that the limitation of a right is demonstrably justified and, consistent with *Sudi*, held the standard of proof requires 'a degree of probability that is commensurate with the occasion'.

In considering the evidence, the Tribunal accepted testimony of the housing officer in relation to actions taken by the Director prior to the application for possession. Further as the policy had been referred to and s 250 of the Act had been consulted, the Tribunal drew an inference that the policy had been followed.

As to the relationship between the limitation and its purpose, the Tribunal considered the Director's obligations under the *Housing Act 1983* to provide safe, secure housing and remarked that these obligations 'far outweigh the consideration of Mr Turcan's personal rights'.

**Maya Narayan**, Intern, and **Chris Povey**, Senior Lawyer, with the Homeless Persons' Legal Clinic

## Comparative Law Case Notes

### What Constitutes a Deprivation of Liberty?

*Secretary of State for the Home Department v AP* [2010] UKSC 24 (16 June 2010)

A recent decision of the UK Supreme Court has confirmed that certain control order restrictions may constitute a deprivation of liberty sufficient to engage the operation of art 5 of the *European Convention on Human Rights*.

### Facts

The appellant, AP, is an Ethiopian national residing in the UK. AP was suspected of involvement in terrorism. On 10 January 2008, the Secretary of State obtained a control order against AP which was subsequently modified on 21 April 2008. The modified control order subjected AP to a 16 hour curfew and required him to live at an address in the Midlands, some 150 miles from his family in London.

AP appealed against the imposition of the control order and, on 12 August 2008, Keith J quashed the obligation to live in the Midlands. Keith J considered that the interference with art 8 of the ECHR (the right to respect for private and family life) was justified and proportionate in the interests of national security. However, his Honour considered that the terms of the control order constituted an art 5 deprivation of liberty.

In making his finding, Keith J considered that the obligation to live in the Midlands away from family and friends had the effect of subjecting AP to an 'internal exile' which, when coupled with the 16 hour curfew, took the control order outside the realm of a mere restriction on movement and instead amounted to a deprivation of liberty. Keith J found that it was extremely difficult for AP's family to visit him in the Midlands, that he could not integrate socially and spiritually at the local mosque, and that he suffered general social isolation in the town. Importantly, Keith J found that, but for the obligation to live in the Midlands, the control order would not have breached art 5.

A majority of the Court of Appeal overturned Keith J's decision on 15 July 2009. AP appealed this decision to the Supreme Court. The appeal raised the following matters:

- whether conditions which were justifiable restrictions under art 8 could 'tip the balance' in relation to art 5, in that there would be no breach of art 5 but for those conditions;
- whether the judge can take into account subjective 'person specific' factors (such as the particular difficulties of AP's family visiting him in the Midlands) when considering whether a control order amounts to a deprivation of liberty; and
- whether Keith J had made inconsistent findings of fact in respect of the art 5 and art 8 claims (as was held by the Court of Appeal).

### **Decision**

The Supreme Court unanimously found in favour of the appellant on all three grounds.

In relation to the first ground of appeal, the Supreme Court noted that it was established law that a restriction relevant to an art 8 claim might be relevant to an art 5 claim even if the restriction does not establish a breach of art 8. Consequently, it was held that if an art 8 restriction is a relevant consideration to an art 5 claim, 'by definition it is capable of being a decisive factor' in an art 5 claim.

As to the second ground of appeal, the Supreme Court found that the Secretary of State's argument that a decision-maker should only look to objective factors in assessing the effect of a control order was entirely without basis. The Court held that it was necessary to look to both objective and subjective factors in determining the effect that the control order has on the individual's liberty. To the extent that subjective factors unreasonably contribute to the individual's isolation (such as the unreasonable behaviour of an individual or that of his or her family), then the correct analysis is that those factors are to be regarded as causing the relevant restriction on liberty, and not the restrictions of the control order. However, this was not the case for AP.

As to the third and final ground of appeal, the Supreme Court found that Keith J had not made the inconsistent findings of fact declared by the Court of Appeal. Accordingly, the Supreme Court set aside the decision of the Court of Appeal and restored the decision at first instance.

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

This case affirms the principle outlined by the majority of the House of Lords in *Secretary of State for the Home Department v JJ* [2008] 1 AC 385 that an art 5 deprivation of liberty may take 'a variety of forms other than classic detention in prison and strict arrest'. Thus, in appropriate circumstances, a control order will be regarded not merely as a *restriction* on liberty, but rather a *deprivation* of liberty sufficient to engage art 5. The approach to deciding this issue in the UK is to consider the length of the curfew and the degree of social isolation occasioned by the control order restrictions.

The case may provide assistance when interpreting the scope of the right to liberty and security of person contained within s 21 of the Victorian *Charter*. In particular, the decision may assist in

determining whether action taken on the part of the State in respect of an individual constitutes a deprivation of liberty under s 21(3).

The decision is at [www.bailii.org/uk/cases/UKSC/2010/24.html](http://www.bailii.org/uk/cases/UKSC/2010/24.html).

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

### Torture and the Transfer of Prisoners

*Evans, R (on the application of) v Secretary of State for Defence* [2010] EWHC 1445 (Admin) (25 June 2010)

Ms Evans, a peace activist, sought to stop the practice of British personnel transferring detainees to the Afghan authorities by arguing the practice exposed such transferees to a real risk of torture or serious misconduct.

The British High Court, while troubled by this case, determined the operation of British monitoring systems (which included regular and full access to the detention facilities and individual transferees) would be sufficient to safeguard against the occurrence of abuse and, while isolated examples of abuse may occur, a consistent pattern of abuse that would expose all British transferees to a real risk of ill-treatment was not reasonably likely.

#### Facts

Currently, approximately 9000 British armed forces personnel operate in Afghanistan. Subject to the law of armed conflict, those British forces are authorised to kill or capture insurgents and this power to capture extends to a power to detain temporarily.

Concurrently, the Afghan Government is entitled to prosecute those within its jurisdiction who are believed to have committed offences against Afghan law. This is considered to be an important element of the strategy for securing the rule of law and bringing security to Afghanistan.

What follows is that, where captured insurgents are believed to have committed offences against Afghan law, there are sound reasons for transferring them into the custody of the Afghan authorities for the purposes of questioning and prosecution. According to British policy, however, detainees must not be transferred into the custody of Afghan authorities if there is a real risk they will suffer torture or serious mistreatment.

Ms Evans, a peace activist opposed to the presence of UK and US armed forces in Afghanistan, sought to stop the practice of transferring detainees into Afghan custody. To that end, she argued that transferees in Afghan custody have been, and continue to be, at real risk of torture or serious mistreatment and, as such, the practice of transfer has been, and continues to be, in breach of the policy and unlawful.

#### Decision

Independent reports considered by the Court painted a picture of widespread and serious ill-treatment of detainees in Afghanistan. Against that background, the Court concluded it was essential for British personnel to implement an effective set of safeguards for the transfer of detainees into Afghan custody. This meant complying with international human rights obligations, including ensuring full access to detainees for the purpose of monitoring their conditions.

When considering the type of access required, the Court said it is necessary to consider a number of aspects: physical access to facilities, the extent to which it is possible to locate detainees at those facilities and the quality of the visits to individual detainees (for example, whether interviews could be conducted in private so that detainees could voice any complaints they had about their treatment).

Following a consideration of the evidence, the Court determined there existed the possibility British transferees would be subjected to torture or serious mistreatment at all facilities. However, it held that, while isolated examples of abuse may occur, a consistent pattern of abuse that would expose all British transferees to a real risk of ill-treatment was not reasonably likely at NDS Kandahar and NDS Lashkar Gah provided:

- all transfers were made on the express basis British personnel would be given full access to each transferee on a regular basis;

- each transferee was actually visited on a regular basis; and
- British personnel would consider the immediate suspension of transfers if full access was denied at any point without an obviously good reason or a transferee made an allegation of serious mistreatment which could not be reasonably and rapidly dismissed as unfounded.

The British High Court held that transfers to NDS Kabul, on the other hand, where access to detainees was denied, would expose transferees to a real risk of torture or serious mistreatment and as such would be unlawful.

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

The Court found this a 'troubling and difficult case' and noted '[i]f it were not possible to transfer detainees to Afghan custody, the consequences would be very serious'. For example, detainees would have to be released after a short time, leaving them free to renew their attacks and cause further death and injury and the opportunity to prosecute them and gain intelligence would be lost. Nonetheless, the Court was clear that none of these considerations affect the standard to be applied when determining the lawfulness of the transfer of detainees.

In light of this decision, if the transfer of a detainee raises a real risk of torture or serious mistreatment, the transfer breaches the prohibition against torture and ill-treatment regardless of the consequences of not being able to transfer that detainee. Therefore, the prohibition against torture and ill-treatment requires Australian authorities to put in place adequate safeguards for assessing the risk of torture and serious mistreatment before detainees are transferred out of their custody.

The decision is at [www.bailii.org/ew/cases/EWHC/Admin/2010/1445.html](http://www.bailii.org/ew/cases/EWHC/Admin/2010/1445.html).

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#### **Extra-territorial Application of the Human Rights Act**

*Smith, R (on the application of) v Secretary of State for Defence & Anor* [2010] UKSC 29 (30 June 2010)

The Supreme Court of the United Kingdom has held by a 6:3 majority that the *Human Rights Act 1998* (UK) has no application to members of the armed forces serving overseas when they are outside military bases. Therefore, deaths occurring on foreign soil need not be subject to full investigation into the possibility of State failure to protect human life under art 2 of the *European Convention on Human Rights*. However, deaths of military personnel on active service overseas which do occur within the jurisdiction of the United Kingdom and which appear to result from State failure should be subject to comprehensive investigation.

#### **Facts**

Private Jason Smith of the British Territorial Army was mobilised for service in Iraq in 2003. After spending eight days in Kuwait to acclimatize, he was stationed at Camp Abu Naji in Iraq and billeted to an un-air-conditioned athletics stadium 12km from the base. By August 2003, temperatures exceeded 50°C in the shade. Private Smith reported sick on 9 August, complaining about the heat, but continued to carry out various duties. On 13 August he was found collapsed and rushed to the Camp Abu Naji hospital but died shortly after of hyperthermia.

The initial coronial inquest into Private Smith's death was quashed by the High Court due to procedural errors. Private Smith's mother argued that her son died within the legal jurisdiction of the United Kingdom and was therefore entitled to protection under the *Human Rights Act* and the *Convention*. Under art 2 of the *Convention* (the right to life), a death which may implicate a public authority must be subject to an art 2 standard of investigation. This requires broader inquiry into whether the death was the result of systemic State failure to implement policies protective of human life.

The Secretary of State for Defence conceded that Private Smith's death on a British army base invoked the jurisdiction of the United Kingdom, and a new Article 2 inquest into his death would be held accordingly. However, the case continued in order to obtain judgment on the following:

- Is a soldier on military service abroad protected under the *Human Rights Act* when outside his or her base?
- If so, must the death of such a soldier be the subject of an art 2 inquest?

At first instance, confirmed by the Court of Appeal, both of these questions were answered in the affirmative. The Secretary of State for Defence appealed to the Supreme Court.

### **Decision**

The Supreme Court allowed the appeal on the jurisdiction issue, but dismissed the appeal on the inquest issue.

#### Jurisdiction

The majority (Lords Phillips, Walker, Collins, Hope, Rodger and Brown) held that, for the purposes of the *Convention*, armed servicemen/women posted abroad are not within the jurisdiction of the United Kingdom and therefore are not protected under the *Human Rights Act*. The majority observed that, according to the jurisprudence of the Strasbourg Court, 'jurisdiction' under the *Convention* is essentially territorial, but can arise extra-territorially in exceptional circumstances. The Respondent argued that extra-territorial jurisdiction could arise on the basis of personal status, as members of the armed forces are under the authority and control of the United Kingdom. However, the majority rejected this submission. Lord Phillips reasoned that, as the *Convention* was drafted shortly after the large-scale deployment of troops in World War II, it was unlikely that State Parties intended it to extend to armed operations on foreign soil. In any case, whether personal status could trigger jurisdiction under the *Convention* was a question for the Strasbourg Court. According to Lord Collins, the case of armed servicemen and women serving abroad did not fall within one of the exceptions to territorial jurisdiction recognized by the Strasbourg Court, and there were no policy grounds to justify extending those exceptions in the way the Respondent proposed. To do so would involve courts in the ultimately non-judicial issue of how armed conflict is conducted abroad.

The minority (Lady Hale, Lords Mance and Kerr) accepted that jurisdiction under the *Convention* could be triggered by personal status. Their Lordships reasoned that the United Kingdom exercises authority and control over British military personnel. Members of the armed forces reciprocate that authority with allegiance and obedience on the basis that they will receive the support and protection of the country they serve. Although the United Kingdom could not protect human life in Iraq to the same extent that it did domestically, it should, to the extent possible, put in place facilities to protect against risks to the armed forces.

#### Inquest

The Court held unanimously that art 2 investigations are not automatically required whenever military personnel die abroad. However, if an ordinary inquest into a death reveals a possible breach of the right to life by the State, an art 2 investigation is required. This was the case with respect to Private Smith's death.

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

This case advocates a narrow understanding of 'jurisdiction' for the purposes of human rights legislation. If matter arises which involves Victorian public authorities acting inter-state or internationally, similar arguments about extra-territorial application may arise.

The decision also underscores the importance of comprehensive investigation into deaths which may involve State failure to protect the right to life under s 9 of the *Charter*. This includes the conduct of coronial inquests generally, as well as investigations into deaths associated with police contact. Presently, no independent body exists to carry out investigations into such deaths in a way which would comply with the Government's obligations under the *Charter*.

The decision is at [www.bailii.org/uk/cases/UKSC/2010/29.html](http://www.bailii.org/uk/cases/UKSC/2010/29.html).

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### **Do the Rights to Marriage and Equality Require States to Recognise Same-Sex Marriage?**

*Schalk and Kopf v Austria* [2010] 30141/04 (24 June 2010)

Does the right to marry, and the 'family unit', extend to same-sex couples? The European Court of Human Rights recent decision in *Schalk and Kopf v Austria* considers these issues.

## Facts

Under Austrian domestic law, a marriage concluded by a same-sex couple is null and void. In 2002, Schalk and Kopf, a same-sex couple, applied to the Vienna Municipal Office to marry, but their request was refused. They ultimately applied to the European Court of Human Rights to challenge the decision, founding their application arts 12 and 14 of the *European Convention of Human Rights*.

## Decision

### Violation of the right to marry

Article 12 of the Convention guarantees the right to marry and to found a family to '[m]en and women of marriageable age ... according to the national laws governing the exercise of this right'. Relying on the Court's case-law, which established that the Convention was a 'living instrument which is to be interpreted in present-day conditions', the applicants argued that the right should be read as one that applied to same-sex couples.

The Court disagreed, holding that the Convention did not impose an obligation to allow same-sex couples to marry. While the right enshrined in art 12 was not confined to opposite-sex couples, the issue of whether to allow same-sex couples to marry was reserved for regulation by contracting states.

Noting that contracting states were 'best placed to assess and respond to the needs of society', the Court emphasised its reluctance to substitute its own judgment in the place of contracting states. While the institution of marriage had undergone 'major social changes' since the Convention was adopted, it had 'deep-rooted social and cultural connotations' that differ largely between societies. With only six of the forty-seven contracting states allowing same-sex marriage, the Court thought there was 'no European consensus' on the issue.

### Violation of the right to respect for private and family right on the basis of sexual orientation

The Convention also guarantees:

- the right to respect for private and family life under art 8, a right that may only be limited 'in accordance with the law and [as] necessary in a democratic society' for certain purposes; and
- the enjoyment of the rights and freedoms secured by the Convention without discrimination under art 14.

Relying on art 14 (taken in conjunction with art 8), the applicants alleged that, by being denied access to marriage, they had been unlawfully discriminated against on based on their sexual orientation.

Importantly, the Court's decision recognises for the first time that the notion of 'family life' under art 8 extends to same-sex partners living in a *de facto* relationship, 'just as the relationship of a different-sex couple in the same situation would'.

However, the Court concluded that there was no obligation to grant access to marriage to same-sex couples based on art 14. Because the Convention must be read as a whole, and its articles construed in harmony with one another, given the conclusion that art 12 did not impose an obligation to grant access to marriage to same sex-couples, it could not be implied from art 14 (taken in conjunction with art 8).

The applicants also alleged that they had been discriminated against on the basis of their sexual orientation because (at the time of the appeal was filed in 2002) they did not have any other right to legal recognition of their relationship.

Subsequent changes in Austrian domestic law changed the complexion of the applicants' claim. After their application was lodged, but before it was heard, the Austrian *Registered Partnerships Act* came into force. It granted same-sex couples the right to enter into 'registered partnerships', and implemented a range of reforms to provide registered partners with many (but not all) of the same legal rights as married couples. The differences noted by the Court included that:

- registered partnerships were concluded in different offices to marriages;
- registered partners could take on a common 'last name', whereas married couples had a common 'family name'; and
- registered partners could not adopt children, nor access artificial insemination.

While the Court acknowledged that there was an 'emerging European consensus towards legal recognition of same-sex couples', it was an area to be regarded 'as one of evolving rights with no established consensus'. Accordingly, contracting parties enjoy a margin of appreciation in the timing of the introduction of legislative changes, and the Austrian Government could not be reproached.

Despite noting that the 'differences based on sexual orientation require particularly serious reasons by way of justification', the Court held the contracting parties enjoyed a margin of appreciation under art 14 about the content of recognition granted to same-sex couples. The Austrian Government had not exceeded the margin in its choice of rights and obligations conferred by registered partnership. The differences in parental rights 'correspond[ed] ... to the trend in other member States' and, in any event, because the applicants had not claimed that they were directly affected by the differences, the Court declined to examine them in detail.

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

Like the Convention, the Victorian *Charter* also affords protections to families, protecting persons from unlawful or arbitrary interference with their family (s 13) and acknowledging that families 'are the fundamental group unit of society and are entitled to be protected' (s 17). At the very least, the decision is likely to be influential in interpreting what constitutes a 'family' under the Victorian *Charter*.

The Victorian Government has in recent times introduced a range of reforms intended to grant to same-sex couples the same legal rights available to other couples under state law (see the *Statute Law Amendment (Relationships) Act 2001* and the *Statute Law Further Amendment (Relationships) Act 2001*) and to allow same-sex partners to register their relationship (see the *Relationships Act 2008*).

For now, the more contentious issue of access to marriage by same-sex couples cannot be resolved at the state (or territory) level in Australia. With the Howard Government's 2004 amendments to the *Marriage Act 1961* reserving marriage to 'a man and a woman to the exclusion of all others', s 109 of the Constitution (which renders invalid any state law that is inconsistent with a Commonwealth law) looms large. The issue presents another example of the constraints of state and territory-based human rights protections in the Australian federal compact.

The decision is at <http://www.bailii.org/eu/cases/ECHR/2010/995.html>.

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### **Right to Life Includes Right to Health and Freedom from Poverty**

*Laxmi Mandal v Deen Dayal Harinagar Hospital & Ors* [2010] 8853/2008 and *Jaitun v Janpura Maternity Home & Ors* [2010] 10700/2009 (High Court of Delhi, 4 June 2010)

The High Court of Delhi has issued directions in response to the systemic failures resulting in the denial of benefits to two mothers below the poverty line (BPL) during their pregnancy and immediately after, in violation of the right to life contained in art 21 of the Constitution of India and international human rights obligations incorporated by the *Protection of Human Rights Act 1993*.

Under the Constitution, the right to life is comprised of two inalienable survival rights: the right to health (which includes the right to access and receive a minimum standard of treatment and care in public health facilities, and in particular, the reproductive rights of the mother); and the right to food.

### **Facts**

The High Court determined two petitions simultaneously concerning deficiencies in the implementation of a cluster of Government funded schemes aimed at reducing infant and maternal mortality, resulting in the denial of benefits to two mothers below the poverty line during their pregnancy and immediately thereafter.

#### Shanti Devi and her daughter Archana

Shanti Devi was a mother of two children (of four pregnancies). She was of poor health and suffered from anaemia and tuberculosis.

Seven months into her fifth pregnancy, Shanti Devi had severe oedema, anaemia and fever, and had also fallen on the stairs of a building resulting in a fractured humerus and multiple fractured ribs. She

saw a midwife and was referred to Faridabad Hospital. Due to insufficient finances, Shanti Devi was unable to attend the hospital for two weeks.

The hospital advised that Shanti Devi had miscarried the child and referred her to Sanjay Gandhi Hospital. Sanjay Gandhi Hospital then on referred Shanti Devi to Saroj Hospital due to insufficient facilities for the removal of the foetus. Despite providing the relevant BPL documentation on arrival, Saroj Hospital refused treatment on the ground that Shanti Devi was not below the poverty line (BPL patients in urgent need of medical attention can obtain treatment at no cost).

Shanti Devi was then taken back to Sanjay Gandhi Hospital which then referred her to Deen Dayal Hospital, where she was diagnosed with lack of platelets derangement due to a lack of protein during pregnancy and the foetus was removed.

One year later Shanti Devi became pregnant for the sixth time and died giving birth to a pre-mature baby at home without the presence of a skilled birth attendant. A maternal audit of the death of Shanti Devi was conducted and the report concluded that the primary cause of Shanti Devi's death was postpartum haemorrhage due to retained placenta.

Additional indirect and contributing factors to her death were broadly described as:

- socio-economic status which denied access to needed resources and services; and
- poor health condition which was a culmination of anaemia, tuberculosis and repeated, unsafe pregnancies.

#### Fatema and Alisha

Fatema is poor, homeless, uneducated, suffering from epilepsy and living under a tree in Jangpura, New Delhi. Twice during her pregnancy, Fatema visited a Maternity Home for vaccinations and to inquire about the cash benefits that she could avail upon delivery. Fatema received no response or assistance from the authorities.

Fatema delivered her daughter, Alisha, under a tree in full public view without access to skilled health care and medical guidance. The Maternity Home was informed of the delivery the same day, however no visit was made to Fatima by the staff of the Hospital. Five days after the birth, Fatema brought Alisha to the Maternity Home for her vaccination.

The child was not examined and Fatema was not given any advice or medicines. Fatema was advised that she was anaemic, although this was in the absence of any blood test. Fatema was administered medicines and issued a discharge slip so that she could get a birth certificate for Alisha and cash assistance under a particular Government scheme.

Fatema was refused payment by the Maternity Home on numerous occasions. On the intervention of a social activist, Fatema was able to get Rs. 550 from the Maternity Hospital. Fatema and Alisha's health continued to deteriorate and they did not receive any nutrition or health care under the relevant schemes.

#### **Decision**

Indian Supreme Court jurisprudence has aimed to protect and enforce the right to health and the right to food consistently with international human rights law. In particular, international human rights conventions have been incorporated in Indian domestic law through the *Protection of Human Rights Act 1993*.

The Supreme Court has also set down the content of the right to health and food and, consistent with international human rights law, the obligations of conduct and result. These rights are enforceable through a continuing mandamus by the Supreme Court which the High Court is obliged to carry out to ensure the implementation of those orders.

In response to the two petitions, the Government of India stated that the responsibility for implementation of the schemes was essentially with the State governments and that the relevant State Governments were replying on the status of implementation of the order of the Supreme Court.

In commenting on the current status of the health schemes, the High Court reinforced the notion that there cannot be a situation where a pregnant woman who is in need of care and assistance is turned away from a Government health facility only on the ground that she has not been able to demonstrate her BPL status or her 'eligibility'. In addition, it noted that the approach of the government, both Central

and State, in operationalising the schemes should be to ensure that as many people as possible are covered by the scheme and are not denied the benefits. The onerous burden on persons BPL to prove that they are persons in need of urgent medical assistance constitutes a major barrier to their access to the services.

The Court observed that these two instances were not brought to the notice of the central government and there was also no inbuilt mechanism for corrective action, restitution and compensation in the event of the failure of any beneficiary to gain access to the services under the schemes.

In neither of the cases of Fatema or Shanti Devi were the substantive benefits under particular schemes made available and a significant feature of both cases is that both women delivered their babies outside of the institution. The schemes envisage that even for home deliveries, assistance has to be provided to the pregnant women.

During her life time Shanti Devi did not get the benefit offered under the relevant schemes which constituted a major failure which aggravated the causes that ultimately led to her avoidable death.

The shortcomings identified by the Court in the working of the schemes were as follows:

1. Lack of 'portability' of the schemes across states – persons declared BPL in any state of the country should be assured the continued availability of such access to public health care services throughout the country.
2. Interaction of cash assistance under the schemes – benefits should be made available irrespective of the number of live births or the age of the mother to ensure pregnant women across the country are not denied cash assistance.
3. Overlap of the schemes – there must be an identified place for women to approach to be given the benefits under various schemes.
4. Administration of nutritional and health scheme overhaul (deplorable condition) – the presence of health facilities should be clearly labelled and identified and be fitted with the necessary equipment to carry out the tests. In the rural set up, monthly camps should be held at an identified place where pregnant women and young children can undergo health check-ups.
5. Referral system to be improved – the system should ensure safe and prompt transportation of pregnant women from their places of residence to public health institutions or private hospitals and vice-versa. Existing ambulance and transport services require augmenting and improving significantly.

Other directions were also issued to ensure that the benefits under the various schemes are not denied to the beneficiaries and that assistance is provided promptly at the nearest point where it can be accessed; for example, the imposition of registers and reporting systems as well as constant review and monitoring of the implementation of the schemes.

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

This case sheds light on the potential scope of the right to life contained in s 9 of the Victorian *Charter* with respect to reproductive rights and the right to health and nutrition during and following pregnancy.

In addition, this decision is relevant to the interpretation of the right to protection of families and children in the context of ss 17 and 8 of the *Victorian Charter*, in particular, the right of the child to be protected by society and the State, without discrimination.

The decision is at [www.escri-net.org/usr\\_doc/Laxmi\\_Mandal\\_Court\\_Decision.pdf](http://www.escri-net.org/usr_doc/Laxmi_Mandal_Court_Decision.pdf).

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#### **Balancing the Right to Freedom of Expression and the Right to a Fair Trial**

*Toronto Star Newspapers Ltd v Canada*, 2010 SCC 21 (10 June 2010)

Legislation providing for mandatory publication bans on bail application hearings was upheld by the Supreme Court of Canada as a reasonable compromise between protecting the accused person's right to a fair trial and the right to freedom of expression.

## **Facts**

The Canadian Criminal Code provides that an accused person is entitled automatically to an order preventing publication of information produced at bail hearing, if he or she makes such a request. Such orders may prevent publication of this information until the end of the hearing or until the prosecution is dropped.

In Canada, the evidence which can be presented at bail hearings is not tested for relevance or admissibility, and it often goes to the reputation of the accused. It is usually different to the evidence presented at trial and often not related to the offence being tried. Additionally, the media can publish the identity of the accused, comment on the charge and the alleged facts, and report the outcome of the bail application.

Parliament's objective in making the relevant law was to ensure expeditious bail hearings and to protect the right to a fair trial. Trial fairness is engaged because the accused might be prejudiced by the publication of information provided at the bail hearing which was not relevant or admissible in the main trial. The ban prevents the dissemination of evidence which, for the sake of ensuring an expeditious hearing, is untested for relevance or admissibility.

However, there is no question that the orders limit freedom of expression by preventing publication of information which may be of interest to the public and which would facilitate understanding and scrutiny of the criminal justice system.

This appeal concerned two cases: a murder prosecution from Alberta and an alleged terrorism-related offence from Ontario. Both of these cases attracted significant media attention and a number of media outlets challenged the bans, arguing they were a violation of the right to freedom of expression in the *Canadian Charter of Rights and Freedoms*.

## **Decision**

To establish the objective behind the bail system, the majority judgment of the Canadian Supreme Court engages in a discussion of the history of bail and cites studies into the relationship between pre-trial incarceration and conviction at trial.

The majority concluded that the availability of the ban 'is integral to a series of measures designed to foster trial fairness and ensure an expeditious bail hearing'.

### Proportionality test

The majority conducted an analysis based on the *Oakes* test (broadly equivalent to s 7 of the Victorian *Charter*). For an infringement of a human right to be allowed, the test requires a pressing and substantial objective, a rational connection with the infringement, and a demonstration that the chosen means interfere as little as possible with the right infringed and that the benefits outweigh its deleterious effects.

The deleterious effects of the bans identified by the majority were that they impair the freedom of individuals to discuss information about the institutions of government, and prevent full access and scrutiny of the criminal justice process, especially when the bail hearing attracts media attention and the outcome cannot readily be understood by the public.

However, these effects were outweighed by 'the need to ensure certainty and timeliness, to conserve resources, and to avert the disclosure of untested prejudicial information'. The court also pointed out the limited value to the public of the information subject to the ban, which is untested, one-sided, stigmatising, and often irrelevant to guilt.

### Proposed alternative: a hearing to decide a discretionary publication ban

Arguments were raised concerning the possibility of an alternative which would involve a lesser infringement of the right to freedom of expression, such as allowing for a separate publication ban hearing. The court found this would be a waste of resources and a burden on the accused. Accused persons might decide not to apply for bail because of the risk that information would not be protected, or if they did apply for bail they would be under additional pressure at the time of the bail hearing, a period in which they are vulnerable and typically have limited resources to prepare for hearings.

The majority said that accused persons should be able to ‘focus their energy and resources on their liberty interests rather than on their privacy interests’. The automatic nature of the ban ‘ensures that they will not renounce their right to liberty in order to protect their reputations’.

The Court also identified a number of mitigating factors about the ban: namely that it does not prevent publication of the identity of the accused, the facts, the offence, the outcome of the application, or any legal conditions attached. The ban is also temporary. Although the information may no longer be newsworthy by the time it can be published, this cannot be said to limit freedom of expression more than is necessary.

There was also discussion of changing the scope of the ban or making it discretionary only with respect to the judge’s reasons. The majority thought these suggestions would also fail to serve the objectives of the ban.

Therefore, there was no alternative measure available to parliament which would have achieved the objectives with a lesser effect on freedom of expression. The majority concluded that the mandatory ban represented a reasonable compromise.

#### Dissent: Abella J

Abella J thought the appropriate remedy was to allow for a discretionary ban, to be decided at the bail hearing.

Her Honour’s judgment emphasised the importance of the public being able to ‘see the judicial process at work’ and found that the claimed benefits of the automatic ban do not outweigh the infringement of the ‘open court principle’.

The concerns about pre-trial publicity and delay were speculative, they were not serious infringements of the right to a fair trial, and they could be remedied in other ways. Rather than referring to the effects of publicity generally, Abella J focussed on the argument that a properly instructed jury should be able to disregard irrelevant evidence.

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

The most significant aspect of this judgment is its broad interpretation and discussion of the right of accused persons to a fair trial, and its analysis of the way pre-trial procedures including bail applications have a significant impact on this.

The decision has parallels with several sections of the Victorian *Charter of Human Rights and Responsibilities*.

In relation to the right to liberty and security of person, s 21(6) refers to the right of accused persons not to be detained automatically in custody, but does not refer to privacy or information rights. As part of the right to a fair hearing in s 24, a court is empowered to exclude media organisations from a hearing if permitted to do so by law. This recognises that privacy may in some circumstances be necessary to facilitate a fair trial. However, s 24(3) of the *Charter* provides that all judgments or decisions must be made public unless the best interests of a child otherwise require – this would presumably be inconsistent with a measure as expansive as the Canadian publication bans.

The decision is also an example of a limitation of the right to freedom of expression (s 15 of the *Charter*). It is recognised that this right sometimes needs to be limited, in particular to respect the rights and reputation of other persons (s 15(3)), and there are already various Victorian decisions upholding limitations to the right.

The decision is at <http://scc.lexum.umontreal.ca/en/2010/2010scc21/2010scc21.html>.

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#### **Access to Information and Freedom of Expression**

*Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 (17 June 2010)

The Supreme Court of Canada held that the right to freedom of expression in s 2(b) of the *Canadian Charter of Rights and Freedoms* does not guarantee access to all documents held in government hands. Access to documents is a derivative right of the freedom, where the denial of that access would preclude meaningful public discussion on matters of public interest. Access may validly be denied on

the basis of countervailing considerations. In this case, those considerations were client-solicitor and law enforcement privilege.

### Facts

Two men, Graham Court and Peter Monaghan (the accused), were convicted of murder. New trials were ordered for the accused on the basis of fresh evidence, the loss of which had not been disclosed by the police to the defence until two and a half years after the trial, and inadequate jury instructions.

During the re-trial, the accused applied for a stay of proceedings on the grounds of a breach of their *Charter* rights. The trial judge (Glithero J) found 'many instances of abusive conduct by state officials' and granted a stay.

The Ontario Provincial Police (OPP) then investigated the conduct of the police involved and exonerated them of any misdoing. The OPP offered no explanation for its conclusions. The Criminal Lawyers' Association, sought the disclosure of documents relating to the investigation under Ontario's *Freedom of Information and Protection of Privacy Act 1990*. The documents at the heart of the matter were an OPP report detailing the results of the investigation, and two pieces of correspondence containing legal advice on the OPP investigation and report.

The *FOI Act* provides that the relevant Minister may, by exercise of discretion, exempt certain categories of documents from disclosure, including:

- law enforcement records (s 14); and
- client-solicitor privilege (s 19).

Section 23 of the *FOI Act* provides that certain exemptions would not apply where a 'compelling public interest' in disclosure clearly outweighed the purpose of the exemption (the 'public interest override'). The public interest override does not, however, apply to ss 14 and 19.

The Minister refused to disclose the report or the legal advice on the basis of the exemptions, but gave no reasons for that decision. The Association appealed the Minister's decision to the Assistant Information and Privacy Commissioner, who upheld the Minister's decision. The Commissioner found that, while the public interest clearly outweighed the purpose of the exemption in this case, the public interest override did not apply to the ss 14 and 19 exemptions. The Commissioner further found that the omission of ss 14 and 19 from s 23 did not constitute a breach of the freedom of expression under s 2(b) of the *Charter*. A single judge of the Ontario Divisional Court upheld the Commissioner's decision. However, the Ontario Court of Appeal by majority allowed the Association's appeal holding that the exclusion of ss 14 and 19 from the public interest override violated s 2(b) of the *Charter*.

The Minister appealed to the Supreme Court of Canada.

### Decision

The Supreme Court unanimously allowed the appeal, holding that:

S 2(b) does not guarantee access to all documents in government hands. Section 2(b) guarantees freedom of expression, not access to information. Access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government.

The Supreme Court considered the relevant question to be to determined was how far s 2(b) protection extended. In answering that question, the Supreme Court held that the best approach involved addressing the three inquiries in *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927:

6. Does the activity in question have expressive content and therefore attract the freedom in s 2(b)?

The Supreme Court held that, to satisfy this requirement, it must be established that 'access is necessary to permit meaningful debate and discussion on a matter of public interest'. In this case, that requirement was not met, as the record supporting the misconduct of state officials was already in the public domain.

7. Is there something in the method or location of that expression that would remove that protection?

In relation to this question the Supreme Court observed that the Association would need to demonstrate that access to the ss 14 and 19 documents, obtained through the public interest override, would not 'impinge on privileges or impair the proper functioning of relevant government institutions'.

Again, the Association failed to meet this test. Sections 14 and 19 were 'intended to protect documents from disclosure on these very grounds'.

8. If the activity remains protected, does the state action infringe that protection?

In view of its conclusions with respect to the first two questions, the Supreme Court found it unnecessary to answer this question. In any event, Supreme Court found that the absence of the public interest override with respect to ss 14 and 19 did not significantly impair the Association's access to documents. The Minister exercises a discretion in considering whether the ss 14 and 19 exemptions apply. In exercising that discretion, the Minister is required to have regard to the public interest in disclosure. The public interest override, the Supreme Court held, would add little to the consideration of the public interest in disclosure already mandated by the *FOI Act*.

The Supreme Court did decide to remit the s 14 claim back to the Commissioner. The Supreme Court noted that, in exercising the discretion under ss 14 and 19, the Minister was required to consider individual parts of the record and to disclose as much of the information as was possible when an exemption was claimed.

In reviewing the Minister's decision, the Commissioner was required to consider whether the exemption was properly claimed and, if it was, whether the Minister had properly exercised the Minister's discretion. In this case the Commissioner had not considered the exercise of the Minister's discretion, and should reconsider the s 14 exemption claim. The Supreme Court held:

The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been investigated by the Commissioner. We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

The s 19 exemption claim was not ordered to be reconsidered. The categorical nature of solicitor-client privilege meant, the Supreme Court concluded, that it was 'difficult to see how these records could have been disclosed'.

### Relevance to the Victorian *Charter*

Section 15 of the Victorian *Charter* protects the right to freedom of expression. This freedom expressly includes the freedom to seek, receive and impart information in writing. In contrast to the decision of the Canadian Supreme Court, in *Victoria*, this right has been held to 'incorporate a positive right to obtain access to government-held documents' (see *XYZ v Victoria Police* [2010] VCAT 255 (16 March 2010)).

The decision is at [www.canlii.org/en/ca/scc/doc/2010/2010scc23/2010scc23.html](http://www.canlii.org/en/ca/scc/doc/2010/2010scc23/2010scc23.html).

**Tim Goodwin** is a lawyer with *Allens Arthur Robinson*

### Freedom of Expression and the Protection of Journalistic Sources: When Can a Journalist be Compelled to Reveal their Source?

*R v National Post*, 2010 SCC 16 (7 May 2010)

In this case, the Canadian Supreme Court found that the guarantee of freedom of expression in s 2(b) of the Canadian *Charter of Rights and Freedoms* (Canadian *Charter*) does not create a constitutionally entrenched immunity to protect journalists against the compelled disclosure of secret sources. The Court examined if there was nevertheless a common law privilege 'to be applied in light of the important public interest in freedom of expression' and found that this must be assessed on a case-by-case basis. In this case, the Court considered that the public interest in protection of the secret source did not outweigh the public interest in the production of physical evidence of the alleged crimes.

### Facts

M, employed as a journalist by *National Post*, was investigating whether the then Prime Minister was involved in financial fraud and forgery. X, a secret source, provided M with relevant information on condition of confidentiality. X told M that he received a document anonymously in the mail and discarded the original envelope. M was satisfied that X was a reliable source who did not believe the document to be a forgery. M faxed copies of the document to the Prime Minister's office and to a lawyer for the Prime Minister, all of whom responded that the document was a forgery.

National Post subsequently refused requests from the police to obtain the document and envelope, and M declined to identify his source. The police obtained a search warrant and assistance order and National Post applied to have the court orders set aside. The reviewing judge did so, but they were reinstated by the Ontario Court of Appeal.

In the Supreme Court, National Post and M (the appellants) claimed the search warrant and assistance order were incompatible with s 2(b) of the Canadian *Charter* (which guarantees freedom of expression) or that they were otherwise unreasonable under s 8, which guarantees 'the right to be secure against unreasonable search and seizure'.

### Decision

The Court initially dealt with the appellants' claim that the guarantee of freedom of expression (s 2(b)) created a constitutionally entrenched immunity to protect journalists against the compelled disclosure of secret sources. The Court stated that 'the history of journalism in this country shows that the purpose of s 2(b) can be fulfilled without the necessity of implying a constitutional immunity' and 'accordingly, a judicial order to compel disclosure of a secret source would not in general violate s 2(b).' It acknowledged that the European Court 'locates journalist privilege in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, but [noted that it is] necessarily so because the Convention is the source of its jurisdiction.'

After concluding that there is no s 2(b) immunity, the Court examined if there is a common law privilege to be applied in light of freedom of expression. It found that a 'case-by-case model of privilege' should be used rather than a 'class privilege model'. According to the Court, the assessment is to be made under Professor Wigmore's criteria for establishing confidentiality in common law (as set out in *M (A) v Ryan*, [1997] 1 SCR 157, at para 30). Under this approach, a promise of confidentiality will be respected if the 'media party' proves all four of the following criteria:

- that the communication originated in confidence;
- that the confidence is essential to the relationship in which the communication arises;
- that the relationship is one which should be sedulously fostered in the public good; and
- the public interest in protecting the identity of the informant from disclosure outweighs the public interest in getting the truth.

The analysis under the fourth criterion 'does most of the work' according to the Court, and 'underlying this analysis is the need to achieve proportionality in striking a balance amongst competing interests'. The weighing up will include 'the nature and seriousness of the offence under investigation...the probative value of the evidence sought to be obtained, measured against the public interest in respecting the journalist's promise of confidentiality...[and] the underlying purpose of the investigation.'

The Court held that this criteria provides a 'workable structure' which 'will provide the necessary flexibility and opportunity for growth that is essential to the proper function of the common law.'

The Court noted that it is for the Court to decide when disclosure is required and not for individual journalists, and that that conclusion is not changed by an individual journalist's belief in the good faith of his source. Confidentiality may be lost when 'information [is] put into the public domain maliciously'. The Court further held that 'this [case] is not the usual case of journalists seeking to avoid testifying about their secret sources;...[t]his is a physical evidence case and the documents are the very *actus reus*...of the alleged crime.' Hence, immunity is situation specific and journalists have 'no blanket right to suppress physical evidence of a crime'.

The Court then examined whether the court orders were 'unreasonable' within the meaning of s 8. The issuing judge proceeded *ex parte* but allowed one month between its issuance and execution and, according to the Court, it respected the special position of the media. The Court therefore concluded that the orders were properly issued and not unreasonable under s 8 of the Canadian *Charter*.

The appeal was dismissed.

### Dissenting opinion

Abella J, dissenting, was of the opinion that 'the harm caused by the public disclosure of the identity of the confidential source...is far weightier than any benefit to the investigation of the crime' and would hence have allowed the appeal. Abella J considered 'the benefit to the forgery investigation of getting

the documents ...at best marginal' and that also the fourth Wigmore criteria had been satisfied. Abella J also considered that when a journalist has taken 'credible and reasonable steps to determine the authenticity and reliability of his source, one should respect his professional judgment.'

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

Freedom of expression is protected in Victoria through s 15(2) of the *Charter*. This right can be restricted through an internal limit in s 15(3) and also through s 7(2) which provides for the reasonable limitation of rights protected by law.

This case can provide guidance on assessing when the right to freedom of expression can be restricted, particularly when balancing protection of journalistic sources with other public interests such as effective criminal investigation. The court suggested a case by case assessment of the journalist-confidential source privilege by using the common law 'Wigmore criteria'. These criteria establish that the claimant must prove that the public interest in protecting the identity of the secret source from disclosure outweighs the public interest in getting the truth.

The decision is at [www.canlii.org/en/ca/scc/doc/2010/2010scc16/2010scc16.html](http://www.canlii.org/en/ca/scc/doc/2010/2010scc16/2010scc16.html).

**Susanna Hedenmark** is a volunteer with the Human Rights Law Resource Centre

## **HRLRC Policy Work**

### **HRLRC Coordinates Major NGO Report on Australia to UN Committee on the Elimination of Racial Discrimination**

Australia is scheduled to be reviewed by the UN Committee on the Elimination of Racial Discrimination in Geneva in August 2010.

In July 2010, the Human Rights Law Resource Centre, together with the National Association of Community Legal Centres, submitted a major NGO submission on Australia to the UN Committee on the Elimination of Racial Discrimination.

The report, which was endorsed by a coalition of over 100 NGOs, details that racial and religious minority groups in Australia continue to experience racism in their daily lives and to suffer unequal human rights treatment and outcomes. There remain serious concerns about the racially discriminatory character and impact of a range of Australian laws, policies and practices. Many of the advances in human rights protection since the election of the Labor Government in 2007 have been symbolic in nature; structural changes necessary to turn commitments into practice still need to be made.

The NGO report documents areas in which Australia is falling short of fulfilling its obligations under CERD and focuses on areas that have been the subject of extensive NGO activity and research in Australia.

Subjects detailed in the report include:

- the lack of sufficient legal protection from racial discrimination in Australian law, policy and practice, including the ineffectiveness and, at times, unavailability of remedies for violations;
- the ongoing discriminatory outcomes experienced by Aboriginal and Torres Strait Islander people in the enjoyment of many civil, political, economic, social and cultural rights;
- the impact of the Northern Territory Intervention on Aboriginal and Torres Strait Islander peoples;
- the adverse impact of laws, policies and practices on asylum seekers, refugees and other non-citizens;
- the various forms of discrimination faced by migrant communities in Australia;
- the impact of Australia's counter-terrorism laws on Somali, Kurd and Muslim communities in Australia; and
- the need for better implementation of Concluding Observations of human rights treaty monitoring bodies and a worrying trend in Australia's response to views of those bodies.

The report contains concrete recommendations for Australian authorities, which would bring Australia more fully into compliance with its obligations under the *International Convention on the Elimination of*

*All Forms of Racial Discrimination*; an Australia in which all persons can live with freedom, respect, equality and dignity.

The report is at: [www.hrlrc.org.au/content/topics/equality/cerd-ngo-report-for-review-of-australia-7-july-2010/](http://www.hrlrc.org.au/content/topics/equality/cerd-ngo-report-for-review-of-australia-7-july-2010/).

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

### Universal Periodic Review: Joint NGO Report on Australia

Australia is to be reviewed by the UN Human Rights Council through the Universal Periodic Review process in January 2011.

A coalition of 68 NGOs – coordinated by the Human Rights Law Resource Centre, Kingsford Legal Centre and the National Association of Community Legal Centres – has submitted a 5 page Report to the UN Human Rights Council on Australia, setting out key human rights issues and concrete recommendations, including in relation to:

- the legal recognition and protection of human rights;
- Australia's cooperation with international human rights mechanisms;
- equality and non-discrimination;
- women's rights;
- children's rights;
- the rights of people with disability;
- GLBTI rights;
- Indigenous rights, including in respect of the Northern Territory Intervention, the criminal justice system, native title, the Stolen Generations, Stolen Wages, and access to adequate health care, housing and education;
- the rights of migrants, refugees and asylum seekers;
- prisoners' rights and conditions of detention;
- police use of force and oversight and complaint mechanisms;
- the administration of justice;
- homelessness;
- mental health care;
- human rights and counter-terrorism;
- business and human rights; and
- international assistance and Australian foreign policy.

The report was submitted to the UN Human Rights Council in Geneva on 12 July 2010 and is at [www.hrlrc.org.au/content/topics/business/upr-ngo-report-on-australia/](http://www.hrlrc.org.au/content/topics/business/upr-ngo-report-on-australia/).

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

### Setting the Agenda: Policy Brief on Human Rights in the Asia-Pacific

On 28 June 2010, the Centre published a policy brief on 'Human Rights in the Asia-Pacific: Australia's Role and Responsibilities'.

As the Federal Government prepares its response to the report of the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade, '*Human Rights and the Asia-Pacific: Opportunities and Challenges*', the paper contends that Australia should develop a comprehensive policy on human rights in the Asia-Pacific and makes 21 concrete recommendations for action in the following areas:

- Human Rights as a Key Instrument and Aim of Australian Engagement in the Region
- Adopting a Human Rights-Based Approach to Aid and Development Assistance
- Adopting a Human Rights-Based Approach to Military and Security Cooperation

- Empowering Communities and Supporting NGOs
- Human Rights Treaty Ratification and Implementation
- Strengthening Human Rights Institutions
- Enhancing Parliamentary Engagement with Human Rights
- Human Rights Envoys and Ambassadors

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

- Promoting Equality and Addressing Discrimination in Australia
- Foreign Policy and Human Rights
- Business and Human Rights
- Protecting Privacy while Responding to Terrorism

The policy briefs are at [www.hrlrc.org.au/content/topics/asia-pacific/setting-the-human-rights-agenda/](http://www.hrlrc.org.au/content/topics/asia-pacific/setting-the-human-rights-agenda/).

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

### HRLRC Provides Update to UN Human Rights Committee on Australia

On 2 April 2009, the UN Human Rights Committee adopted Concluding Observations in respect of Australia's compliance with its obligations under the *International Covenant on Civil and Political Rights*.

On 6 July 2010, the Human Rights Law Resource Centre made a Follow-Up Submission on Implementation of the Human Rights Committee's Concluding Observations on Australia. The submission updates the Committee as to:

- the four Concluding Observations about which the Committee requested relevant information on implementation from Australia within one year (namely, counter-terrorism law and policy, the Northern Territory Emergency Response, violence against women and mandatory immigration detention); and
- the outcomes of the National Human Rights Consultation.

Further background information on each of these issues is contained in the comprehensive NGO Report, Addendum and fact sheets provided to the Committee in 2009, available at [www.hrlrc.org.au/content/topics/civil-and-political-rights/un-human-rights-committee-review-of-australia-march-2009/](http://www.hrlrc.org.au/content/topics/civil-and-political-rights/un-human-rights-committee-review-of-australia-march-2009/).

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

### HRLRC Casework

#### Centre Obtains Landmark Judgment regarding Prisoner Access to Healthcare and Humane Treatment in Detention

In a landmark decision on 9 July 2010, the Supreme Court of Victoria found that the Centre's client, Kimberley Castles, is entitled under s 47(1)(f) of the *Corrections Act 1986* to undergo IVF treatment while in prison.

The judgment affirms the principle – well-established in international human rights jurisprudence – that prisoners should not be subjected to hardship or constraint other than that which necessarily results from the deprivation of liberty. The judgment also recognises the fundamental importance of prisoners' access to healthcare and that IVF treatment is a legitimate treatment necessary for the preservation of health.

This matter was run on a pro bono basis by the Human Rights Law Resource Centre, together with Blake Dawson, Debbie Mortimer SC and Michael Borsky of Counsel.

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

### Centre Launches Landmark Voting Rights Case in High Court

On 23 July 2010, the HRLRC and GetUp! announced proposed action in the High Court of Australia to promote and protect voting rights for disadvantaged groups. The case will be heard in the High Court in an urgent hearing on 4 August 2010.

The case is a constitutional challenge to the validity of changes to the *Commonwealth Electoral Act 1918* made by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006*. The Amendment Act results, inter alia, in the electoral roll being closed on the day on which the electoral writ is issued for new or re-enrolling voters, and three days after the writ is issued for voters updating enrolment details. Previously, the electoral roll remained open for a period of seven days after the issue of the writ.

According to the AEC, historically, the calling of an election has resulted in significant numbers of persons enrolling or changing enrolment during the 7 day period, particularly young Australians. The 7 day period enabled the AEC to advertise and promote enrolment and target particular groups with information campaigns, including Indigenous Australians and people experiencing homelessness. At the 2004 Federal Election, approximately 423,000 people enrolled, re-enrolled or updated enrolment during the 7 day period.

The purpose of the relevant provisions of the Amendment Act was stated to be to enhance the integrity of the electoral roll. According to the AEC, however, early close of the rolls does 'not improve the accuracy of the rolls for an election' and makes them '*less accurate*, because less time will be available for existing electors to correct their enrolments and for new enrolments to be received'. An Australian National Audit Office performance audit of the roll in 2001/02 found that it was of 'high integrity' and that there was no evidence of widespread or organized fraud that needed to be addressed by closing the rolls early.

The Parliamentary Joint Standing Committee on Elections (2001, 2005) and the Senate Finance and Public Administration Committee (2006) have consistently found that the voters most adversely affected by the early close of the rolls are young Australians, and those with limited access to information, knowledge of the electoral system or means of enrolment, including people experiencing homelessness, Indigenous Australians, people with disability and Australians from non-English speaking backgrounds. By way of contrast, Article 25 of the *International Covenant on Civil and Political Rights* (which has been ratified by Australia) provides that every citizen has the right and should have the opportunity, without discrimination or any unreasonable restrictions, to vote. Article 25 has been interpreted by the UN Human Rights Committee to provide that 'States must take *effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed.*' (HRC, General Comment 25).

Pursuant to the principles established by the High Court in *Roach v AEC*, the plaintiffs will argue that the early close of the rolls is a limitation or impairment of the right to vote, that the purpose of the impairment is not demonstrably justified, and that the means of achieving that purpose are not reasonably appropriate and adapted, or proportionate, to the maintenance of the constitutionally prescribed system of representative government. The plaintiffs will also argue that the early close of the roll and the consequent disenfranchisement of otherwise eligible voters, is incompatible with the Constitutional requirement (ss 7 and 24) that the Houses of Parliament be 'directly chosen by the people'.

The Centre is being assisted in this matter by Mallesons Stephen Jaques, together with Ron Merkel QC, Kristen Walker, Fiona Forsyth and Neil McAteer of Counsel.

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

### Centre Makes Submissions Regarding Investigation of Police-Related Deaths

On 8 July 2010, the Centre made submissions in the Coroners' Court in the inquest into the death of 15-year old Tyler Cassidy, who was fatally shot by police in 2008. The submissions focused on the independence, adequacy and effectiveness of the investigation into Tyler's death, outlining that such deaths should be investigated by a body that is practically, institutionally and hierarchically independent of the body or persons being investigated.

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

## Seminars and Events

### '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](http://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](mailto: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 the 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/](http://www.humanrightseducationconference2010.com.au/).

## Resources and Reviews

### HRLRC in the News

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

- Cynthia Banham, '[Time to Practise What We Preach on Human Rights](#)', *Sydney Morning Herald* (Sydney), 21 July 2010
- ABC Law Report, '[IVF Treatment for Prisoners](#)', *ABC Radio National*, 20 July 2010
- Andrea Petrie, '[Welfare Cheat Wins Right to IVF on Jail Time](#)', *The Age* (Melbourne), 10 July 2010
- AAP, '[Prisoner Wins Access to IVF](#)', *The Australian* (Sydney), 9 July 2010
- Paul Anderson, '[Jailed Welfare Cheat Granted Access to IVF Treatment](#)', *Herald Sun* (Melbourne), 9 July 2010
- ABC, '[Prisoner Wins Right to Continue IVF Treatment](#)', *ABC Online*, 9 July 2010
- ABC, '[Gay Group Gives Evidence Over Church Discrimination](#)', *ABC Online*, 9 July 2010
- Greg Roberts, '[Cassidy's Family Try to Suppress Details](#)', *Nine News* (Melbourne), 8 July 2010
- Alex Boxsell, 'Rights Bill by Stealth Feared', *Australian Financial Review* (Sydney), 2 July 2010

### Book Launch: *The Change Imperative: Creating a Next Generation NGO*

A major new book on NGO strategy, *The Change Imperative: Creating a Next Generation NGO* by Paul Ronalds, will be launched at 6pm on 3 August 2010 at Readings Bookstore, 309 Lygon Street, Carlton.

The book will be launched by the Rev Tim Costello, CEO of World Vision Australia.

The book argues that international non-governmental organisations are in the midst of a strategic revolution. Faced with the challenge of managing their growing size and influence in international politics, these organizations are making decisions that will determine their long term survival. Those that are unable to respond to increased politicization of aid, new technologies and demands for increased accountability; those that struggle to define their role in a world that has only recently begun to recognize their authority, will fail to meet their goals. Those that are committed to flexibility, learning and rethinking their strategies and structure will see their organizations succeed.

## Foreign Correspondent

### Reflections from Domestic Human Rights NGO Engaging with the UN in Geneva

The HRLRC has recently undertaken to establish a presence in Geneva for 9 months with the general aim of enhancing the effectiveness of the HRLRC's engagement with the UN human rights system. Having just returned from my three month placement in Geneva, we thought it opportune for me to offer a few thoughts and reflections from my time spent there.

My first impression is one of how accessible and available everyone and everything is in Geneva. Almost without exception, everyone I met was extraordinarily giving of their time, expertise and experience – whether they be UN experts, people working in international NGOs or OHCHR staff. The chance to have coffee with Committee members, observe a Human Rights Council session first hand, meet with other NGOs undertaking similar work in other countries, walk the corridors of the OHCHR office or even bump into a Special Rapporteur on the tram are simply not opportunities that happen anywhere but in Geneva. For a human rights organisation based on the other side of the world, the opportunity to spend an extended period of time in Geneva is invaluable.

Second, and it seems kind of obvious to say, but Geneva is truly an international city. Whether it's people who have made their home in Geneva, or others who are short term visitors, the Geneva community is full of diverse people from all over the world. Particularly as someone working for a domestic NGO in a country far, far away, it is enormously beneficial to be exposed to a whole range of different perspectives and experiences from human rights defenders from all parts of the globe.

Third, and probably most significantly, I'm coming to realise more and more that the UN is an inherently political beast. Given the fundamental principle of state sovereignty and the central role played by

member states, the success of the UN's human rights mechanisms is largely dependent on the approach taken by member states. Driven largely by fears of being criticised, some member states often play an active role in ensuring that human rights mechanisms are weakened, politicised and therefore ineffective.

This leads me to my fourth observation, which is the notable silence of many countries, such as Australia, that promote themselves as human rights leaders. At times, the loud voices of the human rights 'spoilers' tend to dominate proceedings and result in criticism being directed at many of the UN mechanisms, often unfairly. Such criticisms are very rarely balanced or rejected by other member states. My impression is that a much greater role must be played by the human rights 'supporters' like Australia in order to counter the politicisation and obfuscation that is often perpetuated by the human rights spoilers and to ensure that discussions of human rights situations are balanced and principled.

Fifth, there is a crucial role played by NGOs in the effective operation of the UN system. NGOs play an invaluable role in both bringing matters to the attention of human rights mechanisms, promoting their discussion and in ensuring that the outcomes of such discussions result in real change on the ground. Given the limited opportunities for formal involvement by NGOs, much of the influence happens informally in the corridors and behind closed doors. Greater must be done to protect and enhance the significant role that NGOs play. Ensuring that there is sufficient space for the voices of human rights defenders to be heard is absolutely fundamental to the effective operation of the UN and its human rights mechanisms.

My sixth impression, and probably the starkest to me as someone who works with a domestic NGO, is the lack of involvement of domestic NGOs in discussions about institutional reform of the UN mechanisms. For a range of reasons, not the least being a lack of time and resources, domestic NGOs are largely silent in discussions relating to matters of major institutional reform, such as the review of the Human Rights Council and potential reform of the treaty monitoring bodies. Given that it is domestic NGOs which often have the practical, on the ground experience of engaging with these mechanisms, it is imperative that their voices are heard and included in these important discussions to ensure that such mechanisms are strengthened and made more relevant and effective.

Finally, there is no doubt that, at its best, the UN has great potential to effect substantial change to the human rights situations on the ground in many countries. However, at its worst, the UN can be a time-consuming, ineffective bureaucracy. NGOs must therefore be strategic about which mechanisms to engage with and how to do so most effectively, otherwise valuable time and resources can be wasted on ineffective mechanisms. Change doesn't begin, nor does it end, in Geneva. Rather the UN's various human rights mechanisms are to be used by NGOs on the ground as valuable tools to effect change to human rights situations.

### July Update

And, just in case you are worried about missing the usual foreign correspondent piece, here is an update about UN news from the last month:

The third session of the **Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)** took place in Geneva from 12 to 16 July 2010. The main agenda items for the meeting were a progress report on EMRIP's study on Indigenous peoples and the right to participation in decision-making and a general discussion on the use of the Declaration on the Rights of Indigenous Peoples at the international, regional and national levels to advance the rights of Indigenous peoples. Over 500 participants attended the meeting, including a significant contingent of Australian organisations.

The 99<sup>th</sup> session of the **Human Rights Committee** is currently sitting in Geneva. Much of the attention on the Committee's session has focused on the examination of Israel, particularly on Israel's position with respect to the application of the ICCPR obligations with respect to the occupied Palestinian territories. The Committee is also undertaking its periodic examinations of Estonia, Cameroon and Colombia, as well as continuing its discussion on the development of a new General Comment on freedom of expression.

The eleventh **Inter-Committee Meeting of the Human Rights Treaty Bodies (ICM)** was held in Geneva from 28 to 30 June 2010. The items on the agenda focused on discussion of the working methods of treaty bodies and, in particular, the new optional reporting procedure of developing the list of issues prior to reporting by states parties – a practice that has recently been adopted by the Committee

against Torture and the Human Rights Committee. The ICM's agenda also included informal consultations with states parties and a joint meeting with special procedures mandate holders.

Of particular relevance to Australia, the **Committee on the Elimination of Discrimination against Women** is currently in the process of examining Australia's compliance with CEDAW. Sitting in New York, the Committee engaged in an interactive dialogue with representatives of the Australian Government on 20 July and will release its Concluding Observations on 30 July 2010. Australia is also due to be reviewed for its compliance with the **Convention of the Elimination of All Forms of Racial Discrimination** (CERD) in Geneva on 10 and 11 August 2010, however there are concerns about whether the review will take place due to the Government being in caretaker mode ahead of the election on 21 August 2010.

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

## If I Were Attorney-General...

### A Ten Point Plan for the Promotion and Protection of Human Rights in Australia

#### Australia's Human Rights Legacy and the 2010 Federal Election

Respect for human rights is the foundation of a community that is fair, just, cohesive and inclusive. The promotion and protection of human rights should be a key priority for the next Australian Government.

On the international stage, Australia has a proud bipartisan history in the development of human rights laws and institutions. At home, the recent National Human Rights Consultation demonstrated that human rights matter deeply to Australians. Human rights principles resonate with Australian democratic values, including the rule of law and our sense of a fair go.

The Consultation also demonstrated, however, that our framework of laws and institutions does not provide comprehensive protection of rights, particularly for vulnerable or disadvantaged groups. The Consultation disclosed a strong majority view that 'we could do better in guaranteeing fairness for all within Australia and in protecting the dignity of people who miss out', including the homeless, people with mental illness, Aboriginal Australians, asylum seekers and children with disability.

#### Ten Policies for a Fairer Australia

The next Federal Government should commit to the following policies for a fairer Australia:

1. A comprehensive poverty alleviation and social inclusion strategy, with holistic, concrete and measurable programs and targets, including in the areas of Indigenous disadvantage, mental illness, violence against women and homelessness.
2. Consolidated federal anti-discrimination legislation which actively promotes equality, provides comprehensive protection against discrimination and establishes reporting frameworks and requirements to measure progress. Equality can contribute to social cohesion, higher productivity and participation, and improved outcomes in areas including education and health.
3. Strengthened parliamentary engagement with human rights, including by enacting the Human Rights (Parliamentary Scrutiny) Bill 2010, requiring the preparation of reasoned Statements of Compatibility for all proposed legislation, and empowering the Joint Parliamentary Human Rights Committee to 'monitor national and international human rights obligations and provide suggestions and recommendations on how to best promote and protect human rights standards'.
4. An inquiry into the merits of constitutional amendment to enshrine the right to equality and non-discrimination.
5. A comprehensive federal Human Rights Act which provides legal recognition and protection of all civil, political, economic, social and cultural rights and establishes mechanisms to promote human dignity, good government and accountability.
6. The establishment of mechanisms to ensure independent monitoring, oversight and scrutiny of all places of detention, including prisons, immigration detention centres, juvenile justice facilities, police cells, psychiatric hospitals and disability institutions. The humane treatment of detainees contributes to rehabilitation, reduced recidivism, and safer and more cohesive communities.

7. The abolition of mandatory immigration detention and off-shore processing, an increase in Australia's humanitarian intake, and access to adequate housing, health care, education and work rights for refugees and asylum-seekers. The next Federal Government should also legislate to provide complementary protection in accordance with Australia's refugee and human rights law obligations.
8. A comprehensive review of Australia's counter-terrorism laws, policies and practices to ensure that they are consistent with international human rights standards and are reasonable, necessary, proportionate and effective.
9. Committing to use the *UN Declaration on the Rights of Indigenous Peoples* as the basis for Indigenous affairs, including in relation to: the National Congress of Australia's First Peoples; the commitment to 'Close the Gap'; the amendment of the Northern Territory Intervention and native title legislation; the provision of reparations to the Stolen Generations; the repayment of Stolen Wages; and Treaty negotiations.
10. A human rights-based approach to foreign policy, including by: undertaking Human Rights Impact Assessments across all areas of foreign affairs (including aid, development, trade, investment, business, labour, migration, defence, military cooperation, security and the environment); ensuring that human rights are incorporated into the objectives and activities of all regional organisations and processes in which Australia participates and that impact on human rights; and negotiating for bilateral and multilateral agreements to include human rights clauses and safeguards.

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