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

The Centre promotes and protects human rights through policy analysis, advocacy, strategic litigation and capacity building.

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

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

Opinion

Strengthening Democracy: HRLRC and GetUp! Case Restores Right to Vote to Over 100,000 Australians

On 6 August 2010, in an historic decision, the High Court struck down legislation which resulted in the early close of the electoral rolls and denied over 100,000 Australians the right to vote.

The decision was a landmark victory for representative democracy, political participation and accountable government.

The case was 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 resulted 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.

In the Centre’s view, it is crucial to representative democracy and accountable government that all people have the right, and the practical opportunity, to vote. As art 25(b) of the *International Covenant on Civil and Political Rights* provides, ‘every citizen shall have *the right and the opportunity...without unreasonable restrictions*, to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors’. The UN Human Rights Committee, in a General Comment, has confirmed that states have *positive* duties under art 25(b) to ensure that ‘disadvantaged citizens have the opportunity to vote and have access to information that helps them exercise this right meaningfully’. Expert commentary states that this establishes a ‘duty on States parties to guarantee with *positive measures* that all formally eligible persons have the *actual opportunity to exercise their political rights*...States parties must take positive steps to ensure that persons are truly able to exercise their right to vote’.

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The early close of the rolls, which occurred thanks to Howard-era amendments, denied over 100,000 people the opportunity and right to vote. The legislation disproportionately disenfranchised Indigenous Australians, young people, people experiencing homelessness and people in remote communities. In so doing, the legislation diminished our democracy.

The decision of the High Court, in ordering that the rolls stay open for at least 7 days to enable people to enrol or update their enrolment, restores and promotes the fundamental human right to vote and, in so doing, enhances democracy and promotes representative government.

The challenge to the early close of the rolls was jointly conceived and coordinated by the Human Rights Law Resource Centre and GetUp! and builds on the previous work of the Centre in establishing constitutional protection of the right to vote in the landmark High Court case of *Roach v The Commonwealth* [2007] HCA 43.

The matter was run pro bono by an outstanding legal team comprising Ron Merkel QC, Kristen Walker, Fiona Forsyth and Neil McAteer of Counsel, together with Mallesons Stephen Jaques.

The Court's order is available [here](#). Reasons will be published at a later date.

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

News

HRLRC Brings You the Latest Human Rights News and Views

The HRLRC now brings you the latest Australian human rights news, views and developments as they happen via Twitter (follow us at <http://twitter.com/rightsagenda>) and a weekly human rights news summary every Friday at www.hrlrc.org.au.

UN Committee on the Elimination of Discrimination against Women Releases Concluding Observations on Australia

On 30 July, the UN Committee on the Elimination of Discrimination against Women released its Concluding Observations following a review of Australia's compliance with the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW).

The Committee commented on a number of positive developments in Australia and welcomed the enactment of the *Paid Parental Leave Act 2010*, the ratification of the *Optional Protocol to CEDAW* and measures adopted to combat trafficking and support victims of trafficking. The Committee also acknowledged the progress made in promoting women in leadership positions and noted that two of Australia's highest public offices are occupied by women.

The Committee raised a number of serious concerns, including around legislative protection of women's rights, violence against women, participation in political and public life and the rights of disadvantaged groups of women, particularly Indigenous women, women with disabilities, migrant women, women from culturally and linguistically diverse backgrounds and women from remote or rural communities.

Some of the Committee's concrete recommendations for reform were that Australia should:

- give due consideration to the adoption of a Human Rights Act;
- fund and implement the National Action Plan to Reduce Violence against Women and their Children, including a mechanism for independent monitoring;
- adopt targeted measures to ensure the equal participation and representation of women in public and political life, with a particular focus on Aboriginal and Torres Straits Islander women and women with disabilities;
- develop a comprehensive child care policy to include out of school hours and vacation care and increase the supply of affordable and quality child care;
- prohibit, except where there is a serious threat to life or health, the sterilisation of girls and of adult women with disabilities in the absence of their fully informed and free consent; and
- integrate a gender perspective in its efforts aimed at achieving the Millennium Development Goals.

The Committee noted that the provisions of CEDAW are binding on Australia and that it expects any incoming government to observe the recommendations contained in the Concluding Observations.

The Committee's recommendations are at www.hrlrc.org.au/content/topics/equality/committee-on-the-elimination-of-discrimination-against-women-releases-concluding-observations-on-australia-august-2010/.

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

Australia Reviewed by UN Committee on Racial Discrimination

On 10 and 11 August 2010 the Australian Government attended a hearing at the United Nations Committee on Racial Discrimination ('CERD') in Geneva to explain some of its most controversial policies to that expert body on racism. CERD held a hearing as part of its review of Australia's performance of its legal obligations under the *Convention on the Elimination of All Forms of Racial Discrimination* to respect, protect and promote the human right to equality and freedom from racial discrimination.

Over the course of the one day hearing, CERD members asked the Australian Government delegation to provide information on a range of government laws, policies and practices that raise concerns in relation to racial discrimination. The Committee were particularly interested in hearing from the Australian delegation on:

- the Northern Territory Intervention measures such as welfare quarantining and suspension of the Racial Discrimination Act;
- issues affecting Aboriginal and Torres Strait Islander people, including:
 - the new National Congress of Australia's First Peoples;
 - deaths in custody and overrepresentation in the prison population;
 - ongoing disadvantageous outcomes for Aboriginal and Torres Strait Islander peoples in health, housing, education and employment;
 - difficulties of proving native title and obtaining land rights; and
 - remedies for past injustices, such as compensation to members of the Stolen Generations and for Stolen Wages;
- the mandatory detention of asylum seekers and refugees, including children, and the conditions in which people are held on Christmas Island;
- discrimination and prejudice in the community against migrants, particularly Indian people, and the prevalence of violent attacks against those communities; and
- the impact of counter-terrorism laws on Muslim and Tamil communities in Australia, including in particular the compounded impact on women.

The Committee also raised queries about the need for constitutional protection from racial discrimination and for Australian law to criminalise acts of racial hatred.

A delegation of Australian NGOs that work in race discrimination issues, and who had previously provided CERD members with written briefs, flew to Geneva to meet and brief CERD members in person on race discrimination issues. The NGO delegation was comprised of Louise Edwards from the National Association of Legal Centres, Les Malezer from Foundation for Aboriginal and Islander Research Action, Emily Howie from the Human Rights Law Resource Centre, Brian Wyatt from the National Native Title Council, Rodney Dillon and Louise Edwards from Amnesty International and two elders from Aboriginal communities in the Northern Territory.

A major NGO report, coordinated by the HRLRC and NALCLC, was provided to the Committee and is available at www.hrlrc.org.au/our-work/law-reform/ngo-reports/.

The NGO delegation was greatly enhanced by the attendance of two Aboriginal elders from the Northern Territory, Rev Dr Djiniyini Gondarra from Arnhem Land and Rosalie Kunoth-Monks from Utopia. I was struck by the power of Rosalie and Djiniyini's advocacy. They brought into the briefing rooms and meeting rooms of Geneva the sense of despair and injustice that is felt by people subject to the Northern Territory Intervention. As they spoke, they conjured the indignity for the women whose groceries are removed from their baskets at checkouts because the items they want are not allowed on

the Basics Card. They talked about the shame of the big blue signs at the entrance to Aboriginal communities that tarnish and stigmatise the people inside as alcoholics, paedophile and pornography addicts. They spoke from the heart and with conviction.

Australia's Race Discrimination Commissioner, Graeme Innes, also made a formal statement during the hearing about the state of race discrimination in Australia. That statement can be found at www.hreoc.gov.au/about/media/speeches/race/2010/20100811_CERD.html.

The hearing on Australia concluded on 11 August 2010 and Concluding Observations of the Committee are expected to be published on 27 August 2010.

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

National Human Rights Framework Developments

Tasmania Commits to a Charter of Human Rights in 2011

In June 2010 the Attorney General for Tasmania, the Hon Lara Giddings MP, announced that she will introduce a Bill for a Tasmanian Charter of Human Rights in mid-2011. The Attorney General also announced a series of steps which will inform the development of this Bill, comprising:

- the release of a 'Directions Paper' in September 2010;
- consultation with the Tasmanian community regarding the most appropriate model for a Tasmanian Charter of Rights in October/November 2010;
- the release of an Exposure Draft and further consultation on this draft in March 2011; and
- 'introduction of final Human Rights Charter Bill to Tasmanian Parliament' in mid 2011.

Announcing the project and timetable, the Attorney General noted that:

The Tasmanian Law Reform Institute also conducted a community consultation project in relation to human rights protection in 2006 and 2007. That consultation found strong support amongst respondents for stronger human rights protection in Tasmania. More particularly it found there was strong support for a charter of rights approach.

A charter will act as a statement about the values and principles of the community, and introduce standards to ensure that human rights are a priority for the government when making laws and decisions.

For further details see www.justice.tas.gov.au/corporateinfo/projects/human_rights_charter.

Equality Law Reform Project

The new Australian Human Rights Framework, released by the Federal Government in April 2010, included a commitment to 'harmonise and consolidate Commonwealth anti-discrimination laws to remove unnecessary regulatory overlap, address inconsistencies across laws and make the system more user-friendly'.

In August 2010, the HRLRC wrote to the Federal Government on behalf of over 40 human rights and community organisations setting out that we consider this commitment to be inadequate. The letter called on the Government to expand the scope of the so-called 'Consolidation Project' to strengthen and modernise our anti-discrimination regime and improve our laws to ensure that they:

- promote equality;
- provide comprehensive protection against discrimination; and
- establish reporting and measurement frameworks.

On 17 August, the HRLRC received a response from the ALP stating that:

If re-elected, we confirm that a Gillard Labor Government will harmonise and consolidate anti-discrimination laws as a key priority of our next term. As part of this exercise, Federal Labor will examine gaps in existing federal anti-discrimination laws and the adequacy of powers of the Australian Human Rights Commission and the complaint handling process.

As part of this exercise, Federal Labor will include protections against discrimination on the basis of a person's sexual orientation or gender status.

The commitment is repeated in the Attorney-General's Ministerial Statement, released on 13 August, which states that 'As part of the project to harmonise Australia's anti-discrimination laws, we will examine gaps in our laws, the effectiveness of remedies, and work to reduce the regulatory burden for business.'

At the Legal Debate between the Attorney-General and Shadow Attorney-General on 13 August, the Liberal Party also committed to include sexual orientation as a protected attribute in Federal anti-discrimination laws.

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

Victorian Charter of Rights Developments

Statements of Compatibility under the Victorian Charter

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

Equal Opportunity Bill 2010

The Equal Opportunity Bill 2010 replaces the *Equal Opportunity Act 1995* (Vic) as the legislative framework to protect Victorians against discrimination on the basis of certain characteristics such as race, sex, age and impairment. The Bill aims to improve Victorian equal opportunity law by:

- creating positive obligations to redress the impact of past or continuing disadvantage in certain circumstances;
- giving the Victorian Equal Opportunity and Human Rights Commission increased enforcement options to respond to systemic discrimination;
- extending protection from discrimination to people who work on a volunteer or unpaid basis;
- speeding up the disputes process by allowing people with a dispute to go directly to VCAT instead of requiring them to lodge a complaint first; and
- updating the exceptions to unlawful discrimination.

The Statement of Compatibility identifies a number of human rights contained in the *Charter* that are engaged by these measures. While the Bill protects the right to equality, the exceptions contained in the Bill limit this right in certain circumstances. Other human rights engaged by the Bill include:

- the right to freedom of association, which is limited through the prohibition against discrimination in relation to membership of clubs;
- the right to a fair hearing, which may be limited by the provisions allowing the Commission to order non-disclosure of information in certain circumstances;
- the right to freedom of expression, which is limited by the secrecy requirements that bind the Commission's staff and board members; and
- the right to be presumed innocent, which is limited by the formulation of the defence to the offence of discriminatory advertising.

The Government considers that these limitations are reasonable and justifiable under s 7(2) of the *Charter*.

Adrienne Lyle, Solicitor, and **Anthony Sciuto**, Law Graduate, Mallesons Stephen Jaques Human Rights Law Group

Victorian Charter Case Notes

Charter Rights Should be Construed Broadly and by Reference to International and Comparative Human Rights Jurisprudence

Director of Public Transport v XFJ [2010] VSC 319 (29 July 2010)

The Victorian Supreme Court has affirmed the importance of a broad approach to the construction of human rights in the *Charter*, including appropriate reliance on international human rights law and comparative jurisprudence.

Facts

This case concerned the accreditation of XFJ to drive a taxi.

In 1990, XFJ killed his wife and attempted suicide after experiencing profound trauma, but was found not guilty by reason of insanity. He was detained in custody at the Governor's pleasure and released into the community in 1998. For the last 14 years, XFJ has been 'symptom free'. He was described as 'intelligent and insightful', and no more likely than any other member of the community to re-offend. He had undertaken charity work with the elderly and people experiencing homelessness, but required flexible paid employment to enable him to care for his 19 month old son with leukaemia. He sought a taxi licence for this purpose.

The Director of Public Transport appealed a decision of VCAT to accredit XFJ as a suitable person to drive a taxi. The Victorian Equal Opportunity and Human Rights Commission intervened in the proceeding to make submissions about the relevance of the *Charter*.

Decision

Justice Ross dismissed the Director's appeal and affirmed XFJ's suitability for accreditation. The case was not decided on *Charter* grounds. Justice Ross did, however, make a number of observations about the *Charter* in obiter, including that:

- Section 32(1) of the *Charter* is a statutory directive which requires 'exploring all possible interpretations of the provisions in question and adopting that interpretation which least infringes Charter rights' (see also *R v Momcilovic* [2010] VSCA 50).
- The right to equality and non-discrimination under s 8 of the *Charter*, 'like other rights protected by the Charter, should be construed broadly' (see also *DAS v VEOHRC* [2009] VSC 381).
- 'There is considerable support in the international jurisprudence for the adoption of a flexible approach to the question of the appropriate comparator in the context of the equality right' and a 'different approach to disability discrimination' than that currently prevailing in Australia under the *Disability Discrimination Act 1992* (Cth) (see, eg, *Novia Scotia (Workers' Compensation Board) v Martin* [2003] 2 SCR 504).
- There was 'considerable force in the Commission's submissions' that 'interpretation of the Charter requires consideration of general human rights standards and jurisprudence, not simply the application of domestic cases concerning different statutory regimes'.

Read together with the decision of Emerton J in *Castles v Secretary to the Department of Justice* [2010] VSC 310 (which 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'), the decision of Kaye J in *WBM v Chief Commissioner of Police* [2010] VSC 219, in which his Honour eschewed reliance upon international jurisprudence in interpreting the right to privacy under the *Charter*, is increasingly isolated and anomalous.

The decision is at www.austlii.edu.au/au/cases/vic/VSC/2010/319.html.

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

Tribunal has Jurisdiction to Determine whether Public Authority has Acted Compatibly with Human Rights

Director of Housing v TK [2010] VCAT Application 2010/11921 (Unreported, 22 July 2010)

VCAT Deputy President Lambrick has held that the Tribunal has jurisdiction to determine whether an application made pursuant to ss 250 and 330(1) of the *Residential Tenancies Act* has been made in breach of the *Charter*. This affirms the decision of Bell J in *Director of Housing v Sudi* [2010] VCAT 328.

Facts

The Director of Housing applied to VCAT for a jurisdictional hearing, essentially requesting Lambrick DP to consider whether the Tribunal should follow the decision of Bell J, sitting as President of VCAT, in the case of *Director of Housing v Sudi* [2010] VCAT 328. In that case, Bell J held that the Tribunal had

jurisdiction to consider and determine *Charter* issues. In doing so, Bell J pointed out that 'human rights remedies must be accessible in order to be effective'.

Justice Bell's finding that the Tribunal had jurisdiction to determine *Charter* issues was central to the outcome and resolution of Sudi's case. This is because Bell J ultimately held that the Director of Housing had acted unlawfully under s 38(1) of the *Charter* in seeking, without adequate justification, to evict a refugee family from social housing in breach of their right to family and home under s 13(a).

Justice Bell further held that this unlawfulness invalidated the Director's application for a possession order under s 344 of the *Residential Tenancies Act*. Had *Charter* issues been incapable of determination by the Tribunal in that case, it would have been necessary for the matter to be partly heard in the Supreme Court. Justice Bell took the view that this would have been a 'bad outcome' for access to justice and contrary to the principles of 'finality and complete dispute resolution'.

Decision

Lambrick DP decided to follow the decision of Bell J. The Deputy President's reasons were primarily based on the 'general principle of comity', holding that:

The general principle of comity between co-ordinate divisions of the same court has great relevance to tribunals and requires that I should follow the decision of another member of the tribunal unless I am convinced that it is wrong. There is much sense in the principle. It allows for consistency of decision-making and it also enables prospective litigants to have some certainty of outcome. It is not in the interests of efficient justice to have diverse rulings of the tribunal on the same issue.

Lambrick DP went on to comment that:

There is particular efficacy for adopting such an approach in this case. The decision was a decision of the former President of the Tribunal, delivered on his last day in the role. His Honour heard extensive submissions from counsel and took considerable time and care in reaching his conclusions. He took into consideration both Australian and international jurisprudence. He referred to earlier decisions of the tribunal. He purposefully stated the case as being a test case on the issue making it clear that it was his intention that members of the tribunal should follow the decision. Cases, including this one, were adjourned by parties in consequence of the decision being delivered.

Significance to the application of the *Charter*

Lambrick DP summarised the significance of Justice Bell's approach in the following terms:

There is no doubt that *Sudi's* case has the potential for changing the manner in which some matters will proceed before the tribunal. In some possession applications, involving public authorities time will be dedicated to arguments surrounding the *Charter* issues in addition to the application of the *Residential Tenancies Act 1997*.

Lambrick DP then went on to note that the necessity to dedicate time to *Charter* arguments in some possession applications '[i]s not a reason to disregard significant Victorian legislation. Nor is the fact that the *Residential Tenancies Act* does not, (for the most part), distinguish between private and public landlords'.

Lambrick DP observed that:

The *Charter* is in its infancy in terms of jurisprudence. The extent of its application within courts and tribunals is yet to be fully determined. Although I have some sympathy with the applicant's contention that the tribunal as a creature of statute must never venture outside the enabling enactments which give it its jurisdiction, there is also some considerable force in the findings of Justice Bell in *Sudi's* case, that the tribunal should not and cannot entertain an application founded on illegality.

As pointed out by Lambrick DP, *Sudi's* case has been taken on appeal and it is possible that the decision of Bell J could be overruled by the Court of Appeal. The decision of Lambrick DP has not been published.

Jacqui Bell is on secondment to the Human Rights Law Resource Centre from Blake Dawson

VCAT Considers Right to Equality and Retrospective Operation of the *Charter*

Valentine v Emergency Services Superannuation Board [2010] VCAT No G585/2008 (29 July 2010)

The Victorian Civil and Administrative Tribunal has held that s 32 of the *Charter* does not apply retrospectively to affect the interpretation of the *State Superannuation Act 1988* (Vic) insofar as it

governs spousal pension entitlements anytime before 1 January 2008 (when s 32 came into effect). Nonetheless, VCAT Deputy President Macnamara found that the State Superannuation Board's position did not directly or indirectly discriminate against the applicant on the basis of her marital status, such that s 8 of the *Charter*, providing for equality before the law, would not have been violated. However, it was suggested in relation to s 14 of the *Charter*, which protects the right to freedom of thought, conscience, religion and belief, that a legal interpretation which imposed a significant financial penalty on a citizen who adhered to her religious beliefs about marriage could be viewed as limiting the freedom of religion or belief in practice.

Facts

The applicant's husband was a member of a superannuation scheme administered under the Act, which provided for the payment of a spousal pension to the applicant upon the death of her husband. However, pursuant to s 37(2) of the Act, a spouse's entitlement to a pension would be suspended during any period of remarriage. Upon her husband's death in 1983, the applicant applied for and was granted spouse and children's pensions for herself and her three children by the Board, consistent with the rules of the superannuation scheme. The applicant remarried in 1989, and the Board suspended her spousal pension in 1990. In 1993, s 37(2) of the Act was repealed. Following this amendment, the applicant made a number of informal requests to the Board seeking to recover pension entitlements said to have accrued to her since the repeal of s 37(2) of the Act. In 2008, the applicant again wrote to the Board, formally requesting that it consider her application for reinstatement of her spousal pension with effect from 30 November 1993. On 18 July 2008, the Board notified the applicant that it had declined her request, following which she applied to VCAT for a review of the Board's decision.

The applicant submitted that s 37(2) of the Act, prior to repeal, should be interpreted compatibly with the *Charter* and that the s 32 interpretative obligation required the effect of the repeal of s 37(2)(a) to be interpreted as having reinstated her previous entitlement to the spousal pension. The Board contended that s 32 of the *Charter* could not apply retrospectively to determine the applicant's entitlement to a spousal pension in 1993. Further, even if it did govern the current situation, the Board argued that there had been no infringement of the applicant's human rights, or that the discrimination was justified under s 7(2) of the *Charter* on the basis of 'needs' and the social context in which the provisions developed.

Decision

Retrospectivity of s 32

Section 32 of the *Charter* contains an obligation to interpret all statutory provisions, as far as possible, in a way that is compatible with human rights. Section 49 of the *Charter* is a transitional provision, which provides that the *Charter* extends and applies to all Acts, whether passed before or after 1 January 2007 (the commencement date of Part 2 of the *Charter*, entitled 'Human Rights'), but that it does not affect any proceedings commenced or concluded before that date. In considering whether s 32 of the *Charter* has retrospective effect, VCAT Deputy President Macnamara cited the conclusion of Bell J in *Kracke v Mental Health Review Board* [2009] VCAT 646, that s 49:

makes the special interpretative obligation in s 32(1) retrospective in the sense that it applies to past legislation. It is one thing to make such an obligation apply to past legislation. It is quite another to make it apply to the operation of past legislation on past events the settled legal relations arising from them.

Applying Bell J's approach in *Kracke*, Deputy President Macnamara held that s 32 did not have retrospective operation, and as such, the *Charter* provisions did not apply to the *State Superannuation Act*, insofar as it governed the applicant's pension entitlements anytime before 1 January 2008. He noted that, if the *Charter* were to apply, the repeal of s 37(2)(a) of the Act could have a different meaning and consequence after 1 January 2008 (when s 32 of the *Charter* came into force) than it did before. As there was no new post-*Charter* event bearing on the operation of this provision vis-à-vis the applicant, Deputy President Macnamara concluded that:

the cessation of [the applicant's] pension in 1990 is one of the 'settled relations' which remain undisturbed by the operation of section 32, whether one considers that situation by reference to pension payments that she might otherwise have received in 2006 for instance, or those which she might have received in 2008.

In light of this conclusion, Deputy President Macnamara observed that the outcome of the proceedings largely depended on the proper construction of the *State Superannuation Act*, in accordance with the rules of statutory interpretation existing at that time. Relying on both a common law presumption

against giving substantive changes to the law retrospective operation, as well as s 14(2)(d) of the *Interpretation of Legislation Act 1984* (Vic) (which provides that when an Act or provision is repealed, the repeal shall not affect the previous operation of, or anything done or suffered under, that Act or provision), it was held that the repeal of s 37(2)(a) of the Act was not retrospective.

Whilst these findings, according to Deputy President Macnamara, determined the proceeding entirely in the Board's favour, he continued to consider the effect that s 32 of the *Charter* would have had if it did apply to determine the meaning of relevant provisions of the Act.

For reasons not made clear in the decision, the applicant submitted that it was unnecessary for VCAT to consider the operation of s 38 of the *Charter*. As such, the extent to which the Board or VCAT in its review jurisdiction was bound to give proper consideration to the applicant's human rights, as required by s 38 of the *Charter*, was not considered.

Equality before the law (s 8)

Deputy President Macnamara observed that s 8 of the *Charter* generally prohibits discrimination, but specifically permits 'positive discrimination' in favour of particular groups in society, using as an example the nation's indigenous people. He noted that what constitutes discrimination is not 'left at large', as it is defined in s 3 of the *Charter*, and informed and guided by s 6 of the *Equal Opportunity Act 1995* (Vic). The *Equal Opportunity Act* prohibits two kinds of discrimination, direct and indirect, the content and operation of which depend on what matters are considered to be 'attributes' for the purposes of that Act. Deputy President Macnamara highlighted that 'marital status' is one such attribute.

According to the applicant, the Board's interpretation of s 37 of the Act both directly and indirectly discriminated against her on the basis of her marital status, and thereby violated the s 8 *Charter* entitlement to equality. Directly, the applicant was said to have been treated less favourably than a spousal pension recipient who remarried after 30 November 1993. However, Deputy President Macnamara accepted the Board's submission that as 'marriage status' is a relevant attribute, not the 'date of marriage', there were no facts giving rise to a claim of direct discrimination. The extent to which 'date of marriage' is synonymous with 'marriage status' at a particular date was not discussed.

Deputy President Macnamara also rejected the applicant's argument that she had suffered indirect discrimination – in that the Board had imposed an 'unreasonable requirement' that she somehow terminate her remarriage – as discrimination of this kind requires that the person cannot do what is being required of him/her, and that the requirement is unreasonable.

Freedom of thought, conscience, religion and belief (s 14)

Invoking s 14 of the *Charter*, the applicant contended that the Board penalised persons in her position who, on religious grounds, were averse to cohabitation without marriage or a kind of 'divorce of convenience'. Deputy President Macnamara suggested that an argument could be raised based on s 14 of the *Charter*, in that the imposition of a 'penalty' on the applicant for her living in 'lawful matrimony' with her second husband rather than 'in sin' constituted a violation of her religious beliefs:

A legal interpretation which would impose a significant financial penalty upon a citizen who adhered to her religious beliefs relative to matrimony could be regarded as a coercion or a restraint in her freedom to have or adopt a religion or belief in practice.

However, given that the applicant's arguments based on the *Charter* were unsuccessful, it was unnecessary for Deputy President Macnamara to decide this question.

The decision has not yet been published.

Georgina Dimopoulos is a Law Graduate and **Monique Carroll** is a Senior Associate with Allens Arthur Robinson

Application of the Charter to Public Sector Employment Decisions and Practices

Quinn v Overland [2010] FCA 799 (28 July 2010)

The Federal Court of Australia has found that there is a serious issue to be tried that s 20(3)(c) of the *Public Administration Act 2004* (Vic) ('the PA Act') places a statutory duty on public sector employers to conform with 'public sector employment principles'. Although not directly relevant to this case, s 8(ca) of the PA Act defines public sector employment principles to include 'employment processes that will

ensure that... human rights as set out in the *Charter of Human Rights and Responsibilities* are upheld'. This decision also supports the view that employment policies established for the purpose of s 8(ca) constitute statutory duties that must be upheld by public sector employers.

Facts

Ms Quinn sought an injunction to prevent the respondents from continuing to suspend her from employment. She was employed as a permanent officer of the Victorian Public Service as manager of the Drug and Alcohol Branch of the Victoria Police Forensic Services Centre. In light of a report of the Victorian Ombudsman which (among other things) concluded that arrangements for dealing with the management of drug exhibits were ineffective, Ms Quinn was advised that she would be suspended with pay. Over a period of seven months from the date of suspension on 10 December 2009, three different investigators were appointed by the respondents to investigate the conduct of Ms Quinn. The findings of each investigator varied and eventually, on 14 July 2010, the original suspension of employment was replaced by a fresh suspension based on the findings of the third investigator. This fresh suspension occurred following the interlocutory hearing but prior to judgment being delivered. The respondents were granted leave to reopen the hearing.

Justice Bromberg had to consider whether there was a serious issue to be tried that ss 20(3)(c) and 8 of the PA Act placed statutory duties on public sector employers, creating corresponding private rights capable of being pursued by public sector employees. In summary, s 20(3)(c) of the PA Act provides that, when exercising duties as an employer, a public service body Head must exercise a right, power or authority in conformity with the public sector employment principles. At issue in the case was the public sector employment principle contained in s 8(b), which provides that employment processes must be established that will ensure that 'public sector employees are treated fairly and reasonably'.

Justice Bromberg had to consider whether it was arguable that a clause of a relevant certified agreement was applicable in the circumstances by virtue of it being established for the purpose of s 8, or it being otherwise arguably applicable pursuant to the obligation imposed by s 20(3)(c) read alone. The relevant certified agreement could not be directly enforced via an injunction due to it being deemed a 'transitional instrument' under Fair Work laws. The clause in question (clause 17.8) dealt with the circumstances in which an employee could be suspended from employment. It was arguable that the second respondent had not complied with clause 17.8 (and other related clauses) in the circumstances.

Decision

While Justice Bromberg stated that it was 'neither appropriate nor necessary' that he 'reach a definitive view as to the statutory obligations imposed upon the second respondent by the PA Act', his Honour was satisfied that there was a serious issue to be tried that 'in making the decision to suspend Ms Quinn, the second respondent exercised its power under the PA Act'.

His Honour held that it was arguable that s 20(3)(c) identified s 8 as containing the relevant public sector employment principles that the respondents were required to conform with as employer, including the duty to treat Ms Quinn fairly and reasonably. His Honour found that treating Ms Quinn fairly and reasonably necessarily required at a minimum, that the respondents comply with the employment policy that incorporated clause 17.8 by reference. His Honour found it arguable that s 20(3)(c) imposed this statutory duty independently of s 8.

His Honour also found it arguable that s 8, either operating alone or in combination with s 20(3), imposed an obligation on the respondents to comply with clause 17.8. Because s 8 required the establishment of employment processes that would 'ensure' compliance with the principle identified (in this case, that public sector employees be treated fairly and reasonably), it was arguable that s 8 placed an obligation on public service body Heads to comply with those processes. This meant that each process established for the purpose of making sure public sector employees were treated fairly and reasonably (including, in this case, the processes set out in clause 17.8), became a requirement of s 8 itself, rather than a process merely established pursuant to s 8. As a result, it was arguable that a breach of clause 17.8 could constitute a breach of statutory duty either pursuant to s 8 operating alone or in conjunction with s 20(3).

On the facts, it was found that it was seriously arguable that Ms Quinn's suspension of employment had been invalid by reason of breach of a statutory duty, and after considering other relevant issues, his Honour granted the injunction to restrain the respondents from suspending Ms Quinn's employment.

Human Rights Implications of the Decision

Although it was not relevant to the case, s 8(ca) defines public sector employment principles to include 'employment processes that will ensure that... human rights as set out in the Charter of Rights and Responsibilities are upheld'. The decision of Bromberg J indicates that ss 20(3)(c) and 8(ca) place statutory duties on public sector Heads, also creating corresponding rights capable of being pursued by public sector employees seeking relief against employment practices that breach their human rights contained in the *Charter*.

Further, if workplace processes are established by public sector Heads to ensure that *Charter* rights are upheld in the workplace, Bromberg J's decision lends weight to the argument that those processes form part of the statutory duties and corresponding rights contained in sections 20(3)(c) and 8(ca) of the PA Act.

The decision is at www.austlii.edu.au/au/cases/cth/FCA/2010/799.html.

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Comparative Law Case Notes

What Level of Inquiry and Analysis is Required to Determine the Reasonableness of a Police Search?

R v Cornell, 2010 SCC 31 (30 July 2010)

The Supreme Court of Canada has considered the level of inquiry and analysis required to be conducted by police when determining whether a forced entry into a premise is reasonable, consistent with the right to be secure from unreasonable search and seizure.

Facts

Police had been investigating a 'dial-a-dope' cocaine trafficking operation. 'N' and 'T' had histories of violence and association with an organised criminal group. Whilst Cornell did not have a criminal record and was not believed to be a member of the group, police surveillance had spotted N entering Cornell's residence for short periods on four occasions. Further, police found a mobile phone registered to Cornell in N's vehicle.

The police obtained a warrant to search Cornell's residence. Prior to executing the warrant, N was detained in police custody. The police tactical team undertook a 'dynamic' entry, ramming down Cornell's door without knocking or announcing their presence. Nine police officers, wearing balaclavas and body armour, entered the house with weapons drawn. The only person in the house was Cornell's intellectually disabled brother, who was brought down by police and handcuffed. Cocaine was discovered in Cornell's bedroom, which Cornell admitted was for the purpose of trafficking.

Cornell submitted that the cocaine was seized through a violation of s 8 of the *Canadian Charter of Rights and Freedoms*, which provides a right to be secure against unreasonable search or seizure. Cornell further submitted that the evidence should not have been admitted pursuant to s 24(2) of the *Charter*, as it would bring the administration of justice into disrepute.

As the search had been lawfully authorised, the issue for the Supreme Court was whether the search had been conducted in a reasonable manner.

Decision

In a decision that turned on the specific facts of the case, the Supreme Court, by a majority of 4-3, determined that the search had been conducted reasonably.

The majority and minority both considered the common law 'knock and announce', principle when considering whether the search was conducted reasonably. This principle requires that there be notice of presence, notice of authority and notice of purpose, being the lawful reasons for entry. The principle is not absolute, and in cases of departure from this principle, police carry the onus of establishing why it

was necessary. The police must be judged by what was, or should reasonably have been, known to them at the time.

Majority Judgment

The majority held that the police had well founded fears in relation to their safety and the occupants of the house based on their reasonable belief that Cornell's residence was being used in a drug trafficking enterprise and because a known trafficker who associated with violent people was welcome in the Cornell residence. The police were entitled to draw reasonable inferences from such facts, without making a separate assessment of the real threat of violence from the Cornell residence. The majority were of the view that 'Section 8 of the Charter does not require the police to put their lives or safety on the line if there is even a low risk of weapons being present'.

It was accepted that the police had reasonable grounds to believe that evidence would be destroyed. Cocaine, a substance easily destroyed, was suspected to be on the premises. The police did not know who was in the house or whether there was any person that would destroy the evidence upon becoming aware that police were at the door. That N was known to be in police custody did not affect the reasonableness of the search.

Dissenting Judgment

The minority noted that there was no reason to suspect that weapons were on the premises. The decision-making of the Police was criticised for failing to make reasonable inquiries to ascertain the nature of the premises, the identities or backgrounds of the occupants and the real risk of resistance.

The minority were concerned by the wearing of balaclavas by police, making the following observation:

Gratuitous intimidation of this sort – psychological violence entirely unrelated to the particular circumstances of the search – may in itself render a search unreasonable. Moreover, anonymity in the exercise of power, particularly state power, invites in some a sense of detachment and a feeling of impunity.

In relation to risk of evidence being destroyed, the minority noted that:

It is well established that generic information about the potential presence of drugs in a home is insufficient to warrant so drastic a violation of its occupants' constitutional rights.

The minority's view was that the s 8 violation was not minor or technical; rather it represented an 'armed, sudden and violent assault by masked intruders on a private residence without reasonable justification'. As a result, the evidence obtained should have been excluded pursuant to s 24(2) of the Charter.

That the dynamic entry appeared to be driven more by general police practice rather than specific information about Cornell rendered the infringement more serious because it highlighted that it was systemic in nature, despite past judicial condemnation.

In characterising the impact of the s 8 violation, the minority noted that the right to be secure against unreasonable search and seizure is long recognised at common law. The expectation of privacy is at its highest in the home. An unreasonable search that intrudes into an area where individuals enjoy a high expectation of privacy renders the intrusion more serious.

The privacy interest protected by s 8 is most actively engaged in the context of a private residence, and society's interest in the adjudication of this case on its merits does not outweigh the interests of society, in the longer term, in discouraging routine disregard by police of constitutional, statutory and common law safeguards designed to protect the sanctity of a person's home.

Relevance to the Victorian Charter

Whilst the Victorian *Charter* does not expressly provide for a right to be secure against unreasonable search and seizure, the discussion of the expectation of privacy within the home may be useful in interpreting s 13 of the Victorian *Charter*, which protects the right of persons not to have their privacy, family, home or correspondence arbitrarily interfered with. It may also assist with the interpretation of s 20, which prevents a public authority from depriving Victorians of their property, other than in accordance with the law.

The decision is at www.canlii.org/en/ca/scc/doc/2010/2010scc31/2010scc31.html.

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When Will Damages be a Just and Appropriate Remedy for Breach of Human Rights?

City of Vancouver v Ward 2010 SCC 27 (23 July 2010)

The Supreme Court of Canada has handed down a significant judgment on the availability of damages for a breach of human rights under the Canadian Charter of Rights and Freedom. *City of Vancouver v Ward* provides a four-step test for the determination of when damages are an appropriate remedy and what its quantum should be to achieve an appropriate and just result.

Facts

In 2002 the claimant, Mr Ward, attended a ceremony at which the Canadian Prime Minister was present to mark the opening of a gate to the entrance of Vancouver's Chinatown. The police received a tip that an unknown individual would attempt to assault the Prime Minister by throwing a pie at him. Police were provided a description of the general appearance and attire of a man aged in his 30s.

The police identified Mr Ward as the would-be culprit, even though he did not match the suspect's profile. He was chased and arrested for breach of the peace. Mr Ward strongly protested his innocence but was nonetheless taken to the police station, where he was strip searched and detained for four and a half hours in a small cell. The police also impounded his car which they intended to search once a warrant had been obtained. During the course of Mr Ward's detention, however, police realised they did not have evidence to support a charge of attempted assault, or to obtain a search warrant. Mr Ward was not the would-be culprit. Mr Ward was subsequently released without charge.

The claimant brought an action in tort and for the breach of his human rights.

At first instance, Tyson J of the Supreme Court of British Columbia found that the State had acted in violation of Mr Ward's Charter rights by conducting the strip search and seizing the vehicle (2007 BCSC 3). This was contrary to the right to be free from unreasonable search and seizure under s 8 of the Canadian Charter. His imprisonment also amounted to a breach of Mr Ward's right under s 9 not to be arbitrarily detained or imprisoned and resulted in the State's commission of the tort of wrongful imprisonment.

Justice Tyson awarded damages in the amount of \$5000 for the strip search and \$100 for the seizure of the vehicle pursuant to s 24(1) of the Canadian Charter. This decision was affirmed on appeal before the British Columbia Court of Appeal (2009 BCCA 23).

The City of Vancouver appealed to the Supreme Court of Canada.

Decision

Section 24(1) of the Canadian Charter provides:

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

The Canadian courts have variably used this provision to issue a broad range of remedies, including declarations, injunctions and damages.

However, as McLachlin CJ stated in the introductory remarks of the Supreme Court of Canada's ruling in this case:

Although the *Charter* is 28 years old, authority on this question [of awarding damages] is sparse, inviting a comprehensive analysis of the object of damages for *Charter* breaches and the considerations that guide their award.

The Court undertook a comprehensive analysis of the appropriateness of damages in cases of human rights breaches. The scope of section 24(1) was found to grant courts a wide discretion, which should not be placed in a 'strait-jacket of judicially prescribed conditions'. Rather, the courts' discretion is fettered only by the limitation that the remedy must be 'appropriate and just', which will be determined by the facts and circumstances of each case.

The Court affirmed that damages could be an appropriate remedy in human rights cases, in the sense that damages could satisfy the general considerations for appropriateness and justness as previously stated by the courts:

[A]n appropriate and just remedy will: (1) meaningfully vindicate the rights and freedoms of the claimants; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and (4) be fair to the party against whom the order is made.

The four-step test

In determining whether damages were an appropriate and just measure to recompense Mr Ward, the Court affirmed the decision of the lower courts with respect to the strip search, but not for the vehicle seizure. A four step analytical process was followed:

1. Has a Charter breach been established?
2. Will damages serve a useful function or purpose?
3. Are there countervailing considerations that would render damages inappropriate or unjust?
4. What quantum of damages would be appropriate and just?

With respect to step 1, there was no question that s 8 of the Canadian Charter had been breached by the conduct of the police in arresting and detaining Mr Ward.

With respect to step 2, damages should achieve compensation, vindication and deterrence. The objectives of the Charter necessarily required this; these functions also reflected the legal principles underlying public law damages for constitutional breaches. Compensation recognised and addressed any loss to the claimant caused by a human rights contravention, including physical, psychological and pecuniary losses. This might also include 'intangible losses' such as distress, humiliation, embarrassment and anxiety. The purpose of vindication, however, was not to remedy the loss of the individual, but rather to recognise that a Charter breach caused harm to society as a whole. Finally, deterrence invoked the task of influencing government behaviour to foster greater compliance with Charter rights and responsibilities in the future.

With respect to step 3, the Court stated:

[E]ven if the claimant establishes that damages are functionally justified, the state may establish that other considerations render s 24(1) damages inappropriate or unjust. A complete catalogue of countervailing considerations remains to be developed as the law in this area matures. At this point, however, two considerations are apparent: the existence of alternative remedies and concerns for good governance.

Alternative remedies could include other Charter remedies such as declarations, private law remedies for actions for personal injury, and remedies for actions covered by legislation permitting proceedings against the state. Declaratory relief has been seen to be sufficient in cases where a claimant has not suffered personal damage. The existence of a potential private law action (such as a tort) does not bar a claimant from seeking Charter remedies, except where it would result in double compensation.

On the issue of good governance, it was open to the state to advance that a monetary award could have an adverse impact by deterring active governance, but this was not a matter of course since damages could equally promote good governance by encouraging Charter compliance. Also, the public law context provides that the state cannot be held liable for damages arising from actions undertaken pursuant to a valid statute that is subsequently declared invalid as this would inhibit effective decision-making. 'Practical wisdom' and procedural requirements may also be relevant considerations.

With respect to step 4, the quantum of damages must also be 'appropriate and just' in the circumstances. The Court referred to existing jurisprudence which provided that the seriousness of the breach is the principal determinant of quantum. Seriousness relates to the impact on the claimant and the nature of the state's conduct. The quantum must also be fair to both the claimant and the state. Relevant factors include public interest in good governance and not diverting (substantial) state resources away from public programs.

Application to Mr Ward's claim

The Court found that the strip search was a serious breach of the right to be protected against unreasonable searches. Strip searches were 'inherently humiliating and degrading' and led to 'significant injury to an individual's intangible interests'. In Mr Ward's case, the strip search was 'unnecessary and violative' in all the circumstances, in particular in the context of the minor nature of the alleged offence and the minimal risk of harm Mr Ward posed. This displayed the police's insensitivity to Charter concerns. Thus an award of damages (in the amount determined at first instance) was

appropriate because the strip search caused significant injury to Mr Ward, and arose from significantly inappropriate police conduct. The state was not able to convince the Court that alternative remedies were appropriate.

However, in the case of the vehicle seizure, the Court held that a declaration of Charter breach was sufficient. Important factors were that Mr Ward had suffered no loss (thus compensation was not necessary), and whilst wrong, the seizure was not sufficiently serious to warrant an award of damages to vindicate the breach or to deter future breaches.

Relevance to the Victorian Charter

This decision is a landmark ruling on the availability and appropriateness of monetary compensation in instances of human rights breaches. It confirms the need to give human rights law the 'teeth' it requires to bring attention to the real and serious nature of rights violations.

While other remedies, such as declarations and injunctions, are and remain important powers available to the courts, financial penalties can have a much greater impact on the 'bottom line' by putting a price on belligerence.

In Victoria, the powers of the courts are significantly more constrained compared to the Canadian jurisdiction. Section 39(3) expressly provides that a person is not entitled to be awarded any damages because of a breach of *Charter* rights.

But other remedies are available pursuant to section 39(1), which permits a person to raise unlawfulness under the *Charter* only if they otherwise have a cause of action to seek relief or remedy against an act or decision of a public authority. In *Kracke v Mental Health Review Board* [2009] VCAT 646 (Justice Bell), the Tribunal had this to say about *Charter* remedies generally:

As to remedies, the Charter is not a toothless tiger. It confers power on the Supreme Court of Victoria to make a declaration of inconsistent interpretation. It extends the power of courts or tribunals to grant relief or remedies for unlawful acts or decisions of a public authority to a ground of unlawfulness arising under the Charter. It expressly preserves the existing powers of courts or tribunals to grant relief or remedies, including declarations of unlawfulness, in respect of the acts or decisions of public authorities. The existing powers of the tribunal to grant any remedies or relief in proceedings before it is thus in no way limited by the provisions of the Charter (except to the extent that granting any such remedy or relief itself might be incompatible with human rights).

The concepts of compensation and vindication were applied by Bell J to acknowledge the fact that a breach of human rights has both a personal dimension (to the injured individual) and a societal dimension. Therefore, while the four-step test established in *City of Vancouver v Ward* may not be directly applicable in the Victorian setting, the principles affirmed by the Supreme Court of Canada are relevant and instructive in the development of the Victorian approach to *Charter* remedies generally.

The decision is at www.canlii.org/en/ca/scc/doc/2010/2010scc27/2010scc27.html.

Sara Law is a lawyer who will soon join the Administrative Law Branch of the Victorian Government Solicitor's Office.

Right to Equality: Recognising and Prohibiting Discrimination beyond 'Innate' or 'Inherent' Characteristics

Clift v United Kingdom [2010] ECHR 1106 (13 July 2010)

In *Clift v The United Kingdom*, the European Court of Human Rights gave a broad reading to art 14 of the *European Convention of Human Rights*, finding that a person's status as a particular class of prisoner could be a ground of discrimination under the Convention.

Facts

Clift had been serving a sentence of 18 years' imprisonment. In accordance with the law at the time, he became eligible for release on parole in 2002, and entitled to release in 2005. In order to qualify for release on parole, prisoners serving determinate (fixed-term) sentences of more than 15 years' imprisonment required the recommendation of the Parole Board and further approval by the Secretary of State. For prisoners serving a fixed-term sentence of less than 15 years, or prisoners serving an indeterminate (life) sentence, the further step of approval by the Secretary was not required.

Clift was denied release in 2002 by the Secretary, despite a positive recommendation by the Parole Board. He was later released on licence, but two years after his initial eligibility for release. Clift claimed that the Secretary's decision to deny his release constituted discrimination on the ground of his status as a prisoner serving a sentence of 15 years or more. He argued that he was in an analogous position to fixed-term prisoners serving sentences of less than 15 years, but treated less favourably by the imposition of a more stringent requirement for release. He argued that the discrimination was objectively unjustifiable. He alleged that this violated art 14 of the Convention (which prohibits discrimination), considered in conjunction with art 5 (which protects the right to liberty and security of person).

Clift's claim was unsuccessful before the Divisional Court, on appeal to the Court of Appeal, and before the House of Lords. Clift then appealed to the European Court of Human Rights.

The main issue before the Court was whether or not the alleged ground of discrimination – the applicant's status as a certain class of prisoner – fell within the ambit of art 14. In particular, did the ground of 'other status' mentioned in art 14 extend to cover a status that was not 'personal' to the complainant but rather the result of a distinction made by law (between certain classes of prisoner) or because of the conduct of the complainant. The United Kingdom government argued that these characteristics were divorced from the 'innate' character of the individual, and therefore were not covered by the section. The applicant argued that in light of the purpose of the Convention to protect human rights, the words of art 14 should not be strictly construed.

Decision

The Court began by acknowledging that the alleged basis of discrimination did not expressly fall within the terms of art 14. However, they recognised that the grounds listed in art 14 were 'illustrative and not exhaustive'. The Court accepted that some of the grounds specifically relate to 'innate' or 'inherently personal' characteristics. However, it was noted that in the past, the Court has accepted that the word 'status' has been given a broad reading and not restricted in this way. The decision in *James and Others v the United Kingdom*, 21 February 1986, in which the alleged ground of discrimination was a difference between large and small property owners, was mentioned, as was the decision in *Engel and Others v the Netherlands*, 8 June 1976, where the Court held that a distinction based on military rank could run counter to art 14. The Court concluded that the applicant, in being classified as a certain type of prisoner, did enjoy 'other status' for the purposes of Article 14.

In determining whether the applicant was in an 'analogous position to other prisoners treated more favourably,' a requirement under art 14, the Court said that the comparator need not be identical to the applicant; the fact that there were 'differences' between the groups did not preclude the application of art 14. As the same principles were used to assess the risk posed by long-term prisoners serving less than 15 years and long-term prisoners serving 15 years or more, the applicant was deemed to have been in the same circumstances as prisoners serving less than 15 years.

The Court then considered whether the applicant was treated less favourably without objective justification. They accepted that more stringent early release criteria might be justified with respect to some prisoners who may pose a higher risk to the public. However, they said that in this case, applying more stringent criteria to prisoners serving determinate sentences than those serving indeterminate life sentences (who might be thought to pose *greater* risks) appeared to 'lack any objective justification.' The Court also accepted that it may be legitimate to have a 'cut off point' at which more stringent requirements would be applied, such as fifteen years (in this case), but added this could only be justified if it 'achieved the legitimate aim pursued.' The Court concluded that it did not here.

The appeal was successful, and the applicant received non-pecuniary damages for the 'feelings of frustration, uncertainty and anxiety' suffered in the extra years of incarceration.

The Court's decision sheds some light on the scope of art 14. In future cases, discrimination based upon categories of prisoner may fall foul of the Convention. The Court has clearly favoured a broad, non-exhaustive approach to art 14. However, while rejecting a narrow interpretation of 'other status' in art 14, and drawing analogies to earlier cases where the 'other status' of the complainant was not innate or personal, the Court does not seem to have provided any clear guidance as to how to determine whether a particular trait or 'situation' would be classified as 'other status'. It seems that future cases will be interpreted broadly and by analogy with this and past cases.

Relevance to the Victorian *Charter*

Section 8 of the Victorian *Charter* recognises the right to 'recognition and equality before the law', including 'effective protection against discrimination'. While the term 'discrimination' is defined under s 3 of the *Charter* by reference to discrimination on the basis of an attribute set out in s 6 of the *Equal Opportunity Act 1995* (Vic), which does not recognise 'other status' as a protected attribute, this decision supports a broad and purposive approach to determining the scope and application of those attributes that are recognised and protected.

The decision is at <http://www.bailii.org/eu/cases/ECHR/2010/1106.html>.

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Control Orders and the Deprivation of Liberty

AN v Secretary of State for the Home Department [2010] EWCA Civ 869 (28 July 2010)

A recent decision before the England and Wales Court of Appeal has found that if a control order is legally flawed, or revoked by the Secretary of State, then it shall be quashed *ab initio*.

Facts

A number of persons residing in the UK, including AN, AE and AF, were subject to control orders issued by the Secretary of State under s 1(2)(a) of the *Prevention of Terrorism Act 2005*. Following the House of Lords' decision in *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, the Secretary of State decided to revoke the orders in force instead of disclosing further information to the controlees.

However, proceedings against the controlees remained pending in the Administrative Court under s 3(1) of the Act and so the question was whether the control orders were to be quashed *ab initio* or prospectively. In *AN* [2009] EWHC 1966 (Admin), the Court held for prospective revocation, while in *AE and AF* [2010] EWHC 42 (Admin), the Court held the orders were quashed *ab initio*.

In the first case, AN was subject to criminal action for breaching his control order and, if the order was quashed *ab initio*, his prosecution would have failed. Meanwhile, AE and AF wished to seek damages in the second case for the 3.5 years that they were subject to control orders.

The findings in the *AN* and *AE and AF* cases can be contrasted as follows. In *AN*, Mitting J acknowledged that he had a discretion under s 3(12) of the Act to quash the order or to have it revoked. Justice Mitting concluded that at the time of issuing the control order, the Secretary of State was entitled to rely on closed material without disclosing it and that it was not therefore a nullity.

However, in *AE and AF*, Silber J held he was bound to quash the control order *ab initio* because:

- significant authority supported such a finding;
- anything less would render the controlees' rights under art 6 (the right to a fair hearing) ineffectively secured; and
- ultimately, had the Secretary of State complied with the disclosure obligations, which were eventually affirmed in *AF (No 3)*, the control orders would not have proceeded.

AN and the Secretary of State appealed to the England and Wales Court of Appeal challenging the respective findings on the revocation of control orders.

Decision

This decision was the first of the control order cases before the higher courts to provide a definitive ruling on whether flawed control orders are quashed *ab initio*. In concluding that the appropriate remedy in all cases is one of quashing *ab initio*, as held by Silber J and not revocation as held by Mitting J, the Court of Appeal discussed a number of pertinent issues.

The Secretary of State and administrative acts

The Court of Appeal rejected Mitting J's finding that a non-derogating control order so closely resembles a court order that it retains its validity unless set aside by a court. According to Maurice Kay LJ (with whom Rix LJ and Stanley Burnton LJ agreed), the Act vested the power to make non-derogating control

orders exclusively in the Secretary of State and the Court's role is merely to supervise. Consequently, their Honours concluded that if a control order is legally flawed then it is to be dealt with like any other flawed administrative act by being quashed *ab initio*.

Reasonableness and good faith

While the Court of Appeal acknowledged that the Secretary of State was acting in good faith, their Honours rejected Mitting J's finding that this was a relevant consideration and held that regardless of intention, the effect was to interfere with the human rights of the controlled persons. The Court held it is a fallacy to suggest a control order is valid and there are reasonable grounds on the one hand, without then being willing to disclose the material on which the Secretary of State relies.

Revocation

Their Honours rejected the submission that s 3(12)(c) of the Act dealing with revocation is emasculated if it was not one of the remedies available in the circumstances. The Court went on to say that s 3(12)(c) is of importance and use, but only when the circumstances have changed from a time where a control order is sustainable to a period where it becomes flawed. This scenario did not occur on the facts and so the structure of the Act assumes a flawed control order is void *ab initio*.

Human Rights Act and habeas corpus

The Court of Appeal acknowledged that the art 6 right to a fair trial under the *Human Rights Act 1998* may not apply at an administrative stage of determination. However, their Honours held it was nevertheless axiomatic as the Secretary of State knows he will have to abide by disclosure requirements and justify the order to the court.

The Court of Appeal also rejected the suggestion that the case was conceptually different to an art 5 right to liberty case and referred to the principle of *habeas corpus*. Ultimately, the court concluded the principle that 'no member of the executive can interfere with the liberty of a British subject except on the condition that he can support the legality of his action before a court of justice' is not confined to the full deprivation of liberty cases.

Relevance to the Victorian Charter

This decision may be of persuasive value when interpreting the right to a fair trial under s 24 and the right to liberty and security under s 21 of the *Charter*. However, in the absence of a federal human rights instrument, the decision will have limited direct applicability to Australian control orders issued under the *Criminal Code 1995* (Cth) and the application of the *habeas corpus* rule in such circumstances.

The decision is at www.bailii.org/ew/cases/EWCA/Civ/2010/869.html.

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Protecting Marriage or Legislating Morality? Same-Sex Marriage Equality under the US Constitution

Perry v Schwarzenegger, Case No. C 09-2292 VRW (US District Court for the Northern District of California, 4 August 2010)

The US District Court has held that a prohibition against same-sex marriage violates the US constitutional requirements of 'due process' and equal 'protection'.

Facts

Following an amendment to the California Constitution in November 2008, same-sex marriages could not be recognised under California state law. In May 2009, two same-sex couples were therefore denied Californian marriage licences by California authorities.

California voters had voted to amend the Constitution through a ballot proposition known as Proposition 8. It followed an earlier attempt to amend state legislation in similar terms. The earlier attempt, another ballot proposition known as Proposition 22 (or the 'Defense of Marriage Act'), was invalidated by the

California Supreme Court. The Court had found that Proposition 22 violated the California Constitution's equal protection guarantee (*In re Marriage Cases*).

Proposition 8 initially survived challenge in the California Supreme Court (*Strauss v Horton*). Three days before that decision, the couples who had been denied marriage licences by Californian authorities filed suit in the US District Court, seeking a declaration that Proposition 8 was invalid, and an injunction against its enforcement. They pleaded that Proposition 8 violated the Fourteenth Amendment of the United States Constitution.

While the suit named a number of government defendants (including California's Governor, Arnold Schwarzenegger), the State's Attorney-General conceded Proposition 8 was unconstitutional, and the remaining government defendants declined to defend the action. Thus, it was left to Proposition 8's proponents (led by a State Senator), who were granted leave to intervene as defendants, to defend the suit.

Decision

Violation of the Due Process Clause

The Due Process Clause, part of the Fourteenth Amendment to the US Constitution, provides that '[n]o State ... shall ... deprive any person of life, liberty, or property, without due process of the law'.

It is 'well established' by Fourteenth Amendment jurisprudence that the freedom to marry is one of the fundamental rights protected by the Due Process Clause. The defendants argued that this right was only available to opposite-sex couples, and that the plaintiffs were seeking recognition of a new right (ie same-sex marriage) that was not recognised by the Due Process Clause.

The Court disagreed, holding that the plaintiffs were seeking to exercise the same right that had been previously recognised, and that the state was obliged to allow them to do so under the Due Process Clause.

While marriage had not been 'traditionally ... open to same-sex couples', the Court concluded that marriage 'is a union of equals' to which gender is irrelevant (and is therefore a right open to same-sex couples). In particular, the Court noted that:

- despite the defendants' assertions that the 'central purpose of marriage ... [was] to promote naturally procreative sexual relationships', the state had never inquired into procreative capacity or intent before issuing a marriage licence, and marriage was 'more than a licence to have procreative sexual intercourse' (with 'choice and privacy' also pivotal);
- race and gender restrictions that had previously shaped marriage (including coverture and anti-miscegenation laws) were never part of the 'historical core' of marriage; and
- California had eliminated marital obligations based on gender, and same-sex and opposite-sex couples were equally able to perform the rights and obligations of marriage.

Same-sex couples had the ability to enter into registered partnerships under California law, but this was not enough to satisfy the state's obligations under the Due Process Clause. Although the Court noted that domestic partnerships offered 'almost all of the rights and responsibilities associated with marriage':

- domestic partnerships existed solely to differentiate same-sex unions from marriages; and
- marriage was a 'culturally superior status compared to a domestic partnership', and withholding the designation of marriage 'significantly disadvantaged' the plaintiffs.

On the defendants' 'minimal evidentiary presentation', Proposition 8 could not withstand strict scrutiny. It therefore violated the Due Process Clause.

Violation of the Equal Protection Clause

The Equal Protection Clause, also part of the Fourteenth Amendment to the US Constitution, provides that no state shall 'deny to any person within its jurisdiction the equal protection of the laws'.

The Court found that Proposition 8 discriminated on the basis of sexual orientation (by 'targeting gays and lesbians in a manner specific to their sexual orientation and because of their relationship to one another'). Classifications based on sexual orientation are subject to strict scrutiny.

However, strict scrutiny was not required because, even applying a 'rational basis' review (a lower standard of review), Proposition 8 failed, and therefore violated the Equal Protection Clause.

The defendants had argued that there were six relevant state interests justifying Proposition 8, each of which the Court rejected:

Alleged interest	Court's reasoning
Preservation of the traditional institution of marriage as the union of a man and a woman	Tradition alone cannot form a rational basis for a law, does not rationally further a state interest; rather, it harms the state's interest in equality.
Proceeding with caution when implementing 'radical' changes to a 'bedrock social institution'	Same-sex marriage has no adverse effects on society or the institution of marriage. The evidence showed 'beyond debate' that allowing same-sex couples to marry had a neutral 'if not positive' effect and 'would benefit the state'. The defendants' contrary evidence was not credible.
Promoting opposite-sex parenting over same-sex parenting	The evidence showed 'beyond any doubt that parents' genders are irrelevant to children's developmental outcomes'. Proposition 8 had nothing to do with children, because it 'simply prevents same-sex couples from marrying'. Same-sex couples with children were treated identically to opposite-sex parents under California law.
Protecting the freedom of those who oppose same-sex marriage	Proposition 8 did not affect the rights of those opposed to homosexuality or to same-sex marriage, and individuals' moral views were an insufficient basis to enact a legislative classification.
Treating same-sex couples differently from opposite-sex couples	Under California law, for all relevant purposes, same-sex and opposite-sex unions are the same. Only moral and religious views form the basis for the contrary belief.
Any other conceivable legitimate interests identified during the proceedings	Many of the purported interests identified were 'nothing more than a fear or unarticulated dislike of same-sex couples', and on the evidence, Proposition 8 'simply conflicts with the guarantees of the Fourteenth Amendment'.

The Court reasoned by inference from the evidence that the 'sole premise' for Proposition 8 was the 'private moral view' that same-sex couples are inferior to opposite-sex couples. Again, this provided no proper basis for the state to legislate.

Relevance to the Victorian *Charter*

It is widely expected that the decision will be appealed, ultimately to the United States Supreme Court. A running theme through the trial judge's decision is that the defendants' case was wholly unsupported by the evidence it led. The majority of the defendants' witnesses were not called to give evidence, and their two experts were criticised by the trial judge for their lack of credibility and reliability; the trial judge decided that little or (for one of the experts) 'essentially no weight' should be given to their opinions. In contrast, the trial judge found the plaintiffs' experts were 'amply qualified' and offered credible opinions. This is expected to influence the disposition of any appeal.

Like the United States Constitution, the Victorian *Charter* recognises that every person has the right to enjoy their human rights 'without discrimination' (s 8(2)), and is entitled to the 'equal protection of the law' (s 8(3)). The decision (and any subsequent appellate reasons) may be persuasive in interpreting the scope and content of the 'equal protection' guarantee under the Victorian *Charter*. Of course, it is important to recognise that the Victorian *Charter* imposes a different test to the 'strict scrutiny' and 'rational basis' tests for limiting the rights to due process and equal protection propounded in *Perry*. Under the Victorian *Charter*, 'reasonable limits ... demonstrably justified in a free and democratic society' may be applied to human rights (s 7(2)).

In the context of the same-sex marriage debate in Australia, the decision will have no immediate legal impact. The Commonwealth *Marriage Act 1961* reserves marriage to opposite-sex couples, and any inconsistent state law would be rendered invalid by virtue of s 109 of the Australian Constitution.

The decision is available at <https://ecf.cand.uscourts.gov/cand/09cv2292/files/09cv2292-ORDER.pdf>.

Samuel Porter, Solicitor, Mallesons Stephen Jaques Human Rights Law Group

Limitations on the Right to Peaceful Assembly and Protest

Mayor of London (On behalf of the Greater London Authority) v. Hall & Ors [2010] EWCA Civ 817 (16 July 2010)

The England and Wales Court of Appeal upheld a High Court decision which held that the Mayor of London is entitled to seek an injunction against a group of protestors who established a long-term camping village in a public space. The Court found the injunction did not violate the protestors' right to freedom of expression or the right to freedom of peaceful assembly and freedom of association protections enshrined in arts 10 and 11 of the *European Convention of Human Rights*. The Court granted two defendants who protested separately from the group permission to appeal the injunction and associated costs.

Facts

On 1 May 2010, a group established a camp named 'Democracy Village' in Parliament Square Gardens ('PSG') in London to hold demonstrations against the government. Over a one month period Democracy Village increased in size and became self-sustained. The Court estimated the damages to the grounds amounted to £50,000 as a result of the protestors' occupation of PSG.

On 3 June 2010, the Mayor of London claimed an order for possession of PSG on behalf of the Greater London Authority and sought an injunction against the protestors. The defendants challenged the Mayor's statutory right to claim possession of the property and challenged the injunction as a violation of their right to freedom of expression and freedom of peaceful assembly and association under arts 10 and 11 of the *Convention*. The High Court held the Mayor was entitled to the order for possession and that the injunction was not in violation of the protestors' rights. On appeal the defendants challenged their right to a fair trial under art 6 of the *Convention*, whether the claim for possession was properly constituted, whether the order for possession and injunction complied with arts 10 and 11 of the *Convention* in regards to proportionality, and whether the injunction was a permissible remedy in aid of criminal law sanctions.

Decision

The Court of Appeal granted two defendants the right to appeal the injunction, but dismissed the appeal of all other claims asserted by defendants who claimed association with Democracy Village.

Right to a Fair Trial

The right to a fair trial was challenged based on a lapse in the initial proceedings that ultimately created an abbreviated procedure. The Court held the abbreviated procedure was appropriate to deliver prompt injunctive relief and that it was not in violation of the defendants' art 6 right.

Right to Claim Possession

The Court upheld the High Court's determination that the Mayor is entitled to statutory right of possession against persons who occupy PSG. The issue brought before the High Court challenged the Mayor's statutory right of possession over property vested in the Crown. The Court of Appeal determined, 'every aspect of ownership and possession is vested in the Mayor, as part of his own statutory duty and statutory right, and not as an agent of the Crown: he has complete control and regulation of PSG'.

Compliance with Articles 10 and 11 of the Convention and Proportionality

The Court of Appeal held arts 10 and 11 did not provide an adequate defence for the protestors. Articles 10(2) and 11(2) provide that the right of freedom of expression and peaceful assembly and association may be interfered with if the rights are 'prescribed by law and it is necessary in a democratic society in the interest of national security or public safety for the prevention of crime or disorder, for the protection of health or morals or for the protection of the rights and freedom of others'. The High Court was required to apply a balancing test to determine whether any interference with the defendants' rights under arts 10 and 11 was within the law as necessary to meet a pressing social need and whether the actions taken were proportionate to the harm caused.

The High Court found Democracy Village prevented the public from exercising their rights over a very significant part of PSG for a prolonged and indefinite period of time and that their occupation jeopardized the protection of health in the occupied areas. The High Court determined the Mayor's attempt to seek an injunction was 'a wholly proportionate response and [that] no defendant has a Convention defence or any other defence to the claim for right of possession'.

The Court of Appeal upheld the High Court ruling and concluded there were insufficient grounds to challenge the decision. The Court stated the defendants had been permitted to express their views and assemble freely, however, that 'it is equally important to all other people who wish to demonstrate on PSG that the Democracy village is removed....that presence impedes the ability of others to demonstrate there'.

Injunction and Costs

The Court found the High Court was justified in granting injunctive relief to the Mayor given the length and nature of the occupation of PSG. However, the Court noted it should, 'in principle, be 'reluctant' to grant an injunction in aid of the criminal law which provided for penalties'.

The Court granted permission to appeal the injunction to two defendants who claimed they were protesting separately from Democracy Village. The Court determined that the defendants are entitled to an individual proportionality assessment under art 10 of the *Convention*. They also granted them permission to appeal costs to limit their liability to 80% rather than 100%.

Relevance to the Victorian Charter

This case is particularly relevant to the scope of right to freedom of expression under s 15 of the *Charter* and the right to peaceful assembly and freedom of association under s 16. The right to freedom of expression under art 10 and the right to peaceful assembly under art 11 of the *Convention* are similar in the scope of the protection of rights found in ss 16 and 15 of the Victorian *Charter*. Thus, Victorian courts may adopt a similar approach when considering the effect prolonged protests in public spaces have on the right to freedom of expression and peaceful assembly and association under the *Charter*.

This decision is at www.bailii.org/ew/cases/EWCA/Civ/2010/817.html.

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

HRLRC Policy Work

Centre Makes Submission to UN Committee against Torture on Priority Issues for Review of Australia

On 24 August 2010, the Centre provided a submission to the UN Committee against Torture setting out a number of issues which we consider the Committee should include in its List of Issues for Australia Prior to Reporting in respect of Australia's compliance with the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

The Committee is likely to develop a List of Issues for Australia Prior to Reporting at its next session in November 2010.

In the Centre's view, the Committee should seek for Australia to detail the human rights compatibility of domestic law, policy and practice in the following areas:

- migration law, policy and practice, particularly in relation to refugees and asylum seekers;
- prisoners' rights and conditions of detention;
- policing, police use of force and police-related deaths;
- counter-terrorism law, policy and practice;
- violence against women;
- homelessness;
- aspects of involuntary treatment of people with mental illness or disability;
- the lack of domestic prosecution of alleged war crimes and crimes against humanity; and

- gaps in Australian law, policy and practice with respect to exposing persons to the death penalty or torture or ill-treatment abroad, whether through extradition, the provision of mutual assistance in criminal matters, or the provision of police to police agency assistance.

The submission is at www.hrlrc.org.au/content/topics/counter-terrorism/torture-and-ill-treatment-submission-to-un-committee-against-torture-on-australia-24-august-2010/.

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

Improving Human Rights Consideration and Compliance within the Public Sector: Submission to Australian Public Service Commission

The Australian Government has tasked the Australian Public Service Commission to revise the Australian Public Service Values to a 'smaller set of core values that are meaningful, memorable and effective in driving change'. Among other considerations, this revision should seek to 'affirm the importance of including consideration of human rights issues in policy making'.

On 28 July 2010, the HRLRC made a submission to the APSC setting out the reasons for which the APS Values and Code of Conduct should be revised to require that the APS '**actively respects, protects, promotes and fulfils human rights**', and the other educational and cultural measures and strategies that would support the entrenchment and realization of this value.

In summary, the Human Rights Law Resource Centre submission recommends that:

- the APS Values and Code of Conduct should be revised to require that the APS 'actively respects, protects, promotes and fulfils human rights';
- for the purpose of the APS Values and Code of Conduct, 'human rights' should be defined to include *all* of the human rights and freedoms enshrined in *all* of the core international human rights treaties to which Australia is or may become a party;
- the scope, content and application of 'human rights' within the APS Values should be understood and informed by reference to 'international human rights law and the judgments of domestic, foreign and international human rights courts, bodies and tribunals';
- the revision of any APS Values to incorporate consideration of human rights should be accompanied by a comprehensive, integrated, well-resourced, targeted and ongoing human rights education program for the APS and related entities;
- federal departments and agencies should develop human rights action plans and report on human rights compliance in their annual reports; and
- the APS should develop a range of other mechanisms and measures, such as those adopted by public authorities in Victoria and identified by the Victorian Equal Opportunity and Human Rights Commission as being useful and effective in the development and entrenchment of a human rights-based approach to public service.

The submission is at www.hrlrc.org.au/content/topics/national-human-rights-consultation/improving-human-rights-in-the-public-sector/.

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

Enhancing NGO Engagement with the UN Committee on the Elimination of Racial Discrimination

On 2-3 August 2010, the Centre made a short submission and provided a briefing to the UN Committee on the Elimination of Racial Discrimination with a view to enhancing treaty body engagement with NGOs and contributing to the use and implementation of treaty body recommendations on the ground.

The briefing paper is at www.hrlrc.org.au/content/topics/equality/enhancing-ngo-engagement-with-cerd/.

A summary of the interactive NGO dialogue with the Committee is at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10248&LangID=E.

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

HRLRC Casework

HRLRC Victory for Representative Democracy in the High Court

On 6 August 2010, in an historic decision, *Rowe & Anor v Australian Electoral Commission & Anor* [2010] M101/2010, the High Court struck down legislation which resulted in the early close of the electoral rolls and denied over 100,000 Australians the right to vote.

This decision, in ordering that the rolls stay open for at least 7 days to enable people to enrol or update their enrolment, restores and promotes the fundamental human right to vote and, in so doing, enhances democracy and promotes representative government.

The challenge to the early close of the rolls was jointly conceived and coordinated by the Human Rights Law Resource Centre and GetUp! and builds on the previous work of the Centre which established constitutional protection of the right to vote in the landmark High Court case of *Roach v The Commonwealth* [2007] HCA 43.

The matter was run pro bono by an outstanding legal team comprising Ron Merkel QC, Kristen Walker, Fiona Forsyth and Neil McAteer of Counsel, together with Mallesons Stephen Jaques.

The Court's order is available at www.hrlrc.org.au/files/High-Court-Order.pdf. Reasons will be published at a later date.

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

Centre Prepares Individual Communication Regarding Torture in Uganda

The Centre is acting for a man who obtained asylum in Australia after fleeing torture and persecution in Uganda. In particular, the Centre is preparing an Individual Communication to the UN Human Rights Committee on behalf of the man, alleging violations of various provisions of the *International Covenant on Civil and Political Rights*, including the prohibition against torture (art 7), the right to liberty and security (art 9) and the right to humane treatment in detention (art 10).

The Centre is being assisted in this matter by Mallesons Stephen Jaques.

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

Seminars and Events

'The Sacred and the Secular: The Same-Sex Marriages Case' with Justice Albie Sachs

20 September 2010, Melbourne

Date: Monday, 20 September 2010

Time: 5.45 for 6.00 – 7.30pm

Venue: DLA Phillips Fox, Level 21, 140 William Street

Cost: \$30 / \$15 concession or full-time student

RSVP: 13 September 2010 (Use booking form available at www.hrlrc.org.au – numbers are limited)

Albie Sachs was appointed by Nelson Mandela as an inaugural judge of the Constitutional Court of South Africa, from which he retired in 2009. He was a member of the National Executive of the ANC and played a crucial role in the transition of South Africa to democracy. In 1988, while in exile in Mozambique, he was badly injured by a car bomb placed by South African security agents, losing an arm and the sight of an eye.

As a judge of the Constitutional Court, Justice Sachs was responsible for a number of landmark human rights judgments, including in relation to equality, non-discrimination and social and economic rights. In 1991, Albie Sachs won the Alan Paton Award for his book *Soft Vengeance of a Freedom Fighter*. He is also the author of *Justice in South Africa* (1974), *The Jail Diary of Albie Sachs* (1966), *Sexism and the Law* (1979) and *The Free Diary of Albie Sachs* (2004). His most recent book, *The Strange Alchemy of Life and Law*, will be launched in Melbourne at this seminar.

Albie Sachs is visiting Australia to deliver the University of New South Wales Law Faculty Annual Hal Wootten Lecture.

Victorian State Election Human Rights Forum

9 September 2010, Melbourne

The Castan Centre for Human Rights Law presents a Victorian State Election Human Rights Forum.

Participants: **Robert Clark MP**, Shadow Victorian Attorney-General and Liberal Member for Box Hill and **Brian Walters SC**, Greens candidate for the State seat of Melbourne

Moderator: **Damien Carrick**, presenter of The Law Report on ABC Radio National.

The 2010 Victorian election is scheduled for 27 November and human rights will be a vital campaign issue. Please join us as representatives of the Liberal Party and the Greens answer questions from Damien Carrick about their parties' policies that impact on human rights.

This event is free and open to the public, but space is limited, so RSVP is essential.

Date: 9 September 2010

Time: 6pm to 7.30pm

Venue: Telstra Corporate Centre, Level 1, 242 Exhibition Street, Melbourne

RSVP: castan.centre@monash.edu or phone Janice Hugo on 9905 3327

The Attorney-General, Rob Hulls MP, was invited to attend the forum but withdrew due to other commitments. The Government declined to nominate an alternative speaker to represent the ALP.

Anti-Death Penalty Dinner with David Marr, Journalist and Author

8 October 2010, Brisbane

Australian Lawyers for Human Rights and Aussies Against Capital Punishment invite you to attend a dinner to mark World Day Against the Death Penalty.

Date: Friday, 8 October 2010

Venue: Rydges South Bank, 9 Glenelg Street, Brisbane

Time: 6:30 for 7:00 pm start

Cost: \$80 per person

RSVP: Friday, 3 September 2010

For bookings and inquiries, email elisa.petranich@uqconnect.edu.au.

We seek your support to promote human rights and oppose the death penalty.

Interdisciplinary Workshop: Archives and Indigenous Human Rights

12 October 2010, Melbourne

This event is jointly sponsored by the National Archives of Australia and Monash University (The Centre for Organisational and Social Informatics, the Centre for Australian Indigenous Studies and the Castan Centre for Human Rights Law).

The workshop will investigate Indigenous rights in archives and records. The workshop will be of specific relevance to archivists, Indigenous communities and individuals, records and information managers, Indigenous studies researchers, and lawyers interested in the nexus between Indigenous human rights, law and archives.

Date: Tuesday, 12 October 2010

Venue: Rydges Hotel, 186 Exhibition Street, Melbourne

Speakers include Mick Gooda (Aboriginal and Torres Strait Islander Social Justice Commissioner), Professor Bradford Morse (Dean of Law and Professor of Law, University of Waikato Te Piringa, New Zealand, and Professor of Law, Faculty of Law, University of Ottawa), Allison Krebs (University of Washington Information School and Native American Speaker on Native American Archival Protocols), Jim Berg (a descendant from the Gunditjmara tribe in Western Victoria and a member of the Public Records Advisory Council), and Dr Julie Debeljak (Senior Lecturer, Deputy Director, Castan Centre for Human Rights Law, Monash University).

Program and registration details at www.infotech.monash.edu.au/about/events/2010/cosi-workshop-1210.html.

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/.

Resources and Reviews

HRLRC in the News

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

- Daniel Flitton, '[Australia to Defend "Racist" Northern Territory Intervention at the UN](#)', *Sydney Morning Herald* (Sydney), 10 August 2010
- James Eyers, 'High Court Allows Votes', *Australian Financial Review* (Sydney), 7 August 2010
- Tom Arup, '[High Court Allows 100,000 to Vote](#)', *The Age* (Melbourne), 7 August 2010
- ABC AM, '[Victoria to Review Police Investigations](#)', *ABC News*, 7 August 2010
- '[GetUp! Wins High Court Challenge](#)', *Lawyers Weekly* (Sydney), 6 August 2010
- ABC Stateline, '[The Trouble with Cops Investigating Cops](#)', *ABC News*, 6 August 2010
- James Eyers and Hannah Low, 'It'll be All Writ by Election Night', *Australian Financial Review* (Sydney), 30 July 2010
- James Eyers, 'Court Challenge to Vote Deadline', *Australian Financial Review* (Sydney), 27 July 2010

Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

The International Commission of Jurists, together with the Inter-American Institute of Human Rights, has published an online Commentary to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. This excellent resource explains the content of the Protocol clause by clause, together with its drafting history. The Commentary is at <http://icj.org/dwn/database/ENG-CommentaryOP-ICESCR.pdf>.

Human Rights Jobs

Human Rights Arts and Film Festival – Volunteers Wanted

HRAFF is currently advertising for a number of positions, including an Event Coordinator, Web Developer, Legal Officer and Secretary.

For further information, see <http://www.hraff.org.au/Info/Volunteer.aspx>.

Postgraduate Scholarships at the University of Melbourne

The University of Melbourne is currently offering a number of scholarships in human rights and related fields. Included among these scholarships are:

- An Australian Postgraduate Award (Industry) scholarship as part of the *Poverty in the Midst of Plenty: Economic Empowerment, Wealth Creation and Institutional Reform for Sustainable Indigenous and Local Communities* ARC Linkage Project: see www.atns.net.au/objects/XZBIAMOIQUD/APAI_Scholarship_Ad.pdf

- Two 'Human Rights Scholarships': see <http://cms.services.unimelb.edu.au/scholarships/pgrad/local/available/humanrights>

Foreign Correspondent

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

Three weeks into my placement in Geneva, I feel well qualified to give a newcomer's impressions of the town otherwise known as Swiss Canberra.

It's summer. Half the town is on holidays and the rest are by the lake, making the most of the short window of opportunity in which the weather allows for swimming, water skiing and sailing. The lakeside promenade is abuzz with fairground rides, toy trains and Saudi Arabian holidaymakers. Groups laze on grassy knolls with drinks from pop-up bars and fireworks are held every other night. If you're not careful, four gelati will cost you \$40 and if you swim too near the ducks you get flea bites.

Committee on the Elimination of Racial Discrimination

But a stone's throw from the lake's edge, UN business continues throughout summer at Palais Wilson, where for four weeks from 2 to 27 August 2010, the Committee on the Elimination of Racial Discrimination held its 77th session.

At the beginning of the session, on 3 August 2010, CERD held an interesting meeting with NGOs to discuss the ways in which CERD might improve its work with NGOs. CERD is currently the only treaty monitoring body that does not have a formal mechanism for engaging with NGOs, so the meeting was an opportunity to discuss with the Committee how that could be improved.

NGOs made some interesting and practical suggestions for improving their interaction with CERD. First, many NGOs, including the Human Rights Law Resource Centre, submitted that CERD could be more accessible. This might be done through enhanced information for NGOs on its website to assist NGOs to intervene in CERD processes. Such processes can be inaccessible or difficult to understand for national NGOs who may not usually work with the Committee. Many organisations also suggested increasing the use of technologies, such as skype and video conferencing, to allow national NGOs to appear before the Committee without the cost of coming to Geneva.

Although in practice NGOs brief CERD informally, such as during lunchtime briefings prior to state party reviews, there is not a formalised process for this. This means that CERD members are not formally required to attend NGO briefings and that NGOs do not have the benefit of UN services such as a record of proceedings or interpreting services. Many NGOs suggested that CERD could make room in its programme for NGOs to brief the Committee whilst it is in session.

Finally, NGOs raised the issue of reprisals – which is a big issue being discussed in Geneva more generally. This means reprisals against human rights defenders by their domestic Government for their involvement in CERD processes. NGOs urged the Committee to consider what measures it could take to protect NGO participants from reprisals, which may come in the form of withholding of funding, threats of violence or even violence.

During this session, CERD also reviewed ten countries, including Australia, for the performance of their legal obligations under the *Convention on the Elimination of Racial Discrimination*.

It was not always clear that Australia's review would go ahead this August. When the general election was called and the Government was placed in caretaker mode, the Australian Government requested that CERD defer the review due to its concern that caretaker conventions would unduly limit the ability of the Australian delegation to participate. However, CERD proceeded with the review and in the end caretaker conventions did not inhibit the Government from engaging fully with the Committee. The Australian delegation's approach to the Caretaker Guidelines was very sensible and allowed it to discuss and explain current and past policies, only preventing it from discussing future government action.

Australia's approach looks particularly constructive when compared to that of Iran, whose delegation filibustered for the whole second part of the hearing, meaning the Committee did not have the opportunity to ask questions of the delegation. Quite a performance...

CERD's Concluding Observations arising from this session are expected to be published on 27 August 2010.

Review of the UN Human Rights Council

Separately, the review of the Human Rights Council is underway, with the President releasing his 'Proposed Modalities' for the review. There will be two informal consultations at the end of August 2010, during which time views on the issues to be covered will be discussed. The President has welcomed the engagement of civil society in the review process and the Centre is in the process of developing a policy and position paper for this purpose.

Forthcoming UN Human Rights Mechanism Meetings

Coming up at the United Nations in September are the **Working Group on Arbitrary Detention's** session from 30 August to 3 September, the **Human Rights Council's** 15th session from 13 September to 1 October and the **Committee on the Rights of the Child's** 55th session from 13 September 2010 to 1 October 2010.

Emily Howie is Director of Advocacy and Strategic Litigation with the Human Rights Law Resource Centre. She is currently on a three-month placement in Geneva, hosted by the International Service for Human Rights.

If I Were Attorney-General...

Providing Principled, Evidence-Based Leadership

To be honest, my usual fantasy is a sporting one. It generally culminates in me scoring the crucial point with three seconds to go in the Grand Final. My teammates – an anachronistic mixture of moustachioed players drawn mostly from the 1980s and 90s – rush over to congratulate me. Nelson Mandela (captain-coach) hands me a poem with a Latin title.

But sporting glory is fleeting. If I want to enliven my fantasy life, I need to move to the political plane. While the HRLRC's parlour game allows me to skip the minutiae of pre-selection, factional alliances and kissing other people's babies, I do probably need to clarify the ground rules. The fantasy part is that I'm the Attorney-General and that people remember me fondly for my exploits in the 2010 Grand Final; all of the other details are real. This means that I'm working within the confines of a hung parliament.

One of the biggest problems with a hung parliament is that the air of the electorates held by crucial independent members can be thick with the smell of pork. When the government is daily faced with the prospect of losing a no-confidence motion on the floor of the House of Representatives, no proposal from Ms or Mr Crucial Independent MP can be dismissed as hare-brained.

In a country that values fairness, everyone's human rights, including access to basic services, should receive equal protection. To this end, I would establish an independent commission to audit all electorates to determine the true availability of core services, such as in health and education. When my government plans to implement a new service in a particular place, it will be required to show three things. First, that there is a demonstrable need for the service in this community. Second, that communities in other, less politically-sensitive electorates are not being abandoned. And third, that this proposal fits into a clear plan to lift core services, necessary for the enjoyment of basic rights, in *all* parts of Australia.

This brings me to my second proposal. One of the great untold stories of Australian politics relates to a promise that all governments tend to break. The promise seems so obvious that few people notice it as part of a party's election manifesto, but it's almost always there. There's usually some enthusiasm for the promise in the heady days after the election win. But then one day, you realise it's gone. I'm talking about is the government's promise to adopt a rational, evidence-based approach to developing policy and law. It sounds like a no-brainer for any government, but it's not.

Imagine if a major corporation commissioned a review of an aspect of its business, liaised with all its key stakeholders and the public, and received a report recommending a new strategy. If the CEO said, 'I can't fault the logic in this report, but I've heard that a couple of focus groups reckon it all sounds a bit iffy, and so I'm going to give the whole thing a miss,' then the Board would surely ask why a communications issue is impeding important substantive reform.

And yet, this happens time and again in government. The National Human Rights Consultation is an excellent case in point. It was a major public inquiry, it canvassed the views of experts and ordinary Australians alike, and it came up with a clear human rights reform template that elicited strong majority endorsement. If there had been a clearly-identified logical problem with this report, one could understand the government's reluctance to implement its key elements. But that wasn't the issue.

The government explained its reticence about the proposed Human Rights Act as being based on a fear of prolonging a 'divisive' debate, given that there was strong but not universal support for the more ambitious proposals in the NHRC report. Surely, this is where political leadership comes in. As Attorney-General, I would speak to the experts, obtain the evidence on difficult questions of policy, and then go for broke in persuading my colleagues and the broader public that this is the right way to go.

While it would be profoundly undemocratic to introduce policy and laws that the public as a whole disagrees with, true wisdom in any democracy doesn't begin and end with the latest focus group. A mature, sophisticated nation first gives its citizens the information necessary to form a view on a particular topic; it encourages open debate that allows for the participation of multiple perspectives; and it ends with the government providing principled leadership and making the tough decisions.

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