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The HRLRC aims to:

1. Promote and protect human rights in Australia through litigation, advocacy, research, education and training.
2. Build capacity in the legal and community sectors to use human rights in casework, advocacy and service delivery.
3. Empower people that are disadvantaged or living in poverty by operating within a human rights framework.

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

Opinion

In Search of Our Rights

A new law introduced to Victorian Parliament by the Brumby Government will give Police the power to search people randomly, including by strip searching children and people with disability, in violation of fundamental human rights and freedoms. A similar law has recently passed the lower house of the State Parliament in Western Australia.

The Summary Offences and Control of Weapons Acts Amendment Bill 2009 (Vic) will give police the power to randomly search people who are in a 'designated area'. If passed, the Bill will enable police to conduct searches of *any* person in such an area, including children, even in the absence of *any* reasonable suspicion of wrongdoing. The Bill also allows police to conduct strip searches in certain circumstances. The power to conduct strip searches extends to the invasive strip searching of children.

This is the first time since the passage of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) that a law has been introduced into parliament with a statement that the law is incompatible with human rights.

There are at least two reasons why we should be extremely concerned about giving these broad new powers to police.

First, in giving police the power to randomly search any person in a 'designated area', even in the absence of any reasonable suspicion of wrongdoing by that person, the Bill means that people will be searched for no reason other than being in the wrong place at the wrong time.

Putting aside for a moment the unfairness to the person who is searched for no reason, how could it ever be good police practice, or an efficient use of limited police resources, for police to stop and search people who are not suspected of doing anything wrong?

Secondly, and even more alarmingly, these laws would apply to children.

In tabling an unprecedented statement of *incompatibility*, the Police Minister, Bob Cameron, has effectively admitted that the new police search powers unreasonably and disproportionately infringe peoples' right to privacy and the right of children to protection in their best interests. While this demonstrates the value of the *Charter* in promoting parliamentary transparency and accountability, it is very concerning that the Government has determined that it will go ahead and pass the laws anyway.

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MALLESONS STEPHEN JAQUES

Why do police need powers to conduct these intrusive and random searches of people?

In parliament, the Police Minister sought to justify the search powers in the interests of community safety, including the safety of children. But when it comes to the crunch, the Government's own analysis concludes that these laws are not in the best interests of children and that the laws fail to protect the rights of children. Moreover, in conceding that the laws are incompatible with its own *Charter of Human Rights and Responsibilities Act*, the government has effectively conceded that this law's limitations on human rights are neither 'reasonable' nor 'demonstrably justifiable'.

Whilst human rights, such as the right to privacy, can be limited in some circumstances, the government should only limit rights to achieve some other significant benefit for the community, such as the protection of public order and safety. Moreover, where the rights being infringed are the fundamental rights of children, the need must be pressing and compelling indeed.

It is therefore extremely concerning that the government has not demonstrated or adduced evidence of the need for these new police search powers.

Perhaps the Government does have good reasons for passing these laws and infringing rights, but if so we have a right to be told those reasons and shown the evidence. Instead, we are given a vague reference to community concerns about crime and are left to draw our own conclusions about the crass political capital to be gained by a Government being seen to be 'tough on crime'.

It is difficult to see how infringing children's rights and interfering with peoples' privacy is the best way to go about 'protecting' the community. Rather, it is precisely this sort of law from which we need protection.

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

Anti-Discrimination Laws that Discriminate

What's the difference between a travel company for women and a private club for men? It's not a joke, but the answer may make you laugh.

In Victoria, a travel company that excludes men constitutes unacceptable discrimination. A club that excludes women is fine.

The reason for this perplexing inconsistency is that private clubs are permanently exempt from our *Equal Opportunity Act*. This means that while other groups (such as women's only travel agencies) are obliged to justify their discriminatory practices, private clubs are under no such obligation.

Last week, VCAT (the Victorian Civil and Administrative Tribunal) denied Travel Sisters, a company that wanted to arrange tours for women only, permission to discriminate. The decision was based on the failure of Travel Sisters to provide an adequate justification for why they needed to exclude men.

Under Victorian law, organisations that do not enjoy a permanent exemption from the Act are allowed to discriminate, but only if they can justify doing so. VCAT will consider the reasons provided and attempt to strike an appropriate balance between competing rights and interests.

In fact, Travel Sisters could have mounted a case for providing a women's only service, but didn't. Instead their explanation for why they needed to discriminate didn't go much further than 'because we want to', so their application was rejected.

This requirement to explain and justify discrimination is not imposed on men's clubs.

On 24 November, a Victorian parliamentary committee recommended that this regime be left in place. If Victorian parliament adopts the Committee's recommendations, clubs such as the Australian Club, the Melbourne Club and the Athenaeum Club will retain their licence to discriminate, no questions asked.

The committee was unwilling to interfere with club members' right to freely associate and right to privacy. But it is difficult to argue that the need for men-only clubs to exclude female members outweighs the need to eradicate discrimination against women.

Even the Savage Club acknowledges this. In his evidence to the committee, Noel Bushnell of the Savage Club said that requiring justification of discriminatory membership policies would pose 'an almost insurmountable barrier to men-only clubs'.

Men-only clubs may appear innocuous, but they are a significant obstacle to substantive equality for women. The exclusionary nature of these clubs systematically deprives women from developing their career potential and breaking into powerful business, political and community networks.

Denying women equal access to these elite and powerful institutions also reinforces the stereotypical view that women are inferior as leaders and business professionals.

It is believed that Chief Justice Marilyn Warren is the first Victorian Supreme Court Chief Justice in over a century who has not been offered honorary membership of the Australian Club.

The symbolic significance of these exclusionary practices – and their endorsement in our laws – should not be underestimated. Nor should we be placated by claims that discrimination against women is a ‘non-issue’. In 2008, women in ASX 200 companies held 2 per cent of CEO positions, chaired 2 per cent of boards and held 8.3 per cent of board director positions.

Earlier this year, state Attorney-General Rob Hulls said that private men’s clubs were ‘fast becoming an amusing relic’. If we allow these clubs to retain their special protection, the joke is on us.

Rachel Ball is a lawyer at the Human Rights Law Resource Centre. Melanie Schleiger is an anti-discrimination lawyer at Lander & Rogers

News

Government Moves to Comprehensively Prohibit Torture and the Death Penalty

On 19 November 2009, the Attorney-General, the Hon Robert McClelland MP, introduced the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill 2009*. The Bill seeks to:

- enact a specific Commonwealth torture offence in the Commonwealth Criminal Code which would operate concurrently with existing offences in State and Territory criminal laws. This is intended to ‘more clearly fulfil Australia’s obligations under the United Nations Convention Against Torture to ban all acts of torture, wherever they occur’.
- amend the Commonwealth *Death Penalty Abolition Act 1973* by extending the application of the current prohibition on the death penalty to State laws, thus ensuring that the death penalty cannot be introduced anywhere in Australia. This is intended to ‘safeguard Australia’s ongoing compliance with the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the Abolition of the Death Penalty’.

In the Second Reading Speech, the Attorney-General outlined that ‘the overarching purpose behind these amendments is, in the spirit of engagement with international human rights mechanisms, to ensure that Australia complies fully with its international obligations to combat torture and to demonstrate our commitment to the worldwide abolitionist movement.’

‘Taking these steps demonstrates our fundamental opposition to acts that are contrary to basic human values,’ said the Attorney-General.

HRLRC Shortlisted for Two Australian Human Rights Awards

The Human Rights Law Resource Centre is very proud to have been shortlisted for two Australian Human Rights Awards. The Awards are made annually to individuals and organisations that have made outstanding contributions to the promotion and protection of human rights in Australia. The Centre has been shortlisted in both the ‘Community Organisations’ category and the ‘Law’ category.

The presentation ceremony will be held in Sydney on 10 December 2009.

Further information about the Awards is available at www.humanrights.gov.au/hr_awards/index.html.

UN Expert Calls for New Global Treaty on the Rights of People in Detention

Professor Manfred Nowak, the UN Special Rapporteur on Torture and a leading international authority on the protection of human rights, has called for the development of a new global treaty on the rights of people in detention. In a report to the UN General Assembly, Prof Nowak warned that many States fail to respect the basic dignity of prisoners, by providing inadequate food, sanitation and healthcare.

According to the Rapporteur, unacceptable prison conditions persist in both rich and poor countries, perpetuated by a view of prisoners as being 'at the bottom of society and therefore not deserving of basic levels of care.' Prof Nowak finds that 'the penitentiary system in most countries is not aimed at the reformation and social rehabilitation of convicts but rather simply serves the punitive purpose of locking detainees and prisoners away. Most importantly, the conditions of detention in many places of detention do not meet any international minimum standards as laid down in the Standard Minimum Rules for the Treatment of Prisoners and similar soft law instruments.

The report details numerous examples from around the world of overcrowded prison cells lacking basic heat or ventilation, young children being held in the same detention areas as hardened adult criminals, and routine torture and ill-treatment. Developed countries were particularly cited in relation to the treatment of asylum seekers and unlawful migrants, the incarceration of remand prisoners with convicted prisoners, as well as the mixing of juvenile detainees with adults.

The report is available at <http://www2.ohchr.org/english/issues/torture/rapporteur/index.htm>.

Report on Poverty and Inequality: Do Human Rights Make a Difference?

The Joseph Rowntree Foundation in the UK has recently published a major study entitled, *Poverty, Inequality and Human Rights: Do Human Rights Make a Difference?*.

The study examines the use and effectiveness of a human rights-based approach to alleviate poverty and inequality.

Some of the key findings of the study include that:

- Human rights can be used to 'reframe conceptions of poverty and challenge stereotypes of people affected by it';
- Human rights approaches are useful in mobilising communities and alliances to combat poverty, often 'connecting disparate actors for social change';
- Human rights can provide very useful and effective tools for measurement, monitoring, scrutiny and accountability;
- 'Communities affected by poverty that have asserted their right to participate in decision-making have generated practical and cost-effective policy solutions.' 'Participatory human rights work generates practical solutions to problems experienced by people living in poverty and can help deliver best use of public funds.'
- 'Constitutional and other legal protection of civil and political and socio-economic rights has achieved tangible results in tackling poverty in some contexts.'

The study concludes with lessons for governments and civil society for integrating human rights and anti-poverty work.

The study is available at <http://www.jrf.org.uk/sites/files/jrf/poverty-human-rights-full.pdf>.

National Charter of Rights Developments

ACT NOW! A Human Rights Act for Australia

The landmark Report of the National Human Rights Consultation, released by the Federal Government on 8 October 2009, recommends that Australia enact a comprehensive national Human Rights Act.

The Report also recommends a range of other measures to protect human rights in Australia, including strengthening the Australian Human Rights Commission, enhancing human rights education, improving parliamentary scrutiny of human rights, improving access to justice and addressing Indigenous disadvantage and exclusion.

The Government has announced that it will respond to the report in December 2009. **For people concerned with improved protection of human rights in Australia, the time to act is now!**

What can you do?

You can be part of the campaign for a Human Rights Act by emailing or writing to your local MP or to the Prime Minister and the Attorney-General.

In preparing a letter, you may find the following materials helpful:

- Letter to MPs and Senators on a Human Rights Act sent by the HRLRC to all federal MPs and Senators (see www.hrlrc.org.au/files/HRA-for-Australia-Letter-to-all-MPs.pdf);
- Briefing Paper on a Human Rights Act for Australia sent by the HRLRC to key Ministers and MPs (see www.hrlrc.org.au/files/Briefing-Paper-A-Human-Rights-Act-for-Australia1.pdf); and
- Supplementary Briefing Paper on the Benefits of a Human Rights Act for Australian Foreign Policy and Relations sent by the HRLRC to DFAT and the Foreign Minister (see www.hrlrc.org.au/files/Supplementary-Submission-to-DFAT-on-a-HRA.pdf).

In writing your email or letter, don't assume that your MP has any knowledge about the consultation or the report. Here are some tips about what you might include in a letter:

- Tell your MP about the massive participation by Australians in the Consultation – the largest ever in Australian history – and that the report strongly recommended the adoption of a Human Rights Act (supported by 87.4% of submissions).
- Most importantly tell your MP about your story and why human rights matter to you. Is it because of a breach of your human rights or of the rights of someone close to you? Or do you know about human rights problems through your work or community?
- Tell them why action needs to be taken NOW. Explain how the human rights issue you experience persists in some form.

Tell your MP to support a Human Rights Act as a means of addressing inequality, improving democracy, and creating a human rights culture in Australia.

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

Victorian Charter of Rights Developments

Statements of Compatibility under the Victorian Charter

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

Below is an analysis of recent significant Statements.

Summary Offences and Control of Weapons Acts Amendment Bill 2009

On 10 November 2009, the *Summary Offences and Control of Weapons Acts Amendment Bill* was introduced into Parliament to 'enhance police powers to tackle violence and disorder'. The stated purposes of the Bill include:

- introducing a new power for police to 'move on' people in a public place in certain circumstances;
- creating a new offence of disorderly behaviour; and
- providing police with enhanced powers to search for weapons.

The Statement of Compatibility for the Bill concludes that the Bill is partially incompatible with the *Charter* as a result of amendments to the *Control of Weapons Act 1990*. However, the Minister stated that the government believes it is necessary and appropriate to provide police with expanded powers to address the community's concerns regarding weapons-related offending. The Bill is the first piece of legislation since the introduction of the *Charter* to be accompanied by a Statement of Compatibility that admits incompatibility with the Charter.

The Scrutiny of Acts and Regulations Committee will commence its review of the Bill and its compatibility in the week starting 23 November 2009.

The Bill engages a number of rights under the *Charter*.

New police powers to move on

Clause 3 of the Bill grants police the power to give directions to people to 'move on' in circumstances where police believe that a person 'is likely to breach the peace', 'is likely to endanger the safety of other persons' or 'the behaviour of the person or persons is likely to cause injury to a person or damage to property or is otherwise a risk to public safety'.

The Statement of Compatibility accepts that the right to freedom of movement, as protected by s 12 of the *Charter*, is limited by clause 3. However, it states that this limitation is reasonable and justified in accordance with s 7 of the *Charter*.

The right to freedom of movement is the right that every person lawfully within Victoria has to move freely within Victoria. The Statement of Compatibility states that the 'move on' order may only be made where police reasonably suspect a member of the public of breaching the peace, endangering safety or damaging property or where there is a likelihood of one of those things occurring. The Statement concludes that the nature and extent of the limitation only restricts the rights of freedom of movement to the extent necessary to achieve the legislative purpose of protecting public order and the limitation is therefore reasonable and justifiable under s 7(2) of the *Charter*.

The right to freedom of expression is also engaged by clause 3. Section 15 of the *Charter* provides that every person has the right to freedom of expression. The Statement of Compatibility asserts that while the right may be engaged by the exercise of the 'move on' powers, there is no incompatibility with the *Charter*. Section 15 allows for the right to freedom of expression to be subject to lawful restrictions and the Statement holds that the 'carefully tailored' nature of the power means that it will only be used to respond to behaviour that gives rise to a disruption to public order or a reasonable suspicion of a disruption to public order.

While the Statement concludes that the 'move on' powers are compatible with the *Charter*, there may be some concerns that exist as to implications for human rights, given that the exercise of the powers will be based on subjective predictions of future behaviour by individual police officers. The test for the exercise of the powers is broad, vague and arbitrary. This creates the danger that the powers could be applied in a discriminatory and disproportionate way, thus limiting the right to freedom of movement further than necessary to achieve the purpose of protecting public order. The risk also exists that, as a result of the broad and arbitrary nature of the 'move on' powers, they could be used in a way that limits other human rights, such as the rights to freedom of expression and peaceful assembly.

New offence of disorderly conduct

Clause 6 of the Bill creates the offence of behaving in a disorderly manner in a public place. The clause engages the rights to freedom of expression and peaceful assembly.

In relation to the right to freedom of expression, the Statement of Compatibility states that the new offence does not breach this human right, asserting that, 'the offence of behaving in a disorderly manner places limits on acceptable behaviour in public places in order to serve the legitimate purpose of protecting public order and the rights of others to the peaceful enjoyment of public spaces ... however the language in which the offence ... is cast is malleable, allowing for it to be interpreted and applied narrowly so as to ensure consistency with the human rights framework'.

The Statement of Compatibility notes that the offence may limit the right to peaceful assembly. However, it states that this limitation is justified in order to protect public order and the rights of others. Again, the malleability of the language in which the offence is cast is said to ensure that it can be interpreted in a manner that restricts the right no more than necessary.

New search powers

Clauses 12 and 13 grant new search powers under the *Control of Weapons Act 1993*. The new powers allow a senior police officer to declare an area to be a 'designated area' for a maximum period of 12 hours. Police may then stop and search persons and vehicles in this designated areas even if they have not formed a reasonable suspicion that the person or vehicle is carrying a weapon. The new search powers are premised on there being a likelihood of weapons-related violence occurring in the designated area.

The Statement of Compatibility accepts that the random search powers are inconsistent with the right to privacy and the rights of children to such protection as is in their best interests. While the Statement concludes that these powers are incompatible with the *Charter*, the government has stated that it intends to proceed with the legislation given the considerable community concern about weapon-related offending.

The Statement does not give any consideration as to whether the powers limit the right to freedom of expression or association. However, given that there is no exemption for peaceful protests applying to

the random search powers, the powers appear to engage the rights of freedom of association and expression.

Caris Cadd is on secondment to the PILCH Homeless Persons' Legal Clinic from Freehills

Statute Law Amendment (Evidence Consequential Provisions) Bill 2009

The *Statute Law Amendment (Evidence Consequential Provisions) Bill 2009* seeks to facilitate the implementation of the *Evidence Act 2008*. Of the clauses in the Bill that engage human rights under the Victorian *Charter of Human Rights*, cl 52 is of particular interest as it engages the right to a fair hearing (recognised by s 24 of the *Charter*).

Clause 52 of the Bill extends the definition of 'unavailability' by inserting a new circumstance in which a person will be deemed unavailable to give evidence. A person will be considered 'unavailable' under the Act if that person is 'mentally or physically unable to give evidence and it is not reasonably practicable to overcome that inability'.

The Minister's Second Reading Speech explains that

it is not intended that this amendment lower the standard of 'unavailability' generally. It would be insufficient for a witness to merely produce a medical certificate asserting that they are incapable of giving evidence. A real mental or physical inability to testify must be shown.

The Statement of Compatibility for the Bill recognises that cl 52 engages the right to a fair hearing, and notes that the expanded definition is relevant to both s 63 (the exception to the hearsay rule in civil proceedings if the maker of a previous representation is not available) and s 65 (the exception to the hearsay rule in criminal proceedings if the maker of a previous representation is not available). Further, the Statement notes the role to be played by other sections of the Act that provide safeguards against possible abuse of this expanded definition, such as s 67 of the Act which requires notice to be given where such evidence is to be introduced.

The report into the Bill by the Scrutiny of Acts and Regulations Committee agreed that the right to a fair hearing is engaged by cl 52, and asked Parliament to clarify the issue of cross-examination. Specifically, SARC enquired as to 'whether or not cl 52, by permitting a witness statement to be used as the sole or decisive evidence against an accused without any opportunity for cross-examination, is compatible with defendants' *Charter* rights to a fair hearing and to examine witnesses against them.' SARC is yet to publish a response to this question.

SARC also noted a ruling earlier this year of the European Court of Human Rights on a similar English provision, which was found to be in breach of the defendant's right to a fair hearing (*Al-Khawaja and Tahery v UK* [2009] ECHR 110). Contrary to the assertions in the Statement that other provisions of the Act provide adequate safeguards against abuse of the right to a fair hearing, the European Court in that case said (at 37) that it 'doubt[ed] whether any counterbalancing factors would be sufficient to justify the introduction in evidence of an untested statement which was the sole or decisive basis for the conviction of an applicant.'

Despite the Minister stating that unavailability will be dependent upon a witness having a 'real' mental or physical inability to testify, the Bill fails to indicate any standard by which this inability should be judged. Further ambiguity is added by the requirement that the inability is not '*reasonably practicable to overcome*'.

The Bill has now been passed by both Houses of Parliament.

Emma Barton, Human Rights Law Group, Mallesons Stephen Jaques

Victorian Charter Case Notes

Equality and Exemptions: Discrimination on the Grounds of Political Activity

Victorian Electoral Commission (Anti-Discrimination Exemption) [2009] VCAT 2191 (30 September 2009)

VCAT has granted the Victorian Electoral Commission ('VEC') an exemption from the *Equal Opportunity Act 1995* (Vic) ('EO Act') to enable the VEC to take into account certain political activities of a person when considering whether to offer the person employment, contract work or an appointment on the audit

committee of the VEC. In arriving at her decision, Vice President Harbison referred to the principles enunciated by President Bell in *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869.

The Victorian Equal Opportunity and Human Rights Commission ('VEOHRC') intervened in the matter as an interested party.

Facts

The VEC sought an exemption to enable it to request and consider the following information of applicants for employment and contract work with the VEC and membership of the VEC audit committee:

- current or previous membership of a political party within Australia;
- current membership or association with a political lobby group, excluding membership of a union or professional association, which promotes a political position in respect of an issue currently before the electorate in an election;
- whether the person has been a councillor for a Victorian local council; and
- whether the person has published or publicly expressed a political opinion on an issue before the electorate at an election.

Without an exemption for this conduct, such conduct would breach various sections of the EO Act because it discriminates based on the attribute of political belief or activity.

The VEC has been granted exemptions for similar conduct since 1991, although past exemptions have identified the particular staff positions that were subject to the exemptions. However, the VEC submitted that there has been a fundamental change to its structure and workforce, which now comprises many casual employees. The VEC submitted that all of its staff and audit committee members 'may be required to make decisions of a highly contentious nature from time to time'. As a result, these individuals must be independent and be perceived as independent to maintain a high level of public trust in the election process.

The VEC submitted that, in practice, it would interview and assess applicants for its positions according to its normal process. Only applicants who are successful in this process would be asked to disclose whether the above exemption criteria apply to them. The Electoral Commissioner would personally evaluate whether the employment of the person is reasonable in light of the information that they disclose and the role for which they are applying.

Decision

Vice President Harbison confirmed that VCAT is acting in an administrative capacity, and therefore as a public authority, when exercising its power to grant exemptions under s 83 of the EO Act. As a result, VCAT is obliged to act compatibly with human rights under s 38 of the *Charter*. Vice President Harbison noted that, in any event, VCAT is required by s 32 of the *Charter* to interpret s 83 of the EO Act in a way which is compatible with human rights.

Vice President Harbison considered that the rights to equality, privacy, participation in public life, freedom of expression, freedom of association and freedom of thought, conscience, religion and belief were relevant to the VEC's application. She observed that these rights 'are of the highest importance'.

The purpose of the exemption, being to ensure the independence and impartiality of the election process, was also held to be an important public purpose as it is vital to the protection of freedom and democracy. According to Harbison VP,

by giving up the right to express their own political views or to engage in conduct of a political nature, the employees of the VEC may be seen as making the free expression of political views via the ballot box possible for all Australians. Thus...this exemption is a means of protecting the democratic framework within which all citizens' rights to equal opportunity can be exercised.

In terms of the nature and extent of the limitation, Harbison VP noted that only applicants who were successful at the first stage of the process would be asked to disclose their political activities, the disclosure would be treated in confidence, and the VEC does not intend to automatically exclude applicants based on disclosures. Further, applicants would have an opportunity to argue their case prior to a decision being made to use their disclosure to bar employment or committee membership.

Vice President Harbison considered there to be an arbitrariness to the proposed exemption, which addresses perceived bias but not actual bias. Nonetheless, Harbison VP concluded that this is preferable to not dealing with the issue at all, and that she could not conceive of criteria to identify actual bias.

Vice President Harbison was also concerned by the lack of clarity in the proposed terms of the exemption. The VEC addressed these concerns by, among other things, agreeing to explain to job applicants why they are required to disclose political activities. The VEC further agreed to ensure the privacy of information disclosed and to allow VCAT to monitor the exemption. However, Harbison VP considered that the exemption was still uncertain due to the Electoral Commissioner's broad discretion to discriminate based on any information disclosed.

Having weighed these factors, Harbison VP granted the exemption sought by the VEC. However, she amended the criteria of information that the VEC could consider to:

- current or previous membership of a political party within Australian within the past 15 years;
- a course of conduct within the past 15 years directed to supporting the aims of a political party of an independent candidate in a State, Territory or Federal election;
- current membership or association with a political lobby group, excluding membership of a union or professional association, which promotes a political position in respect of an issue currently before the electorate in the election for which that person is to be employed;
- whether the person has been a councillor for a Victorian local council within the past 15 years;
- a course of conduct within the past 15 years directed to supporting the political aims of a local councillor; and
- whether the person has publicly engaged in conduct promoting a political position in respect of an issue currently before the electorate in the election for which that person is to be employed.

Vice President Harbison granted the exemption for a period of three years and ordered that the VEC report to VCAT every six months on the operation of the exemption. Her Honour noted that, in the long term, it may be more sensible for the VEC to be given a statutory exemption.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VCAT/2009/2191.html>.

Melanie Schleiger is a lawyer with Lander & Rogers

Equality and Exemptions: Discrimination to Promote Gender Equality in Education

Carey Baptist Grammar School Ltd (Anti-Discrimination Exemption) [2009] VCAT 2221 (23 October 2009)

Carey Baptist Grammar School ('Carey') was also successful in its application to VCAT for an exemption from the *Equal Opportunity Act 1995* (Vic) ('EO Act'). VCAT renewed Carey's exemption to enable it to treat prospective female students preferentially in order to promote a gender balance of the student body.

Facts

Carey is an independent school that was initially for boys only. However, in 1979, the school community decided that Carey would become coeducational, and it commenced enrolling female students.

Deputy President McKenzie indicates that the benefits of coeducation include: 'the opportunity to gain knowledge and understanding each sex of the other and to appreciate both the similarities and differences between the sexes, including differences in ways of thinking...[and] increasing self confidence in relations between the sexes'. However, McKenzie DP indicated that these benefits are diminished or lost if there is a gender imbalance. It is unclear what evidence was submitted in support of the benefits of coeducational programs or the need for gender balance to ensure enjoyment of its benefits.

Carey has been granted exemptions since 1997 to advertise for prospective female students to enter the school, and to structure its waiting lists, allocate student placements and offer bursaries and enrolments in a manner that is preferential to female students. The number of female students at Carey has increased over this period such that, in 2009, 48 per cent of the total student body was female.

Despite this, McKenzie DP found that, without the exemption, '[t]here would be a growing majority of boys to girls across the various year levels of the school, and the school's coeducational model might fail'.

Decision

The principles enunciated by President Bell in *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869 were applied. Namely, McKenzie DP held that, in determining whether to grant an exemption under the EO Act, it is necessary to consider which human rights are engaged and whether the proposed exemption limits those rights in a way that is justified under s 7(2) of the *Charter*.

Deputy President McKenzie held that the application engaged the right to equality, as protected by s 8(3) of the *Charter*. Notably, McKenzie DP did not consider the right of children to protection under s 17 of the *Charter*, which is arguably relevant considering the evidence that coeducation is advantageous for boys but disadvantageous for girls.

Deputy President McKenzie considered the exemption to be a justified limitation on the right to equality of prospective male students. This is because the limitation aims 'to provide choice in education' and 'ensure that the coeducational experience [at Carey] continues to be viable and to benefit both sexes'. In McKenzie DP's view, the exemption is proportionate, and the least restrictive way to prevent Carey's female students being 'swamped' and coeducation undermined.

Carey's submission that the exemption was not discriminatory because it assisted or advanced female students, who are disadvantaged because of discrimination, was rejected. Carey did not demonstrate how girls are disadvantaged in their education, and so it could not rely on the 'special measures' provision in s 8(4) of the *Charter*.

It is a condition of the exemption that Carey must notify VCAT if, at any time, there is an equal gender balance in each and every year level at each school campus.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VCAT/2009/2221.html>.

Melanie Schleiger is a lawyer with Lander & Rogers

Equality and Exemptions: VCAT Denies Exemption for Women Only Travel Tours

Travel Sisters (Anti-Discrimination Exemption) [2009] VCAT A189/2009 (17 November 2009)

Facts

In 2009, Erin Maitland applied to the Victorian Civil and Administrative Tribunal ('VCAT') under s 83 of the *Equal Opportunity Act 1995* (Vic) ('EO Act'), for an exemption to allow her to operate women only travel tours.

The applicant submitted that her proposed business would provide access to a safe and secure environment for women wishing to travel. In support of her claim for an exemption, the applicant submitted that her proposed business would:

- offer security to women who were frightened or uncomfortable traveling alone;
- be tailored to women's common interests;
- offer reassurance to the male partners of women traveling alone;
- provide an opportunity to travel for women who, for cultural, religious or other reasons, are unable to, or feel uncomfortable, traveling in mixed groups; and
- provide security to domestic and sexual violence survivors wishing to travel.

In making these submissions, the applicant drew on the arguments put forward in *Morris* [2007] VCAT 380, a similar case in which an exemption was granted.

VEOHRC Intervention

The Victorian Equal Opportunity and Human Rights Commission ('VEOHRC') intervened in the proceedings against the application. Citing Bell J's decision in *Lifestyle Communities (No 3)* [2009] VCAT 1869, the VEOHRC argued that the 'purpose of the Equal Opportunity Act did not permit the grant of exemptions in order to achieve convenient, economic and practical outcomes, but that the true purpose was to promote equal opportunity and prevent discrimination'.

In the VEOHRC's view, the applicant had provided insufficient evidence to justify the proposed limitation of the right to recognition and equality before the law – a core element of the EO Act. It submitted that 'accommodating a mere preference by a section of the female community for women only tours was unlikely to be able to be characterised as promoting equal opportunity and assisting the prevention of discrimination'. It further submitted that the proposed limitation of the right to equality was extreme in so far as it sought to exclude men on the basis of gender stereotypes related to men's behaviour and women's reaction to men's presence. The VEOHRC noted that there are less extreme alternatives, such as enforcing standards of conduct on tours, which would enable the applicant to achieve her business objectives without unreasonably impinging on the right to equality.

Decision

Judge Harbison denied the application for an exemption. In so doing, her Honour noted that the Victorian *Charter* requires a very stringent test to be applied in deciding whether or not to grant an exemption under section 83 of the EO Act. A limitation of the right to equal protection, she said, is permissible only if it can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Judge Harbison concluded that the applicant had failed to discharge the burden of establishing why the proposed limitation of the right to equal protection was justified. Her Honour based this decision, in large part, on the failure of the applicant to provide evidence to support the matters on which she relied. She reasoned that '[u]ntil this evidence is provided the most that can be said is that the applicant believes that her target group would prefer to participate in tours that were exclusive female. The grant of an exemption may well be convenient and practical to assist Erin in the establishment of her business, but it cannot presently be justified on human rights principles'. In her Honour's view, it was irrelevant that the applicant was unable to produce supporting evidence since she had not yet commenced her business. In line with the submission made by the VEOHRC, Harbison J also concluded that there were less restrictive means available to the applicant to reasonably achieve her business objectives. Judge Harbison distinguished the application from VCAT's earlier decision in *Morris* on the basis that it was decided prior to the entry into force of the Victorian *Charter*, and that the supporting evidence supplied by the applicant in the *Morris* case differed from the evidence brought in the present case.

Analysis

Travel Sisters serves as a reminder that applications for exemption under s 83 of the EO Act will be considered in the context of the obligations enumerated in the Victorian *Charter*. Judge Harbison's decision makes explicit the fact that it is the applicant who bears the burden of establishing that an application for exemption is compatible with the Victorian *Charter*. The failure to provide sufficient evidence regarding the compatibility of an application for exemption will result in its dismissal.

Judge Harbison's finding in *Travel Sisters* might have been strengthened, however, if her Honour had considered the obligation in the context of *substantive equality* pursuant to s 8 of the Victorian *Charter*. In this regard, Her Honour might have explained that the obligation not only requires equal treatment of the similar interests of men and women, but also the accommodation and acknowledgement of biological as well as socially and culturally constructed differences between them. In so doing, her Honour might have recognised that there may well be circumstances where the establishment of women's only travel tours is permissible under s 7(2) of the Victorian *Charter*. In this connection, she might have drawn parallels with VCAT's decision in *YMCA – Ascot Vale Leisure Centre (Anti Discrimination Exemption)* [2009] VCAT 765, in which the YMCA – Ascot Vale Leisure Centre was granted an exemption to offer women's only swimming sessions to enable Muslim women to participate in them. Judge Harbison might have also provided insight into how the applicant might have sought to discharge the evidentiary burden, given that she had not yet commenced her business and was acting lawfully by applying for an exemption first.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VCAT/2009/2427.html>.

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Right to a Fair Hearing and the Duty of the Court to Unrepresented Litigants

Russell v Yarra Ranges Shire Council [2009] VSC 486 (29 October 2009)

On 29 October 2009, Kaye J of the Supreme Court of Victoria considered the duty that a court or Tribunal might owe to an unrepresented litigant to ensure that the person understands his or her legal rights. His Honour considered the principles of natural justice under common law and also the right to a fair hearing under s 24 of the *Charter of Human Rights and Responsibilities Act 2006*. Justice Kaye found that the Victorian Civil and Administrative Tribunal had not breached the principles of natural justice and therefore had not denied rights under s 24 of the *Charter*.

Facts

The Supreme Court proceeding involved an application for leave to review a decision of VCAT to dismiss an application to cancel a permit granted by the Yarra Ranges Shire Council for the development of the Monbulk Community Hub.

Following the processes of the *Planning and Environment Act 1987*, an application by Council for permission to construct the Community Hub was advertised and objections received. The Applicant, Mr Russell, did not lodge an objection. A meeting of the Council resolved to issue the permit on 9 September 2008. Mr Russell met with the Council on 9 October 2008, where he was advised that a permit had been issued. That same day Mr Russell lodged an application with the Victorian Civil and Administrative Tribunal to cancel the permit. The Council issued the planning permit for the development on 10 October 2008.

The application to cancel the permit was heard by VCAT on 6 February 2009. Mr Russell, who was unrepresented at the hearing, unsuccessfully applied for an adjournment. Mr Russell argued that there had been a material mistake in the grant of the permit. The Deputy President dismissed Mr Russell's application.

The application to the Supreme Court for leave to appeal included the following grounds:

- VCAT denied the applicant natural justice in failing to adjourn the proceeding to allow the applicant to obtain legal advice which resulted in the applicant losing an opportunity to amend the application; and
- that the Tribunal denied the applicant his right to a fair hearing pursuant to s 24 of the *Charter*.

Kaye J considered what duty a court or Tribunal might owe to an unrepresented litigant to ensure the litigant understands his or her rights. His Honour considered precedent, including the recent decision of Bell J in *Tomasevic v Travaglini* [2007] VSC 337, which demonstrated two propositions:

- that the court ought to ensure that an unrepresented litigant understands his or her rights so that the litigant is not unfairly disadvantaged; and
- that the court shall refrain from advising a litigant how or when a litigant should exercise those rights. The court should ensure it does not become or be perceived to become an advocate for an unrepresented litigant.

The court must strike an appropriate balance between the two propositions.

Decision

Section 24 of the *Charter* protects the right to a fair hearing. The right is expressed follows:

A person charged with a criminal offence of a party to a civil proceeding has the right to have the charge or proceeding decide by competent, independent and impartial court or Tribunal after a fair and public hearing.

This decision considered the duty of the court to advise unrepresented litigants as to their rights as being part of the right to a fair hearing.

The Court considered whether the Tribunal was required to, but did not offer to the applicant an opportunity to adjourn his application to enable him to seek legal advice regarding his application.

Kaye J considered the conduct of the two hearings before the Tribunal on 30 January and 6 February 2009. His Honour noted that:

- on 30 January 2009 the applicant was represented at the Tribunal by counsel;
- the same Deputy President sat on both hearing dates and was entitled to assume the applicant had received appropriate advice;
- in the ruling on 30 January, the Deputy President noted that proceeding was an application to cancel the permit and not an application to review the Council's decision to grant the permit; and
- the transcript did not demonstrate that the applicant should have been offered an opportunity to adjourn in order to seek further advice regarding amending the application.

Kaye J considered whether the *Charter* provided a positive right to a fair hearing that went further than the common law. At 42, His Honour stated that:

I do not consider that s 24(1) of the *Charter* adds materially to the right of the applicant to a fair hearing before the Tribunal, for the purposes of the matters agitated in the application before me.

In this case the court decided pursuant to the common law that there had been no breach of natural justice. It also rejected the submission that the Tribunal had failed to comply with the *Charter*.

In summary it was held that the applicant did not have a real or significant basis for contending that the Tribunal denied natural justice or any rights under s 24 of the *Charter*. Accordingly, the application for leave to appeal was dismissed.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VSC/2009/486.html>.

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Freedom of Information under the Victorian Charter

McInnes v VicRoads (General) [2009] VCAT 2342 (4 November 2009)

McInnes made an application under the *Freedom of Information Act* 1982 (Vic) ('FOI Act') to VicRoads for a copy of an anonymous letter that VicRoads had received warning that his health might impact on his driving. VicRoads asked McInnes to provide them with a medical report, upon the presentation of which his licence was confirmed by VicRoads. However, the process caused McInnes to feel stressed and victimised. McInnes believed that a neighbour in his hostel had sent the letter.

VicRoads refused McInnes' application for the letter. The reasons included that the letter was sent to VicRoads in confidence and its disclosure would likely impair VicRoads from obtaining similar information in the future: s 35(1) of the FOI Act.

In applying to the VCAT for a review of the decision, the applicant relied on the rights to privacy (s 13 of the Victorian *Charter*) and freedom of expression (specifically the right to seek and receive information and ideas of all kinds in s 15(2)).

Decision

On 4 November 2009 Member Proctor affirmed VicRoads' decision.

This decision is relevant to:

- the threshold required before a right protected by the *Charter* is engaged;
- the effect of internal qualifications on the enjoyment of a right; and
- the interaction between existing rights-based legislation, such as the FOI Act, and the *Charter*.

Engagement of Charter Rights

The Tribunal found that the *Charter* rights to privacy and freedom of expression were not engaged.

The Tribunal applied the right to freedom of expression narrowly as not extending to creating a positive obligation (outside the FOI Act regime) on government to impart requested information: [33]. This is consistent with the approach of Bell J in *Smeaton v VWA* [2009] VCAT 1195 in which his Honour stated that the FOI Act does not limit a person's right to hold or express opinions or to receive information 'which others may wish to give': [28].

The Tribunal also considered the right to privacy with particular emphasis on the separate meanings of 'arbitrary' and 'unlawful' interference with the right to privacy: see [22-24]. Member Proctor found that

VicRoads' interference was reasonable and not arbitrary. Further, the system enabling people to anonymously notify VicRoads with concerns about other drivers meant that VicRoads received information it would not receive if authors were required to give their name.

Internal Limitations

Both the rights to privacy and freedom of information contain internal qualifications.

In this decision, the Tribunal relied on those qualifications to conclude that the rights were not engaged. This meant that sections 7(2) and 32 did not arise.

With respect, this is an overly narrow approach to the construction and engagement of rights. Further, it is inconsistent with the approach of Bell J in the seminal case of *Kracke v MHRB* [2009] VCAT 664, in which his Honour stated [109-110]:

Where rights are expressed in terms that contain a specific limitation, the nature and content of the rights in their plain state are not seen to be reduced by the specific limitation. Rather, the specific limitation is seen as an indication of what might be considered in determining whether any limitations are reasonable and justified under the general limitations provision in s 7(2).

This, when identifying the scope of the right at the engagement stage, this is done broadly and purposively, even where the right contains a specific limitation. Such a limitation becomes subsumed in the overall justification which is undertaken in the next stage.

Freedom of Information and the Charter

The Tribunal found that the FOI Act (and not the Charter) expresses the Victorian government's intention as to its obligations to release information: [32]. The FOI Act regime creates a parallel analysis: would disclosure be reasonably likely to impair VicRoads' ability to obtain other information; and does the public interest require disclosure? As the Tribunal held that the rights were not engaged, the Tribunal considered these questions rather than considering whether any limitation was justified and proportionate.

The decision is available at <http://www.austlii.edu.au/au/cases/vic/VCAT/2009/2342.html>.

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Comparative Law Case Notes

The Right to Water: South African Court Considers Justiciability of Socio-Economic Rights and the Roles of Courts and Parliaments

Mazibuko v City of Johannesburg [2009] ZACC 29 (8 October 2009)

The decision of the Constitutional Court of South Africa in *Mazibuko v City of Johannesburg* [2009] ZACC 28 is the first to consider the right of access to sufficient water entrenched in the South African Bill of Rights. Its elucidation of the principles to be applied when Courts adjudicate cases based on economic and social rights will be crucial to the understanding of these rights both within and outside South Africa.

Facts

The case arose from a new program of water supply implemented in the Soweto area of Johannesburg. Soweto, a historically black district of Johannesburg, was constructed according to apartheid-era urban planning principles, and, because of its black population, was made subject to special water policies. Each household was deemed to consume a fixed amount of water and charged accordingly. Actual usage of water was in fact far higher, in part due to leakage from badly corroded pipes. Many residents did not pay the deemed consumption charges.

It was decided that the situation in Soweto would be changed. The Johannesburg water authority generally made available two 'levels' of consumption to Soweto residents: a yard tap or a 'pre-paid meter'. According to city policy, all Johannesburg households (including those in Soweto), are supplied with 6kL per month of water free of charge ('free water policy'), in accordance with national free water allowance legislation. Beyond this amount, pre-paid meters would not supply water unless credit was purchased.

The Applicants were all residents of Phiri, in Soweto. They were all poor and lived in accommodation ranging from a brick house to a 'stand', the occupancy rate of which varied. They asked the Court to declare that the City's free water policy and the water authority's installation of pre-paid water meters were unconstitutional. Other arguments as to the lawfulness of these measures under South African national legislation are not discussed here.

Decision

Background

Section 27(1) of the South African Bill of Rights says that '[e]veryone has the right to have access to...sufficient food and water'. Section 27(2) further states that '[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'.

Two lower courts had decided largely in favour of the Applicants. They found, in essence, that the pre-paid meter system was unlawful, and that the right to 'sufficient water' in the South African Bill of Rights entitled the Applicants to an amount of water greater than the statutory minimum of 25L per person per day.

In contrast to the lower courts, the Court did not uphold any of the Applicants' grounds of objection.

Free water policy

The Applicants objected to the free water policy on the basis that a 6kL monthly allowance did not represent 'sufficient water'. O'Regan J, who delivered judgment on behalf of the Court, therefore began by pointing out that while traditionally human rights cases are about the state's duty to refrain from interfering with a right, the present case required the Court to consider the extent of the state's **positive** obligations.

Her Honour determined in the first place that s 27(1)(b) of the Bill of Rights did not require the state, on demand, to provide every South African with sufficient water. Rather, read in conjunction with s 27(2), the right to sufficient water required the state to take 'reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources'. The concept of progressive realisation implicitly recognises that the right to sufficient water cannot be achieved immediately, especially given the backdrop of poverty and deprivation against which the Bill of Rights was adopted.

O'Regan J therefore declined to 'give content to' the right to 'sufficient water' by articulating an amount of water that would satisfy its requirements. To do so, O'Regan J feared, would exclude any consideration of context from the right's application, something she thought was crucial to the assessment of whether a government measure was 'reasonable'.

The Applicants also argued that the free water policy was unreasonable because the free allocation applied irrespective of household wealth or size. On this point, O'Regan J emphasised that the determination of precisely which measures will be employed to realise social and economic rights is properly the domain of the legislature and executive. The nature of realisation depends on circumstance, and '[c]ourts are ill-placed to make these assessments for both institutional and democratic reasons'. As a result, Courts will generally not seek to re-draft government policies in assessing whether they meet the standards of the Constitution. They will merely ask whether they are reasonable.

Here, O'Regan J found that the free water policy was reasonable. The grounds relied upon by the Applicants to show unreasonableness could not succeed because alternatives to the City's approach would have been extremely costly, inequitable or impossible to implement. Importantly, the record showed that the City had continually reviewed its policy and undertaken research and consultation to this end. This demonstrated that measures had been employed to **progressively** realise the right to sufficient water.

Pre-paid meter system

The Applicants argued that the move from deemed consumption to pre-paid meters was unconstitutional. Although they conceded that the deemed consumption model was unsustainable, they submitted that the pre-paid meter system was retrogressive and unreasonable.

O'Regan J compared the two systems and found that (a) the new system allowed for a free per month allotment of water and (b) resulted in lower overall tariffs for users. Her Honour did not think this could amount to a retrogressive measure. She declined to take into account in this comparison that, prior to the introduction of the pre-paid meter system, many users did not in fact pay for their water.

Purpose of ESC rights litigation

O'Regan J noted finally that the purpose of litigation over social and economic rights should be to hold the executive and legislature to account by fostering participative democracy and requiring the state to justify its policy decisions. That is, the litigation requires the government to explain why its policies are reasonable, what research underlies them and why they were selected. The benefits of this approach, according to O'Regan J, were borne out in this case when the government was compelled to explain, and saw fit to amend independently of any Court order, the flaws in its free basic water policy.

Relevance to the Victorian Charter

There are presently no social or economic rights contained in the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The immediate relevance of this case to the interpretation of the *Charter* will therefore be limited. However, the Court's treatment of the South African Government's positive obligations to fulfil social and economic rights provides a useful framework within which the present debate on the introduction of a 'Human Rights Act' might evolve. Further, the Court's elucidation as to the content and justiciability of socio-economic rights could usefully inform the forthcoming review of the Victorian *Charter*, s 44(2)(a)(i) of which requires consideration as to whether ESC rights should be included in the legislation.

The decision is available at <http://www.constitutionalcourt.org.za/site/Mazibuko.htm>.

Sharyn Broomhead, Human Rights Law Group, Malleons Stephen Jaques

Criminal Records and the Right to Privacy

R (on the application of L) v Commissioner of Police of the Metropolis [2009] UKSC 3 (29 October 2009)

The United Kingdom Supreme Court has held that decisions to release information stored in public records about an individual's criminal convictions, including non-conviction information, will always engage art 8 of the *European Convention of Human Rights*. Accordingly, when deciding whether to release information under s 115 of the *Police Act 1997* for the purposes of an enhanced criminal record certificate, decision makers must consider whether the disclosure of the information is likely to interfere with the applicant's private life, and, if so, whether that interference can be justified.

Facts

Through an employment agency the appellant was hired to supervise children at a secondary school. In accordance with company policy, the employment agency applied for an enhanced criminal record certificate ('ECRC').

Section 115 (now section 113B) of the *Police Act 1997* requires the Secretary of State to issue an ECRC to applicants who satisfy the prescribed criteria. Sections 115(6) and (7) provide that an ECRC is a certificate which gives 'the prescribed details of every relevant matter in relation to the applicant which is recorded in central records'. Information contained in central records includes records of convictions as well as cautions. Prior to issuing an ECRC the Secretary of State must ask the relevant police force to provide any information which in the chief officer's opinion is (a) relevant and (b) ought to be included in the certificate. Accordingly, non-conviction information, for example, allegations and non-criminal activity, may be disclosed.

In the appellant's case, the ECRC issued after the police check did not show any criminal convictions. However, it disclosed that:

- in the past the appellant's son had been put on the child protection register under the category of neglect;
- the appellant failed to exercise the required degree of care and supervision of her son;
- the appellant had refused to cooperate with the social services during this period; and

- her son was removed from the child protection register after he had been convicted of robbery. Shortly after the ECRC was issued the appellant's employment was terminated. The appellant sought judicial review of the Metropolitan Police Service's decision to disclose the information about her son, alleging that it contravened her right to respect for her private life contrary to art 8 of the *European Convention*.

Decision

Article 8 of the *European Convention* recognizes the right to respect for a person's private and family life, home and correspondence.

The Court firstly considered whether art 8 was engaged. Lord Hope, who delivered the leading judgment, held that the decision to disclose information held in central police records fell within the scope of art 8 for the following reasons:

- Exclusion from employment affected the appellant's ability to develop relationships with others, her reputation, her ability to earn a living and consequently the enjoyment of her private life.
- Although information about her son's conviction was public in nature, the fact that the appellant was his mother was private information as was the information regarding the level of care she provided him and her lack of co-operation with the social services.
- Although information about criminal convictions is public in nature, the fact that it is stored in central records enables the information to be disclosed well after the incident and 'as it recedes into the past, it becomes part of the person's private life which must be respected' [27].

The Court then considered whether the limitation on the appellant's rights under art 8(1) could be justified as proportionate under art 8(2).

The Court held that an appropriate balance had to be struck between the need for the protection of children and vulnerable adults from the risk of harm and the appellant's right to respect for her private life. Police are obliged to consider, firstly, whether the information is relevant, and secondly, the likely impact on the private life of the applicant. Decisions to disclose information under s 115 were closely guided by the observations of Lord Woolf MR in *R(X) v Chief Constable of the West Midlands Police* [2005] 1 WLR 65. The Court disagreed with the approach in the case finding that balance was 'titled against the applicant too far' in that 'it has encouraged the idea that priority must be given to the social need to protect the vulnerable as against the right to respect for private life of the applicant' [44]. The Court held that 'the correct approach as in other cases where competing Convention rights are in issue, is that neither consideration has precedence over the other' [45].

The Court gave examples of the factors to consider when assessing proportionality:

- gravity of the material involved;
- reliability of the information on which it is based;
- whether the applicant has had a chance to rebut the information;
- the relevance of the material to the particular job application;
- the period that has elapsed since the relevant events occurred; and
- the effect of disclosure on the applicant.

It was considered that in some situations where the disclosure may be irrelevant, unreliable or out of date, then the applicant should be afforded an opportunity to comment.

The Court concluded that the information disclosed about the applicant was no doubt relevant and 'bore directly on the question whether she was a person who could safely be entrusted with the job of supervising children in a school canteen or in the playground' [48] and accordingly dismissed the appeal. Although the appellant was unsuccessful, the principles espoused in this case are significant for future police decisions to disclose information held in public records and the interpretation of art 8 generally.

Relevance to the Victorian Charter

This case has direct relevance for the interpretation of s 13 of the Victorian *Charter* which mirrors article 8 of the *European Convention*. In particular, the Court's finding that exclusion from employment may

affect an individual's private life and that decisions relating to personal information stored in public records engage the right to privacy may assist arguments regarding the scope of the right to privacy under the *Charter*.

In Victoria, non-conviction information cannot be disclosed by public authorities. In April 2007 the Council of Australian Governments 'agreed in-principle to a framework to improve access to a consistent and expanded range of inter-jurisdictional criminal history information by child related employment screening schemes to improve the safety and protection of children.' The Crimes Amendment (Working with Children – Criminal History) Bill 2009 proposes to implement COAG's agreement and is currently before the federal parliament. The Bill seeks to remove exemptions in the *Crimes Act* to permit disclosure of pardoned quashed and spent convictions. Interestingly, Victoria and the ACT (jurisdictions with human rights legislation) did not agree at the COAG meeting to participate in the exchange of information on non-conviction information.

The decision is available at <http://www.bailii.org/uk/cases/UKSC/2009/3.html>.

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Protesting for Animal Rights and the Right to Freedom of Expression and Assembly

Novartis Pharmaceuticals UK Ltd & Ors v Stop Huntingdon Animal Cruelty ('SHAC') & Ors [2009] EWHC 2716 (QB) (30 October 2009)

The High Court of England and Wales refused to grant amendments to an interim injunction that would have prevented animal rights activists from wearing blood splattered clothing, covering their faces with masks, displaying banners and using fireworks at a protest against a pharmaceutical company. The Court explored where to draw the line between free expression and unlawful harassment, observing that this is a matter of fact and degree.

Facts

The first defendant in this case was Stop Huntingdon Animal Cruelty ('SHAC'), an animal rights activist group campaigning for the closure of an animal testing laboratory called Huntingdon Life Sciences ('HLS'). As part of its campaign against HLS, SHAC targeted associated companies, including the first claimant, Novartis Pharmaceuticals UK Limited.

Prior to this case, an interim injunction had been granted, which imposed restrictions on SHAC's rights to protest against Novartis. That injunction was granted under the *Protection against Harassment Act 1997* (UK), which has also been invoked to prevent harassment in other animal rights cases.

In this case, the claimants applied for amendment of the injunction to address concerns about a protest planned for Halloween. Among other things, the claimants sought orders that the protestors must not:

- wear clothing or costumes splattered with blood;
- wear balaclavas, masks or face coverings;
- use banners to accuse Novartis and/or its employees of murdering, torturing or abusing animals.

SHAC had previously engaged in unlawful activities. The other defendants in this case were founding members of SHAC who were serving prison sentences for offences relating to SHAC's campaign.

Decision

Justice Sweeney took a cautious approach in deciding this application, noting that:

- the case was still at the interlocutory stage, and
- the claimant had not identified any previous case where such restrictions had been ordered.

Justice Sweeney refused to amend the injunction to prevent the protestors from wearing blood splattered clothing or costumes. He held that such a restriction was not proportionate and was unlikely to be practically enforceable.

He also refused to prevent the protestors from wearing masks, but acknowledged that that issue was less 'clear cut'. In reaching his decision, he balanced the potential for ghoulish masks to cause distress and conceal the identity of people who intend to harass others against:

- the practical problems that a ban on masks would cause for the Police;
- the risk that such a prohibition would heighten tensions; and
- the rights of people to wear innocuous masks.

He also noted the police's existing statutory powers concerning masks.

Justice Sweeney held that there is no reason to distinguish between shouting words (to which there was no objection) and printing the same words on a banner. For that reason, and because of practical obstacles to enforcement, he refused to grant the amendment relating to banners. He also refused to grant the amendment relating to fireworks, which he found to be redundant in light of existing laws.

In reaching his decision, Sweeney J considered the protestors' rights to freedom of expression, freedom of peaceful assembly and freedom of association (guaranteed under arts 10 and 11 of the *European Convention on Human Rights*). He observed that those rights are 'jealously safeguarded by English law'.

He quoted from the judgment of Sedley LJ in *Redmund-Bate v DPP*:

Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having.

Articles 10 and 11 of the *European Convention* expressly allow for the restriction of freedom of expression, freedom of peaceful assembly and freedom of association by laws which are necessary in a democratic society, in the interests of (among other things) preventing disorder or crime, or protecting the rights of others.

Justice Sweeney held that any such restrictions must be: '(i) convincingly established; (ii) justified by compelling reasons; (iii) subject to careful scrutiny; (iv) proportionate and no more than necessary.'

He found that delineating between protest and expression on one hand and harassment on the other hand 'involves intensive factual enquiry, and difficult questions of degree'.

In this case, the rights to freedom of expression, freedom of assembly and freedom of association needed to be balanced against the right to respect for private and family life, home and correspondence (protected under art 8 of the *European Convention*). Citing Dyson LJ in *Connolly v DPP*, Sweeney J held that:

generally speaking members of the public have the right to be protected from material intended to cause them distress or anxiety whether in the privacy of their own homes or in the workplace. It all depends on the circumstances. The more offensive the material the greater the likelihood that such persons have the right to be protected from receiving it. Much is likely to turn on the position of the recipient.

Apart from a minor amendment to the injunction, the claimants' application was rejected.

Relevance to the Victorian Charter

The right to freedom of expression is enshrined in s 15 of the Victorian *Charter* and the rights freedom of association and freedom of assembly are protected under s 16. Like art 10 of the *European Convention*, s 15 of the *Charter* contains an 'in-built' limitation on the right to freedom of expression. Under s 15(3), that right may be subject to lawful limitations which are necessary to (among other things) respect the rights of others or protect public order. In addition, s 7(2) of the *Charter* provides for the reasonable limitation of protected rights by law, where such limits can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking relevant factors into account.

This case may provide useful guidance in appraising whether restrictions on freedom of expression, freedom of association and freedom of assembly are justified, particularly in the context of protests. However, as Sweeney J emphasised, the resolution of such issues 'involves intensive factual enquiry'. Therefore, each case must be considered in light of its specific circumstances.

The decision is available at <http://www.bailii.org/ew/cases/EWHC/QB/2009/2716.html>.

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HRLRC Policy Work

Disability Discrimination and Migration Law

The Joint Standing Committee on Migration is conducting an inquiry into the health requirements undertaken for Australian visa processing. The current rules prevent many individuals and families from accessing visas because the applicant or a member of their family has a disability.

The Centre made a submission to the inquiry arguing that that decisions to grant or refuse visas must comply with Australia's international human rights obligations – particularly those contained in the *Convention on the Rights of Persons with Disabilities* – and the standards of non-discrimination set out in the *Disability Discrimination Act 1992* (Cth).

Neither international law nor the DDA prohibit all forms of discrimination. However, for discrimination to be lawful it must be demonstrably justifiable and meet standards of reasonableness and proportionality. The Centre considers that the current migration regime focuses on costs associated with disability in a way that is neither reasonable nor proportionate. Importantly, the health requirement does not consider the economic and non-economic contributions that can be made by people with disability and their families.

The submission is available at <http://www.hrlrc.org.au/content/our-work/law-reform-and-policy-work/disability-rights-discrimination-and-migration-law-nov-2009/>.

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Homelessness and Human Rights: Towards a Right to Adequate Housing

A major report by the House of Representatives Standing Committee on Family, Community, Housing and Youth, tabled on 26 November 2009, recommends the enactment of new homelessness legislation which enshrines 'the right of all Australians to adequate housing'. The report, *Housing the Homeless*, contains 15 recommendations aimed at preventing and addressing homelessness in Australia.

According to the Australian Bureau of Statistics, there are over 105,000 people who experience homelessness on any given night. The Committee's report states that this is 'despite over a decade of relative national prosperity' and cites the conclusions of then UN Special Rapporteur on the Right to Adequate Housing, Miloon Kothari, following his 2006 country mission to Australia that:

Australia has failed to implement its international legal obligation to progressively realize the human right to adequate housing to the maximum of its available resources, particularly in view of its possibilities as a rich and prosperous country.

In response, the Committee recommends that Australia enact comprehensive homelessness legislation which contains commitments to reducing homelessness 'by allowing access to adequate and sustainable housing' and to achieving 'social inclusion for people experiencing homelessness or at increased risk of homelessness'.

The Committee notes that 'the majority of submissions to this inquiry strongly support new homelessness legislation which incorporates an enforceable right to adequate housing' and also highlights the 'options put forward by the National Human Rights Consultation Committee to promote and better protect social, economic and cultural rights, including the right to adequate housing'.

In a unanimous report, and consistent with the HRLRC submission to the inquiry, the Committee recommends that any 'new homelessness legislation specify the right of all Australians to adequate housing'. Citing article 11 of the *ICESCR*, the Committee considers that 'such a provision should:

- include appropriate reference to Australia's international human rights obligations;
- include a clear definition of adequate housing; and
- explicitly recognise the right to adequate housing will be progressively realised.'

Also consistently with the HRLRC submission, the Committee states that 'effective and independent monitoring and reporting on progress toward the realisation of the right to adequate housing is essential' and that such 'monitoring and reporting should include disaggregated information for those populations identified as vulnerable or marginal'.

The HRLRC submission (together with many other submissions) recognised that homelessness is a human rights issue and is both a cause and a consequence of poverty and other human rights

violations. In response, the Committee states that it 'fully appreciates the associations between homelessness and the increased risks of experiencing discrimination and violations of rights'. Further, it recommends that 'the Australian Government, in cooperation with state and territory governments, conduct an audit of laws and policies that impact disproportionately on people experiencing homelessness' and that 'laws and policies that do not conform to anti-discrimination and human rights obligations should be amended accordingly'. Recognising that such an audit would be an intensive task, the Committee recommends that priority be given to review and amendment of 'anti-discrimination laws, residential tenancy laws, and public space laws'.

The Government has not yet announced the date for its response to the report.

The Committee report is at <http://www.aph.gov.au/house/committee/fchy/homelessness/report.htm>.

The HRLRC submission to the inquiry is at <http://www.hrlrc.org.au/content/topics/esc-rights/housing-rights-submission-to-australian-parliament-on-homelessness-legislation-aug-2009/>.

Philip Lynch is Director and Emily Howie is a Senior Lawyer with the Human Rights Law Resource Centre

ICCPR: Implementation of the Human Rights Committee's Concluding Observations on Australia

On 20 November 2009, the HRLRC made a submission to the Australian Government in relation to implementation of the Human Rights Committee's Concluding Observations on Australia's compliance with the ICCPR. The Attorney-General's Department sought input from civil society on the implementation of the Committee's recommendations made in March this year.

The HRLRC's submission provides a number of recommendations on steps that should be taken by the Australian Government to address the concerns raised by the Human Rights Committee and to comply with Australia's international human rights obligations in the following areas:

- the legal framework for the protection of human rights following the recent National Human Rights Consultation;
- counter-terrorism legislation;
- rights of equality and non-discrimination;
- the rights of Indigenous Australians, including in relation to the Northern Territory Intervention, a national representative body and compensation for the Stolen Generations;
- addressing violence against women;
- homelessness;
- non-refoulement obligations;
- reform of extradition and mutual assistance laws;
- police powers and the use of force;
- immigration detention; and
- issues relating to access to justice.

A copy of the submission is available at <http://www.hrlrc.org.au/content/our-work/law-reform-and-policy-work/domestic-submissions/implementation-of-the-human-rights-committee-concluding-observations/>.

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

Police Powers: Summary Offences and Search Legislation Must be Amended to Ensure Human Rights Compatibility

The Victorian Government has introduced the Summary Offences and Control of Weapons Acts Amendment Bill. If passed, the legislation will provide police with broad new powers to randomly search people in designated areas without any requirement that police officers have a reasonable suspicion of wrongdoing; to strip search people before arresting them; and to move people on the basis of a suspicion that a person might do an illegal act in the future.

The Bill has been introduced into the Victorian Parliament to 'enhance police powers to tackle violence and disorder'.

Whilst there may be a legitimate need for the Victorian Government to take legislative or other action to combat violence in our community, the Human Rights Law Resource Centre is extremely concerned that:

- the Government has not articulated the particular public safety and security risk that the Bill seeks to address;
- the Government has issued a Statement of Compatibility that admits that some of the limitations on human rights are neither 'reasonable' nor 'demonstrably justifiable' but wishes to pass the law anyway; and
- there has been no consultation with the community during the development of the Bill or prior to its introduction to Parliament.

The Human Rights Law Resource Centre made a submission to the Victorian Parliament's Scrutiny of Acts and Regulations Committee, calling on the Committee to:

- ask the Police Minister to articulate the particular public safety and security risk that the Bill seeks to address and to provide cogent evidence of those risks;
- recommend that the Bill not be passed in its current form because it includes unreasonable and disproportionate limitations on human rights; and,
- if the Bill is to be passed, to recommend that, at the very minimum, certain amendments be adopted.

The submission is available at <http://www.hrlrc.org.au/content/topics/civil-and-political-rights/police-powers-summary-offences-and-search-legislation-must-be-amended-to-ensure-human-rights-compatibility-nov-2009/>.

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

HRLRC Casework

Indigenous Rights: Federal Government Must Immediately Reinstate the *Racial Discrimination Act 1975*

In a letter to the Prime Minister, the Attorney General and Minister Macklin, the Human Rights Law Resource Centre has strongly urged the Rudd Government to immediately reinstate the *Racial Discrimination Act 1975* (Cth) to apply to all measures of the Northern Territory Intervention. The letter has been endorsed by more than 150 non-government organisations from all over Australia, including Indigenous organisations, peak bodies, religious groups and other community groups.

The letter explains that the reinstatement of the *Racial Discrimination Act* would ensure that laws, policies and practices designed to 'Close the Gap' would be more effective and beneficial for Indigenous peoples, and would demonstrate and confirm the Rudd Government's commitment to the protection and promotion of human rights.

The letter is available at <http://www.hrlrc.org.au/content/topics/equality/indigenous-rights-federal-government-must-immediately-reinstate-the-racial-discrimination-act-1975-nov-2009/>.

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

Indigenous Rights: UN CERD Response to Request for Urgent Action on NT Intervention

The UN Committee on the Elimination of Racial Discrimination has requested the Australian Government to address the discriminatory aspects of the Northern Territory Intervention. In a letter dated 28 September 2009, the Committee notes the recent assessment of the UN Special Rapporteur on the Rights of Indigenous Peoples following his country visit to Australia that the Northern Territory Intervention remains incompatible with Australia's international human rights obligations.

The Committee's letter also notes that Australia's next periodic report under the Convention on the Elimination of Racial Discrimination is now more than 12 months overdue, and requests the Australian Government to submit its report before the Committee's forthcoming session in February 2010.

The letter is available at

http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Australia28092009.pdf.

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Seminars and Events

The Responsibility to Protect: Prevention and Intervention in response to Mass Atrocity Crimes

27 and 28 November 2009, Melbourne

The Human Rights Law Resource Centre and the Institute of Legal Studies at the Australian Catholic University present a major conference on 'The Responsibility to Protect: Protection and Intervention in response to Mass Atrocity Crimes'. The conference will be held on 27 and 28 November 2009 at the Australian Catholic University, Melbourne.

Confirmed speakers for this major conference include the **Hon Gareth Evans AO AC**, the **Rt Hon Malcolm Fraser AO AC**, the **Hon Bob McMullan MP** (Parliamentary Secretary on International Development Assistance), **Prof Ramesh Thakur** (Canadian Commission on Intervention and State Sovereignty), **Prof Alex Bellamy** (Director of the Asia-Pacific Centre for the Responsibility to Protect), **Prof Joseph Camilleri**, **Prof Spencer Zifcak** and **Phoebe Wynne-Pope**.

Background: At the United Nations Summit in 2005, the world's political leaders agreed to adopt the principle of the responsibility to protect. This principle, and its practice, is designed to ensure that every possible step is taken by individual nations, and by the international community, to ensure that mass atrocity crimes, such as those which occurred in Rwanda, Kosovo and East Timor, will not occur again.

In January 2009, the Secretary-General of the United Nations delivered a report to the UN General Assembly in which he fleshed out the meaning and operation of the new principle. Distinguishing it from the prior doctrine of humanitarian intervention, the report emphasized that the primary responsibility for preventing mass atrocities rested with the nation state concerned. However, where a state is unable or unwilling to take preventative steps, the responsibility must shift to the international community to ensure that genocide, crimes against humanity, war crimes or ethnic cleansing do not eventuate.

The purpose of this conference is to explain the parameters of this new principle of international law and political practice, to address the practicalities and problems of its implementation, to consider its potential application in the Asia-Pacific region, and to tackle again the vexed question of military intervention for humanitarian purposes.

The conference will be of interest to those concerned with international law, international relations, international aid and development, Asia-Pacific politics, and Australia's role in ensuring security and well-being in our immediate region.

For further information see www.acu.edu.au/acu_national/the_university/conferences/r2p/.

Resources and Reviews

David Kinley, *Civilising Globalisation: Human Rights and the Global Economy*
Cambridge University Press, 2009, 256 pp, \$49.95 (paperback)

Alison Brysk, *Global Good Samaritans: Human Rights as Foreign Policy*
Oxford University Press, 2009, 287 pp, \$52.95 (paperback)

In *Civilising Globalisation*, Professor David Kinley explores the intersections between the global economy and human rights, asking: 'In what ways does, can and should the global economy support and assist human rights, and in what ways do, can and should human rights instruct the global economy?' (p 1).

In answering this question, Kinley explores the ways in which international aid, trade and commerce variously promote and violate human rights and makes concrete recommendations as to how to harness

the human rights benefits of globalisation while minimising the abuses. At the core of Kinley's thesis is the idea that human rights are the 'ultimate foundation upon which rests the legitimacy of the actions of our governments, our international institutions, our corporations and business enterprises [and] our organs of civil society' (p 239) and that, by consequence, human rights must be deeply integrated and mainstreamed into the functions and actions of these entities. As Kinley writes, 'Poverty does not cause human rights abuse; the actions or inactions of governments and other institutions and organisations, as well as other individuals, *cause* human rights abuse' (p 27). By consequence, he says, 'governments, international finance and multinational corporations must be forced to do more than pay lip service to their legal and ethical duties to protect human rights'.

Approaching human rights as part of 'core business' is similarly the focus of *Global Good Samaritans* by Canadian political scientist Professor Alison Brysk. Like *Civilising Globalisation*, *Global Good Samaritans* starts with a question: Why do a small number of principled, persistent, human rights promoting states, or 'Global Good Samaritans' as Brysk calls them, sacrifice their national interest to help strangers? Her simple answer is ... they don't (p 31). Drawing on case studies including Canada, Costa Rica, Sweden and The Netherlands, Brysk explains that such states construct and re-construct their national interest with a broad, long-term vision of a rule-based international system that values and promotes human rights, security, democracy and good governance. Global Good Samaritans, she posits, see the 'blood, treasure, and political capital they contribute to the international human rights regime as an investment, not a loss' (p 31). They have learned to see themselves, she continues, 'as interconnected members of a global community that works best for everyone when human rights are respected' (p 31). Put another way, Global Good Samaritans recognise the domestic and international imperatives of a rule-based international social order, of adhering to the rules, and of a genuine multilateral commitment to tackling global problems. They recognise that, in the absence of these imperatives, urgent challenges such as climate change, poverty, financial instability and food insecurity will remain unresolved, with grave implications for global, regional and national peace, security and development. As Kinley writes in *Civilising Globalisation*, 'I am as concerned with what we stand to lose if the project [of mainstreaming human rights in the global order] fails, whether through mendacity, ignorance, arrogance or neglect, as with what we stand to gain if it succeeds' (p 229).

In addition to recognising the dangers of not adopting a persistent and principled approach to human rights in international relations and foreign policy, Brysk demonstrates that Global Good Samaritans also see and reap the benefits of doing so. Such benefits include: the development of a more stable and predictable international and regional policy environment; enhanced international credibility and diplomatic capital; enhanced policy coherence and effectiveness as human rights construct common frameworks for domestic, bilateral and multilateral policy and relations; the development of diverse, cross-cutting international networks with other promoter states; and the ideation and mobilisation of universal and constructive national values and identities.

Both *Civilising Globalisation* and *Global Good Samaritans* are clear, cogent, accessible and balanced works. They make very significant, positive and optimistic contributions to debates regarding human rights and international order and contain concrete and critical recommendations as to the integration of human rights into global and domestic politics and economies. As Brysk concludes:

We can build a better world by nurturing every element of the international human rights regime. Global institutions, transnational civil society and state human rights promoters are interdependent and synergistic. They can reinforce each others' efforts—and must learn from each others' visions and experiences. (p 234)

Phil Lynch is Director of the Human Rights Law Resource Centre

New Issue of *Alternative Law Journal* – The Architecture of Justice

The *Alternative Law Journal* is a quarterly refereed journal which focuses on social justice, human rights, access to justice, progressive law reform and legal education. The *Journal* has a diverse readership among legal practitioners, judges, policy makers, law students and legal studies students.

The latest issue, themed *The Architecture of Justice*, contains articles on highly topical issues such as Indigenous property rights, same-sex equality, gender equality, disability discrimination, domestic violence, greening workplaces, and war crimes in Iraq.

For further information and to subscribe, see www.altlj.org.

Human Rights Jobs

Senior Lawyer, Pro Bono Practice, Gilbert + Tobin (Sydney)

Gilbert + Tobin, a leading Australian corporate law firm, seeks a senior lawyer for its pro bono practice in Sydney. The position is a maternity leave contract role for approximately 14 months.

Gilbert + Tobin is acknowledged as a pioneer in pro bono services and now has three lawyers dedicated entirely to pro bono work. The pro bono practice aims to help provide access to justice for marginalised and disadvantaged people and organisations representing them. The practice includes litigation, intellectual property matters, corporate and commercial advice and assistance, property work and submissions, policy work and community legal education. There is also a strong focus on working with Indigenous communities.

The Senior Lawyer will be responsible for the supervision and management of the pro bono practice including managing two full-time pro bono lawyers. It is essential that the successful applicant has a minimum of 8 years post admission experience, strong people management skills, litigation case management experience, practice management and development skills. Knowledge of the access to justice sector is preferable. For further information, contact Mel Klem, Human Resources Consultant on (02) 9263 4070 or mklem@gtlaw.com.au. Applications close 4 December 2009.

If I Were Attorney-General...

Addressing Indigenous Exclusion and Discrimination through Self-Determination

The plight of many Indigenous communities in Australia is the most significant and pressing human rights issue in this country. Indigenous communities continue to be subjected to both direct and systemic discrimination, with the result that they remain particularly disadvantaged in their enjoyment of other fundamental human rights. During her recent visit to Australia, Amnesty International Secretary-General, Irene Khan, observed that 'the longstanding failure of Australian governments to turn this tide of human tragedy demands much more than condemnation'.

The denial of basic human rights for many Indigenous peoples is not just a matter that affects Indigenous Australians themselves, but is also a matter that should be of serious concern to the entire Australian community. As a society, we all suffer when the poor, the dispossessed, the oppressed and the vulnerable are unable to assert their basic human rights. Inequalities waste human potential, often lead to social instability, and rob our nation of the opportunity for all of us to benefit from the richness of diversity.

Discrimination is both a cause and consequence of poverty and social exclusion. Discrimination often traps marginalised individuals and communities in a downward spiral. Discrimination, marginalisation and exclusion often lead to poverty and economic under-development, which in turn leads to further discrimination.

The result of this cycle of poverty and discrimination is that minorities, such as Indigenous Australians, are often left behind because they do not have the opportunity to have their voices heard. When it comes to policy making and decision making about matters which directly affect them, often the unique circumstances of their exclusion are not taken into account. This leads to isolated communities, a lack of basic services, lack of education, distrust of government, violence and immense and lasting psychological damage.

Discrimination is not only caused by laws and policies. Discrimination also manifests by feeding deep-seated social prejudices, which perpetuate feelings of disempowerment, marginalisation and social exclusion.

The key to addressing the situation faced by many Indigenous communities is the empowerment of those communities. Many Indigenous Australians are often unable to speak for themselves and to assert their basic human rights. Human rights promote political participation, empowerment, and addressing the key causes that lead to poverty in the first place. Rather than a top-down paternalistic approach, addressing disadvantage requires engaging with affected people, and involving them in the design and implementation of community based approaches to achieve substantive equality.

If I were Attorney-General, I would take the following first steps to address Indigenous disadvantage in Australia.

First, I would immediately reinstate the operation of the *Racial Discrimination Act 1975* in full and in respect of all aspects of the Northern Territory Intervention. Instead of looking to implement technical, legal amendments in an attempt to characterise Northern Territory Intervention measures as ‘special measures’ under the *Racial Discrimination Act*, the *RDA* must be fully reinstated to enable scrutiny of whether the measures properly constitute ‘special measures’.

The fact that the legislation was suspended in the first place is a matter of great concern, and clearly breaches Australia’s international human rights obligations. The result of the suspension of the Act is that, both practically and symbolically, the measures designed to ‘Close the Gap’ will simply not work.

Practically, suspension of the *Racial Discrimination Act* has meant that the Intervention’s measures cannot be scrutinised for whether they do actually meet the criteria required to be classified as ‘special measures’ for the benefit of Indigenous communities. Symbolically, the wholesale brushing aside of rights of non-discrimination, and the implementation of draconian, racially-based policies, is particularly damaging to the relationship between Australian governments and Indigenous Australians. Such measures have contributed to strong feelings among Indigenous communities of disempowerment, disillusionment, voicelessness and distrust of government.

Of course, reinstatement of the *Racial Discrimination Act* would require that particular aspects of the Northern Territory Intervention be redesigned. In this respect, and as a crucial second step, it is clear that many of the Northern Territory Intervention measures, as currently constituted, must be scrapped. In their place, appropriate measures must be designed that involve the full, meaningful and effective participation of affected Indigenous communities.

In this respect, listening to the voices of affected communities and involving them in working out ways to address their disadvantage is crucial to ensuring that measures designed to Close the Gap and address Indigenous disadvantage are effective, culturally appropriate and, most importantly, have the buy-in and support of those communities. Particularly in the context of the significant investment of public funds by Government – over \$1 billion – there is therefore also a very real public interest in ensuring that such programs are effective.

Thirdly, I would ensure the establishment of an effective, adequately resourced national Indigenous representative body. Significant steps have been taken in the last 12 months towards the establishment of such a body. However, it is noteworthy that the Northern Territory Intervention measures were designed and implemented – and continue to operate – at a time when there has been no representative body for Indigenous Australians. A representative body would enable Indigenous Australians to participate meaningfully in policy formulation and public debate about matters that directly affect them.

Fourthly, I would move to amend the ‘race power’ contained in the Australian Constitution, which has been interpreted by the High Court of Australia to enable measures to be passed to the detriment of Indigenous Australians. The human rights issues which have resulted from the Northern Territory Intervention are evidence that an entrenched guarantee against racial discrimination that would override the law of the Commonwealth is required.

Finally, I would ensure that all of the proposals above were further developed and implemented in close, ongoing and respectful engagement with Indigenous Australians, consistent with their fundamental right of self-determination.

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